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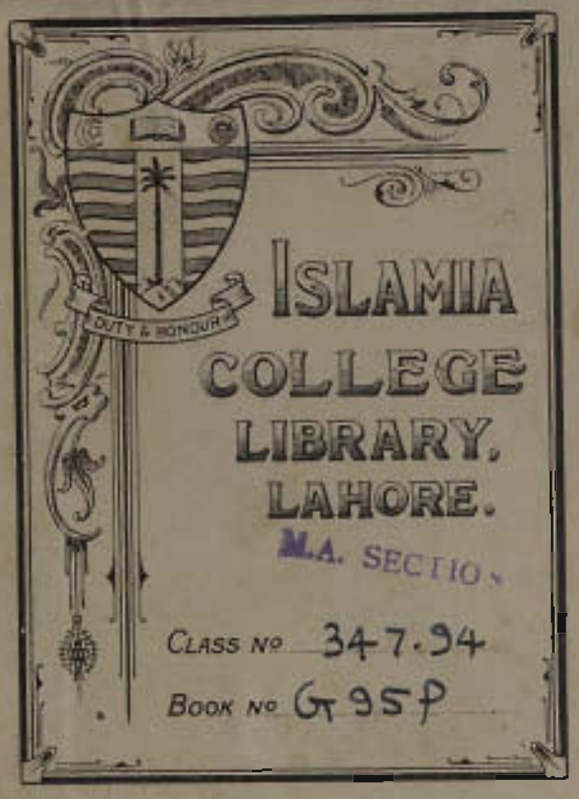

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THE

PHILOSOPHY OF PROOF

IN ITS RELATION TO THE ENGLISH LAW OF JUDICIAL EVIDENCE

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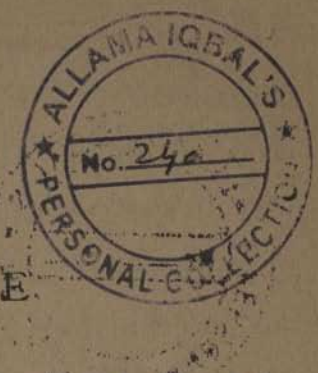

PREFACE.

MANY years ago, when I first approached the study of judicial evidence through the medium of Mr. Best's valuable work, I detected, as I thought, a screw loose in the commonly accepted theory of legal proof; in other words, I discovered what I believed to be a serious flaw more particularly in the doctrines relating to real evidence, engendering fallacies which permeated and obscured the whole system, and tended to hamper and obstruct the actual practice—fallacies which even Bentham had done little or nothing to refute or dispel.

It was this which determined me to attempt the composition of the present work, which, I need hardly say, is not designed to add to the number of practical treatises on the positive law of evidence. Any attempt on my part to rival the elaborate works of Messrs. Taylor, Starkie, Best, or other writers of the same type, would be a task as hopeless as it would be

distasteful. Nor is this book designed to serve as a concise epitome of such treatises after the model of Mr. Powell's compact manual, or the digest of Sir James Stephen. My purpose is to treat the subject of evidence from a philosophical point of view, to deal chiefly with principles, and, generally speaking, to touch upon the rules of positive law only so far as they are affected by and serve to illustrate those principles.

The task has proved, however, more difficult than I had anticipated. I found that the thorough investigation of the subject involved me in the discussion of many topics which I would fain have avoided, and led me into speculations that were very foreign to my original design—speculations which to some of my readers may appear recondite and fanciful, to others even puerile; and which, at best, may be thought to appeal rather to the moral philosopher or the logician than to the jurist; but which, nevertheless, are not without a certain bearing upon Evidence; and cannot, I firmly believe, be neglected without detriment to the completeness and utility of a theoretical treatise like the present one.

Then, again, on attempting to apply the principles which I had myself constructed to the existing rules of law, I encountered a serious impediment in my own imperfect acquaintance with the practical routine and working of the substantive law, upon which the adjective law of evidence operates, and with which it is inextricably blended. As an illustration of what I mean, I may mention that when commenting upon the nature of the proof furnished by a record, I found myself very much in the dark as to the precise mode in which such a document is framed and drawn up in actual practice, and without any available means of supplying my deficiencies in that respect. If I have unfortunately been guilty of any blunders from this cause, I must crave the indulgence of my readers, and remind them that I do not pretend to teach the positive law, but only to expound the natural principles by which the law should be guided. My legal readers will have no difficulty in rectifying my mistakes, and applying my principles, *mutatis mutandis*, to the actual state of the case.

I have divided the whole work into sections, not necessarily as marking a division of the subject-matter,

but chiefly with a view to assist reference to the various passages of the book.

The works to which reference is chiefly made in these pages are the following :—

Bentham Ev. - -	Bentham's 'Rationale of Judicial Evidence,' in five vols. London, 1827.
Dumont Ev. - -	'A Treatise on Judicial Evidence,' by M. Dumont, translated into English, published in the Law Journal, 1825.
Best Ev. - - -	'Best on Evidence,' sixth edition, by J. A. Russell, which is practically the same as the present (seventh) edition.
Taylor Ev. (*T. E.*) -	'Taylor on Evidence,' seventh edition, which is practically the same as the present (eighth) edition.
Powell Ev. - -	'Powell on Evidence,' third edition, by Cutler and Griffin.
Stephen Ev. - -	'Digest of the Law of Evidence,' by Sir J. F. Stephen, third edition.
Mill Log. - - -	'A System of Logic,' by J. S. Mill, in two vols. London, 1843.
Whately Log. - -	'Whately on Logic,' crown octavo edition. 1857.

In citing Mr. Mill's work, I have given references to the corresponding passages in the People's Edition, 1884 (P.), which, generally speaking, do not vary materially, if at all, from the original edition. The letters 'a' and 'b' relate to the columns on each page.

In citing Mr. Taylor's work, I have given, in brackets, the section numbers in the right-hand margin of the page, which run through all the later editions, as well as the actual section numbers of the edition to which I refer.

J. R. GULSON.

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THE PHILOSOPHY OF PROOF

INTRODUCTION

1. It is to be observed that the word 'Evidence' has at least three legitimate meanings.

In the first place, it may be employed to denote the *Science* of proof, or the fundamental, natural principles which regulate the art of proving.

Secondly, it signifies the *Art* of proof, or the rules and methods employed in the application of that science to practice.

And thirdly, it is used to designate the physical means or agency by which that art is carried into effect. (*a*)

Now, although we shall find ourselves under the necessity, as we proceed, of treating Evidence both in the light of an art and of a mere physical operation, yet the principal design of the present work is to regard the subject from a scientific point of view.

2. For that Evidence is a science is a position that scarcely admits of dispute. What kind of process will tend most effectually to elicit the truth with regard to doubtful matters of fact, is a question which obviously depends, not upon any rules of positive law, but upon certain causes inherent in the very nature of things. The same can hardly be said of any other branch of the law. Law has often been called a science; but no other department of the law is a science in the same unqualified sense in which Evidence is so. The

(*a*) *Vide* Taylor Ev., i. 1.

question, for instance, whether real property ought justly to descend to the eldest son, or be distributed in equal shares among the children of the deceased, is one that can hardly be determined by a reference to any inexorable rule of nature. A point of this kind can only be decided by an appeal to experience — by observing what it teaches us to be most favourable to the interests of society at large. In short, it is a mere question of expediency. And there are many similar questions, standing on the very threshold of jurisprudence, which appear to be in a like predicament. (*b*) In a word, the fundamental principles of justice would seem either to be altogether *arbitrary* and optional (*c*), or at least, if governed by any natural law at all, to be ruled by laws that are in great measure concealed from human intelligence. But with the law of Evidence all this is reversed. That Evidence *must* ultimately rest upon certain fixed and immutable first principles seems almost self-evident. Nor, further, does there seem to be any ground whatever for supposing that these principles are inaccessible to the researches of the human intellect.

3. But even if the laws of proof should be as certain and as capable of demonstration as the conclusions of geometry or the laws of number, still, it could hardly be expected that a code of positive rules, framed by jurists with a view to the discovery of truth, should start at once upon the path of true theory. Every practical art, in whatever degree it be the offspring and creature of natural laws, must of needs in its infancy be conducted without the guidance of strict scientific principles. These can rarely, if ever, be discovered before considerable progress has been made in the art itself, until which time its practitioners are compelled, as it

(*b*) *Vide* Paley Mor. Philos., VI., chap. viii., p. 459 (ed. 1818).
(*c*) *Ibid.*, p. 461.

were, to feel their way by dint of experience, and to judge of the soundness of their methods by the value of the results which they actually obtain.

But as the art advances, various theories are from time to time suggested as a basis for the practical rules that prevail at the time. These primitive theories the light of further experience often demonstrates to be untenable, and they are then either abandoned altogether, or modified, so as to bring them more into harmony with the results of actual practice. And this process continues, until at last, in course of time, the true theory stands completely revealed. As soon as this consummation has been achieved, there ceases to be any further question, either of judging safely by results, on the one hand, or of rectifying and remodelling theories on the other. The science and the art—the theory and its application to practice—are now found to work in perfect harmony, and mutually to confirm and illustrate each other.

4. Somewhat of this kind has been the history of every art which has attained any degree of scientific precision. But this is a point which judicial evidence, even as administered in this country, has not, as I venture to think, yet attained. While the English law of Evidence is perhaps almost as perfect as any mere art, which is destitute of the guiding hand of a sound theory, can hope to become, its true scientific principles have not hitherto, I feel sure, been correctly expounded. In spite of the high degree of perfection which the actual practice of Judicial evidence has unquestionably reached in the present day, I do not hesitate to express my conviction that the theories that prevail with regard to it are deplorably insufficient. How far I am justified in forming this opinion will appear in the sequel; but assuming it for the present to be well founded, the phenomenon may, I think, be sufficiently accounted

for. In other words, it may be shown that several causes have conspired to impede the progress of Judicial evidence as a science.

5. In the first place, the present theoretical doctrines of evidence had their origin in so comparatively barbarous and narrow-minded an age that it was hardly to be expected that they should reflect the light of true philosophy. In the case of a more popular art, the theory would doubtless have been amended long before now by a gradual and tentative process of reform. But judicial evidence labours under peculiar disadvantages in this respect, that it cannot free itself from any erroneous theories that are once propounded regarding it with the same ease as a more literal art. *(d)* For in matters of jurisprudence, when once a theoretical principle has passed into a maxim, or grown into a doctrine, it becomes, as it were, a part and parcel of the law of the land, from which position, too, it is well-nigh impossible to dislodge it, since it remains unaffected alike by ordinary judicial decisions, and by Acts of Parliament, both of which are, for the most part, directed to the adjustment or reform of more tangible questions. And thus it comes to pass, that while the practice of Evidence has been constantly improving, the theory has remained from a remote date almost stationary.

6. In the second place, lawyers and jurists are, generally speaking, too much occupied in the solution of practical questions to find leisure to pay much attention to mere abstract philosophical speculation. They might possibly, however, have received light and assistance from the researches of the scientific world, if philosophers had condescended to turn their attention to the subject of Evidence. But unfortunately this art has never attracted the notice of philosophy.

(d) *Vide* Best Ev., s. 120.

The process of verifying mere facts, when conducted apart from the administration of justice, has never been recognised as an art, still less as an art based upon a science, for the simple reason that it is performed so unconsciously and insensibly that the mode in which it is done provokes no attention. Its very simplicity has caused it to be neglected as a serious study. When in private life we wish to gain a knowledge of any given state of facts, we seek for that knowledge when we can, and where we can, without troubling ourselves to inquire into the precise manner in which it is acquired, or into any systematic rules by which the process of gaining it may be regulated. We choose our own time and opportunity both for obtaining the evidence and for acting upon it when it is obtained. And thus conducted, the operation appears so simple that it has never been regarded as the creature of any sort of natural law or scientific rule.

7. In reality, however, the science of Evidence is well worthy of the attention, not only of the ordinary and of the judicial inquirer, but also of the philosopher or logician.

As regards the ordinary inquirer, Evidence, *i.e.*, the process of verifying individual facts, (*e*) has a solid existence, and an extensive sphere of action far beyond the mere precincts of courts of justice. As Bentham truly observes: (*f*) 'Questions of evidence are continually presenting themselves to every human being every day, and every waking hour of his life.' And if we wish to arrive at the truth even in the solution of these everyday questions, we must in reality, though it may be unconsciously, conform to what may be called the natural rules of evidence, *i.e.*, to certain scientific principles or laws of Nature by which the process of verifying matter of fact is necessarily

(*e*) *Vide* Post, ss. 16 and 24. (*f*) *Vide* Bentham Ev., i. 18.

governed. In exact proportion as our method of investigation is regulated by these principles shall we succeed in gaining genuine knowledge; in exact proportion as it departs from them shall we fall into error. For which reason the study of natural evidence is a matter of no slight interest to every person engaged in practical pursuits of whatever kind.

8. As regards the lawyer also, the value of judicial, no less than of extra-judicial proof, depends, in the first instance, upon a due observance of the natural principles of evidence. Any serious departure from these, even in the methods of legal investigation, must inevitably result in absurdity and injustice. Judicial evidence, indeed, ought to be nothing else than natural evidence, modified, but not contradicted, by those rules of positive law which legal tribunals have power to impose, and which are calculated to meet the characteristic exigencies of their case. (*g*) And if this be so, the importance of a correct apprehension of those natural principles alike to the legislator, the judge, and the legal practitioner can hardly be disputed.

9. Lastly, the science of natural evidence is well worthy of the attention, not only of the ordinary and of the judicial inquirer, but also, as previously remarked, of the philosopher. For it forms a species of introduction or preliminary to the sciences of Logic and Induction, which cannot be neglected without serious injury to the study of both. It is, indeed, to its complete isolation from matter of fact that we must look for the origin of that futility which has been the very common reproach of Logic; an isolation which is the more to be deprecated when we consider that Logic would be a purely imaginary science were it not employed upon the materials supplied by Evidence.

10. Now the natural rules of evidence are in

(*g*) *Vide* Best Ev., s. 34.

themselves, as I shall endeavour to point out, extremely simple, nay, almost ridiculous in their simplicity. I shall endeavour to show that all our knowledge of facts is traceable to a single source; and that though we cannot, as some exponents of the subject would have us to believe, (*h*) refer the whole art of evidence to a single rule of universal application, yet the whole science is reducible to two heads or divisions—the one relating to the *modus probandi*, or means by which the fact is brought home to the knowledge of the inquirer, and the other turning upon the relation in which that fact stands towards the ultimate subject of inquiry. And as each of these two divisions contains but two branches, it can hardly be said that the system of natural evidence, which is here suggested, is by any means intricate.

11. Nor is the simplicity of evidence seriously impaired by its application to legal investigation. For though we find (in our positive code) a few subsidiary rules which have no place in the natural system, still the whole art of judicial evidence is reducible to two leading heads, each consisting, as before, of two species. In other words, I propose to show that even in a legal view there are in reality but two instruments of evidence, or vehicles of proof, and two methods or modes of operation, the direct and the indirect, common to both.

12. But though the actual rules of evidence, whether regarded from a natural or a judicial point of view, are extremely simple and elementary, yet the application of those rules to practice must always present infinite difficulty. First, because, simple as evidence is in itself, yet the subject-matter of evidence, which includes all facts, whether material or mental, is inexhaustibly wide, complicated, and perplexing. Secondly, because, if for no other reason than that all

(*h*) *Vide* Post II., chap. xxii.

proof is addressed to the *mind* of the Inquirer, we cannot, while dealing with evidence, entirely avoid a reference to the mysterious connection between mind and matter, which seems almost completely to defy our attempts to examine or analyse it. But there are other reasons why metaphysical questions must continually obtrude themselves into the domain of Evidence. *Actions*, which are dictated and impelled by the will and mind of man, form a most important topic both of judicial and extra-judicial inquiry; while language, the utterance of which by speech or writing is among the most significant of human actions, is not only a frequent subject-matter of proof, but also constitutes a principal vehicle or instrument of evidence.

And this double aspect of language forms a third ground of embarrassment to the student of evidence, since it has a constant tendency to obliterate a distinction of the most vital importance—the distinction, namely, between evidence and fact. And as a fourth cause of complication, we find that Logic, whose operations form an indispensable auxiliary to the proving process, is so inextricably interwoven with the art and science of proof, that a study of the rules, or, at least, of the general principles of deduction, which involves in a remoter degree a reference to induction also, is to some extent essential to a clear conception of Evidence. And thus, simple as the mere rules of evidence, considered apart from their subject-matter, and from all subsidiary operations, undoubtedly are, I think I shall be able to show that they have hitherto been seriously misunderstood.

13. The first part of this work will be devoted to the study of natural evidence, including an inquiry into the nature of *facts*, the subject-matter of all evidence properly so-called, as well as a short survey of the general principles of inference in its relation to evidence. In the

second book, it will be my object to exhibit the bearing of the natural principles of proof upon the positive rules of the English judicial system. It will be my endeavour to point out how far the practice, on the one hand, and the abstract doctrines and maxims of the law, on the other, are in harmony or at variance with natural science. And these inquiries will, I think, tend to show that the former is much more conformable to true principle than the latter—a result which is due to certain causes to which we have already adverted, namely, that the practical side of the law of evidence is the constant subject both of legislative reform and of judicial amendment; while the abstract doctrines, not being amenable to improvement of this kind, remain isolated alike from true principle and from the actual practice, and continue to exist as a travesty of the former, and as stumbling-blocks and impediments to the latter.

14. The object of the present work, therefore, is not so much to attempt or suggest any amendment of the existing practice of judical evidence, as to explode certain of the antiquated doctrines that obtain in our books, and thus to simplify and facilitate the practice, which is not in itself open to much exception. Indeed, it appears to me that the more we scrutinise evidence, the more we shall be led to deprecate any sweeping change in the actual law.

At the same time, it can hardly be denied that there are a few points in which the practice itself, as distinguished from the theory, is at variance with sound principle. It will, therefore, be my endeavour to point out where this is the case, and to offer some suggestions as to the manner in which such evil may be remedied in the present, and avoided for the future.

15. But my principal object will be to propound, as far as lies in my power, the true *theory* of evidence; an art which, in its judicial aspect at least, has hitherto

been guided rather by experience and common sense than by the light of genuine science. And if this be really true, the task which I have proposed to myself can scarcely be deemed a superfluous undertaking. For, however trustworthy a guide experience may prove in solving questions of fact, the presence of a false theory of the process, or even the absence of a true one, must inevitably tend to perplex and embarrass the Inquirer, and retard his progress. He may arrive by dint of mere common sense at the truth at last, but he will at least be longer on the journey. He may be compared to a traveller, who, after rambling about from place to place, and making inquiries on the road, ultimately reaches his destination, but who would, nevertheless, have saved both time and labour if he had been provided in the first instance with a map, which would have enabled him to proceed at once in a direct line to his goal.

Part I

NATURAL EVIDENCE

CHAPTER I

OF EVIDENCE IN GENERAL

16. EVIDENCE, from our point of view—that is, Natural evidence regarded as preliminary to the art of Judicial evidence—may be described as the science of verifying individual facts, either for their own sake simply (*i.e.*, because we want to know those very facts themselves), or with a view to establish other or ulterior facts by means of an *inference* or *deduction* drawn from the facts thus actually verified.

17. This latter process, *i.e.*, the operation of drawing an inference or *conclusion* from a fact ascertained by evidence to another unascertained fact, including the rules for conducting the process correctly, is the business of Logic, or, as it has become the fashion to call it, of 'Deductive logic,' or reasoning, and not of Evidence in the restricted sense in which we view it. And if it were possible for us to ascertain every fact that we require to know by means of direct evidence, the art of Logic or reasoning would not concern us at all. In practice, however, this is far from being the case. There are multitudes of facts relevant to our inquiries judicial or non-judicial, which, though theoretically capable of verification by evidence, are practically not so, for the simple reason that no evidence of them can actually be procured. And here it is that Logic steps in, and, so to speak, enlarges the scope of Evidence. For though we may not be able to ascertain by direct evidence the very fact that we require, we are frequently able to procure evidence of some other fact or series of facts,

from which the former may be inferred with a sufficient amount of probability or approach to certainty to answer our purpose. And thus it comes to pass that Logic, though perfectly distinguishable from Evidence, is yet a powerful auxiliary to it.

18. Evidence, on the other hand, is something more than an auxiliary to Logic. For Logic can ascertain nothing of *itself;* it can only infer from a known fact to some fresh fact not previously known. Thus the two sciences of Logic and Evidence may be said to be ancillary to each other in the discovery of truth. Evidence supplies data, while Logic, when required, infers fresh facts from those data: While Logic is entirely dependent on Evidence for the reality of its results, Evidence is largely indebted to Logic for the magnitude of its effects.

19. But there is yet a third operation concerned in the discovery of truth. We have spoken of drawing an inference from one fact to another. Properly and logically speaking, however, no inference or conclusion whatever can be drawn from an individual fact, nor from any number of individual facts merely. Logic teaches us that every deductive process, or process of inference, begins with a General proposition or Truth, (*a*) and that it is only by combining this general proposition with the particular fact thus ascertained by evidence that we can obtain a conclusion or inference as to any fresh fact. The question then arises: Whence does Logic obtain the general proposition which is thus necessary in each case to complete the process of inference? And this involves the mention of the third operation subservient to the discovery of truth, viz., 'Induction,' or, as it is now frequently called, 'Inductive reasoning,' whose function it is to construct General propositions, (*b*) or, in

(*a*) *Vide* Mill Logic, i. 234, P. 113.
(*b*) *Vide* Mill Logic, i. 347, P. 186a.

other words, to ascertain and fix the General Truths or laws of nature, of which a general proposition is the expression in language. This process, again, involves an appeal both to Logic and to Evidence, though to evidence of the plainest and simplest kind. The business of Induction is to collect a number of facts previously verified by Evidence, and to combine or construct them with the assistance of Logic into one General Law, which may serve Logic as a stepping-stone to the discovery either of fresh facts, or of fresh laws of nature.

20. It is important, however, to observe that the methods of evidence employed by the Inductive philosopher are somewhat different from those necessarily employed by the judicial, as well as by the ordinary inquirer; and for this reason, that the facts which the former is called upon to ascertain differ somewhat in their aspect from those with which the latter has to deal. The inductive philosopher does not, generally speaking, require to verify any particular fact. It is not a particular fact, but a fact of a particular character, that is the object of his researches. And, as a general rule, any fact whatever of that particular kind will serve his purpose. He is thus enabled either to bide his time and remain upon the watch until a fact of the requisite character occurs in the course of nature, so that he may then apply his own powers of observation to it, or, if it be a fact of a kind that is within his own control, he is able actually to call it into existence at his own pleasure by means of experiment. In either case he obtains ample facilities for applying his own perceptive faculties to the fact which he desires to verify; and the methods of proof which he employs are, therefore, of the plainest and simplest description.

21. With the ordinary inquirer, however, the case is otherwise. He does not require to know whether a

wound of a particular kind is likely or certain to produce death, but whether a particular wound has in fact produced the death of a particular person—not whether a certain combination of substances will explode under certain conditions, but whether an explosion did actually occur at a certain time and place, and the causes that led to it. In short, it is always a particular identical fact that is the object of his research; and since the self-same fact, when once terminated, can never be recalled or repeated, it is but seldom, comparatively speaking, that it is possible for him to employ his own faculties of perception in the task of inquiry.

22. But though the mode of proof employed by the Inductive philosopher be far simpler and more conclusive than that which is usually available either in judicial matters or in transacting the ordinary business of life, still, that preliminary part of the process of Induction, which consists in the verification of facts, can scarcely be regarded otherwise than as a branch of Evidence, even in the narrower sense in which we view that science. It is still evidence, though it be not precisely that phase of evidence with which we are peculiarly concerned.

23. These three sciences or operations, then—Evidence, Induction, and Logic—mutually dependent on, and ancillary to each other, are the chief, if not the only instruments in the discovery of truth, whether such truth consists of individual facts or of general laws of nature. The province of Evidence is to ascertain individual facts; of Induction, to collect such facts, and construct general truths out of them; of Logic, to draw inferences or conclusions from the materials supplied by the other two. Each of these three operations has been in turn described by its exponents as the art or science of proof or evidence; of each in turn it has been said that it constitutes the daily business of our lives. (*c*)

(*c*) *Vide* Bentham Ev., i. 18, and Mill Logic, i. 10 and 347, P. 5b and 186a.

And it can hardly be said that these pretensions are wholly unfounded in the case of either of the three. All three may, to a certain extent, be said to form the daily business of our lives. All three, being subservient to the discovery of truth, may, in a certain sense, be said to form a portion, at least, of the art of proof. But it is to the first only that we shall give the title of Evidence or Proof, since the other two—Induction and Logic—are already furnished with appropriate designations. It is with the first operation only that we are directly concerned; the other two only affect us incidentally.

24. 'Evidence,' then, or 'Proof,' as we view it, is the science or art of verifying individual facts; of ascertaining whether a given fact be true or false, real or fictitious. (*d*) And as all our knowledge of mundane matters in general, and of facts in particular, is, and must necessarily be, originally obtained by the exercise of the senses, all evidence may be justly said to be ultimately referable to the same source—the evidence of external or material facts to 'perception'; of internal or mental facts to that inward perception which is distinguished by metaphysicians as 'intuition' or 'consciousness.'

25. And at first sight it might appear that for an operation so simple as that of *observing*, no science or rules of art could be necessary. (*e*) And indeed, if it were possible for each human being to apply his own perceptive faculties to every fact which he desired to know, the art of evidence could hardly present any other difficulty than that of distinguishing between a direct perception and an inference from it.

But in practice a very small proportion only of our knowledge is derived from what we personally observe. We want to know many facts that occurred before we

(*d*) *Vide* Whately Logic, 229. (*e*) *Vide* Mill Logic, i. 7, P. 4a.

were born—many that happened or are happening in places far beyond the range of our perceptive powers; and as we cannot annihilate time and space, we are compelled to rely in great measure on the perceptions of other men, and their account of such perceptions, for proof of external facts. (*f*)

This circumstance introduces such complications into the operation of proving, that the attempt to reduce evidence to a system can hardly be deemed superfluous; at least, as a preliminary to judicial evidence.

26. Since, however, the further discussion of this question will necessarily involve a premature reference to one of the leading *divisions* of Evidence—a subject which may be more fitly and conveniently considered hereafter—let it suffice us for the present to observe that all Evidence or Proof—all our knowledge of facts—is originally derived from, and ultimately referable to, *one single source*, viz., 'Perception' or 'Intuition.' And now, before proceeding any further in our examination of 'Evidence,' it will be desirable to turn our attention for a time to *Facts*, the subject-matter of Evidence.

(*f*) *Vide* Taylor Ev., ss. 42 and 50, and Abercrombie Intell. Powers, 32 and 54, 13th ed., and Post, s. 174.

CHAPTER II

OF A FACT

27. INASMUCH as the sole function of Evidence consists in the investigation of facts, the study of Evidence is almost inevitably preceded by some sort of inquiry into the nature of facts, the subject-matter of its operations.

28. It is but right, however, to premise that this inquiry will necessarily lead us into the discussion of questions that may appear to the reader not only somewhat recondite and fanciful, but also considerably remote from the domain of Evidence.

Although we may regret this, yet at the same time we can scarcely avoid it; for it is hardly possible to trace the relationship that exists between Evidence and Deduction without entering somewhat deeply into such topics. And logic is so inextricably involved with evidence, that we could not do anything like complete justice to our subject without making some sort of attempt to trace this relation—without some endeavour to show where the province of Evidence, properly so called, ends, and Inference begins.

Even this, however, would be a comparatively simple task, if only we were able to accept the doctrines and theories of logic just as they stand. But this, unfortunately, is not possible.

For though logic, so far as its own peculiar processes and their results are concerned, is sound and serviceable enough, yet when we come to deal with the theories which logicians entertain with regard to subsidiary questions—to their notions, for instance, respecting

things, *terms*, or the names of things, *propositions*, and the like—matters which form, as it were, the connecting link between Evidence and Deduction, and are common ground to both, there we find their views very far from satisfactory. In a word, we find the logical doctrines on such subjects in many cases meagre and insufficient, and in others irrational and absurd, and totally unfit to endure the ordeal of a connection with plain matter of fact. As a consequence of this, we are compelled in many instances to review these subjects, and to supplement and revise the logical theories relating to them to a considerable extent before we can adopt them to our purpose, or hope to establish a systematic connection between the two sciences of Deduction and Evidence.

Having offered this short plea for the somewhat speculative tendency of the introductory part of the present work, we will now resume our inquiry into the nature of facts, the subject-matter of Evidence.

29. Now the first question that naturally presents itself in such an inquiry is: What is meant by 'a fact'—how are we to define it? One very common reply, I believe, to this question is expressed in the words, 'A fact is a truth.'

But this answer, it is to be observed, is unsatisfactory for at least two reasons. First, because it leaves us little better off than we were before, inasmuch as we still remain in the dark as to what a 'truth' is; and secondly, because, though in a certain sense every statement of an existing fact is a truth, yet the word 'Truth' comprehends considerably more than what is embraced by the word 'fact,' and may, therefore, with greater propriety and convenience be reserved to denote that kind of truth only to which the word 'fact' does not apply, in order that a separate and distinct territory may thus be assigned to each of the two terms in question. (*g*)

(*g*) Ante, s. 19.

30. And yet it is by no means so easy as may be imagined to find any more suitable reply to the question. For, strange to say, there appears to be an almost total absence of information as to the precise meaning of the word. Authors of works upon Evidence, who are peculiarly concerned with facts and their proof, and who are, therefore, one would suppose, specially interested in finding a satisfactory definition of the term, are, for the most part, entirely silent on the subject. Bentham, it is true, devotes a short chapter to the classification of facts, (*h*) and Mr. Best applies two or three sections to the same purpose; (*i*) but neither the one nor the other has thought fit to attempt to explain or define the meaning of the word itself.

31. But inasmuch as the art of evidence is wholly conversant about facts, it is obviously most desirable that we should begin by ascertaining, as precisely as possible, what a 'fact' really is. And this, in the almost total absence of authority, we must endeavour to accomplish on our own behalf.

In the first place, then, it is to be observed that a fact, in our view, must be something that is susceptible of *proof*. And since we have already decided that all proof or evidence is referable to 'perception' or 'intuition,' (*k*) conversely a fact must be that which is capable of being 'perceived,' or of being 'intuitively felt'—of becoming directly known to the mind itself, whether through the medium of the external senses, or, without their intervention, by the simple exercise of the apprehensive faculty, unassisted by any effort of the reasoning powers beyond that amount of judgment which is involved in the progress from the feeling of which we are conscious to a belief in the existence of the thing that we feel.

(*h*) *Vide* Bentham Ev., i. 39, etc.
(*i*) Best Ev., ss. 11, 12 and 13. (*k*) Ante, s. 24.

32. By what mysterious agency we come to learn what we intuitively know, it is beyond our province, unnecessary, and perhaps even fruitless to inquire. That we do know what we see, what we feel, and what we are thinking about must be taken for granted, otherwise all evidence would fall to the ground. But the matters which we do thus arrive at a knowledge of may be summed up, at most, under three heads. First, we are conscious of what passes in our own minds—our thoughts, emotions, wishes, desires, and so on—which may be all comprised under the name of *Feelings*, or phases of the mind.

33. Secondly, when we refer our feelings, or *sensations*, as they are then designated, to some condition of our own bodily organs, we are conscious of something more than the mental feeling itself: we become aware of our own physical existence, of the bodily state that occasions the feeling, and of the *whereabouts* of the sensation. When I am conscious of an emotion or a thought, I do, indeed, become aware of its existence; but I know not where it is. But when I feel a bodily sensation, whether of pain or of pleasure, whether of sight, touch, taste, smell, or hearing, I instantly refer it to some part of my corporeal frame. When I feel a pain in my foot, or in my finger, or in my tooth, I know at once, and instinctively, that the pain is *there*. If I see a thing, I do not mistake it for hearing, nor for smelling; I know instantly that the sensation proceeds from my eye, and not from my ear or my nose. The knowledge thus obtained, so far as the patient himself is concerned, appears to be purely intuitive. How it is obtained I shall not attempt to explain; but that we do feel and know something of the state of our own bodily organs, and that without any inspection or 'perception' of the part itself, is obvious. Our own physical existence and bodily states,

therefore, as well as our mental feelings, appear to become known to us, to some extent, at least, by pure intuition.

34. But thirdly, when we ascribe our sensations to the presence or agency of something external to ourselves, we are said to 'perceive' that something external, which we call, in general terms, a 'Body' or material substance. (*l*)

Our conviction of the existence of material objects has been regarded by many philosophers as a part of our intuitive knowledge. (*m*) My own reflections, however, have led me to a directly opposite conclusion. They have, in short, tended to convince me that, though the perception, or sensation itself is intuitive, the belief in the presence of something external, to account for it, is a matter of judgment and reasoning.

The reason why we ascribe our sensations to the presence of external objects, and call them perceptions, is twofold. First, because perceptions, unlike mere mental feelings, occur according to a fixed law. Secondly, because they occur equally to all sentient beings who are in the same situation for observing the objects in question.

35. For instance, I perceive an orange on the table before me. Why do I say, 'I perceive' an orange? For this reason: I am conscious of, or feel, a sensation of yellow colour, of uneven surface, of circular shape, of a certain size, and so on, in my visual organs: I extend my hand, and feel certain tactual sensations of roundness, softness, size, and weight, etc.: I put the object to my nose, and am conscious of a peculiar odour: I can obtain other sensations by cutting, or biting, or tasting the orange: And whenever I encounter one of the

(*l*) Mill Logic, i. 74, P. 36b.

(*m*) *Vide* Reid Hum. Mind, p. 55, ed. 1827; Abercrombie Intell. Pow., 144, 13th ed.; and Mill Logic, i. 77 and 8, P. 38a.

sensations, or a sufficient number of them to satisfy me of the presence of the orange, I find by experience that I can invariably obtain all the others.

Again, another person comes into the room. He agrees with me at once that the orange is there. So far as we can make known our feelings to each other, I find that he obtains, or can obtain, precisely the same sensations from the supposed presence of the orange as I do. And if twenty more people enter the room, the result is precisely the same with them all.

From the fixed order in my own sensations, *i.e.*, the uniform law by which they are invariably regulated and connected, and from the precise resemblance observable between my own sensations and those of other sentient beings, when similarly situated, I infer that there is some external cause for the series of perceptions which we all experience—some real object, which we all agree in calling an orange. All which, I think, shows clearly that our belief in the existence of the material world is not intuitive, but the result of judgment founded on experience.

36. For suppose that any one or more of the sensations, which experience has taught me to expect, were wanting; suppose that, after receiving the visual sensations, I found that I was unable to obtain the others—that on reaching out my hand I could not find anything to touch, nor anything to smell or to taste, should I then believe in the existence of the orange? Should I not begin to doubt the evidence of my own eyes?—not that I could call in question the existence of the sensations themselves as mental feelings; but should I not doubt the presence of any external cause for them —of the material object? Nay, is not this absence of fixed law and order the very ground of our disbelief in the real existence of the physical objects, which we appear to perceive in our dreams?

Or again, suppose that, after obtaining myself all the sensations which I expected from the presence of the orange, another person were to come into the room, and were to declare that he could perceive no orange—that he could neither see, feel, taste, nor smell it, should I not in this case also begin to doubt the evidence of my own senses, and to believe that I was dreaming—that the sensations were an hallucination or illusion, *i.e.*, that they existed in my own mind only? And if other persons came in, and without collusion behaved in the same manner, should I not feel convinced that such was the case? Most decidedly I should; and therefore I maintain that our belief in the existence of matter is grounded, not on simple intuition, but on reasoning from our intuitive knowledge.

37. All that we actually know, independently of inference, is in every case the same, namely, our own intuitive feelings; for, as Mr. Mill points out, (*n*) what we call a 'sensation' is quite distinct from the state of the bodily organs which causes, or is supposed to cause, it, and is simply a mental state; and a 'perception' is merely another name for a sensation which is ascribed to the presence of some object or objects external to our senses. Both alike are mental states, though they be each due to physical agency.

38. What we actually know, therefore, is uniformly our own mental feelings, and these only. But inasmuch as we ascribe those feelings in certain cases to the state of our own bodily organs, and in certain of these last instances to the presence and effect upon our senses of material objects external to ourselves, while in others the feeling is believed to have its origin in the mind itself, there arises a threefold division in the subject-matter of our intuitive knowledge; namely, (1) Feelings, or phases of the mind simply; (2) Sensations, or feelings

(*n*) *Vide* Mill Logic, i. 68, 69, P. 33b.

which are referred to some state of our own bodily organs; and (3) Perceptions, or sensation, which we ascribe to the action upon our senses of material objects. And from these three all our knowledge of facts is derived.

39. For facts likewise are of three kinds, corresponding respectively with the former; namely, (1) Psychological or mental facts; (2) Physiological facts; and (3) Physical or material facts—of which the first have their seat in the mind only; the second, in the corporeal frame of sentient beings; and the third, in the material world. The first are known to us by consciousness; the second, by that form of consciousness called sensation; and the third, by that form of sensation which is called perception. We are said to be conscious of our feelings; to feel our sensations; and to perceive material objects.

40. But it is scarcely necessary for us to encumber ourselves with physiological facts. The different states or phases of our bodily organs are, at bottom, physical facts, and may be ascertained, like other physical facts, by perception. They differ from ordinary physical facts, however, in this: that they may become known to the patient himself by intuition or instinctively. So far as they are thus known, they differ in no material respect from psychological facts. So far as they are ascertained by perception, as by ocular inspection of the part itself, they are physical. We may, consequently, divide all facts into Physical and Psychological, the latter comprising Feelings or phases of the mind, which make themselves known to us directly by consciousness; the former manifested to us through the medium of the mental feeling called perception, though actually residing in bodies or material substances.

41. I say 'residing in' bodies or material substances, for bodies or material objects are not in themselves facts. It is true that in common discourse we are said

to perceive material objects. But the expression is hardly philosophically accurate. We do not actually perceive the object itself. What we actually perceive, or, at least, what we are sensible of, is *something about it* — certain tokens by which it manifests its presence to us. We see its colour, shape, and size, its position and movements; we feel its hardness or softness, its roughness or smoothness, and so on. These, therefore, and not the material objects themselves, are the facts. Now these, I think, bear a strong resemblance to what in philosophical language are called the *attributes* of a body. For attributes are generally supposed to correspond to the sensations that we receive from the presence of the bodies to which they belong. Indeed, it has even been argued that they are nothing else but those sensations. (*o*) 'If,' says Mr. Mill, (*p*) 'we know not, and cannot know, anything of bodies but the sensations which they excite in us or in others, those sensations must be all that we can, at bottom, mean by their attributes; and the distinction which we verbally make between the properties of things and the sensations that we receive from them, must originate in the convenience of discourse rather than in the nature of what is denoted by the terms.' 'All attributes, therefore,' he says in another place, (*q*) 'are to us nothing but either our sensations and other states of feeling, or something inextricably involved therein.' Now it matters little for our purpose whether the attribute of a body be regarded in an objective or a subjective view; whether it be looked upon as a property of the material object from which it emanated, or as the sensation which that object excites in the mind of the percipient; all that I wish to point out is this: that if the attributes of bodies

(*o*) *Vide* Appendix, art. 2. (*p*) Mill Logic, i. 83. P. 41a.
(*q*) Mill Logic, i. 101, P. 48b.

as Mr. Mill seems to take for granted, uniformly correspond to the sensations which they excite in us—in other words, if every sensation which we receive from the presence of a material object, everything that we perceive about it, in short, has an attribute to correspond to it, then bodily attributes are identical with physical facts.

42. In adopting this view, however, we find ourselves confronted by this difficulty—that there seems to be no place assigned among attributes for facts of the more transient order. For attributes are usually classed by philosophers under the three heads of Quality, Quantity, and Relation only. (*r*) And it must be owned that it does not seem to be quite clear at first sight under which of the three we are to place *action*, *motion*, or *change*. For all three heads seem to refer to the *state* of bodies, rather than to any *events* that take place with regard to them, or in which they are concerned. Still, the motion of a body is something that we perceive about it, and if perceived at all, it must be perceived through the medium of a sensation, or rather, of a series of sensations. If, therefore, it be true that every sensation which we receive from the presence of a material object has an attribute to answer to it, the sensations which its motion excites in us must have attributes to correspond to them, which attributes, taken collectively, constitute the perceptible motion of the object in question. The motion of a body, therefore, is one of its attributes, or, which is precisely the same thing, a certain succession or series of the attributes belonging to it, and as such would, I think, be properly classed among its relations. And if the motion of a body be among its attributes, physical events, which consist in motion, must also be attributes of the material objects that are concerned in them. And the same is

(*r*) *Vide* Mill Logic, i. 83, P. 41a.

true of the act of a sentient being, the physical part of which consists of a series of perceptible movements that take place in his corporeal frame.

43. But when we say that bodily attributes are identical with physical facts, it is most important to observe that the word 'attribute' must be understood here in a specific, and not in a general sense. We must not confound the attribute itself with the class of attributes to which it belongs. For instance, *hardness* may be said to be an attribute of diamonds, *i.e.*, of *all* diamonds. But neither the hardness of diamonds in general, nor the hardness of all hard substances bears any analogy to a fact, for the simple reason that hardness in this general sense is the name, not, properly speaking, of an attribute, but of a class of attributes. (*s*) But the hardness of a coin which I hold in my hand is a specific attribute—the attribute of a specific existing object capable of being actually felt; and this kind of attribute it is of which it may justly be said that it bears a close resemblance to a physical fact. For physical facts are the perceptible features of material objects—their states and changes or relations, including their mere existence; for to say of a body that it exists is merely equivalent to saying that it manifests a sufficient number of its features or attributes (without specifying which of them) to assure us of its presence. (*t*) Physical facts, therefore, we may define as the perceptible features, or specific attributes of material substances.

44. Psychological facts, on the other hand, can be nothing else than mere mental feelings, or phases of the mind, viewed apart from any exciting cause external to the mind in which they have their seat. Psychological facts are intrinsically more simple than physical, because we are directly conscious of the former, while in the

(*s*) *Vide* Post, s. 63. (*t*) *Vide* Mill Logic, i. 83, P. 41a.

latter case all that is external to the percipient mind is in some sort matter of inference.

Moreover, if it be true that physical facts are the specific attributes of matter, it is no less true that psychological facts are the specific attributes of mind. Our mental feelings—our thoughts, emotions, passions, and so forth—are what we are really conscious of respecting the mind, just as physical attributes are what we actually perceive, or are sensible of, respecting things external; and it is from these feelings that we recognise the existence of mind, just as we recognise the existence of material objects from their attributes, or from the sensations with which those attributes affect us. What tends, however, to obscure this truth is that the word 'attribute,' when used in reference to mental matters, is almost invariably employed in a general, and not a specific sense.

The question, however, is really of little consequence to us, since, whether mental feelings be rightly classed as attributes, or no, there can be no doubt whatever that they constitute what are called psychological facts.

45. The result of our inquiry thus far, therefore, appears to be that Facts, the subject-matter of our intuitive knowledge, are reducible to two heads; namely, (1) Feelings, or phases of the mind; and (2) The perceptible features, or *specific* attributes of matter; of which the former are psychological or mental facts, and the latter physical facts. And there is this striking difference between the two, that while physical facts are capable of being 'perceived' equally by all sentient beings within the range of whose faculties they occur, psychological facts can be directly or intuitively known only to the one individual whose mind is their seat. Other persons, it is true, *may* ascertain them, but they can ascertain them only by inference from physical facts that fall under their own observation.

46. For this reason 'Perception' plays a far more important part in Evidence than 'Intuition' or 'Consciousness,' by which latter expressions the process or agency whereby we become aware of what is passing in our own minds is generally distinguished by metaphysicians.

By them the word 'Perception' is restricted, as we have seen, to denote the operation of receiving sensible impressions from external or material objects. But this distinction, however necessary it be in treating of the mind itself, (*u*) is by no means equally indispensable for our purpose. Not, however, that the difference between a mental and a physical fact is by any means unimportant in its relation to evidence; but at the same time there is nothing to be gained by maintaining a constant distinction between the modes by which we arrive at the knowledge of either. And since 'perception' plays so much more prominent a part in evidence than mere 'intuition,' and since there exists no single term fitted to express at once both these operations, we shall find it more convenient as we proceed gradually to drop the expressions, 'Intuition' and 'Consciousness,' and to employ the single term, 'Perception,' to designate this direct and immediate means of acquiring knowledge, whether such knowledge relate to matter or to mind; unless, indeed, it should become necessary for any special reason to distinguish between the two. In this sense we may say that all evidence is ultimately referable to perception; and that a fact is that which is capable of being perceived.

47. But here it must be observed that though that alone is a fact which is in nature capable of being verified by direct perception, it must not be assumed that the knowledge of a fact may not also be arrived at, though in a less absolute manner, by deduction or

(*u*) *Vide* Reid Hum. Mind, 5, ed. 1827.

inference. Practically we are often compelled to resort to inference as a means of ascertaining a fact, because it so happens that the evidence by perception is unattainable in the particular case; (*v*) but, nevertheless, if the matter be such as is capable under more favourable circumstances of being verified by perception, that is all that is necessary to constitue it a fact.

48. Facts are physical or psychological, but all facts, whether mental or material, must be regarded as possessing a *real existence.* It seems necessary to mention this, because the meaning of the term, 'existence,' seems by some philosophers to be restricted to the existence of material objects external to the mind. But this limitation of the word is scarcely justifiable. For if we are to restrict its meaning to the existence of material objects, we shall have no word left to describe the presence and reality of our Feelings and sensations. Yet these two have a real existence. As Mr. Mill remarks, (*w*) 'Substances are not all that exist; attributes, if such things are to be spoken of, must be said to exist; feelings also exist.' Nay, further, to the mind that feels, the feeling itself must be more indubitably a reality than the thing felt; and therefore to conscious beings, like ourselves, our own feelings and sensations are even more absolutely existences than external objects, since it is, in truth, only through the medium of the former that we can arrive at a knowledge of these last. 'Existence,' says Mr. Mill, (*x*) 'so far as Logic' (and we may add, so far as evidence) 'is concerned about it, has reference only to phenomena; to actual, or possible, states of external or internal consciousness, in ourselves or others. Feelings of sensitive beings, or possibilities of having such feelings, are the only things the existence of which can be a subject of

(*v*) Ante, s. 17. (*w*) Mill Logic, i. 62, P. 30b.
(*x*) Mill Logic, ii. 154 and 5, P. 395b.

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logical induction, because the only things of which the existence in individual cases can be a subject of experience."

49. Every fact, therefore, whether mental or material, being capable of being perceived or intuitively known, may be described as an 'existence,' or an existing reality of nature—existing, that is to say, either in the present or the past, but *not to exist in the future*. Future events are not entitled to rank as facts; for until an event has come into existence, has passed into the category of the present, and become, as the French say, 'accomplished,' it cannot be made the subject of perception, and has, consequently, no place among facts. It is important to remark this, because it is by this feature, the exclusion of the future, and, I think, by this feature only, that a Fact is distinguished from a 'Truth,' or law of nature, which last always involves future events, as well as present and past facts, and has, therefore, no complete existence. We shall have occasion to advert hereafter to this distinction. Meanwhile, we may define a fact as a reality of nature, existing or perceptible in the present or the past, and having its seat either in matter or in mind.

50. But since we can neither communicate to other rational beings, nor even fix in our own minds our idea of the existence of a fact without clothing it in words; the language or discourse in which a fact is expressed, becomes quite as important a consideration for all practical purposes, as the fact itself. Our inquiry into the nature of a fact would, therefore, be incomplete, if we omitted to supplement it by some examination of the form of the language, whereby a fact is enunciated; *i.e.*, is either asserted or denied: which language or discourse we may, for the purpose of distinguishing it as well from assertions of other kinds, as from the fact itself, designate an 'expression of fact.'

CHAPTER III

OF AN EXPRESSION OF FACT

51. A FACT has been described in the preceding chapter as an existing reality of nature, capable of being ascertained by perception or intuition—by perception, so to speak, external or internal, or, in general terms, as that which may be 'perceived.' Hence it follows that a fact, when expressed in language, must also be capable of being believed—of exciting belief. For all belief relates ultimately to perception, or the possibility of perception. (*y*) In popular phraseology *seeing* is said to be believing. And this is perfectly true as far as it goes; but it does not express the whole truth. Every form of perception is equally believing. Belief is excited alike by all the senses. If I hear a *sound*, I cannot help believing in the existence of the sound, nor in the existence of something to cause it, though it is possible I may not know what that something is. If, indeed, the sound takes the form of words, and those words the form of a narrative, then, indeed, hearing the sound, or the words that are uttered, is not believing the truth of the narrative, or the existence of what is narrated. But then I do not, in this case, *perceive* the existence of what is narrated: I only perceive the *sound* or words, and of the existence of the sound, or of its cause, so far as I perceive that by the aid of my other senses, I can entertain no doubt whatever. For the same is true of what is perceived by means of the other senses, as of touch, etc.; as also of what we intuitively know to be

(*y*) *Vide* Mill Logic, ii. 155, P. 396a.

passing in our own minds. It is true that we may believe in the existence of much that we do not perceive. We may believe what we are told, or what we infer; but what we actually perceive we cannot help believing. Thus, though belief is not always grounded on immediate or direct perception, all perception necessarily exacts and involves belief, and belief, too, of the highest order. A fact, therefore, being that which may be perceived, must also be capable of being believed.

52. From which it follows, if indeed it be not sufficiently obvious without, that a fact, when expressed in language, *i.e.*, when either asserted or denied, must always assume the form of what is called in logical phraseology a 'proposition,' which is defined by Whately (*z*) as 'a sentence indicative, *i.e.*, a sentence which affirms or denies.' 'Whatever can be an object of belief, or even of disbelief,' says Mr. Mill, (*a*) 'must when put into words assume the form of a proposition.' 'Nothing but a proposition,' he says in another place, (*b*) 'can be an object of belief or therefore of proof.' 'Belief,' says Mr. Reid, (*c*) 'is always expressed in language by a proposition, wherein something is affirmed or denied. This is the form of speech which in all languages is appropriated to that purpose, and without belief there could be neither affirmation nor denial, nor should we have any form of words to express either.' And I fancy that the most commonly received notion of a fact is, that it corresponds precisely with a proposition—that while a proposition asserts or denies, that which is so asserted or denied is a fact; that while the fact is the real matter itself, the proposition is the language in which it is enunciated, the words in which it is clothed: in short, that a fact is simply and uniformly the subject-matter or import of a proposition.

(*z*) Whately Logic, 41.
(*b*) Mill Logic, i. 59, P. 29a.
(*a*) Mill Logic, i. 21, P. 12a.
(*c*) Reid Hum. Mind, 140.

M. Dumont, the French editor of Bentham's treatise on Judicial Evidence, appears to take precisely this view of the mutual relation of a fact and a proposition. In a note at page 10 of the English translation of M. Dumont's work the following remark occurs: 'Everything is a fact which is susceptible of being announced in a proposition.' It is true that the author is referring in this note to an aspect of the question with which we are not just now concerned, viz.: to the relation between a negative proposition and the corresponding reality which it expresses; but the language which he employs would seem also necessarily to imply that a proposition and a fact are correlative also in all other respects.

53. Although, however, this account of a fact may perfectly represent the popular notion of the meaning of the term, it is considerably too comprehensive a description of a fact for our purpose. While it is quite true that every fact is capable of being announced in the form of a proposition, it is not true that everything susceptible of being announced in a proposition is a fact, at least in our view. And this renders some remarks on the nature and form of a 'proposition' almost absolutely necessary. A proposition, as previously observed, (*d*) is defined by Whately as 'a sentence indicative, *i.e.*, a sentence which affirms or denies.' Any sentence which affirms or denies is a proposition, whatever be its shape. It must, it is true, contain a verb, and that verb must be a verb in the indicative mood, otherwise the sentence could neither assert nor deny. But so far as popular discourse is concerned, a verb with its nominative is all that is required to constitute a proposition. Thus, 'John spoke' is a proposition, since it contains a complete assertion. And in some languages, as in Latin, for instance, it is not even necessary that any nominative should be *expressed*,

(*d*) Ante, s. 52, and *vide* Whately Logic, 41.

in which case a verb in the indicative mood is all that is required to make up the proposition. Thus, as remarked in Professor Jevon's primer of logic, (*e*) when Cæsar said 'Veni, vidi, vici,' he expressed three complete propositions in three words.

54. Logically speaking, however, all propositions are capable of being divided into three parts, called respectively the Subject, the Copula, and the Predicate. For it is obvious that every assertion or denial must assert or deny *something*, even if it be nothing more than simple existence, and this something is called in logical language the 'Predicate.' Moreover, this something must be asserted or denied of or concerning *something else*, and this second something, concerning which the assertion or denial is made, is called the 'Subject' of the proposition. And these two are called the terms (or extremes) of the proposition, because logically the subject is placed *first*, and the predicate *last*. (*f*) But thirdly, there must be some sign to indicate that an assertion or denial is intended to be made, to show that the two *somethings*—the subject and the predicate—are not merely mentioned or enumerated, but that the one, the predicate, is intended to be asserted or denied, or, as the phrase is, 'predicated' of the other—the subject. There must be, in short, some operative word, or *verb*, and this verb is called the 'Copula.' And logicians recognise only one verb for this purpose, namely, the verb *is*, with its tenses, was, etc., for affirming, and *is not*, etc., for denying. The substantive verb, *to be*, is the only *verb* recognised by logicians. (*g*) As regards all other verbs, as they have a more extensive meaning than the verb 'to be,' logicians get rid of that extraneous meaning by attaching it to the predicate. Thus the phrase, 'The Romans conquered,' when logically expressed, would be resolved into, The Romans (subject)

(*e*) Primer of Logic, 39. (*f*) *Vide* Whately Logic, 28 and 38.

were (copula) victorious (predicate). (*h*) And logicians maintain that all propositions are capable of being thus dissected into their component parts, and exhibited in due logical form and order. It certainly cannot be denied, however, that there is often considerable apparent difficulty in thus analysing propositions. (*i*) This difficulty, however, is, I believe, no more than an apparent one. (*j*) For if it be true that every assertion or denial must necessarily assert or deny something concerning some other thing, it seems obvious that every proposition, if intelligible, may be exhibited in due logical form, *i.e.*, with its subject, its copula, and its predicate, displayed in their proper order. And since a fact, when put into words, must always assume the form of a proposition, it follows that every expression of fact is capable, like any other proposition, of being reduced to this logical shape.

55. But, as before observed, while it is true that every fact is capable of being announced in a proposition, and, moreover, in the form of a regular logical proposition, it is not true that everything susceptible of being announced in a proposition is a fact in our view. For all assertions, as well as denials, relating to the *future* must be excluded. Future existences, as we remarked in the last chapter, (*k*) are not entitled to rank as facts, since they cannot become the subjects of perception until they have at least passed into the category of the present. In the first place, therefore, assertions which relate expressly to the future—prognostications, prophecies, and the like—must be excluded from the catalogue of expressions of fact. Further, all propositions which even involve an assertion concerning the future must also be excluded—for which reason we

(*g*) *Vide* Whately Logic, 38. (*h*) *Ibid.*
(*i*) *Vide* Reid Hum. Mind, 414 (ed. 1827). (*j*) *Vide* Post, s. 58.
(*k*) Ante, s. 49.

must, in the second place, except that kind of assertion which is called by philosophers a 'general proposition.' For every general proposition, properly so called, contains an assertion, not only concerning the present and the past, but also concerning the future, and what is more, concerning the *infinite* future. And it is, I believe, this characteristic of *infinity* which constitutes the real fundamental distinction between a general and non-general, or, as I shall beg leave to call it, a 'specific' proposition.

56. This question, however, involves some reference to the nature of general and specific propositions. Logicians have not condescended to take much notice of this distinction; their attention being chiefly directed to the various modifications of which the general proposition itself is susceptible, without reference to its precise relation to the specific. And though the science of Induction is chiefly employed in the construction or discovery of general propositions, (*l*) even inductive philosophers leave us greatly in the dark as to the precise form of the language in which they are expressed. It is true that general propositions, or rather the general truths which they express, are usually contrasted with 'particular' or 'individual' facts; (*m*) but as nothing is said by them as to the character of the proposition in which an individual fact is enuntiated, this does not throw much light on the precise difference between general and non-general propositions. As the distinction, however, is of the most vital importance to the present inquiry, we must endeavour to clear it up as far as possible.

57. Now it is to be observed that though logicians take no notice of the difference between general and other propositions, they do draw a distinction between

(*l*) *Vide* Mill Logic, i. 347, P. 186a.

(*m*) *Vide* Mill Logic, i. 347 and 349, P. 186a and 187a.

general and singular names or terms, (*n*) and as they also recognise a class of assertions designated 'singular propositions,' it might perhaps not unnaturally be inferred that propositions, like names, are either general or singular. A singular proposition is defined to be that of which the subject is a singular name, or a general name (or common term) with a singular sign; (*o*) in other words, a proposition in which the predication is made concerning a single individual thing or person, *i.e.*, the distinctive peculiarity of the singular proposition would seem to consist in the singleness or unity of the subject concerning which the assertion is made. In this sense, however, we cannot accept the singular proposition as the complement of the general one. For a general proposition is described as one in which the assertion is made concerning a *class*, or, as Mr. Mill puts it, (*p*) concerning 'an indefinite number of objects distinguished by a common characteristic, and designated in consequence by a common name.' Now a proposition is none the more 'general' in this sense, because the assertion happens to be made concerning two or more objects instead of concerning a single one only. For instance, the proposition, 'These two apples are ripe,' is not virtually more general than the proposition, 'This (single) apple is ripe.' The former is merely equivalent to two singular propositions of the latter kind; and the question, whether it is to be regarded as such, or as one collective assertion, cannot possibly affect its *specific* character. Nor, again, if we assert the name of three, of ten, or of a hundred apples, is the proposition a whit more general, or less specific. (*q*) Moreover, the case is not altered even if we have not counted the apples. If we make an assertion concerning 'those apples,' or

(*n*) *Vide* Whately Logic, 32. (*o*) *Vide* Whately Logic, 44.
(*p*) Mill Logic, i. 234, P. 114a.
(*q*) *Vide* Mill Logic, i. 353, P. 189a.

'those soldiers,' or 'several men,' without stating, or even knowing, how many there are, the proposition is still specific. The number of objects, though unascertained, might be ascertained. And besides, we might easily make the proposition logically singular by slightly altering the language—by substituting the expression, 'this heap of apples,' for 'these apples,' or 'that detachment of soldiers' for 'those soldiers,' or 'a crowd of men' for 'several men.' For it is to be remarked that the subject of a singular proposition is seldom, if ever, accurately measured, weighed, or counted. For example, suppose that I happen to make some assertion or another concerning a haystack: I call the whole object a haystack, but I know that the subject of my assertion consists of a vast number of minute fragments of hay; of the precise number of those fragments I have hardly the most remote idea, yet my assertion would be not only specific, but in every sense a singular proposition.

58. And we shall now, I think, have little difficulty in reducing to a logical shape such propositions as 'it rains,' 'it snows,' and the like, concerning which Reid remarks that it is difficult to discover their subject and predicate. (*r*) For it is obvious that in these cases the assertion is made concerning certain drops of water, or flakes of snow, uncounted, it is true, and to our limited faculties innumerable, but still specific, the predicate in each case being 'falling,' or 'falling to the ground,' or some such phrase; and consequently the proposition would be logically stated thus: 'Some drops of water,' or 'certain flakes of snow,' (subject), are (copula), 'falling to the ground' (predicate).

Lastly, we may even make an assertion concerning an unascertained *part* of any specific subject without enuntiating a general proposition: in other words, a specific proposition, like a general one, may be either

(*r*) Reid Hum. Mind, 414, ed. 1827, and *vide* Ante, s. 54.

total or partial. (*s*) Thus the assertion, 'A part,' or 'some of these men are Jews,' is specific or non-general.

59. The distinction—the only tangible distinction—between a general and a non-general or specific proposition is this: that while in the latter the assertion is made concerning one or more specific individual objects, in the case of a general proposition the assertion is made, not concerning any number, whether ascertained or otherwise, of specific individuals, but concerning the whole or an undefined part of a *class*—which never is, and never can be complete; which is always liable to be swelled by additions *ad infinitum* in the future. For example, the proposition, 'All oxen are ruminant,' is a general one, since the assertion contained in it relates, not only to all the oxen existing now or formerly, or even to exist at any given future time, but also to all the oxen that are to exist to the end of time. And if we make the proposition partial, or, as logicians express it, 'particular,' by substituting the word 'some' for 'all,' as, for instance, in the sentence, 'Some men are born blind,' the proposition will still be general, because the subject (some men) denotes an undefined portion of a *whole class*, and the assertion is made, not indeed concerning *all*, but concerning a portion of those men who are to exist in the infinite future.

We ought, perhaps, just to notice here that the word 'some' does not always bear this (its logical) meaning. Here, as we have said, it denotes an undefined portion of a whole class. But in many instances it is used in a more limited sense, and stands for an unascertained number of existing individuals, as it does, for example, in the sentence, 'Some men are at work in yonder field,' which, it is obvious, is a specific and not a

(*s*) *Vide* Whately Logic, 44.

general proposition. (*t*) But, on the other hand, where the word 'some' is used in its logical sense, a proposition is none the less general, merely because the assertion embraces a portion only of the subject.

60. Thus it appears that general propositions, whether total or partial, or, to adopt the logical phraseology, whether 'universal' or 'particular,' invariably include assertions concerning objects to exist only in the infinite future; and unless they do so, they are not really general propositions. The division of propositions, therefore, into general and singular would be at once incomplete and faulty. Whether a proposition be singular or not, is really a question rather of grammar, than of logic or philosophy. A singular proposition is merely a specific assertion, which is *universal*, and of which the subject, in a grammatical rather than a logical aspect, happens to be a singular, as contradistinguished from a plural name; such, for instance, as 'The Duke of Wellington's army,' which is grammatically singular, while, on the other hand, 'twenty thousand soldiers led by the Duke of Wellington' is plural; although, logically speaking, both terms are equally specific, and as a *fact* have precisely the same meaning.

Moreover, instances of names, which, though grammatically singular, are in reality general, are not wanting. Such are abstract names, when used to denote, not a single instance of an attribute, but all cases of the same attribute; (*u*) as, for example, the term 'Life' in the sentence, 'Life is short,' which to all intents and purposes is a general proposition. Propositions should, therefore, be distinguished, not as 'General' and 'Singular,' but as (1) General, and (2) Non-general or 'Specific'; General where the

(*t*) *Vide* Ante, s. 57, and Mill Logic, i. 353, P. 189a.

(*u*) *Vide* Post, s. 63.

assertion is made concerning the whole or part of a class, Specific where it is made concerning any number of specific individuals.

61. The epithet, 'Particular,' would perhaps more accurately describe this latter species of proposition; but unfortunately logicians, whose nomenclature is often extremely faulty and misleading, have perverted the epithet 'particular' to the purpose of denoting a species of proposition which would be more aptly described by the word 'partial' or 'incomplete'—a proposition in which the assertion is made concerning a part only of the subject, as distinguished from the 'Universal' proposition, where the assertion is made concerning the whole. (*v*) And here we may remark that no little confusion has been engendered in the study of logic and of logical philosophy by the ambiguous character of this term 'particular.' For its logical meaning as partial, and *indefinitely* partial, is so widely at variance with its popular and ordinary acceptation, where it is synonymous, or nearly synonymous with 'specific,' that the most mischievous consequences are certain to ensue from the mistakes that occur, as they inevitably must, between the two senses of the word.

Thus we find Mr. Mill, for instance, continually using the word in its popular sense, and speaking of arguing from particulars to generals, and from generals to particulars; and this, too, in a work professedly treating of logic, although, logically speaking, a proposition may be at once general and particular, all propositions, whether general or no, being either universal or particular. (*w*)

62. Moreover, the ambiguity of this same word 'particular,' if it has not actually created, has at least done much to increase and perpetuate the confusion

(*v*) *Vide* Whately Logic, 43, and Post, s. 133.
(*w*) Whately Logic, 43.

between the terms 'General' and 'Universal,' by which all modern logical treatises are more or less obscured. (*x*) In popular discourse 'General' and 'Universal' are very nearly synonymous, and the two words are consequently extremely liable to be understood in the same sense. But in logic they have a totally distinct meaning. A *universal* proposition, as just observed, is one in which the assertion is made concerning the *whole subject*; while a general proposition is that in which the assertion is made concerning (the whole or part of) *a class*. The distinction is one which it is most important to preserve. But when we consider that the term 'particular,' as applied to propositions in its logical sense of *partial*, is directly opposed to 'Universal' (or total), while, on the other hand, in its popular acceptation of 'specific' it signifies the exact reverse of 'general,' it becomes obvious that the original liability of the two words in question to be confounded with each other must inevitably be increased, an evil which is still further aggravated by the absence of any suitable term to serve as the complement to 'general,' to which purpose the word 'singular' is, as I have endeavoured to explain, quite inadequate. We are debarred from using the term 'particular' to supply this deficiency, but the word 'specific' will serve as a tolerable substitute to denote non-general propositions.

Propositions, therefore, as formerly remarked, should be distinguished as (1) General, and (2) Specific. And since the former always involve assertions relating to the future, general propositions must be excluded from the category of expressions of fact.

63. And lastly, for the same reason, we must also, generally speaking, exclude from the same category a class of assertions which may without impropriety be designated *abstract* propositions, *i.e.*, propositions which have an

(*x*) *Vide* Post, s. 134, and Mill Logic, i. 237, P. 115b.

abstract term for their subject. For a very slight scrutiny will, I think, suffice to show us that a large proportion, at least, of the assertions and denials that we make concerning such matters are neither more nor less than general propositions in disguise. According to Mr. Mill, an abstract term is the name of an attribute or combination of attributes. (*y*) In this, however, I venture to assert that he is mistaken. What is called an abstract name seldom, if ever, stands for the name of a single instance of an attribute or quality, but is employed to denote all instances, past, present, or to come, which fall within the description of the abstract term in question. It is the name neither of an attribute nor of a combination of attributes, but of a *class* of attributes. (*z*) The term, 'white,' or 'whiteness,' for example, does not signify a single instance of a white object, nor a single white sensation, but denotes the whiteness of all white objects, or all white sensations whatever. And this furnishes, I think, the answer to a question concerning which the same author, when treating of *names*, expresses considerable doubt—namely, whether abstract terms properly belong to the class of general, or to that of singular names. (*a*) Being unable to decide the question to his own satisfaction, he declares it to be 'of no moment,' and proposes to escape from the difficulty by placing abstract names in a class by themselves. It appears to me, on the contrary, that the question is an important one, and a question, too, which may be dealt with without resorting to such an evasion. Abstract names, even though used, as they almost invariably are, in the singular number, (*b*) are still in a logical and philosophical view "general." They are used to denote *all* instances of the attribute in question, not

(*y*) *Vide* Mill Logic, i. 140, P. 68b. (*z*) *Vide* Ante, s. 43.
(*a*) Mill Logic, i. 35, 36, P. 18ab.
(*b*) *Vide* Jevon's Primer of Logic, 18.

a single instance, nor a definite number of specific instances. (*c*) In short, abstract terms are the general names of attributes, and it is a mere accident of grammar that they are always used in the singular number.

64. Moreover, it is worthy of observation that we have, in many cases, no specific names whatever for attributes. Mr. Mill remarks that we have no separate names for the sensations which we receive from the presence of material objects. (*d*) This is quite true, but he fails to observe what is equally true, and what, if the attribute of a body be anything else than the sensation it excites, is equally worthy of remark, namely, that neither have we, in these cases, any separate name to denote the attribute itself. (*e*)

This is more especially true of what are called the *states* of physical objects, and particularly of those more permanent states, which are known as their qualities. As a general rule, whenever we have occasion to speak of an attribute of this kind, we speak of it, not separately, but as belonging to some material substance or body; indeed, in many cases we can scarcely even conceive the attribute as a single instance, except as annexed to the physical object which we believe to be the external cause of it. (*f*) Thus we speak of 'a white bird,' of 'a white statue,' or, if we feel doubtful what it may be, of 'a white object,' or of 'something white,' but never of 'a white' *per se* only. In these cases we have no name for the single instance of the attribute, or, in other words, no term to describe the *specific* attribute of a material object. It is true that we may *predicate* an attribute of this, or any other kind by means of numberless adjectives and participles that abound in our language; (*g*) and whenever one of these words is

(*c*) *Vide* Reid Hum. Mind, 226, ed. 1827.
(*d*) Mill Logic, i. 67, P. 33a. (*e*) *Vide* Ante, s. 43
(*f*) *Vide* Ante, s. 43. (*g*) *Vide* Mill Logic, i. 29, P. 15b.

predicated of a specific subject, it may well be regarded as the specific name of an attribute. For though these terms, when placed in such a situation, are generally regarded by logicians as elliptical expressions denoting the object qualified by the predicate, (*h*) there seems equal ground for maintaining that they denote the attribute itself. For instance, when we say, 'This lily is white,' I confess I fail to see why the word *white* may not be regarded as the name of the *attribute* of the lily, with at least equal reason, as the name of the lily itself.

Mr. Mill, however, in relation to this question, contends, that the adjective ('white,' for instance), when thus used as a predicate, cannot be regarded as the name of an attribute, because, as he says, it does not denote the colour white. (*i*) But this amounts only to saying that it does not signify 'whiteness' in general, *i.e.*, 'all whiteness,' or the white of *all* white objects. This is obvious enough, but it scarcely suggests a sufficient reason why the adjective should not be taken to denote the specific whiteness of the particular lily of which it is predicated. The question, however, is not of any practical importance to us; moreover, even if terms of this kind can be regarded as specific names of attributes at all, they can only be regarded as such when they are used as predicates. We have, generally speaking, no specific names for attributes of this permanent kind, which can be made the *subjects* of a proposition, or concerning which we can predicate anything else. (*k*)

65. As regards attributes in general, however, this statement is subject to considerable exceptions. There are not a few terms in use which denote a single instance of an attribute, and nothing else. Among

(*h*) *Vide* Whately Logic, 40. (*i*) *Vide* Mill Logic, i. 36, 37, P. 18b.
(*k*) *Vide* Mill Logic, i. 29, P. 15a.

these, perhaps the most prominent are the names of sounds. (*l*) Take, for instance, the expression, 'A noise.' 'A noise' is the name neither of a material object, nor simply of a sensation; for we generally ascribe a noise to some external cause residing in matter; and yet the term denotes a single instance of a noise, not all noises. And the same is true of many similar expressions, such as 'a sound,' 'a clatter,' 'a rattle,' 'a crash,' and the like. This may, I think, be accounted for as follows. The sensations by which we recognise and identify external objects, are for the most part, sensations of *sight* (which are far more diversified than our other sensations), or sensations of sight combined with others. For all these varying sensations of sight, or of sight and sense combined, we have distinctive names, which we call the names of the external objects to which we ascribe the sensations. When we see a thing, or see and touch a thing, or see and taste a thing, we know, or think that we know, what it is; and, having a concrete name for it, we speak of it accordingly as a material object. But in the case of our other senses, as of hearing (unassisted by that of sight), we often experience a sensation, which, though we ascribe it to an external material cause, yet we are unable to refer to the agency of any material object in particular: it is true that all sounds are now ascribed to vibrations of the atmosphere; but, in the first place, this was far from universally recognised when the names of sounds were invented; and, secondly, we do not suppose the vibrations of the air to be the *ultimate* cause of the sensations. Not knowing, therefore, to what particular nameable object or objects to refer the sound, we call it by the name of the sensation itself, which thus stands for a single instance of an attribute. Nor is this by any means confined to the names of

(*l*) *Vide* Mill Logic, i. 67, P. 33b.

sounds; for we use the terms, 'an odour,' 'a taste,' and so on, to denote single instances of odours and tastes, etc.; and even in the case of sensations of sight we have the substantives, 'flash,' 'glare,' etc., to describe the visible attributes of some unknown or unspecified luminous substance; not to mention the expressions, 'a sight,' 'a spectacle,' 'a scene,' and the like, which stand for the specific visible attributes of a multifarious collection of objects, too numerous to be conveniently designated by their concrete names.

66. Moreover, in the case of *events*, we are abundantly supplied with specific names; and if, as I am inclined to believe, it be true that all events of the physical kind are just as much attributes (or perceptible features) of material objects as their states are, (*m*) then the name of a particular event, such as 'a death,' 'a fire,' 'a robbery,' is nothing else than the specific name of an attribute, or of a combination or series of attributes. But though they may be the names of attributes, these terms, when thus limited, would never, I apprehend, be classed as *abstract* names. The word 'Death,' for instance, in the sentence, 'Death is painful,' is an abstract term. But it would hardly be regarded as such when limited to a specific instance, or a definite number of specific instances, as, for example, in the sentence, 'A death occurred in that house yesterday'; or even in this one, 'Death was busy in London last week.' In the same manner the word 'Sound,' when used generally, as in the phrase, 'Sound travels slowly,' is an abstract term; but it ceases to be so, when restricted to a specific instance, as in the sentence, 'Not a sound was heard.'

In a word, although there may be many words in our language which may serve as the specific names of bodily attributes, these words, when so employed,

(*m*) Ante, s. 42.

are never properly designated abstract terms, all abstract terms of the physical class being, as previously stated, neither more nor less than a species of general names.

67. As regards abstract terms of the mental sort, on the other hand, these too are always, I think, virtually general. The terms, 'Virtue,' 'Courage,' 'Piety,' 'Fidelity,' etc., when not applied to outward actions, mean *all* instances of virtuous feelings, *all* instances of courageous emotions, and so on. The name of a single instance of a mental feeling or phase of the mind, such, for instance, as 'a thought,' 'an idea,' 'an emotion,' and so on, would certainly not be regarded as an abstract term, since such matters are as much concrete, as anything belonging to the mind can be. Indeed, there are no such things as specific mental attributes, unless 'feelings' themselves be regarded as such. (*n*) Consequently, all abstract terms of the mental class are virtually general names, and stand for all instances of the particular 'feeling' in question.

68. If, however, an abstract term ever be used to denote a single instance of an attribute, or a definite number of such instances (which is, after all, a mere question of the meaning of the expression), in that case it is obvious that the assertion concerning it is just as much a specific proposition as any specific assertion concerning substances in the concrete. But where, on the other hand, an abstract term is employed, as, to say the least, it more frequently is, to denote all instances, past, present, or to come, of an attribute or mental feeling, which resemble each other sufficiently to fall within the description of the abstract term in question, there the assertion concerning it is virtually a general proposition. Abstract terms, when so employed, should

(*n*) *Vide* Ante, s. 44.

therefore, I think, be classed, not as 'singular,' or rather, not as *specific*, but as general names, (*o*) and the assertions wherein they are so employed as general propositions. Like other general propositions, they involve assertions relating to the future, and must consequently be excluded from the list of expressions of fact.

69. The result of our inquiry, therefore, appears to be that, though a fact is invariably expressed in the form of a proposition, all propositions by no means express facts. For since a fact exists only in the present or the past, no proposition which includes an assertion relating to the future can be said to express a mere fact. We must, therefore, exclude from the category of expressions of fact: (1) Specific assertions relating to the future, which express *predictions:* (2) General propositions, which include assertions concerning the future, and express 'General Truths,' or 'Laws of Nature': and (3) Those assertions concerning attributes in general which are virtually general propositions. A fact being consequently expressed in a *specific* proposition, or assertion limited to the past and the present. This species of assertion, and this only, is capable of being verified by perception now, or of having been formerly so verified, and of being now established by the testimony of the actual percipient. Whereas, no proposition, whether specific or general, which involves an assertion that relates to the future, is capable of being verified by perception either now or formerly. Its truth can only be inferred from facts which are, or have been observed. A *specific* proposition concerning the future may be known now by inference, but cannot be verified by perception, until the given future time has arrived at which it expresses a present fact. But a *general* proposition

(*o*) Ante, s. 63.

can *never* be completely verified by perception until the end of time; its complete truth can only be inferred or deduced from a sufficient number of individual facts.

70. Indeed a general proposition is little more than a mere figure of speech embodying the result of a series or assemblage of individual facts collected and marshalled by the process called 'Induction,' and containing a prognostication as to cases of the same kind that may arise in the infinite future. (*p*) Take, for example, the proposition, 'Red' (*i.e.*, Redness) 'is injurious to the sight,' which is a general proposition of the abstract order, equivalent to 'All red objects are injurious to the sight.' Assuming this to be true—to embody a Truth—how do we come to know it? Certainly not by the exercise of perception alone. All that perception can tell us on the subject, is that certain specific red objects—such, for instance, as a red paper on the wall of a room, a red carpet on the floor, a mass of red-hot coals in the grate, and so on—have actually done injury to the eyesight of some particular persons whose eyes were exposed to their influence; and granting that experience has furnished us with a sufficient number of such instances, we may be justified in inferring or concluding, with a greater or less degree of probability, that all red objects will prove injurious in time to come, and generally, that 'Red is injurious to the sight,' but still, all that we can be said actually to know about the matter, are the individual facts on which our general conclusion is based. These individual facts are capable of being completely known by means of perception: the Truth expressed by the general proposition is not so. So far as it can be said to be completely known at all, it must be known by inference.

71. In the preceding chapter we have endeavoured to fix the meaning of the word 'fact.' In the present one

(*p*) *Vide* Mill Logic, i. 249, P. 122a.

we have scrutinised the form of the language in which a fact is expressed: and before dismissing the subject of 'facts,' and their expression in words, we must devote another chapter to some remarks on the connection between the two.

CHAPTER IV

OF THE CONNECTION BETWEEN A FACT AND ITS EXPRESSION IN LANGUAGE

72. A FACT being the existence in the past or the present of some reality of nature, either mental or material, an expression of fact is a proposition, which asserts, or denies that existence; the existence of an object, again, being merely another name for its being perceived, or the possibility of its being perceived. (*q*)

The truth of a proposition of this kind obviously consists in the correspondence or agreement of the language or assertion with the external reality;—in the actual existence of that which the proposition asserts, or the non-existence of that which it denies.

We are also said to *believe* an expression of fact, when we deem it to be true; *i.e.*, when we feel assured that that, which the proposition asserts, does actually exist in nature, or, in other words, has been, or might have been perceived.

In short, the whole question of the truth or falsehood of an expression of fact, and of our belief or disbelief regarding it, hinges upon the existence or non-existence of some reality of nature external, of course, to the language itself.

73. And this is true, not only of those specific assertions whereby facts are expressed, but also, though it may be in a less obvious manner, of propositions generally.

In the case of a specific proposition which relates to

(*q*) *Vide* Mill Logic, ii. 155, P. 396a.

the future, it may be said that we believe it, because we feel assured that the reality, whose future existence is predicted, will come into being, and manifest itself at the appointed time. This is one view of the matter. But there is another, and perhaps a more correct way of looking at it, which will also serve to explain the meaning and grounds of our belief in a General proposition.

In the case of a general proposition, which involves the assertion or denial of an infinite series of facts, past, present, and to come, we can scarcely be said in any sense to believe *all* the facts which it includes, because a large proportion of these are not sufficiently ascertained or specified to be susceptible of belief. Beyond the present, it can hardly be said that there is anything definite either to believe or to disbelieve. But when we yield our assent to a general proposition, we do so because we believe in the existence of the individual antecedent facts on which the proposition is built—from which it is deduced,—while we acquiesce also in the validity of the inference from those individual facts to the general Truth.

And this is equally true of all propositions, whether general or specific, which relate to the future. For no future event can be verified by perception; it can only be inferred from a sufficient number of antecedent facts; and we are, therefore, warranted in believing it only so far as we believe in the existence of those antecedent facts from which the inference is drawn, so that the truth of a proposition of this kind, whether general on specific, may be said to be conditional on the existence of these antecedent facts. From which it appears that the truth of *all* propositions, whether general or specific, as well as the question of our belief in them, turns more or less exclusively on the existence or non-existence of some external reality, *i.e.*, of some reality of nature external to the language.

74. For which reason I contend that existence of some kind, mental or material, is, and of needs must be, either asserted or denied in every proposition. For if it were possible to frame a proposition without (directly or indirectly) affirming, or denying the existence of something external to the language, it would follow that it would be possible to state a proposition which was neither true nor false—a proposition which was neither more true than false, nor more false than true—and which we could neither believe nor disbelieve: there being nothing external to the language to test it by, it would not merely be impossible to ascertain its truth or falsehood, but the terms, 'truth' and 'falsehood,' would have no meaning as applied to it; which, it may be observed, is actually the case with every other form of discourse except a proposition. Whereas the position, that every proposition must be either true or false, even if it were not universally admitted by logicians, (*r*) appears in itself too obvious to be disputed. Existence of some kind, mental or material, is therefore either asserted or denied in every proposition.

75. And this appears to me to go some way at least towards explaining the theory of predication, a subject upon which the greatest misconception and contradiction formerly prevailed. Some of the exponents of logic have described predication to consist in the assertion of an agreement or disagreement between the two *names* or terms represented by the subject and predicate respectively; others, again, of an agreement or disagreement between the two *ideas* corresponding thereto. (*s*) Both of which theories are alike untenable. It is true that we may make an assertion

(*r*) *Vide* Mill Logic, i. 21 and 59, and Whately Logic, 42 and 228, P. 12a and 29a.

(*s*) Mill Logic, i. 128, P. 61b.

concerning the meaning of a name or of names; that we may make an assertion concerning one or more ideas, as mental existences; but when we make an assertion concerning *anything else*, we assert something (whether an agreement or disagreement, or no, remains to be seen), not concerning the *names* of the things, nor yet concerning our *ideas* of the things, but concerning the things themselves. (*t*)

76. Mr. Mill, while he refutes both the theories to which I have alluded, himself fails, I think, to clear up the matter satisfactorily. For he falls into two radical errors in discussing the question. First in concluding that *two* things are necessarily involved in every act of belief, (*u*) and therefore, of course, in every assertion; and secondly, in maintaining in common with Whately and his predecessors, that a proposition does not necessarily involve the assertion or denial of existence; or, which is tantamount to this, that the copula, as such, does not include the assertion of existence. (*v*) I say 'tantamount to this,' because the assertion or denial of existence, if it be contained in a proposition at all, must obviously reside in the copula (or its equivalent verb), since it cannot be involved in the meaning of either of the two terms,—of the subject or the predicate, —nor yet of both together.

In order to illustrate this, let us take an instance of an affirmative proposition of the simplest kind: 'The sun is a sphere.' Now, suppose I were to say 'The sun' only. 'The word,' as Mr. Mill remarks, (*w*) 'has a meaning, and suggests that meaning to anyone who is listening to me;' so far as my hearer understands me, it excites in his mind an idea or conception

(*t*) *Vide* Mill Logic, i. 118, P. 56, 57.
(*u*) *Vide* Mill Logic, i. 23 and 133, P. 12b and 64a.
(*v*) *Vide* Mill Logic, i. 104, and Whately Logic, 39, P. 50a.
(*w*) Mill Logic, i. 23, P. 13a.

of the sun. 'But,' as Mr. Mill proceeds to say, 'suppose I ask him whether it is true; whether he believes it: he can give no answer. There is as yet nothing to believe or to disbelieve.' And if I were to say 'A sphere,' the result would be precisely the same. Moreover—and this Mr. Mill omits to remark—were I even to say, 'The sun and a sphere,' the hearer would still be as far from belief or disbelief as ever. The enumeration of any number of names or terms would no more call for belief or disbelief—could no more be either true or untrue, than the mention of one. But if I should say 'The sun *is* a sphere,' 'Here at once,' as Mr. Mill observes, (*x*) 'is something which a person can say he believes'; something which may be true or false; and *that*, not because *two* objects are mentioned, but, as I contend, because I now assert the real existence of something external,—of something which may or might be perceived; which assertion, as it is not applied in either or both of the two terms, must necessarily be involved in the meaning of the copula.

77. Yet, as previously remarked, we find Mr. Mill gravely arguing that the copula does not necessarily include the meaning of existence. 'In the proposition, Socrates is just,' he says, (*y*) 'it may seem to be implied, not only that the quality *just* can be affirmed of Socrates, but moreover that Socrates *is*, that is to say, exists.' 'This however,' he goes on to say, 'only shows that there is an ambiguity in the word *is*; a word which not only performs the functions of the copula in affirmations, but has also a meaning of its own, in virtue of which it may itself be made the predicate of a proposition.' To which I reply, that not only does the existence of Socrates *seem* to be implied in such a proposition, but it *is necessarily* implied. Not only would the proposition be untrue, if Socrates were in

(*x*) Mill Logic, i. 23, P. 13a. (*y*) Mill Logic, i. 104, P. 50a.

existence and were not just, but it would also be untrue if there were no such person as Socrates in existence. It could hardly be contended, for instance, that the assertion, 'Socrates is just,' is true of the present time; nor, had Socrates never lived, could we say truly that he was formerly just.

78. Mr. Mill, however, proceeds to argue as follows: 'That the employment of it' (the word 'is') 'as a copula does not necessarily include the affirmation of existence, appears from such a proposition as this. A centaur is a fiction of the poets; where it cannot possibly be implied that a centaur exists, since the proposition itself expressly asserts that the thing has no real existence.' (*z*) That this last proposition does not assert or imply material or physical existence I admit; and if physical existence were the only kind of existence asserted by propositions, this proposition, though in form and for logical purposes, affirmative, would be a purely negative one in substance; for the name 'fiction' is, in reference to physical existence, a purely negative name, and the affirmation of a negative name, as we shall see presently, (*a*) expresses a negative and not a positive reality. The proposition would in that case simply *deny* the existence of a centaur. But physical existence is not the only kind of existence that is asserted in propositions, and this is the true reason why the proposition in question has a claim to be considered, in part at least, as affirmative—affirmative, I mean, in substance, and not merely in form. For psychological or mental existence is also asserted in propositions, (*b*) and in some, too, a sort of modified existence partaking of the nature both of physical and psychological. It is this kind of existence which is asserted by the proposition in question, which, so far as it is really in substance

(*z*) Mill Logic, i. 104, P. 50a. (*a*) *Vide* Post, s. 91.
(*b*) *Vide* Mill Logic, i. 62, P. 30b.

affirmative, asserts this : that a centaur (though possessing no existence as a physical object) has a psychological existence in the minds and imaginations of poets and writers, and also a sort of mixed existence, partaking of the nature both of physical and psychological, in the pages of their works, and the language of men. Thus the difference between those propositions which simply assert existence, as, for instance, 'Socrates is,' or 'Socrates exists,' and other really affirmative propositions, appears to be this ; that while the former assert *physical* or *material* existence, and assert it, too, *expressly ;* the latter either assert, or indirectly imply existence of *some* kind, either physical or psychological.

79. Thus in every proposition existence of some kind is either asserted or denied. Even that perplexing and complicated species of proposition, which declares the meaning of a word is virtually the assertion of a long and intricate series of facts, mental or material, by which its import is established ;—such, for instance, as the intention of each individual speaker in uttering the word in question ; that of each writer in penning it, the *idea* that is called up thereby in the mind of the hearer or reader, which psychological facts, coupled with the physical acts of speaking, writing, hearing, or reading, by countless iterations conduce to determine the ultimate conventional signification of the word ; and it is the existence of these innumerable minute facts that is virtually and really predicated by the proposition.

80. If, however, the sentence be a definition, not of the conventional or ordinary acceptation of a word, but of the peculiar meaning which the speaker or writer, for the particular purposes of his discourse, intends to annex to it, (*c*) then, though it may take the apparent shape of a proposition, the sentence is in reality hardly a proposition at all, and consequently can scarcely be said to be

(*c*) *Vide* Mill Logic, i. 182, P. 86b.

either true or false: if couched in an indicative form, it does, indeed, include the assertion of a mental fact, viz., the wish or intention of the author that the word should be taken and understood in the sense prescribed. But even if he could be conceived as representing his wish to be other than it really is, the truth or falsehood of the assertion would be of the very slightest consequence, for the main purpose of such a sentence is not to assert at all, but to fix the import (*pro re natâ*) of the word in question—to *make* it mean what it is defined to mean. And further, whatever be the author's wish or intention, this must of necessity be its effect. Such a sentence, therefore, is rather in the nature of a written or spoken *act*—of a direction, order, or *command*—than an assertion. And accordingly we find that a definition of this kind is sometimes stated in the *imperative*, instead of the indicative form. (*d*) We may, therefore, dismiss definitions of this last kind from our consideration, as not being propositions in any but the most trivial sense. But in every genuine proposition, whether general or specific, existence of some sort, mental or material, is either asserted or denied; otherwise the proposition could neither be true nor false, nor could it excite either belief or disbelief in our minds.

81. Moreover, it is not *two* things or objects that are essential to generate belief, but the *existence* of one. Because every assertion, when logically expressed, must contain at least two names, viz., the subject and the predicate. Mr. Mill concludes, not only that two *names* are indispensable to every act of belief, but also two nameable things. (*e*) Surely this hardly follows. Even if we grant that two names are necessary, why may not the two names be names of one and the same thing? Nay, is it not in many cases precisely because they are so—because they combine, as it were, to depict

(*d*) *Vide* Whately Logic, 97. (*e*) *Vide* Mill Logic, i. 22, P. 12b.

an existing object, that the assertion is true? When, for example, I say, 'This orange is yellow,' does not the truth of the proposition consist in the fact that a yellow orange is actually present before me? But, it may be said, this applies only to the case of a material object, and the name of a material object is neither more nor less than another name for its numerous attributes. And it cannot be denied that it is at least difficult to frame or devise a proposition which does not involve something more than a single attribute, a single perception, or a single feeling. Even where simple existence only is predicated, the subject-matter of a proposition can scarcely ever be said to be absolutely one. This want of unity, however, is not in the least degree a requisite of predication, but arises simply from the infinite divisibility of substances and their attributes. For if there be such a thing as the name of a single object of conception—whether it denote a mere mental feeling, a perception, an attribute, or a physical object—we have but to assert its real existence, and we obtain at once something which we can believe or disbelieve—a sentence to which we may yield, or from which we may withhold our assent. For which reason I say that predication, when traced to its simplest rudiments, consists in the assertion of the existence of a single object. For it is idle to argue, as Mr. Mill attempts to argue, that the object denoted by a name is one thing, and its existence another,—that when we say 'The sun exists,' the sun itself is one thing, and the sun's existence something else. (*f*) Existence must always be the existence of something.

82. The exigencies of logic demand a subject and a predicate. In every proposition, therefore, when logically expressed, there must be *two*, and strictly speaking only two, names or terms. A fact, on the other hand, though

(*f*) *Vide* Mill Logic, i. 23, P. 13a.

it may involve a hundred nameable objects, actually demands the *existence* of one only. And though it may be necessary for the purposes of logic, or even convenient for those of common discourse, to regard a proposition as one name, or one nameable thing, asserted of another — as a predicate affirmed of a subject, or an attribute predicated of an object or class of objects — yet if we wish to discern clearly what predication really means — what is *in fact* intended by the copula — we must adopt a different arrangement. We must, so to speak, attach the predicate to the subject, annex the attribute, as it were, to the object, treat the two names as a joint description of the object or objects concerning which the assertion is made, and regard predication uniformly as the assertion or denial of existence or presence in the universe.

Of presence too, so far as the proposition is specific, at a certain time and place. For every fact—every existence—must occupy a definite period of time, and cover a given portion of space. Even a psychological fact, existing in the mind only, is localised by the hidden tie that links that mind to a corporeal form. Thus time, place, and existence are necessary ingredients of every fact : the two former are not infrequently omitted, or incompletely specified, in the verbal expression, but every proposition must assert or deny existence ; otherwise it could neither be true nor false, nor could it excite either belief or disbelief in our minds.

83. The notion prevalent among logicians, that an assertion can be made without affirming existence, and which, it may be remarked, is in direct conflict with Aldrich's definition of a true proposition—'Vera est, quæ quod *res* est dicit,' (*g*) owes it origin to two causes ;

(*g*) Whately Logic, 228.

first, that many logically affirmative propositions are in fact denials; (*h*) and secondly, that the existence predicated by a proposition is not necessarily physical existence. But in every proposition existence of some kind, physical or psychological, is either asserted or denied—asserted, so far as the proposition is really in substance and fact positive; denied, so far as it is in substance negative.

84. And this seems a favourable juncture for drawing the reader's attention to certain defects in the conventional nomenclature of logic, or to what I conceive to be such. For since a fact is 'that which exists,' and existence only another name for that which may be *perceived*, felt, or intuitively known, therefore I contend that a proposition, which is always the virtual expression of a fact, or of an assemblage or series of facts, should be described as the expression in language of an act of *perception* or consciousness, and not, as logicians commonly define it, as the expression of an act of 'judgment.' It is true that we may arrive at our assent to a proposition—our belief in its truth—through the medium of an inference, and in the case of a general proposition it may be that we cannot do otherwise, and an inference does unquestionably involve an act of judgment; but no act of judgment is necessarily involved in our assent to a specific proposition. I assert because I am conscious, or feel, or perceive, and *know*—because I feel and know *what* I assert—or, it may be, feel and know *something else*, from which I *infer* what I assert; (*i*) and for similar reasons I yield my assent to what is asserted by another. I assent to a proposition because the language represents or describes my own feelings or perceptions. This appears to me to be the whole secret of predication,

(*h*) *Vide* Post, s. 91.

(*i*) *Vide* Mill Logic, iii. 155, P. 396a.

and to explain, to some extent at least, the mystery of assent to a proposition. (*j*) Predication uniformly consists in the assertion or denial of existence, and we assent to what is thus predicated, for the simple reason that we feel or perceive that existence.

85. Denial and dissent, however, it must be confessed, do not appear to stand upon precisely the same grounds as assertion and assent. There is always, I think, somewhat of inference involved in active dissent or disbelief. We do not actively dissent from an assertion merely because we fail to perceive or feel. The mere absence of perception engenders only the state of mind usually described as 'doubt' or 'uncertainty.' But when we actively dissent from or disbelieve an assertion, we do so because we not only fail to perceive or feel what is asserted, but do also feel or perceive something else—some other fact or series of facts—from which we *infer* the absence or non-existence of that which is asserted. But though it may be true that dissent and disbelief call for a certain exercise of the reasoning faculty, no judgment is necessarily involved in our assent to an affirmative proposition—to a proposition, *i.e.*, affirmative in substance—or, in other words, which asserts a positive fact. And thus, although we *may* arrive at our assent to a proposition through the medium of a judgment, judgment is not necessarily involved in the act of belief expressed by a simple assertion; it is essential only to the third operation of the mind, which logicians call 'discourse' or 'reasoning,' *i.e.*, to the inferring process.

86. Similarly the name or 'term' is the expression in words of an act of *conception*. If I happen to think of the sun, I express that thought in language by uttering the name 'the sun.' It is not an act of perception that I thus express, for as yet I perceive nothing. Nor does

(*j*) *Vide* Mill Logic, i. 117, P. 56b.

the utterance of the word express an act of consciousness, for I am thinking of the sun itself, a material object, not of the idea of the sun existing in my mind. If I wished to affirm the existence of the idea in my mind, I should not say 'the sun' merely; I should say, 'I am thinking of the sun,' or, 'I am dreaming of the sun,' or the like. I should make an *assertion*. But if I wish to express the conception itself, I utter the *name* merely.

(1) The name or term, then, expresses an act of *conception*, or of 'simple apprehension,' if simple apprehension means no more than the mere conception of an object. (*k*)

(2) The proposition, an act of *perception* or *consciousness*.

(3) The syllogism or argument, an act of *judgment* or *reasoning*.

87. Exponents of logic and of logical philosophy take but little notice, as I have said, (*l*) of any but general propositions; nor do they seem even to possess a distinctive name for the specific or non-general assertions by which facts are expressed. The result of this is to create a sort of hiatus or gulf between logic and fact, which tends to deprive logic of much of its practical utility, and to obscure the relation between that science and what we call evidence, *i.e.*, the verification of individual facts.

Our own method of inquiry appears to me far more likely to lead to satisfactory results, namely, to begin by analysing the simple fact; thence to pass to the examination of the more complex expression of fact or specific assertion; and then, and not till then, to approach the scrutiny of the general proposition. For facts lurk at the root of every proposition, however complicated, however general, and every fact imports

(*k*) *Vide* Reid Hum. Mind, Ess. IV., chap. i., p. 186.

(*l*) Ante, s. 56.

existence. It is in the reality of this existence that the truth of a proposition consists; it is on this that our belief is founded, and to this that the investigations of evidence are addressed. Having thus disposed of facts and their expression in language, and made such observations as we have deemed expedient on the connection existing between the two, we may now pass to the consideration of some *divisions* of facts which would seem to merit attention.

CHAPTER V

FACTS POSITIVE AND NEGATIVE

88. ALL facts are said to be either positive or negative. (*m*) In a strict sense, however, as Bentham very truly observes (*n*) 'the only really existing facts are positive facts. A negative fact is the non-existence of a positive one, and nothing more.' But as we can hardly even think of a fact, much less communicate that thought to others, without clothing it in words, we find ourselves compelled, to a great extent, to accept the verbal expression as the fact, and not the reality itself; and thus we come to regard the existence and non-existence of facts alike as facts, and to speak of them as such. 'At first sight,' says M. Dumont, (*o*) 'it appears singular to speak of a negative fact; but everything is a fact which is susceptible of being announced in a proposition. It is a fact that I have been in such and such a place: that I have not been there is likewise a fact. To speak otherwise would be to speak unintelligibly.' Nay more, we should scarcely find it possible to express ourselves in any other manner with regard to such matters, even if we attempted to do so. For owing partly to want of precision in the language whereby we express our ideas, and partly also to vagueness in the ideas themselves, it often becomes a matter of extreme difficulty to decide whether the particular fact of which we are speaking is in reality positive or negative. In many instances, as Bentham

(*m*) *Vide* Bentham Jud. Ev., i. 49; Best Ev., s. 13; and Dumont Ev., 10.
(*n*) Bentham Jud. Ev., i. 50. (*o*) Dumont Ev., p. 10, note.

very justly observes, (*p*) the real nature of a negative fact is disguised by the mode of expression commonly employed in speaking of it. And in others it will, I believe, be found that the obscurity is due to the very nature of the perception itself. But since by far the larger part of the evil may be traced to the ambiguities of speech, it may be well to begin our inquiry by considering in what manner and how far the true character, as positive or negative, of a fact is liable to be obscured by the mode in which it is expressed: and first of all we will endeavour, as far as may be, to clear up what may not inaptly be styled, the *logical* difficulty.

89. Every fact, whether positive or negative, is capable, as I have endeavoured in a previous chapter (*q*) to show, of being announced or expressed in a proposition,—in a specific proposition, *i.e.*, of the kind distinguished as an 'expression of fact'; and as all facts are positive or negative, so all propositions, whether specific or general, are either affirmative or negative also. It must be observed, however, that the nature of a fact, as positive or negative, is not necessarily determined by the quality, affirmative or negative, of the proposition in which it is expressed or propounded. The quality, affirmative or negative, of a proposition is, for logical purposes at least, determined by the character, affirmative or negative, of the copula which connects the subject and the predicate. 'A proposition,' says Archbishop Whately, (*r*) 'is affirmative or negative according to its copula': the copula, *is*, being the sign of an affirmative proposition; the copula, *is not*, of a negative one. (*s*) 'A proposition,' says Mr. Mill, (*t*) 'being a portion

(*p*) *Vide* Bentham Jud. Ev., i. 50. (*q*) Ante, s. 69.
(*r*) Whately Logic, 42. (*s*) *Vide* Whately Logic, 38.
(*t*) Mill Logic, i. 106, P. 5ra.

of discourse in which something is affirmed or denied of something, the first division of propositions is into affirmative and negative. An affirmative proposition is that in which the predicate is *affirmed* of the subject; as, 'Cæsar is dead.' A negative proposition is that in which the predicate is *denied* of the subject: as, 'Cæsar is not dead.' The copula in this last species of proposition consists of the words, *is not*, which are the sign of negation; *is* being the sign of affirmation.' And not only in logic, but in popular discourse also a proposition is commonly regarded as affirmative or negative according to the affirmative or negative character of the verb; or, perhaps we ought rather to say, according to the absence or presence of the negative particles, not, no, never, nowhere, or the like, annexed to the verb. (*u*)

90. But the quality of the copula or its equivalent verb does not necessarily determine the nature, positive or negative, of the fact expressed or propounded by the proposition. For names or terms, as well as propositions, may be either positive or negative. 'Another principal division of names,' says Mr. Mill, (*v*) 'is into positive and negative. Positive, as *man*, *tree*, *good*; negative, as *not man*, *not tree*, *not good*. To every positive concrete name, a corresponding negative one might be framed. After giving a name to any one thing, or to any plurality of things, we might create a second name which should be a name of all things whatever except that particular thing or things. These negative names are employed whenever we have occasion to speak collectively of all things other than some thing or class of things.' Here, however, we must not omit to notice that logicians also recognise a third class of names called 'Privative,' intermediate

(*u*) *Vide* Jevon's Primer of Logic, 40.
(*v*) Mill Logic, i. 51, 52, P. 26a.

between the other two, and generally supposed by them to border more closely on the negative than on the positive class of names. (*w*) But if this third species be not altogether illusory, at least, it does not form a class distinct from the other two, for it will, I believe, be found on examination that all so-called privative terms are in reality either positive or negative. The most common examples of privative terms adduced by logicians are the words, 'blind,' 'dumb,' 'deaf,' and the like. These names, however, though they resemble negative connotative terms in implying or involving the absence of an attribute, differ from negatives in this: that they do not connote or imply the *simple absence* of sight, speech, hearing, etc., but import a positive and specific defect in those organs respectively, and an active or positive cause of the absence of the corresponding faculties. The word, 'blind,' as Mr. Mill remarks, (*x*) is not equivalent to *not seeing*, or to *not capable of seeing*, and is not the mere negative of *seeing*, or of *capable of seeing*, for nothing can properly be said to be blind, which is not endowed with organs of sight. The term, 'blind,' is rather equivalent to *endowed with defective or useless organs of sight*, and, whether it be properly called privative, or no, is a positive term; and the same may be said with regard to 'dumb,' and 'deaf,' etc. On the other hand, Archbishop Whately speaks of the word, 'unhappy,' as a privative term. (*y*) But the word, 'unhappy,' if it be taken to connote the mere absence of pleasure, is purely negative; if the presence of misery, positive. (*z*) In short, whatever be the precise meaning of the word privative, all terms, whether they be properly designated privative, or no, are either positive or negative.

(*w*) *Vide* Whately Logic, 82; Mill Logic, i. 53, P. 26b.
(*x*) *Vide* Mill Logic, i. 53, P. 26b.
(*y*) *Vide* Whately Logic, 82. (*z*) *Vide* Post, s. 93.

91. It is obvious, then, that if we affirm one of these negative names, or rather the matter denoted by it, of some other thing, or, in other words, of a subject, we are in reality *denying* the matter denoted by the corresponding positive name; and conversely, when we deny such a negative name of our subject, we are really *affirming* the corresponding positive one. In the former case, though the proposition be in form an affirmative one, it expresses in reality a negative fact, or, what is equivalent, denies the existence of a fact: In the latter case, though the proposition be in form negative, it really asserts a positive one. 'When we affirm a negative name,' says Mr. Mill, (*a*) 'what we are really predicating is absence and not presence; we are asserting, not that anything *is*, but that something is *not*; to express which operation no word seems so proper as the word denying. The fundamental distinction is between a fact and the non-existence of that fact; between seeing something and not seeing it.'

The result of this, then, appears to be, that a positive fact is that stated or expressed by a proposition which affirms some positive, or denies some negative name, of the subject: while a negative fact is that expressed by a proposition, in which some positive name is denied, or negative name affirmed of it. Thus, by way of illustration, let us take as alternative predicates the two terms present and absent, which latter is a negative term exactly equivalent to *not-present*; present being the corresponding positive name, and in its turn exactly equivalent to *not-absent*. We may then frame the following affirmative and negative propositions, viz.,

(*a*) Mill Logic, i. 107, P. 51b.

Subject.	Copula.	Predicate.
John	is (affirmative)	present (positive)
John	is not (negative)	absent (negative)

both expressing positive facts; and the following negative and affirmative propositions—

Subject.	Copula.	Predicate.
John	is not (negative)	present (positive)
John	is (affirmative)	absent (negative)

expressing negative ones. It would, however, be a far simpler and more convenient mode of procedure, for the purpose of distinguishing a positive from a negative fact, to treat the copula or its equivalent verb as unalterable, and to regard the negation as attaching entirely to the predicate. We might then describe a positive fact, as that expressed by a proposition whose predicate was upon the whole positive: a negative fact, as that expressed by a proposition whose predicate was upon the whole negative; and our example would then become simplified as follows:—

Subject.	Copula.	Predicate.
John	is	present (or) not absent

expressing the positive fact; and,

Subject.	Copula.	Predicate.
John	is	absent (or) not present

expressing the negative one.

92. This method of procedure appears according to Mr. Mill (*b*) not to have been wholly unknown to logicians. Mr. Mill himself, however, though as it seems to me, most unreasonably, reprobates the practice, chiefly on the ground that the distinction between affirmation and denial is real, and not merely verbal. This is perfectly true, but surely it furnishes a powerful argument in favour of our arrangement, instead of a ground of objection to it. For since the actual character, as positive or negative, of the fact or truth embodied in a proposition is by no means uniformly determined by the affirmative or negative quality of its copula; it is clear that the common distinction between affirmative and negative propositions, which is founded on the quality of the copula merely, is entirely arbitrary, and, so far as reality is concerned, fallacious. Even, therefore, if the object of these logicians were, as Mr. Mill states it to be, (*c*) to get rid of the distinction between affirmation and denial altogether, they would still be aiming at nothing worse than the obliteration of a purely artificial and misleading distinction. But it does not even appear that such was their design, for, as Mr. Mill himself tells us, (*d*) 'these writers define a negative proposition to be one in which the predicate is a negative name.' It seems much more probable that their design, like our own, was, not to obliterate the distinction between assertion and denial altogether, but simply to alter the criterion so as to bring the affirmative and negative quality of the logical proposition more into conformity with reality and fact. Whether the method of procedure, which Mr. Mill condemns, be suitable to the ends of logic in general is a question that we need not discuss; but it is certain

(*b*) Mill Logic, i. 106, P. 51ab.
(*c*) *Vide* Mill Logic, i. 106 and 107, P. 51a.
(*d*) Mill Logic, i. 106, P. 51a.

that for our present purpose this mode of simplification is both justifiable and convenient.

93. But although we may thus, to some extent at least, dispose of what we have called the 'logical difficulty'; yet even this will not prove in all cases a sufficient guide to indicate the distinction between a positive and a negative fact, for the simple reason, that it is often extremely difficult to distinguish between positive and negative names; or, in other words, to determine whether the particular term, which we are predicating, is actually positive or negative. As Mr. Mill observes, (*e*) 'Names which are positive in form are often negative in reality, and others are really positive, though their form is negative. The word *inconvenient*, for example, does not express the mere absence of convenience; it expresses a positive attribute, that of being the cause of discomfort or annoyance. So the word *unpleasant*, notwithstanding its negative form, does not connote the absence of pleasantness, but a less degree of what is signified by the word painful, which, it is hardly necessary to say, is positive. *Idle*, on the other hand, is a word which, though positive in form, expresses nothing but what would be signified either by the phrase *not working*, or by the phrase *not disposed to work;* and *sober*, either by *not drunk*, or by *not drunken*.' 'Many negative terms,' says Archbishop Whately, (*f*) 'which are such *in sense only*, have led to confusion of thought from their real character being imperfectly perceived: *e.g.*, "Liberty" which is a purely *negative* term denoting merely "absence of restraint," is sometimes confounded with "Power."' 'It is to be observed,' he also proceeds to say, 'that the same term may be regarded either as Positive, or as Privative or Negative according to the quality or character which we are referring to in our minds;

(*e*) Mill Logic, i. 52, P 26b. (*f*) Whately Logic, 82.

thus of "happy" and "miserable," we must regard the former as Positive, and the latter (unhappy) as Privative,' (for which we should read Negative) 'or *vice versâ*, according as we are thinking of enjoyment or of suffering.'

To these we may add two or three similar instances, cited by Bentham as examples of negative *facts*. 'By *health*,' he says, (*g*) 'is meant nothing more than the absence, the non-existence of disease; by *minority*, the individual's non-arrival at a certain age; by *darkness*, the absence of light; and so on.' With regard to the names cited in this last passage, however, it seems necessary to make two observations, which will apply also to the term 'liberty,' referred to in the preceding one; first, that these are not, strictly speaking, the names of facts at all, but abstract terms, or the general names of attributes—a species of word which denotes, not a single fact, but a *class* of facts or attributes; (*h*) and secondly, that they are not such terms as can be made the predicates of a specific assertion, or 'expression of fact.' We cannot say, for instance, 'My father is health'; 'the king is minority'; 'the room is darkness'; 'this man is liberty.' If we wish to express a fact, we must use the corresponding attribute or connotative terms; viz, 'healthy,' or 'a healthy person'; 'under age,' or 'a minor'; 'dark,' or 'in darkness'; 'free,' or 'at liberty,' and so on; but the remark, that though positive in form, they are negative in reality, applies equally to these last modifications as to the former.

94. Since, therefore, some names, which are positive in form, are negative in reality; and others, whose form is negative, are in fact positive; while others again, like 'unhappy' and 'miserable,' are equivocal or ambiguous in that respect, and shift their aspect with every shade

(*g*) Bentham Jud. Ev., i. 50. (*h*) *Vide* Ante, s. 63.

of the speaker's meaning; it is hardly surprising that the *fact*, which is expressed by the assertion or predication of a term, and virtually takes its positive or negative complexion from the character of the predicate, should have its nature, as positive or negative, obscured by the ambiguity attaching to the term predicated. We can gather little or nothing from the mere form of the proposition in which the fact is expressed, since its positive or negative character depends to a great extent on the quality of the names employed in stating it; and the question of the positive or negative quality of names is virtually the same as the question of the corresponding quality of facts, since a name, when used in a specific sense, is nothing else than a fact spoken of substantively, or without predication;—a fact considered apart from its real existence: a fact, again, being the real existence of the object denoted by a specific name. As a consequence of this we find that few operations are attended with greater difficulty than that of drawing the exact line between positive and negative facts.

95. But still, whatever be the difficulty of distinguishing between them, it seems to assume the force of an axiom, that every fact must be either one or the other—must either consist in existence or non-existence; in presence, or in absence. Bentham suggests the following test of distinction between the two. 'For satisfying himself,' he says, (*i*) 'whether in the case of a certain fact, it is the existence or the non-existence, the presence or the absence of it, that is in question, the course a man may take is to figure to himself the corresponding image: he will then perceive whether, by the expression in question, it is the presence or the absence of that same image that is indicated and brought to view.' A better rule could not easily be devised.

(*i*) Bentham Jud. Ev., i. 50.

But the difficulty of applying it will, I think, at once appear from a glance at such seemingly contradictory expressions as the following:—

'My father is ill': 'My father is well.'
'The room is light': 'The room is dark.'
'Cæsar is alive': 'Cæsar is dead.'
'This stone is black': 'This stone is white.'
'Socrates is wise': 'Socrates is foolish.'
'The king is in London': 'The king is in York.'
'The weather is hot': 'The weather is cold.'

We may have occasion to advert to some of these again presently. But as any scrutiny of facts, in respect to their positive or negative properties, will involve a reference to the different kinds of opposition existing between them, it will be advisable, before we proceed, to make a few remarks on this subject.

96. The opposition of facts is a question of which little or no notice is taken by logicians. They do, indeed, treat, and that at some length, of the opposition of propositions. But the logical theory of the opposition of propositions is a different matter altogether from the opposition of facts, or of the specific propositions in which facts are expressed. The logical theory relates to the different kinds of contradiction occurring between *general* propositions, according as those are 'universal' or 'particular,' total or partial; *i.e.*, accordingly as the conflicting assertions are made concerning the whole, or concerning a part only of the subject. A clear account of these different species of opposition, which are distinguished in logic as contradictory, contrary, subcontrary, and so forth, will be found in Archbishop Whately's treatise. (*j*) These distinctions, which are important to logic, as forming part of the doctrine of the syllogism, have little or no direct bearing on 'Evidence.'

97. But there is another kind of opposition recognised

(*j*) *Vide* Whately Logic, 45 and *seq.*

by logical writers as existing between names or terms, and which we may designate *direct* or *indirect* contradiction or opposition, which is of more interest to us, since upon this distinction the nature of the opposition existing between facts also turns. What the opposition of terms is, and how divided, may be best explained by quoting certain passages from Archbishop Whately's work. 'When there are two views,' he says, (*k*) 'which cannot be taken of one single object at the same time, the terms expressing these views are said to be *Opposite* or Inconsistent (repugnantia) as "black" and "white"; when both may be taken of the same object at the same time, they are called Consistent or *Compatible* (convenientia): as "white" and "cold."' 'It is to be observed,' he remarks subsequently, (*l*) 'that the most perfect opposition between terms exists between any two which differ only in respectively wanting and having the particle *not* (either expressly or in sense) attached to them: as "organised," and "not organised"; "corporeal," and "incorporeal." For not only is it impossible for both these views to be taken at once of the same thing, but also it is impossible but that *one* or *other* should be applicable to every object; as there is nothing that can be *both*, so there is nothing that can be *neither*. Everything that can be conceived, must be either "Cæsar," or "not Cæsar," either "corporeal," or "incorporeal."' 'Such terms,' he proceeds to say, 'may be said to be in contradictory opposition to each other.' 'On the other hand,' he remarks, '*contrary* terms, *i.e.*, those which, coming under some one class, are the *most* different of all that belong to that class, as "wise" and "foolish," both denoting mental habits, are opposed, but in a different manner; for though *both* cannot be applied to the same object, there may be other objects to which *neither* can be applied; nothing

(*k*) *Vide* Whately Logic, 81. (*l*) Whately Logic, 83.

can be at once both "wise" and "foolish"; but a stone cannot be either.'

98. It will be observed that these different kinds of opposition are here distinguished by the epithets *contradictory* and *contrary:* We shall prefer, however, to designate the latter *indirect* opposition, and the terms so opposed *inconsistent* terms, since this not only describes the nature of the opposition in question more accurately, but has the further merit of not clashing with the terminology of the opposition of propositions mentioned above. This distinction between compatible and opposite terms, as well as that between the two kinds of opposition, extends itself to facts also; or, to speak more accurately, it is founded on the corresponding compatibility and opposition existing between facts. For if two compatible terms, as 'white' and 'cold,' be predicated in turn of the same subject, the facts thus expressed will also be compatible. Thus, 'this pebble is white,' 'this pebble is cold,' are compatible facts; *i.e.*, they may both be true. On the other hand, if two opposite terms, as 'black' and 'white,' be in turn predicated of the same subject, the two facts thus expressed will be incompatible or opposite. Thus, 'this pebble is white,' 'this pebble is black,' are opposed facts; *i.e.*, they cannot both be true. Two facts, then, relating to the same subject may be said to be *compatible,* when both may be true: opposed, when either one or the other must be false.

99. Opposed facts, however, like opposed terms, may be either *contradictory* or merely *inconsistent.* For if two contradictory terms be in turn predicated of a subject, the two facts thus expressed will then be in direct contradiction. On the other hand, if two indirectly opposed or inconsistent terms be thus in turn predicated of a subject, the two facts so expressed will then be, not directly contradictory, but only incon-

sistent facts. Thus, let us take the two contradictory terms, 'present' and 'absent,' and predicate them in turn of the same subject, 'Cæsar,' for instance; we then obtain the two facts, 'Cæsar is present,' and 'Cæsar is absent,' which stand in direct contradiction to each other: and since everything that can be conceived must be either 'present' or 'absent,' therefore our present subject, 'Cæsar,' must be either one or the other; in other words, either one or the other of two directly contradictory facts must be true. Next let us take the two inconsistent terms, 'Englishman' and 'Frenchman,' and predicate them similarly in turn of one and the same subject, 'Charles,' for instance; we then obtain the two facts, 'Charles is an Englishman,' and 'Charles is a Frenchman,' which are inconsistent facts, as they cannot both be true; but which do not directly contradict each other, as they may both be false; since 'Charles' may be a German. Moreover, for anything that the propositions themselves assert, they might both be true: that they cannot both be true, is in reality an inference founded upon the Truth, that no one man can be born, or have been born, in two different countries. In short, wherever two facts are not directly contradictory, but only inconsistent, their inconsistency rests on an inference or conclusion from some general law of nature.

100. One result of all this is, that whenever we find two facts or expressions of fact opposed in such a manner that one or the other must be true, we may conclude that the facts in question are in direct contradiction, and consequently that either one or the other must be negative. If therefore we happen to know that either of them is positive, we may conclude that the other is a negative fact, and *vice versâ*. On the other hand, if we find two facts opposed in such a manner that (though both cannot be true) both may be false,

we may then conclude that the facts are only inconsistent, and consequently that both are positive: for between negative facts there can be no opposition or inconsistency. I may say, for example, 'Charles is not an Englishman,'—'not a Frenchman,'—'not a German,' —and so on, *ad infinitum*, without any inconsistency; and if the two opposed facts were respectively positive and negative, they would necessarily be directly contradictory; for if the negative fact were the negation of any other matter than that asserted in the positive, there could be no opposition at all. Thus (1) 'This stone is white,' (2) 'This stone is black,' are inconsistent facts, and both positive. (1) 'This stone is white,' (2) 'This stone is not white,' are contradictory, and respectively positive and negative. But (1) 'This stone is white,' (2) 'This stone is not black,' or (2) 'not red,' or (2) 'not heavy,' are neither contradictory nor inconsistent. Two inconsistent facts, therefore, must both be positive.

101. We may now, therefore, perhaps venture to lay down the following simple rules or canons respecting the opposition of facts.

(1) All facts or expressions of fact are either positive or negative.

(2) A positive fact can only be directly contradicted by a negative one, and *vice versâ*.

(3) If two facts stand in direct contradiction, one of them must be negative; the other being positive.

(4) But two positive facts may be inconsistent; *i.e.*, indirectly opposed.

(5) One or the other of two contradictory facts must be true.

(6) But of two inconsistent facts both may be false.

(7) Two negative facts cannot be inconsistent, nor, of course, contradictory.

(8) A positive and a negative fact cannot be incon-

sistent merely. They must either be contradictory or not opposed at all.

(9) Two facts are said to be opposed, when one or the other of them must be false.

102. Hence it appears that the proposition, which seems to controvert a positive fact, is by no means of necessity itself negative; since it may merely express another positive fact which is inconsistent with the former. Such is the case with the propositions, 'This stone is black,' 'This stone is white'; as also with these, 'The king is in London,' 'The king is in York,' (*m*) all of which express positive facts.

But further, even where the expression in question contains the direct contradiction of a positive fact, it is often difficult to realise that it is actually negative; because, though so far as the contradiction itself is concerned it is purely so, yet there is frequently so much of what is positive implied and suggested by the expression, that it will sometimes appear almost as tangible and definite as the fact which it contradicts. There are few propositions, however negative they be, in which the existence, at the least, of the object denoted by the subject is not implied or taken for granted. Thus, we cannot assert that 'the king is not in London,' without implying the life and presence (somewhere else) of a person answering to the description of 'the king'; nor can I state that 'my father is well,' or, in other words, 'not ill,' (*n*) without suggesting the living existence of a human being, who stands towards me in that relation. Hence it comes to pass that even really negative propositions vary to an almost unlimited extent in their indefinite properties. The negative fact itself is always absolutely indefinite; (*o*) but the proposition, which expresses it, is scarcely ever completely so.

(*m*) Ante, s. 95. (*n*) *Vide* Ante, s. 95.
(*o*) *Vide* Best Ev., s. 270.

103. 'Indefiniteness' is a characteristic peculiarity of the negative, which has not entirely escaped the attention of logical writers. But in this, as in most other cases of the kind, if we wish to learn anything with regard to facts from the theories of logicians, we must seek for it in their doctrines, not concerning propositions, whereby facts are expressed, but concerning names or terms. 'A Privative or Negative term,' says Archbishop Whately, (*p*) 'is also called *Indefinite* (*infinitum*) in respect of its not defining and marking out an object: in contradistinction to this, the Positive term is called Definite (*finitum*) because it does thus define or mark out. Thus, "organised being," or "Cæsar," are called Definite, as marking out, and limiting our view to one particular class of beings, or to one single person; "unorganised," or "not Cæsar," are called Indefinite, as not restricting our view to any class, or individual, but only excluding *one*, and leaving it undetermined what other individual the thing so spoken of may be, or what other class it may belong to.' But if this be true of the negative name or term, it is obvious that it is no less true of the negative *fact* expressed by the predication or assertion of the negative term; as also of the expression itself; *i.e.*, of the proposition which is negative in *substance*. If the term, 'absent,' or 'absent person,' be indefinite, the proposition, 'Cæsar is absent,' is no less so.

104. Unfortunately, however, the word, 'indefinite,' as applied to propositions, has been perverted by logicians to the purpose of distinguishing a species of assertion, which would have been more appropriately described by the epithets, 'ambiguous' or 'uncertain.' This abuse of the term, 'indefinite,' has provoked the censure both of Archbishop Whately and of Mr.

(*p*) Whately Logic, 82.

Mill. (*q*) And not only have logicians thus misapplied the word, but they seem entirely to have overlooked the indefinite quality of the really negative proposition. To this result, however, another circumstance, besides the mere perversion of the term, has contributed; namely, that logic is far less concerned with the meaning than with the form of propositions; and that the proposition, which is in logical form negative, is frequently positive in substance and *fact*, and not, therefore, in the least degree indefinite; while many logically affirmative propositions, being in fact negatives, are more or less so. (*r*) It is obvious, however, that the same indefinite property, which logicians have remarked as being inherent to the negative term or name, is no less characteristic, not only of the negative fact, but also of the proposition by which it is expressed—of the proposition, *i.e.*, which is negative in *substance*. For a negative fact is not susceptible, as a general rule, of being perceived. As Bentham observes, (*s*) the only existing facts are positive facts; and a negative fact is the non-existence of a positive one, and nothing more. And in most cases we cannot perceive non-existence or absence; we can only infer it from something existing and present that we do perceive.

105. Yet even this cannot be asserted without qualification. There are some negative facts, which seem equally perceptible as their correlative positives; in other words, there are some facts of which the absence appears to be as perceptible as their presence. Such are cold and heat. If we accept heat as something positive, the proposition, 'It is cold,' would seem to express a purely negative fact; since it asserts nothing more than the absence or withdrawal of a certain quantity of heat;

(*q*) *Vide* Whately Logic, 43, note, and Mill Logic, i. 114, P. 54b.
(*r*) Ante, s. 91. (*s*) Bentham Ev., i. 50; Ante, s. 92.

and yet we appear to feel cold, quite as distinctly as we feel heat; and for this reason, that a certain degree of heat being necessary to our comfort, and even to our life, the absence of it forces itself instantly upon our attention; and the heat is instinctively and involuntarily missed. Somewhat similar is the case of pain and its absence ease or comfort; though a man who had never felt pain could scarcely be conscious of the comfort which he enjoyed. Secondly, there are other facts, of the absence of which we seem so involuntarily conscious, that the consciousness seems almost equivalent to perception. Of this kind are light and darkness. We are so continuously and involuntarily percipient of light, using it, as we do, at every waking instant of our lives, that its absence is instantly and inevitably detected, and we become so necessarily conscious of the darkness, that we seem actually to perceive it. Another instance of the same kind is afforded by the case of Sound and Silence. Silence, at least, has nothing positive about it; yet, as in the preceding case, we are so necessarily percipient of any sound that is sufficiently audible, that the consciousness we obtain of its absence or cessation is scarcely distinguishable from perception.

106. These, however, are all exceptional cases. As a general rule, negative facts are not perceptible, nor is our consciousness of them in the least degree necessary but may vary in every conceivable degree, or even be totally absent; and therefore it is that a negative fact is so much more indefinite, so much less susceptible of proof, than a positive fact; or, in other words, that disproof is so much more difficult and uncertain than proof. As an illustration of this, suppose I am asked if there was a clock in a certain room, which I have just quitted. I may be totally unable to tell, because the clock does not, by its mere presence, force itself upon the attention of a percipient, as either light or sound would do, and there-

fore, even if absent, it may never be missed. If of two credible witnesses, who had been present together in the same room, one were to state that there was a clock there, while the other denied it, we should naturally believe him who asserted the positive fact, and take it for granted that the other, who denied it, was mistaken. Whereas, if of two such witnesses, one were to state that the room was well lit, and the other that it was in total darkness, we should not only feel sure that one or the other was wilfully deceiving us, but we should not in the least know which of the two was the more likely to be telling us the truth.

107. It must be confessed that the distinction between positive and negative facts, as between positive and negative names, is a most perplexing question, and a question too, which scarcely seems to yield results commensurate with its difficulty; but inasmuch as the distinction has a certain bearing upon evidence, which manifests itself in the difficulty by which the proof of negative facts is beset, we should scarcely feel justified in passing it over in silence, even if the inquiry had not a tendency to expose certain misapprehensions in the prevailing doctrines of logic, and thus to aid in establishing the true relation between that Science and Evidence. The effect of the indefinite quality of the negative fact upon its proof will be spoken of in a subsequent chapter. (*t*)

Meanwhile we will proceed to consider some further divisions of facts.

(*t*) Post, i., ch. 18.

CHAPTER VI

OF FACTS PHYSICAL AND PSYCHOLOGICAL

108. Facts have also been distinguished as (1) Physical, and (2) Psychological. The ground of this distinction has already been adverted to in the course of the chapter on Facts, (*u*) where physical facts were described as the perceptible features or specific attributes of material substances; while psychological facts were stated to be identical with Feelings or phases of the mind. In addition to these, we did at first partially recognise a third species of facts designated physiological, occupying a station intermediate between the other two, and having their seat in the corporeal frame of sentient beings. (*v*) These physiological facts were also said to resemble psychological facts in respect of their capacity for becoming known to the patient himself, and to him only, by pure intuition. But inasmuch as they are in all other respects physical, and capable of being ascertained, like physical facts in general, by external perception, we deemed it unnecessary to encumber ourselves with a third species under this head, and have, therefore, in conformity with the views of most other writers, divided all facts into physical and psychological only.

109. For this division of facts is far too significant in its relation to evidence to have escaped the notice of writers on the subject. (*w*) 'By physical facts,' says Mr.

(*u*) Ante, s. 43 and 44. (*v*) Ante, s. 39.

(*w*) *Vide* Bentham Jud. Ev., i. 45; Dumont Ev., 10; and Best Ev., s. 12.

Best, (*x*) 'are meant such as either have their seat in some inanimate being, or if in one that is animate, then not by virtue of the qualities which constitute it such; while "psychological facts" are those which have their seat in an animate being, by virtue of the qualities by which it is constituted animate. Thus,' he says, 'the existence of visible objects, the outward acts of intelligent agents, the ordinary *res gestæ* of a suit, etc., range themselves under the former class; while to the latter belong such as only exist in the mind of an individual, as, for instance, the sensations or recollections of which he is conscious, his intellectual assent to any proposition, the desires or passions by which he is agitated, his animus or intention in doing particular acts, etc.'

It is to be observed that a fact may also be mixed or compounded of both characteristics, of which a voluntary movement or action is a familiar instance. (*y*) The external motion is a physical fact; the volition or exercise of the will, which dictates and impels it, is a psychological one. (*z*)

110. It may be noticed here that Bentham has made a slight attempt to enumerate or classify psychological facts. (*a*) We ourselves, however, will gladly abstain from any endeavour of the kind, believing that no such operation is necessary for our purposes, and being persuaded that any needless attempt to solve metaphysical problems will only tend to perplex and embarrass us. It is sufficient for us to know that there are numberless facts existing only in the mind, and capable of being fully and directly known to the owner of the mind only. For it is the distinguishing characteristic of a psychological fact that it can be actually 'perceived by,' *i.e.*, intuitively known to, the individual person only whose

(*x*) *Vide* Best Ev., s. 12. (*y*) *Vide* Bentham Jud. Ev., i. 46.
(*z*) *Vide* Mill Logic, i. 71, P. 35a. (*a*) *Vide* Bentham Ev., i. 46.

mind is its seat. (*b*) To others, it can only be manifested by his outward acts, voluntary or involuntary. (*c*)

111. It must not be forgotten, however, that all psychological facts possess a real existence. To me, for instance, what passes in my own mind is quite as much a reality as aught that exists or takes place in the external world, if not even more so. For all my knowledge, even of physical facts, must of needs reach me through the medium of my own mind. (*d*) If I have been thinking of an absent friend an hour ago, and remember my thoughts now, I can no more doubt the former existence of those thoughts than I can doubt the physical existence of a person whom I have just met. Moreover, if any assertion be made concerning my own mind, or anything relating to it, I verify it in precisely the same manner as I verify an assertion concerning any material or physical fact that falls under my own observation, viz., by comparing it with the *reality*. The assent, which we so constantly yield to assertions concerning mental objects, is explainable only on the assumption that these mental objects possess a real existence. By way of illustration, we may perhaps be allowed to refer once more to the proposition, 'a centaur is a fiction of the poets,'—a proposition which is cited by Mr. Mill (*e*) by way of proving that the affirmative copula does not necessarily include the assertion of existence. Now this proposition, as we have previously remarked, (*f*) would be little else than a pure negation, equivalent to 'there is no such thing as a centaur,' if it did not comprise the assertion of a psychological reality. And the most ordinary assertion concerning mental objects presupposes something *existing* to correspond to the discourse, otherwise we could neither believe nor

(*b*) Ante, s. 45. (*c*) *Vide* Best Ev., s. 12.
(*d*) Ante, s. 48. (*e*) *Vide* Mill Logic, i. 104, P. 50a.
(*f*) Ante, s. 78.

disbelieve it, nor could it be either true or the reverse. (*g*) If I affirm, for instance, that I dreamt of such and such places or objects last night, surely I must be understood to *assert* something—not merely to *deny* the physical existence of the objects seen in my dream—and to assert something, too, which may be true. But if psychological facts had no existence whatever, all assertions concerning mental objects would be either totally meaningless, false, or mere denials of physical existence. Whereas such propositions are constantly accepted as true assertions expressing *positive* facts; which can only take place on the assumption that they assert realities; in other words, that psychological facts possess a real existence, though that existence can only become known in an unqualified sense to one person.

112. For this, as we have just observed, is the chief distinction in an evidentiary point of view between a physical and a psychological fact; that while the former is in its nature capable of being observed or 'perceived' by every rational agent, or sentient being, who is living at the time of its existence or occurrence; a psychological fact can be 'perceptible,' or in strict metaphysical language, 'intuitively known,' to one only.

The influence which these two characteristics must inevitably exert upon the relative susceptibility to proof of facts of either kind is so obvious that it seems scarcely necessary to point out the importance to Evidence of a division, which is founded on the distinction between them.

(*g*) Ante, s. 74 and 80.

CHAPTER VII

EVENTS AND STATES

113. BENTHAM also distinguishes facts as (1) Events; and (2) States of things. (*h*) He states the source of this division to consist in the distinction between a state of motion and a state of rest. Mr. Best also adopts this division of facts, and Bentham's view of it. 'By an event,' he says, (*i*) 'is meant some motion or change considered as having come about either in the course of nature, or through the agency of the human will, in which latter case it is called an act or action.' 'The fall of a tree,' he adds, 'is *an event*, the existence of a tree is a *state of things*; but both are alike facts.'

114. This account, however, appears to me to be by no means completely satisfactory: for, in the first place, a continued motion, or state of motion, is, as the latter phrase implies, just as much a 'state of things' as a state of rest, at least during its continuance. Thus the revolution of the earth on its own axis, or in its orbit round the sun, is a 'state of things.' So we should call the flow of a river, or the rush of a waterfall, or the continuous dropping of water in a well, a 'state of things'; and that too, although their motion involves no recurrence of identical substances. Instances of this kind might be multiplied indefinitely.

115. But another, and a more formidable objection to the definition in question is suggested by the consideration that the same phenomenon may constitute a state of

(*h*) Bentham Jud. Ev., i. 47. (*i*) Best Ev., s. 13.

things while it lasts, or in reference to the time of its continuance, and yet be termed an 'event' after it has ceased, or even before it has come into existence. Thus, the Deluge was a state of things while it continued, yet it is now called an event in the history of the world. So, a war, which is made up of a series of actions of men, and the consequences of those actions is called a state of things while it lasts, yet is afterwards spoken of as an event in the history of the nations engaged in it.

116. Moreover, though a state of things, speaking generally, has a greater tendency towards permanence than an event, the distinction between the two does not appear to turn on the simple duration of the fact.

What we call an event may occupy any period of time, so only that we see or contemplate the end of it, and are thus enabled to speak of it as a whole. The fall of a stone is an event: the fall of a shower of rain is likewise an event. So also with a fall of rain that lasts for days; or a frost that continues for weeks; and perhaps even with the growth of a tree that has lasted for years. Even that most transient species of event called an action may be prolonged for any period not exceeding the life of the actor. If I deliver a Deed, or sign my name, that is an action: If I write a letter, that too is an action: If I write a book, or copy out a whole library, that, although it may occupy my time for years, is still an action. Even a king's reign, or a man's life, is still an act, though it may occupy half a century or more in the performance. It may perhaps, however, be objected, that each of these last is not an action, but a series of actions, and that a series of actions is not the same thing as a single action. But we must remember that the simplest act involves a series of consecutive actions or movements: I cannot even take a step, or ring the bell, without performing a series or combination of move-

ments, though they be all comprised in a single expression of fact. And we *must* accept the complex expression of fact as the fact. It is as impossible to dissect a fact, whether of this or of any other kind, into its ultimate elements, as it is to discover the indivisible particles of which a material object is composed. 'In theory,' says M. Dumont, (*j*) 'we can conceive a fact absolutely simple; for example, the existence of an atom in a state of rest, an instantaneous perception in the mind, etc. In practice, there is nothing of this kind; a fact, though it may be spoken of as a single fact, is still in reality an aggregate of facts.' (*k*) And if we cannot draw the line between an action and a series of actions, it is obvious that a single action may endure for a man's lifetime.

117. With regard to *States*, on the other hand, it is true that, in order to constitute a state of things, a fact must continue for some period more prolonged than is absolutely required to constitute an event. We may speak of a flash of lightning as an event, but never as a state of things. But this, I would contend, is only because we must have time to speak of a state of things as *continuing*. Some sensible duration there must be, but a very slight duration is sufficient. Thus, we may speak of the condition of the weather as a state of things, though it may change within an hour; of the temperature of a room as a state of things, though it may be altered next moment by the opening of a window. On the other hand, it is manifest that a state of things may endure as long as the universe itself endures. From all which it appears that the distinction between an event and a state does not hinge upon the *duration* simply of the fact in question.

118. The difference between the two, therefore,

(*j*) Dumont Ev., 11.

(*k*) *Vide* Mill Logic, i. 439, P. 249a, and Post, s. 123.

seems neither to lie in the property of motion or change (as opposed to rest) involved in the former species of fact; nor yet in the greater duration merely of the latter; consequently the question, where the precise line is to be found which separates the one from the other, seems a most perplexing one to solve; and we are almost led to doubt whether there really be any fundamental difference between the two. And this doubt increases when we observe that the same fact may in some cases constitute either an event or a state of things, according as we speak of it as terminated or as still continuing to subsist. Indeed, I am strongly inclined to believe that this last circumstance, which appears at first sight to be a mere accident of popular discourse, does in reality embody a scientific truth: viz., that all facts are at bottom events; and that what we call a state of things is nothing else than an event or series of events, which recurs or repeats itself periodically. (*l*) That what appears to us to be rest in nature is not really so. That some agency or causation is always at work, without which, indeed, we should be at a loss to account for the universal decay of matter or material substances—that when this agency works, as it were, in a circle, it produces on our senses the effect which we describe as a 'state,' but which is in reality nothing but a series of events which recur in periods more or less prolonged or contracted; and that since experience teaches us where we may expect this recurrence, and we consequently feel assured that we shall 'perceive' it, whenever we are able, and think fit to bring the fact or series of events within the range of our senses, we come to regard it as a permanent state of rest or quiescence.

119. The truth of the matter appears to be that all facts, whether they be properly called states or events,

(*l*) *Vide* Appendix, art. 1.

are transient or permanent in an infinitely varying degree, from the transit of a flash of lightning or the passage of a thought, to the continuance of the motions of the heavenly bodies or the duration of the existence of the universe itself, and that it is impossible to draw any exact line between facts of the more transient and those of the more permanent order. At the same time, it is obvious that the more permanent a fact is, the more capable it is, *ceteris paribus*, of proof; the greater its duration, the greater are the opportunities which it offers for the exercise of perception while it lasts, and the more likely is it also to assume at any given juncture the aspect of a continuing fact.

120. And this leads to the mention of a distinction between facts which is both well-defined, and at the same time most important for evidentiary purposes; namely, that some are continuing when we speak of them, or, which is more to our purpose, when we are seeking to prove them, while others are already terminated;—some facts are present on subsisting facts, while others are past or bygone facts. The importance to evidence of this division of facts into past and present—into terminated or continuing—is manifest. For a fact, which is still continuing at the very time when the evidence of it is required, is obviously far more capable of cogent and satisfactory proof, than one which is already terminated, and has ceased to exist. To the former the test of perception may be applied on the occasion itself. For proof of the latter we must necessarily have recourse to perception formerly obtained.

This is, in truth, the only tangible distinction between a state and an event—the only distinction which does not seem to elude our grasp and vanish away directly we attempt to scrutinise it.

121. In general terms, then, the expression, a 'state

of things,' may be taken to signify a fact which is continuing at the time when it is to be proved; the word, 'event,' to denote a fact which is already terminated. For it is with bygone events only that we have to deal. It is true that we speak, not only of past events, but also of coming events, and even of passing events. But future events, as I have formerly remarked, (*m*) are not facts, and do not, therefore, concern us; and passing events, while they last, are states. It is bygone events only that come within the scope of our present inquiry. In our view, then, the word, 'event,' may be taken to signify a fact which is terminated at the time when we are seeking to establish it by evidence; the expression, a 'state of things,' to denote a fact which is still continuing. That this precisely represents the scientific distinction between the two, or, indeed, that there is any real scientific distinction between them, is more than I am prepared to argue; but it may at all events, I think, be safely asserted that this account is not far wide of the truth. An event, it is true, carries with it the notion of something more transient than a state, but this, I apprehend, is merely because the want of permanence renders a fact more likely to assume at any given point of time the aspect of a terminated fact. Many important facts, such as the actions of mankind, are so evanescent in their nature, that we have not time even to speak of them before they become terminated, and pass into the category of bygone facts; and hence we come indistinctly to regard facts of this fleeting kind as 'events,' and to reserve the word 'states' to describe those of a more permanent character. But, as I have previously remarked, the difference between an event and a state cannot be determined solely by a reference to the *duration* of the fact in question.

(*m*) *Vide* Ante, s. 49.

CHAPTER VIII

FACTS PRINCIPAL AND EVIDENTIARY; AND FACTS COMPOUND AND COMPONENT

122. FACTS may also be regarded as (1) Principal; and (2) Evidentiary, (*n*) a distinction founded, not on the nature of the facts as such, but on the aspect which they present, or, in other words, the relation in which they stand towards the subject of investigation.

In any inquiry the identical facts proposed for investigation are called principal facts; while any fact that is sought, not for its own sake, but because it has a tendency to establish by inference the truth of a principal fact, may be denominated an evidentiary one. Thus when Robinson Crusoe found the print of a man's foot on the sand, that was an evidentiary fact. What interested him to know was, not whether there existed a mark of a certain shape and size on the shore of his island, but whether another man had lately set foot there. The recent presence of the man whose foot made the impression was the principal fact which he desired to ascertain; the existence of the mark on the sand interested him only in so far as it tended to establish the former fact by inference.

123. But it is important that Evidentiary facts should be distinguished from what may be called *Component* facts. Many facts, we might perhaps even say every fact, or, which is practically the same thing, every expression of fact, is capable of being subdivided or split into a number of minor facts or expressions of fact,

(*n*) *Vide* Bentham Ev., i. 17 and 40, and Best Ev., s. 11.

which minor facts taken collectively form the very substance of the more comprehensive expression of fact in which they are contained. These minor facts may be distinguished from the more comprehensive or *compound* fact, in which they are included, by the name of *component* facts. Thus the assertion, 'Brutus killed Cæsar,' expresses a fact, which might possibly be resolved into the following minor or component facts: (1) Brutus and Cæsar were present together at a certain spot at a particular time. (2) Brutus had a sword in his hand. (3) He struck Cæsar a blow with it. (4) The result of that blow was a certain injury or wound. (5) From the effects of that injury Cæsar afterwards died. It is, indeed, almost, if not wholly, impossible to conceive a fact which might not be decomposed in some such manner as this. 'In theory,' says M. Dumont, (*o*) 'we can conceive a fact absolutely simple; for example, the existence of an atom in a state of rest, an instantaneous perception in the mind, etc. In practice, there is nothing of this kind; a fact, though it may be spoken of as a single fact, is still in reality an aggregate of facts.' (*p*) Whether this be absolutely and completely true without exception is more than I can undertake to decide. It might be contended with much plausibility, at least, that any fact which was capable of being verified by a single act of perception—in fact, for instance, that a specific object was of a particular colour—could hardly be regarded otherwise than as a single fact.

This question, however, is of no practical importance to us. It is quite sufficient for us to know that at least a vast number of expressions of fact are capable of being, and for purposes of proof must be, resolved or subdivided into several minor or component facts, which are not merely *evidentiary of* the larger or compound

(*o*) Dumont Ev., 11.

(*p*) *Vide* Mill Logic, i. 439, P. 249a.

fact; but which taken singly form an integral part of it, and taken collectively are identical with it.

124. But a compound expression of fact, though in a certain sense an aggregate of facts, must not be confounded with the truth expressed by a *general proposition.* A compound fact is in reality quite as much a specific fact as any one of its components. It differs entirely from a general proposition or Truth, in that it is capable of complete proof, either in detail; *i.e.*, by the proof of each of its components, or, it may even be, by its proof in the aggregate; whereas a Truth, involving as it does an *infinite* series of facts, past, present, and future, is incapable of complete proof by perception.

125. A compound fact may, as we have just remarked, be established by the separate proof of each and all of its components, and when all its components are proved to be true, it is manifest that the compound fact itself must also be true, since they collectively constitute it. (*q*) And, on the other hand, if the truth of the compound fact be established, each of its components must also necessarily be true, since without each and all of its components the compound fact has no complete existence; *i.e.*, in the precise shape which the component facts give it. It is true that we may not learn from the mere statement of the compound fact precisely what its components are; in other words, the compound expression of fact may fail to some extent to specify or define the minor facts of which it is composed. For instance, to revert again to the compound expression, 'Brutus killed Cæsar,' this assertion, as it does not specify the manner in which Cæsar was killed, might be fulfilled by a hundred different modes of homicide: but yet it is clear that Cæsar, if killed at all, must in fact have been killed in some particular manner; for the

(*q*) *Vide* Mill Logic, i. 357, P. 191b.

want of detail obviously resides in the expression, and not in the fact itself, or series of facts; and similarly every compound fact, if true at all, must be true in some particular shape or other, or, in other words, must possess some definable components. When once, therefore, we have ascertained what its components or details are, or, if true, should be, we may fairly say that a compound fact has no complete existence without each and all of them. In this sense, then, we are warranted in asserting that, if a compound fact be true, each and all of its components must of necessity be true also. On the other hand, if the compound expression of fact be false, some, at least, of its actual components must also be false. And if any or all of the components be false, the compound expression of fact cannot but be false in the precise shape which those components give to it.

126. This property of mutual truth or falsehood distinguishes the case of compound and component facts from that of principal and evidentiary. Principal and evidentiary facts, properly so called, have not a necessary, but only a probable relation to, or connection with, each other. An evidentiary fact forms no necessary part or constituent of the principal one, but is extrinsic to, or separable from it. One or more facts evidentiary, or apparently evidentiary, of another or principal fact may be perfectly true; but the inference which connects them with the principal, being only more or less *probable*, may be ill-founded, and the principal fact itself untrue. So also, a principal fact, in any shape (*i.e.*, with any conceivable component details), may be true; but it does not follow that any given fact evidentiary of it should therefore be true. Thus, to recur once more to the proposition, 'Brutus killed Cæsar': regarding this in the light of a principal fact, we may easily imagine various facts evidentiary of

it—the fact, for instance, that Brutus fled from the neighbourhood of the crime immediately after it was committed. But although this latter fact has an undoubted tendency, if true, to establish by inference the truth of the principal one; yet it is obvious that the principal fact may be perfectly true without it. Although Brutus did not fly the neighbourhood, he may still have killed Cæsar. And so, on the other hand, even if he did happen to leave the neighbourhood as stated, it does not *necessarily* follow that he was the murderer of Cæsar. The connection, in short, between a principal fact and its evidentiary is never more than a probable one, though the probability may in some cases be of so high a kind as to amount to what is commonly called 'moral certainty.' But it can never be a *necessary* connection. Not, however, that the inferring or deductive process itself is not certain, but the premises or data, from which a real inference is drawn, can never be entirely so. For a real inference is always founded on a general truth or law of nature expressed by a general proposition, which can never be said to be absolutely certain, since it is incapable of complete proof. For which reason it appears to me, that all cases of *demonstration* or necessary inference are more properly to be referred to the relationship of compound and component fact, than to that of principal and evidentiary. (*r*)

127. But though a component fact cannot properly be said to be evidentiary of the compound fact in which it is embodied, yet one of the components of a complex fact may very well be evidentiary of another of its components. A common instance of this takes place where the animus or intent of a person in doing a particular act is inferred from the act itself. Thus in the familiar case of a theft, we may regard the criminal

(*r*) *Vide* Post, s. 137 and 184.

act of *larceny* as a compound fact made up of several component details, as, for example, that the accused took possession of the stolen article; that he ran away with it, and so on—including as a necessary ingredient in the compound fact or crime the felonious intention to steal existing in his mind—a fact which is very commonly inferred from the outward acts of the culprit in taking away the stolen property, etc.; which physical fact or facts thus become evidentiary of the mental fact or intent, while both are involved as necessary components in the complex fact of larceny. On the other hand, it is obvious that any two components of the same compound fact may have no further relation to, or connection with each other, than what is involved in the accidental circumstance of their being embodied together in the same compound expression of fact.

128. I have said that the connection between a principal fact and its evidentiary is never more than a probable one; and since no number of probabilities can amount to more than a high degree of probability, it follows that no number of evidentiary facts properly so called, *i.e.* of facts which do not form an integral part of the principal, can, when established, generate more than a high degree of probability of its truth.

But in order to show more clearly how this want of certainty arises, it will be necessary to inquire at somewhat greater length into the nature of an 'inference'—the link by which an evidentiary fact is connected with the principal one.

To this subject, therefore, the next chapter shall be devoted.

CHAPTER IX

OF AN INFERENCE

129. An inference has been described in the last chapter as the link by which an evidentiary fact is connected with the principal, which latter is said to be inferred or deduced from the evidentiary one, or to be a conclusion from it.

In popular discourse, as well as in logical diction, we speak of drawing an inference or conclusion from a single fact—from a single fact established by evidence.

Logically speaking, however, every conclusion, whether of fact or otherwise, is in reality deduced from *two* other propositions, which are thence called premises. (*s*) It is true that in popular discourse one of these is usually suppressed, but still it must always be implied or assumed, otherwise the inference or conclusion could not be legitimately drawn. For instance, I may reasonably infer from hearing a man moan that he is in pain; but it must also be taken for granted that 'whenever a man moans he is in pain,' else it is obvious that I should not be warranted in drawing the inference. This inference or conclusion, therefore, together with the grounds upon which it is based, when formally and logically stated, would appear as follows:

(1) All men who moan—are—in pain. } Premises.
(2) This man—is—one who moans. }
(3) (Therefore) This man—is—in pain. (Conclusion).

130. Thus every conclusion or inference is in reality deduced or drawn from two propositions or premises,

(*s*) Whately Logic, 17.

which, together with the conclusion itself, are styled an 'argument,' or, in the more strictly technical language of logic, a 'syllogism.' Every process of inference, then, when expressed regularly and at full length, assumes the form of a syllogism, which consists of three propositions, viz., the two premises, and the conclusion itself, as in the following example:

(1) All good men are happy. } Premises.
(2) Cæsar is a good man. }
(3) (Therefore) Cæsar is happy. (Conclusion).

Of the two premises, the first and more comprehensive one, and that which in popular discourse is usually suppressed, is called the *major* premiss; the other one, from which the inference is commonly supposed to be drawn, being called the *minor* premiss. So far as logic goes, the minor premiss, as well as the conclusion that follows it, may be either a general proposition, embodying a Truth, or a specific or singular one, expressing a fact; in other words, we may infer Truths or Laws of nature, as well as specific facts. But in our case, both the minor premiss and the conclusion always express facts; the former, an evidentiary fact, the latter a principal one.

131. The rules or laws of the syllogism, with its various moods and figures, are both technical and intricate, and could scarcely be set forth here without serious inconvenience. Fortunately, however, we are released from the necessity of undertaking any such task, since we find that logicians are agreed that all valid arguments may be exhibited in one or the other of the two following forms, (*t*) viz.:

(1) All good men are happy.

{ All patriots
{ (or) Some patriots } are good men.
{ (or) Socrates is a good man.

(*t*) *Vide* Mill Logic, i. 230, 1, P. 1 1 1ab.

(Therefore) { All patriots / (or) Some patriots } are happy.
(or) Socrates is happy.

to establish an affirmative conclusion; and

(2) No bad men are happy.

{ All tyrants / (or) Some tyrants } are bad men.
(or) Nero is a bad man.

(Therefore) { No tyrants are / (or) Some tyrants are not } happy.
(or) Nero is not

to establish a negative conclusion.

And since our conclusions are always conclusions of fact, we may discard from our consideration the general minor premises, together with the general conclusions that follow, and shall then obtain the following more concise formulas, viz.:

(1) All good men are happy.
Socrates is a good man.
(Therefore) Socrates is happy.

where the conclusion is affirmative; and

(2) No bad men are happy.
Nero is a bad man.
(Therefore) Nero is not happy.

where the conclusion is negative.

132. But even these two may be reduced to one single formula. For it is obvious that so far as discourse is concerned, and logic is said to be entirely conversant about language or discourse, (*u*) we may get rid of the negative propositions in the second example by the simple device of attaching the negation to the predicate; as, for instance, instead of saying:

No bad men are happy, etc., we may say:
All bad men are *unhappy* (not happy).
Nero is a bad man.

(*u*) *Vide* Whately Logic, 37.

(Therefore) Nero is *unhappy*,

a syllogism which exactly corresponds in form with the first example, while it expresses the meaning of the second.

How far such a mode of simplification is suited to the operations of logic in general is a matter that I will not attempt to decide; it is sufficient that for our present purpose the generalisation is both justifiable and convenient. (*v*) All arguments, therefore, may for our purposes be reduced to the following affirmative formula, which may be taken as the universal type of all reasoning, where the conclusion is a conclusion of fact:

All good men are happy.

Socrates is a good man.

(Therefore) Socrates is happy.

133. The axiom on which the validity of the syllogism, and, of course, of this our universal type of the syllogism, is always said to depend, is the celebrated '*Dictum de omni et de nullo*,' of Aristotle, which, however, it is important to observe, we find interpreted by logicians in two different ways: viz., first, that 'whatever is predicated (*i.e.*, affirmed or denied) universally of any *class* of things, may be predicated in like manner of anything comprehended in that class': (*w*) and secondly, that 'whatever is predicated of a *term distributed*, whether affirmatively or negatively, may be predicated in like manner of everything contained under that term.' (*x*) A term is said to be 'distributed' when it is understood to stand for the whole of its significates; and when the assertion is made concerning such a term, or, in other, though somewhat less precise words, concerning the whole of the subject, the proposition is said to be universal. (*y*) It will be seen, therefore, that there is this material discrepancy between the two

(*v*) *Vide* Ante, s. 92. (*w*) Whately Logic, 23.
(*x*) Whately Logic, 53. (*y*) *Vide* Whately Logic, 43.

statements of the dictum—that in the first it is laid down that the assertion in the major premiss must be made concerning (the whole of) *a class*; while in the second nothing is said as to a class, but it is merely required that the assertion should embrace the whole of the subject; in other words, according to the first account the major premiss must be a *general* proposition, whereas according to the second, no such requisite is mentioned, though in both cases alike it is laid down that the proposition must be *universal.*

134. This inconsistency in the account of the axiom in question obviously owes its origin to the confusion between general and universal propositions, which pervades all treatises on logic, and to which we have already had occasion to advert. (*z*) It cannot be too often repeated that a *General* proposition is that in which the predication is made concerning a *class*, whether the whole or part only of that class be intended: a *Universal* proposition, that in which the assertion is made concerning the *whole* of the subject, whether that subject denote a class, or be the name of something specific. Of these two accounts of the dictum Mr. Mill seems to prefer the former; but the grounds which he assigns for adopting this view entirely fail to support it. 'On examining, then, these two general formulæ,' he says, (*a*) 'we find that in both of them one premiss, the major, is a *universal* proposition; and according as this is affirmative or negative, the conclusion is so too. All ratiocination, *therefore*, starts from a *general* proposition, principle, or assumption; a proposition in which a predicate is affirmed or denied of an entire *class;* that is, in which some attribute, or the negation of some attribute, is asserted of an indefinite number of objects, distinguished by a common characteristic, and designated in consequence by a common name.' Here Mr. Mill evidently assumes

(*z*) Ante, s. 62. (*a*) Mill Logic, i. 233, P. 113ab.

that the words, '*Universal*,' and '*General*,' as applied to propositions, are convertible terms. Whereas, so far is this from the truth, that logicians have laid it down as a principle that all *singular* propositions are *universal*. (*b*)

135. And therefore, in spite of Mr. Mill's ruling, I believe the latter of the two accounts to be the true one. For as far as logic is concerned, the assertion in the major premiss need not, as it appears to me, be made concerning a class, so only that it embraces the whole of the subject, which may be either the name of an entire class of objects, or merely the name of the whole of a series of specific existing individuals, forming part only of a class. Many of the universal propositions which do duty as the major premiss of syllogisms in logical works are of this character. For example, Mr. Jevons employs the following proposition as a major premiss: (*c*) 'All English silver coins are made at Tower Hill.' Now this is not, properly speaking, a general proposition. It can relate only to the silver coins now or formerly in existence; for there is nothing in the nature of an English silver coin which should prevent it from being coined elsewhere in time to come, though it may be true as a *fact* that all the coins now or formerly in existence have been coined at the Mint. The expression, 'All English silver coins,' when placed in such a context, does not therefore, properly speaking, denote a whole class, but only that part of the class of English silver coins which is already in existence, comprising only a limited number of specific objects, which, though numerous, are yet capable of being individually counted or examined: (*d*) consequently the assertion made concerning such a subject is no general proposition, since it is limited to the past and the present.

(*b*) Whately Logic, 44, and *Vide* Ante, s. 57.
(*c*) Primer of Logic, 54.
(*d*) *Vide* Mill Logic, i. 353, P. 189a.

Such a proposition, in short, though universal, is a specific assertion, and expresses nothing more than a fact, a comprehensive fact though it be. The same remarks apply to the proposition, 'All electors are ratepayers,' which is also used by the same author as the major premiss of a syllogism. (*e*)

136. It may be noticed, however, that if the major premiss be specific, the conclusion must be specific also: if we start from a fact, however comprehensive, we cannot arrive at a still wider general conclusion; for it seems obvious that no valid conclusion can be more comprehensive than the major premiss itself. The conclusion of a syllogism of this kind must always, therefore, be a conclusion of fact. But so far as the mere logical validity of a syllogism is concerned, the major premiss may be either a general proposition in the full and proper sense, *i.e.*, an assertion concerning a whole class, and relating, therefore, to the future and the infinite, as in the example:

All good men are happy:
Socrates is a good man:
(Therefore) Socrates is happy;

or it may be a specific assertion concerning a limited series of individual objects, which resemble each other in certain characteristics, of which the following may serve as an example:

All the boys at Eton are under nineteen years of age.
George Holmes is a boy at Eton.
(Therefore) George Holmes is under nineteen.

137. In either case it will be seen that the operation of the syllogistic process is equally certain and infallible. Granting that the predicate is true of all and each of the objects included in the major premiss, and granting also that the subject of the minor premiss is one of these objects, the conclusion, that the predicate is true of that

(*e*) Primer of Logic, 54.

particular object, is obviously irresistible. At first sight, therefore, it would seem that in neither case alike is there any real *inference*, properly so called—no step from the known to the unknown (*f*)—since, if we know that the premises are true, we *ipso facto* know all that is asserted in the conclusion. And such, wherever the major premiss is specific, is actually the case. The fact stated in the conclusion forms a mere component part of the more comprehensive fact stated or asserted in the major premiss, and can hardly be said in any proper sense to be an inference from it. If we know, for instance, that each and every boy now at Eton is under nineteen, our knowledge includes the fact that George Holmes, being one of these boys, is under nineteen. This minor fact forms a mere constituent part of the more comprehensive fact that all the boys now at Eton (say 800 in number) are under nineteen years of age. The major premiss and conclusion of such a syllogism stand towards each other in the relation of compound and component facts, or expressions of fact, in the same manner as the fact that 'Brutus killed Cæsar' stands in that relation towards any of the minor facts of which it actually consists, (*g*) with this difference, however, that in the present case the components of the major premiss are all *similar* facts, or, popularly speaking, different instances of the same fact; whereas, in the other case, the components, which go to make up the larger expression of fact, do not of necessity bear any resemblance whatever to each other.

But even where the major premiss is a specific proposition—though there be really no inference properly so called—yet the use of the syllogism is not altogether such solemn trifling as it may at first sight appear to be. For if it does nothing more, the syllogism is at least

(*f*) *Vide* Mill Logic, i. 371, P. 201ab.
(*g*) *Vide* Ante, s. 123.

useful in bringing our knowledge together, and enabling us to interpret it. (*h*) We may have learnt, for instance, that all the Eton boys are under age by other means than actual inspection of, or knowledge concerning each individual boy. We may very probably have been informed of the fact as a whole, and may still require to learn from a separate source the fact stated in the minor premiss, before we are in a position to draw our conclusion. But since every fact, however comprehensive, is, theoretically at least, capable of complete proof by perception, there cannot be said to be any real inference where the major premiss of a syllogism is specific.

138. But on the other hand, the major premiss of a syllogism may, of course, be a general proposition, as in the following instance :

All good men are happy.
Socrates is a good man.
(Therefore) Socrates is happy.

It is to be observed that in this case also the connection or relation between the major premiss and the conclusion (assuming, of course, the truth of the minor) is equally certain, equally demonstrative, as before. If we actually knew that all good men were happy, we should be equally certain that Socrates, being a good man, was also happy. But yet in this case there is a *real* inference, a step from the known to the unknown ; and for this reason, that there is a real inference, a leap from the known to the unknown, latent in the major premiss, the general proposition itself. We can never know by perception, by 'evidence,' that 'all good men are happy,' because the assertion involves the future and the infinite ; we can only assume it from antecedent facts which have been observed.

In every case of real inference, therefore, the major

(*h*) *Vide* Mill Logic, i. 267, 268, P. 130.

premiss of the argument is a general proposition, and the inference resides in the general proposition itself, and not in the syllogistic process. (*i*) All that the syllogism can do for us is to show that what is true of a series of things, is equally true of any one or more of them. Consequently, where the major premiss is certain, the conclusion is so also; but, on the other hand, where the major is only *probably* true, the conclusion is only probably true likewise. For the same uncertainty that pervades the major premiss must also necessarily affect the conclusion, even though that conclusion be, as in our case it always is, a conclusion of fact. We cannot assert absolutely, or without qualification, that 'all good men are happy,' but only that 'all good men are *probably* happy'; we can only conclude, therefore, that Socrates was probably happy. Thus it comes to pass that in every case of real deduction the inference is only a probable one. And a deduction of this last kind, where the major premiss of the syllogism is a general proposition, may be called a *real* deduction, or *real* inference, as distinguished from the mere mechanical process that takes place where the major premiss expresses a specific fact, and no inference is implied in the proposition itself. Practically speaking, then, there is this important difference between a real inference and a mere mechanical deduction, that in the latter case the very fact or instance which forms the subject of inquiry, the conclusion or principal fact, in short, is not only virtually asserted in the major premiss, but is really included in it, and ascertained to be true, or capable of being so ascertained; while in the former, the very instance in question, though professedly asserted in the general proposition, is not really included in it, or actually known to be true, but only assumed from a previous Induction to be so.

(*i*) *Vide* Mill Logic, i., 250, P. 122b.

139. For general propositions, as previously remarked (*j*) are constructed by a process which is known by the name of Induction. (*k*) Every process of Induction, however, involves a deductive process—a process of *real* deduction. Because certain men, viz., A, B, C, and D, etc., without exception were mortal, in other words, have died, I may conclude that all men, past, present, or to come, are likewise mortal; but I cannot do so without assuming also the general proposition, that 'what is true without exception of A, B, C, and D, etc., is also true of all men,' or some other comprehensive general proposition to the like effect; and the inference would then appear in syllogistic form somewhat as follows:

All, or everything, that is true of A, B, C, and D, etc., or,
Whatever is true of A, B, C, and D, etc., } is true of all men.

Mortality (or Death) is true of A, B, C, and D, etc.
(Therefore) Mortality is true of all men.

And since the general proposition at the head of the syllogism must itself have been arrived at by an inductive process, it must also have been obtained by deduction from some other general proposition still more comprehensive; as, for instance, from this one: Whatever occurs in nature a certain number of times without exception, will probably be found to happen in all similar cases, past, present, or to come. But though this last general proposition may be itself derived by the same inductive and deductive process from one still more comprehensive, yet it is obvious that we must at last arrive at some ultimate general proposition, which cannot have been deduced from any previous or ulterior one. In other words, since all induction involves a process of *real* deduction, which deductive process begins with a general proposition, there must be some

(*j*) Ante, s. 19. (*k*) Mill Logic, i. 347, P. 186a.

general proposition to start from, which is independent of either.

140. What this ultimate general proposition, on which all induction, and therefore all real deduction or inference is founded, is, and whence derived, are questions that have been much debated among philosophers. It seems pretty generally agreed, however, that the proposition is virtually the assertion of *uniformity* in the course of nature. 'Whatever be the most proper mode of expressing it,' says Mr. Mill, (*l*) 'the proposition that the course of nature is uniform, is the fundamental principle, or general axiom of Induction.' But as to the source from which it is derived, there appears to be more diversity of opinion. The recognition of this principle has been regarded by some philosophers as an instinct of our nature; while others maintain that it is the result of direct observation or experience. I must own that I myself incline to this latter view. I believe it to be obtained by observation and experience, combined with simple comparison of one fact with another.

141. For though in a logical and scientific view we cannot reason to any purpose without employing general propositions, we must not forget that there is a more simple and primitive mode of drawing an inference, or arriving at a conclusion, commonly called reasoning by analogy. (*m*) Mr. Mill contends with much truth that we can, and in very simple cases do, reason without the aid of any general proposition. (*n*) Not, however, that we can draw any conclusion from the minor premiss, or evidentiary fact alone. Although we may do without the general proposition itself, there must still be something to stand in its place. But Mr. Mill argues

(*l*) Mill Logic, i. 371, P. 201b.
(*m*) *Vide* Jevon's Primer of Logic, 9 and 107.
(*n*) *Vide* Mill Logic, Book II., chap iii., s. 3.

somewhat as follows: Since the general proposition is itself only an inference or induction from a certain number of individual facts or instances verified by observation, why may we not draw our inference *directly* from those individual instances, instead of from a general proposition? Thus, if I infer from the general proposition, 'All men are mortal,' that the present Pope of Rome, being a man, is mortal likewise; and if the general proposition itself is, after all, only an inference or induction from the observed facts that certain specific men, A, B, C, and D, etc., were mortal, *i.e.*, that they have all died, why may I not infer the mortality of the Pope at once from the death of A, B, C, and D, etc., without the necessity of constructing the general proposition at all? (*o*) And it cannot be denied that there is much force in these arguments. Not only, as Mr. Mill remarks, (*p*) may we thus reason directly from experience, but we perpetually do so reason: all our earliest inferences are of this nature. A child, for instance, sees a luminous red object before his eyes; he touches it, and burns himself. On the next occasion when he sees the same, or rather a *similar* object, he remembers his former experience, and—provided it be not his first experience of any kind—he abstains from touching it: in other words, he infers that the second object, as it resembles the first in the attributes of redness, luminosity, and so on, will probably also resemble it in the further attribute of being painful to the touch. In this way, as he remarks, (*q*) the lower animals also reason. A dog fears the whip before he feels it, because he remembers that the same phenomenon was accompanied or followed by pain on a former occasion.

142. But there is one point on which Mr. Mill, to say

(*o*) *Vide* Mill Logic, i. 250, P. 122b. (*p*) Mill Logic, i. 251, P. 123a.
(*q*) *Vide* Mill Logic, i. 251, P. 123a.

the least of it, does not lay sufficient stress, viz., that the general proposition is not an induction from observed facts alone, but from these individual facts in combination with a conviction of the probability of resemblance. Inference, when traced to its simple rudiments, appears to rest ultimately on a belief in resemblance—a belief in the probability of complete resemblance, wherever we observe partial resemblance. Without this belief we can infer nothing. Thus, an object now before me manifests the attributes of luminosity, redness, etc., or excites in me the corresponding sensations. I remember that another object did the like on a former occasion, and I am therefore conscious that the present object resembles the former one thus far. I remember, further, that the former object gave me pain when I touched it. I therefore infer that the present object will be found to resemble the former one in this last respect also.

This belief in the probability of complete resemblance, wherever we observe partial resemblance, is indeed nothing else, when expressed in words, than the fundamental axiom or principle of Induction concerning the general uniformity of nature, (*r*) without which, as we cannot construct a general proposition, so neither can we draw any real inference from the known to the unknown, whether with the intervention of any other general proposition, or without it. Mr. Mill, therefore, is scarcely accurate when he says that we can reason without any general proposition at all. We cannot even reason by analogy, without the general axiom of Induction — without a belief, though it may be an unconscious belief, in the probability of resemblance.

143. This belief, however — this general Truth—is itself gained, as I venture to think, by means of observation and comparison — by observation of individual facts, and a comparison of those facts with each

(*r*) *Vide* Mill Logic, i. 371 ; Ante, s. 140, P. 201b.

other. Thus, suppose that my experience in this world were just commencing, and suppose that the first object that met my eyes was the flame of a candle—that I touched it and burnt myself — flame and pain would become associated together in my mind. But were this the whole of my experience, I should have no reason to suppose that they were associated in nature further than on this one occasion. If I saw another flame—a similar object—I should have no ground for believing, nor should I, as I think, believe, that this second flame would burn me like the first—no instinct would tell me so—and I could not yet *infer*, because I should not as yet have framed my preliminary general proposition—should not as yet have acquired my belief in the probability of resemblance. But I try the experiment, and find that it does burn me again. Flame and pain, I remember, went together before; and flame is accompanied, I feel, by pain now. The Truth, that things which resemble each other in certain points will probably be found to resemble each other in still further respects, begins to dawn upon my mind. And this belief is strengthened and confirmed by every successive experience of my life. I find not only that fire is uniformly accompanied by pain, whenever I choose to try the experiment of touching it, but that every sensation is usually accompanied by another sensation corresponding with what I remember to have felt before, until at last I become thoroughly assured of the fundamental Truth that partial resemblance is *usually* accompanied by complete resemblance. But as this is not invariably the case, or as we are liable, at least, to be deceived, and sometimes find that objects which *appear* to resemble each other in some points do not prove in all respects similar, the general axiom or Truth is accepted only as a *probable* one, and only even probable in cases of a certain kind. To distinguish

between those cases in which the axiom is probably true, and those in which it is not so, is the chief business of Induction. But in no case, or class of cases, is the truth of the axiom more than probable; and hence it comes to pass that all induction, and all *real* inference, is, at best, founded on a probability.

144. This I believe to be a true account of the origin of the fundamental principle of induction. Having once obtained this general proposition to start from, we are then enabled to proceed to all other general propositions by means of an inductive and deductive process—the former consisting in collecting and marshalling a sufficient number of instances to form the minor premiss of a syllogism; the function of the latter being to supply the major premiss or general proposition, and draw the conclusion from both. All other general propositions are merely a development of the fundamental principle of induction—an adaptation of the Law of resemblance to different subject-matter. And until we have constructed this primary general proposition, until we have acquired this belief in the probability of resemblance, we cannot reason at all.

145. What, therefore, Mr. Mill calls reasoning from particulars to particulars (*s*)—reasoning, *i.e.*, by analogy from a given number of individual facts to some other fresh fact of a similar kind, is simply reasoning from the fundamental principle of induction as a major premiss, with that major premiss suppressed. Thus Mr. Mill's instance of deducing the mortality of a living man from the mortality or death of a given number of other men (*t*) may be expressed in syllogistic form as follows:

Whatever is true in nature of a certain number of similar instances is true of another (the present) instance.

(*s*) *Vide* Mill Logic, i. 251, P. 123a.
(*t*) *Vide* Mill Logic, i. 249, etc., P. 122b.

Mortality or Death is true of the given number of instances of *man*.

(Therefore) Mortality is true of the present instance of *man* (the Pope).

Suppressing the major premiss, this becomes, 'Certain men, viz., A, B, C, and D, etc., have died, or are mortal; therefore the Pope, being also a man, or resembling the former in the attributes of humanity, is also mortal.' But the belief in the probability of resemblance must still be there, else we could not draw the inference. We may suppress the general proposition, but it must still be assumed or taken for granted. And if we attempt to decompose this fundamental axiom into its elements, to analyse the sources of our belief, and to substitute these, as the grounds of our inference, for the general axiom itself, we may indeed get rid at last of the general proposition altogether, but we shall find ourselves involved in such a labyrinth of minute facts that memory will fail, and recollection or reasoning will be alike impossible. (*u*) We *may* reason in very simple cases by means of the fundamental axiom alone, *i.e.*, by analogy. Without it, reasoning is, to say the least, impracticable. But even when reasoning by analogy, we are unconsciously syllogising.

146. And to any progress in reasoning — to any reasoning beyond the reasoning of children or of brutes, other more special general propositions are indispensable. For not only, as Mr. Mill says, (*v*) are we liable to forget the individual facts from which we derive a general Truth, but in many cases we have never known them. Much knowledge, much information, reaches us only in the shape of general propositions. I believe, for instance, that gold is malleable; that arsenic is poisonous; that all bodies tend to fall towards the

(*u*) *Vide* Mill Logic, i. 280, P. 140a.
(*v*) *Vide* Mill Logic, i. 268, P. 130b.

centre of the earth; together with a hundred other Truths of chemistry or of physical science, and should not hesitate, if necessity arose, to act on that belief, although I know nothing whatever of the actual observations or experiments by which these truths were established. I believe them, because I have learned them as Truths.

147. Wherever a general proposition is employed in reasoning, the syllogism is the appropriate mode of applying it; (*w*) and since we can never *really* reason or infer without a general proposition of some kind, either expressed or implied, Archbishop Whately was not far from right in asserting that the syllogism is the mode in which we always *must* reason, (*x*) although it be true that the reasoning itself, the real inference, is contained in the general proposition, the development of the fundamental principle of induction, and not in the syllogistic process. But whether any reasoning whatever be possible without a general proposition, or no, it will be at least safer, and at the same time much more convenient, to regard a real inference as consisting uniformly in a deductive process effected by means of a syllogism, which has a general proposition for its major premiss.

148. In this aspect of the matter it may be noticed that the study of Induction is somewhat remote from the art of Evidence; not because the antecedent Inductive operation does not, wherever an inference is necessary, exercise in reality a powerful influence on the conclusion, and, therefore, on the general result of the proof, but because the science of Induction is, so to speak, separated from Evidence by the intervening deductive process of Logic. We may always proceed from the evidentiary to the principal fact by the aid of the general proposition, without seeking to inquire into

(*w*) *Vide* Mill Logic, i. 268, P. 131a. (*x*) Whately Logic, 16.

the actual source from which we derive our major premiss; just as an artisan may use his tools perfectly well without inquiring into the manner in which they are made, or knowing whence the materials for making them are procured.

On the other hand, it is worthy of observation that since all inference, when traced to its simple rudiments, appears to be founded on resemblance—on a resemblance between the present and the past—'judgment,' which means nothing else than the act or faculty of inferring, (*y*) would seem to consist chiefly in recollection and comparison—the comparison of present feelings with those formerly experienced and now recalled to mind.

149. Before we quit the subject of Induction, it is worthy of remark that, as by a mechanical deduction, or syllogistic process, we can infer the truth of any one of a series of similar facts from the truth of the comprehensive expression of fact which includes the whole series; so by a process similar to induction we may establish the truth of a comprehensive or compound expression of fact, which embodies a series of similar facts, or instances of the same fact, by establishing the truth seriatim of all and each of the instances. Thus, we may establish the truth of the proposition that 'All the present inhabitants of Leyden are Lutherans,' by proving that A, B, C, and D, etc. are Lutherans, to the end of a series which includes all the present inhabitants of that town. A mechanical operation of this kind was known to the older logicians by the name of a 'perfect Induction.' But, as Mr. Mill points out, (*z*) such a process is not properly called an Induction at all, since it involves no real inference — no progress from the known to the unknown, and leads to no general proposition, but ends in a specific assertion.

(*y*) Ante, s. 85. (*z*) *Vide* Mill Logic, i. 352, 353, P. 189a.

150. In the case of a so-called 'perfect Induction,' all the minor or component facts are similar facts—or, as we should generally express it, different instances of the same fact. But a process precisely analogous to this—we might almost say identical with it—takes place where a complex expression of fact is made up, not of a series of similar facts, or instances of the same fact, but of several dissimilar ones, and we establish the truth of the more comprehensive proposition by proving all and each of its details. This process, like the preceding one, has also, as Mr. Mill informs us, (*a*) been mistaken for Induction, and this too by no less a philosopher than Dr. Whewell, who, while aptly describing the operation by the name of the 'Colligation of facts,' has unfortunately confounded it with Induction in general. (*b*) This error Mr. Mill has sufficiently refuted in the course of the chapter to which I have just referred. But it was hardly necessary that he should have soared into the realms of astronomy in order to illustrate his meaning. 'Evidence,' whether natural or judicial, literally teems with examples of this process. There is scarcely a single instance of the proof of an 'issue' in a trial at law that does not exemplify it. In a case of larceny, for instance, we prove the whole issue of theft by establishing several minor details—as that the accused laid hands on the stolen article, that he carried it away, that it legally belonged to someone else; the neutral fact, that the accused *intended* to steal it, and so on, which details are not *evidentiary* of, but go to make up the complex fact, or criminal act of larceny. Such a process, however, is obviously no more real induction than the so-called 'perfect induction' of the logicians, from which it differs only in this: that in the latter case the com-

(*a*) *Vide* Mill Logic, i. 356 and *seq.*, P. 191ab. iii. 2, s. 3.
(*b*) Mill Logic, i. 359, P. 192b. iii. 2, s. 4.

ponent facts or details, which go to make up the complex fact, bear no resemblance to each other, and that there appears to be no deductive process to correspond to the so-called inductive one.

151. In every case of real inference it is the minor premiss which expresses the evidentiary fact or facts. In all the examples of syllogisms which were given above, the minor premiss expressed a single fact; and the inference would therefore, in a popular view, be said to be drawn from a single fact. And this is sometimes the case even with inferences in judicial matters. Thus, we may infer from the single fact of *possession* (with the aid, of course, of a general proposition) the principal fact of receiving stolen property with guilty knowledge—an inference which would be exhibited in syllogistic form thus:

All men, or / Every, or any man — found in possession / of stolen property — are, / or is — probably guilty of felonious receiving—

The prisoner / is — found in possession of stolen property, or—one of such men—

(Therefore) The prisoner—is—probably guilty of felonious receiving—

Here the minor premiss of the syllogism, from which the conclusion of guilt is deduced, is the single evidentiary fact of 'possession.' But in most cases of legal inference the minor premiss is made up of a combination or coincidence of evidentiary facts or circumstances. (*c*) For instance, where a murder has been committed, and is the subject of investigation, we cannot infer with any sufficient degree of probability from the fact that A's clothes are stained with blood—nor from the fact that A was seen near the scene of the murder at the time—nor from the fact that he entertained a grudge against the deceased—nor from the fact that he had a deadly

(*c*) *Vide* Dumont Ev., 144, and Bentham Ind. Ev., iii. 12 and 13.

weapon in his possession—nor, in short, from any other single fact, that A is guilty of the murder; for we cannot assert with any sufficient degree of probability, as a general proposition, that 'Any man whose clothes are stained with blood is guilty of the murder in question,' nor that 'Any man who was seen near the scene of the murder at the time is the murderer,' nor the like. We can scarcely infer more from any of these single facts taken alone, than that any person, of whom one of them is true, is *more probably* guilty, than any other person of whom the same fact is not known to be true; and we can only infer A's guilt with any reasonable degree of probability, or moral certainty, from all those facts combined, or, in other words, from the coincidence of all these facts. (*e*) And such an inference, when expressed in syllogistic form, would appear somewhat as follows: All men, or any man, who was seen near the scene of the murder at the time, *and* whose clothes were also found to be stained with blood, *and* who also had a grudge against the deceased, *and* who also had a deadly weapon in his possession, *and* so on—is—probably guilty of the murder.

The prisoner—is—proved by the evidence to satisfy all those conditions.

(Or) is—a man who was seen, etc., etc.

(Therefore) the prisoner—is—probably guilty of the murder in question.

And since the general proposition in the major premiss can be, at best, no more than highly probable, so the inference or conclusion drawn from any number of evidentiary facts, properly so called, can never be more than probable, though the probability may be of so high a degree as to amount to what is called *moral* certainty.

152. It is to be observed that the process of collecting,

(*e*) Post, s. 164.

or of proving, a series or assemblage of evidentiary facts, in order that when combined they may form the minor premiss of a syllogism, is quite distinguishable both from Induction proper, from 'perfect induction,' and from what has been designated 'the colligation of facts.' The process referred to differs entirely from all these, because it ends in no single proposition, either general or specific. All the evidentiary facts are quite separate and detached, and though they may be made to do duty, when enumerated, as the minor premiss of a syllogism, are incapable of being united in one single assertion. For example, the facts, (1) A's clothes were stained with blood; (2) A was near the scene of the murder at the time; (3) A entertained a grudge against the deceased; (4) A had a deadly weapon in his possession, and the like, cannot be united in a single expression, whether of fact or otherwise; though we may well infer from their coincidence in the person of A, that A is guilty of the murder of which he is suspected.

153. Before we conclude the present chapter, there remains a peculiar case of inference, or apparent inference, to which it seems desirable to draw the reader's attention, if for no other reason than because the views which Mr. Mill propounds with regard to it are calculated to create misconception. It is the case, mentioned by that author, (*f*) where the major premiss of a syllogism is the assertion, not of a general Truth or law of nature, but of a *positive* law, the result of the injunction of a superior power. There can be no doubt that such a syllogism may be constructed. For instance, we might argue as follows:

All men who steal—are—liable to punishment.
A—is—one of such men.
(Therefore) A—is—liable to punishment.

The syllogism is a valid one so far as logic is

(*f*) *Vide* Mill Logic, i. 260, P. 127ab.

concerned, (*g*) but then it is obvious that an argument of this kind is not a case of real inference, inasmuch as the major premiss, 'All men who steal are liable to punishment,' expresses a specific fact, and not a general Truth. Mr. Mill's observations on this subject, however, would lead to the belief that an assertion of this kind is a general proposition. 'The proposition,' he says, when dealing with this question, (*h*) 'asserts, not that all men *are* anything, but that all men *shall* do something.' Now this is true enough of the actual *promulgation* of the law—of the sentence, *i.e.*, in which the lawgiver himself proclaims or announces it, which is usually, if not always, couched in the future tense; and it is to this species of sentence, and to this only, that Mr. Mill's remark is applicable. Indeed, he has already expressly admitted this, for in a previous paragraph he observes that in such a case 'the generalisation may not be, in the ordinary sense, an assertion at all, but a command.' (*i*) It is strange that he should have forgotten that a 'command' and a 'proposition' are totally distinct forms of discourse, (*j*) and that a sentence which commands or enjoins, as it can neither be true nor false, cannot be made the major premiss of a syllogism. When a lawgiver declares that 'all men shall, or shall not, do so-and-so,' he does not mean, nor must he be taken to *predict* that all men will, or that they will not, at this or any future time, do the act in question. His purpose is to issue an *order*—to *enjoin* or *prohibit*, not to *assert* or *deny*.

154. Assertions, however, may, as we have already shown, be made concerning such matters, and assertions, too, of more than one kind. For example, we might, as Mr. Mill suggests, (*k*) assert the mere volition or wil

(*g*) *Vide* Ante, s. 135. (*h*) Mill Logic, i. 260, P. 127b.
(*i*) Mill Logic, i. 260, P. 127a. (*j*) *Vide* Whately Logic, 41.
(*k*) Mill Logic, i. 260, P. 127b.

of the legislator, a mental fact, which he admits to be a specific one. Such an assertion would, however, be little to the purpose; for the state of the law is created and determined, not by the mere volition or will of the lawgiver, but by his *act*—by his expression of that will in due form by the utterance of spoken or written words.

But secondly, and this is more to the purpose, this act of the legislator may likewise be asserted in a proposition. Thus we might assert that 'the lawgiver has ordained and commanded that all men who steal shall suffer punishment.' It is clear that this proposition, like the preceding one, expresses a specific fact—the fact of the mandate having been issued—a fact capable of being verified by perception, by hearing or reading the words of the injunction itself. Such an assertion, however, is not a proposition of that comprehensive kind which can be made to do duty as the major premiss of a syllogism. (*l*) But thirdly, we may assert the consequences of the act of the legislator—the state of the law, that 'all men who steal are by law liable to punishment'—a proposition which, while it may, as we have seen, (*m*) be made the major premiss of a syllogism, is equally specific, and capable of being verified by precisely the same evidence as the second. For the mandate of the legislator, when promulgated, *is* the law, and his act in publishing it does *ipso facto make* all men who steal liable to punishment. But then the liability applies only to existing men, and attaches only to acts committed now or heretofore; and the proposition, consequently, relates only to such. For no one, not even the legislator himself, is warranted in asserting as a general proposition, as a Truth, that all his subjects, past, present, or to come, who steal are to be liable to punishment. As a general proposition,

(*l*) Ante, s. 135. (*m*) *Vide* Ante, s. 153.

it would not be true—not even probably true, nay, palpably false. The province of the lawgiver is, not to assert general Truths, but to make and proclaim the law; and as a *command*, positive law speaks as to the future, and the future only. To *assert* the law is rather the function of the judge than of the legislator; but he can assert it only as to existing men, and as to past or present acts. The judge is empowered to say, 'Whoever has committed such an act is guilty of crime, or of wrong,' or 'is liable to punishment or to civil consequences'; but neither the judge nor the legislator himself has power to assert that the man who commits such an act a thousand, or a hundred years hence, or even next year, or next month, or to-morrow, will be liable to such consequences. For it is the nature of positive law that it is, and must ever be, subject to be abrogated or suspended at any moment by numberless causes—by the act of the legislator himself, by that of his successors, by revolution, by conquest, and so on, and it can never, therefore, attach consequences, except to what has been, or is being done, to present or past acts. It is true that it continues to speak until repealed or annulled, but as an *assertion*, it still speaks only as to the past; with the future it has no present concern.

155. And therefore, like all other propositions relating to the past and the present only, the assertion of a positive law expresses a specific fact. For example, suppose in the foregoing instance of receiving stolen property *(n)* that it were declared law (as it is not) that any man found in possession of stolen property should be deemed *ipso facto* guilty of felonious receiving. The major premiss of our syllogism, the assertion, 'All men in possession of stolen goods are guilty of felonious receiving,' would now become a specific fact. There would be no probability or uncertainty in the matter.

(*n*) *Vide* Ante, s. 151.

The truth of the proposition would be conclusively established by proof of the promulgation or existence of the law, and, as 'law,' would in our judicial system require no proof at all. But then the proposition would relate only to present or past possession, not to any possession in the future. But however numerous the existing men might be who fell within the category, however imperfectly we might have ascertained the precise individuals of which the list was composed, we should still know as an existing fact that they were all guilty of felony. The conclusion, therefore, that 'the prisoner (being one of such men) is guilty of felonious receiving,' would be equally certain. It would, in short (assuming of course the possession of the accused to be established), form a component part of the major premiss; while the minor premiss, 'The prisoner is one found in possession of stolen goods,' would be no longer an evidentiary fact, but would now become a principal one, equivalent in the present case to the whole issue or question of guilt.

156. Thus it appears that though a positive law, considered in the light of a command or injunction, speaks, or at least ought to speak, as to the future alone, the proposition which asserts it speaks, and can speak, only as to the present or the past. The proposition which asserts a human law, therefore, is not general, but specific, and expresses nothing more than a fact, though it may be a fact of that comprehensive or collective order which is qualified to do duty as the major premiss of a syllogism. The same thing may be said, too, of every proposition which asserts the effect or result of any human rule, convention, or custom, such as, 'All electors are ratepayers,' 'All English silver coins are made on Tower Hill,' to which we have previously referred. (*o*)

(*o*) *Vide* Ante, s. 135.

These are all specific, and not general propositions, and consequently the inference drawn from a syllogism which starts from such a position as a major premiss is not a *real* inference, but a mere mechanical deduction terminating in an absolutely certain or demonstrative conclusion. Whereas, in the case of a real inference, there can never be any such absolute certainty. For, as previously observed, (*p*) the conclusion drawn from any number of evidentiary facts, properly so called, can never be more than highly probable.

(*p*) *Vide* Ante, s. 151.

CHAPTER X

OF A COINCIDENCE

157. A COINCIDENCE may for our purposes be described as a correspondence or resemblance between two known or ascertained facts, from which resemblance an inference arises of the existence or truth of a third unknown fact.

The reason why the correspondence between two known facts thus raises an inference of the existence of a third fact is this: that the resemblance can only be accounted for on the hypothesis that each of the two similar facts is due to one and the same cause, or, in other words, is caused by one and the same fact, the existence of which may therefore be inferred. But since every inference rests ultimately on a resemblance, (*q*) it may perhaps be asked in what respect a coincidence differs from any other kind of inference. The difference, I think, is this: that in an ordinary case of inference the resemblance is a resemblance between the evidentiary fact or minor premiss of the syllogism, and those antecedent facts which, where the inferring process is conducted in logical form, are wrapped up, and, as it were, obliterated, in the general proposition or major premiss; while in the case of a coincidence, there is also a further resemblance between two facts, which resemblance is expressly asserted in the minor premiss, and forms, therefore, part of the proof of the evidentiary fact.

158. For the circumstance that two facts do thus

(*q*) *Vide* Ante, s. 142.

coincide is itself a fact, though a fact of somewhat complex character, and so far as it raises an inference of the existence or occurrence of an ulterior fact, a coincidence may be regarded as an evidentiary fact. Thus, from the correspondence or agreement in the narratives of two persons (or the testimony of two witnesses) the truth, or real existence of the fact or facts which they relate may (in the absence of any collusion or connivance between them) be fairly inferred; because the congruity in the two accounts can only be explained on the assumption that both narratives emanate from the same source, or, in other words, result from one and the same cause, viz., the existence or reality of the fact or facts which they relate, and the consequent knowledge of those facts acquired by each of the witnesses.

It is to be observed, also, that the inference which arises in such a case is quite independent of the veracity of the authors of the narratives, and arises equally from the correspondence itself, even if they be unworthy of any credit whatever. (*r*) If, however, there have been any collusion or connivance between the authors of the two narratives, that is an alternative cause sufficient to account for the agreement in the two stories, and to preclude the inference that would otherwise arise as to the truth of the facts embodied in them.

The *identity* of persons or of things, also, is a fact which we infer from the coincidence or resemblance of a greater or less number of details in two objects not otherwise ascertained to be identical.

159. The power of a coincidence in raising an inference, and thus generating conviction, is well illustrated in the familiar instance of two or more separate and distinct clocks which agree in pointing to the same hour.

(*r*) *Vide* Taylor Ev., s. 59 (51); Campbell Philos. Rhet., chap. v., Book I., part 3, page 125; and Abercrombie Intell. Powers, part 2, s. 3, page 67.

The time of day, as indicated by the hands on the face of a clock, is a species of statement respecting the position of the sun in the heavens, made by the owner or keeper of the clock in question. At best, it is a mere statement, inasmuch as it results from the voluntary act (*s*) of the owner or person who regulates the clock. Moreover, it is a statement of a very doubtful and precarious character; first, because it may easily be altered at the will of any person who has access to the clock; and secondly, because it is not only exposed to the danger of wilful falsification, but liable also to become inaccurate of its own accord, in the absence of constant care and diligence on the part of the owner. If, then, I happened to be walking through the streets of a town, and being in total ignorance of the time, consulted the first clock I caught sight of, with a view to ascertaining it, and found that the hands stood, say, at twelve o'clock; if this tallied with my preconceived notions of the time, I might possibly believe the clock; but if not—if I had supposed the time to be two or three hours earlier, for instance—I should be inclined to disbelieve it altogether; in any case, I should feel extremely doubtful about the matter. But suppose that a little farther on I encountered another clock, which pointed to the same hour or thereabouts, what a change would instantly take place in my convictions on the subject! I should at once feel, not twice as certain that twelve o'clock was the real time, but ten or twenty times as certain. And suppose that farther on I came to a third clock, which still pointed to the same hour, should I not feel perfectly convinced—absolutely certain—that twelve o'clock was approximately the correct time?—not from the mere added force of the three statements, but from their coincidence, which could only be accounted for by referring them all

(*s*) *Vide* Post, s. 174.

to one and the same common cause, namely, the true state of the case.

160. It is to be observed, however, that it is quite possible for two facts to coincide without the existence of any common cause to account for their correspondence; *i.e.*, they may coincide by chance or accident, in which case their resemblance will not warrant any inference as to an ulterior fact. This species of coincidence is what is called in popular language an odd or curious coincidence. With these accidental coincidences evidence has no further concern than to distinguish them from what we may call 'significant' coincidences, *i.e.*, such as are referable to a common cause.

An accidental coincidence, however, can scarcely occur, except in very simple matters; in other words, two facts can hardly coincide by accident in more than a very few details. The greater the number of details in which they agree, the less probability is there that the coincidence should be accidental, and the stronger is the inference of the existence of a common cause to account for it.

161. Coincidences have been distinguished by some writers as *Physical* and *Moral* coincidences. (*t*) A moral coincidence is one in which any psychological fact is involved in the operation or process of inference, whether as one of the coinciding facts, as the fact inferred, or as occurring in any link which connects these. A coincidence is called a physical coincidence, when no psychological fact is involved in the inferring process, nor in the coincidence itself. The correspondence in the narratives of two different witnesses, to which we have just alluded, is an instance of a moral coincidence. The process on which the inference or conclusion in such a case is founded may be thus

(*t*) *Vide* Best Ev., s. 297.

described. The principal fact, being perceived by each witness, is transmitted from his perceptive faculties to his mind, where it is retained by the memory, and becomes part of his knowledge; which knowledge is then manifested by means of his voluntary statement. Thus the principal fact may be a physical fact; the coinciding statements made by the two narrators are also physical facts; but the knowledge possessed by each of the two witnesses, which is involved in the process of causation, on which the inference is founded, is a mental or psychological fact, and hence the coincidence itself is a moral coincidence.

162. But that is equally a moral coincidence, where the fact inferred, or principal fact, is psychological. For instance, suppose that I see an occurrence myself, for example, a house burnt down; and suppose also that some time afterwards a person, on whose veracity I place no reliance whatever, tells me of it. I conclude instantly that he *knows* the fact; I conclude, not only that he is telling me the truth, but telling me also what he *knows* to be the truth; not because I believe him, for, since he is totally unworthy of credit, I should not, if I had not seen the fire myself, be able to judge whether his statement represented his *knowledge* on the subject, or was the fruit of his imagination or invention: but I conclude so because of the coincidence between the fact itself, as perceived by me, and his statement of the fact.

In this case the coinciding facts—the fact that the house in question was burnt down, and the statement of that fact, are both physical; but the fact inferred—the knowledge of my informant—is a psychological one; and the coincidence is a moral coincidence.

163. Physical coincidences are those existing between material objects, or between some of their features, and giving rise to an inference which involves no psycho-

logical fact. For instance, I find a footprint in my garden, which, on subsequent investigation, appears precisely to resemble or correspond with another footprint made by a boot worn by one of my neighbours. From this correspondence I infer that the two marks were made by one and the same boot; that my neighbour's boot made the first as well as the second mark; and that he has been in the garden. No psychological fact being involved in this process of inference, such a coincidence would, I think, be designated a physical one. Or again, I have in my possession a coin of a particular denomination, on the face of which I make a peculiar and unusual mark. Subsequently, I miss this coin from some place where I had deposited it for safe custody. Afterwards, a coin of the same denomination, and bearing on its face a precisely similar mark, is found in some other person's possession. From the coincidence or resemblance of the mark visible on this latter coin with that which I remember to have myself made on the former one, I infer that the two coins are one and the same. This, too, like the preceding, would, I think, be called a case of physical coincidence.

164. The coincidence of *evidentiary facts* as pointing to the same conclusion, in other words, as indicating or betokening the existence or truth of the same principal fact, is another species of coincidence, which plays an important part in strengthening inferences. (*u*)

The coincidence between two (or more) evidentiary facts is itself a fresh evidentiary fact. It is true that it is, so to speak, a coincidence of one detail only; nevertheless, when two evidentiary facts are *independent* of each other, such a coincidence is incalculably more cogent to establish the principal fact than the two evidentiary facts would be if considered apart from

(*u*) Best Ev., s. 297; Bentham Jud. Ev., iii. 223 and note.

their coincidence. As Mr. Best expresses it, (*v*) 'Where a number of *independent* circumstances point to the same conclusion, the probability of the justness of that conclusion is not merely the *sum* of the simple probabilities of those circumstances, but the multiplied, or compound ratio of them.' For example, a man is found murdered in a railway carriage; his hat is missing, and is afterwards found in the possession of another person. Here is a case of suspicion, indicating the complicity of that person in the murder. But add to this, that on the discovery of the crime the suspected man's own hat is found in the same carriage with the murdered man. This likewise, standing by itself, is a suspicious circumstance—but only suspicious. And the two suspicions simply added together produce at most a strong suspicion. But the *coincidence* between the two evidentiary facts, so independent of each other, yet both pointing to one and the same principal fact, increases this suspicion or probability of guilt almost to an absolute certainty.

165. Where, however, the two evidentiary facts are not independent of each other, but, as Mr. Best expresses it, (*w*) 'arise from one source,' *i.e.*, may possibly arise from some single source other than the principal fact, there they can hardly be said to coincide at all, in the sense of giving rise to a coincidence, or multiplying the probability of the conclusion. They constitute rather an enlarged evidentiary fact than a coincidence of evidentiary facts. For example, suppose it to be established as the second evidentiary fact in the previous case, that the murdered man's watch, as well as his hat, was missing, and was also found in the possession of the same suspected person. This fact, though it strengthens to some extent the probability of guilt, only, so to speak, adds to it, and does not, as in the case of a

(*v*) Best Ev., s. 289, 2nd ed. (*w*) Best Ev., s. 298.

genuine coincidence, multiply it. Any other hypothesis than that of guilt, which would be adequate to explain the one evidentiary fact, might probably serve also to explain the other; whereas it is the characteristic of a real coincidence between evidentiary facts, that though other hypotheses may possibly be framed to account for either one of them, *the principal fact only* can serve to explain both.

We may conclude the present chapter with the remark that it is almost impossible to over-estimate the importance of coincidences, whether as creating in themselves evidentiary facts, or in strengthening the force of those that exist already.

CHAPTER XI

BENTHAM'S DEFINITION OF EVIDENCE

166. BEFORE we proceed to consider the different species or divisions of evidence, it seems desirable to advert for a moment to Bentham's definition of evidence in general. For Bentham has been regarded, I fancy, as somewhat of a prophet in the philosophy of the subject; and since we shall, moreover, have occasion to avail ourselves to some extent of the principles advanced in his 'Rationale of Judicial Evidence,' it appears advisable to begin by clearing away certain errors which tend to obscure and disfigure that which we may deem to be sound and useful in his work.

167. Bentham, then, defines the term 'Evidence,' as 'any matter of fact, the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact; a persuasion either affirmative or disaffirmative of its existence.' (*x*) 'Of the two facts,' he adds, 'thus connected with each other, the latter may, for the purpose of expressing the place it bears in its relation to the other, be distinguished by the appellation of the *principal* fact, or matter of fact; the other by that of the evidentiary fact, or matter of fact.' (*y*)

168. Now this, as a definition of evidence in general, is objectionable on more than one ground.

First, because by describing Evidence itself as a fact, it tends to create a confusion between evidence and the subject-matter of evidence; between the fact proposed

(*x*) Bentham Jud. Ev., i. 17. (*y*) Bentham Jud. Ev., i. 18.

for proof, and the proof itself; in short, between the *quid probandum* and the *modus probandi.* It may be that the means employed by Evidence to ascertain a fact, is, after all, itself a fact; it may be true that, when I perceive a fact, my perception is also a fact; but it is essential to a right understanding of evidence that we should not regard it in that light; that we should view the means of proof as one thing, and the fact, the subject-matter of proof, as another, and keep the two distinct; that our chain of facts, if there be a chain, should start from the fact verified by perception, and not from the act of perception itself.

169. I say, if there be a chain, because, if we accept the fact verified by perception as our starting-point, no chain of facts is necessary. For though the fact that we perceive may very possibly be only an evidentiary fact in relation to the actual subject of investigation, yet, on the other hand, it may be, nay, frequently is, neither more nor less than the principal fact itself.

Thus, for instance, if I wish to ascertain whether it is raining, I look out of the window, and with my own eyes *see* the rain falling, or put out my hand, and *feel* the drops. Here, unless we regard my act of perception as a fact, there is no second or evidentiary fact at all involved in the operation.

It is true that in judicial proceedings we can seldom obtain proof of so high a kind as this—can seldom, in other words, succeed in establishing a principal fact by the evidence of actual perception. In judicial matters we are, for the most part, compelled to resort to that kind of evidence which is distinguished as 'Testimony.' This, however, is by no means universally the case. Even in courts of law it frequently happens that facts which form a constitutent part of the very question in dispute, or *components of the issue*, are submitted to the actual and direct perception of the tribunal. Moreover,

'Testimony,' as will appear hereafter, is but another means of proof, or species of evidence; and it is, therefore, just as necessary to distinguish between testimony and fact, as between fact and perception.

170. Bentham's definition is, indeed, rather a description of an *evidentiary fact* than a comprehensive account of evidence in general. And this he himself appears subsequently to recognise, if we may judge from the following passage, which occurs in the beginning of the third volume of his treatise. (*z*) 'In every case, therefore, of *circumstantial* evidence,' he says, 'there are always, at least, two facts to be considered: (1) the *factum probandum*, or say, the *principal fact*—the fact the existence of which is supposed or proposed to be proved—the fact evidenced to—the fact which is the subject of proof; (2) the *factum probans*—the evidentiary fact—the fact from the existence of which that of the *factum probandum* is inferred.'

Here, then, we have an implied admission that it is only in cases of *circumstantial* evidence that any second or *evidentiary* fact finds a place. And this is so completely true that, as we shall see hereafter, (*a*) the precise distinction between *circumstantial* and *direct* evidence lies in the presence or absence of an evidentiary fact. This latter view, however, is entirely inconsistent with and subversive of Bentham's previous definition of Evidence in general.

171. But besides this, the definition in question is amenable to a second objection, which, though less serious than the first, is still not wholly unimportant; namely, that it assumes the object or design of evidence to be 'to produce a persuasion.' In a certain sense there may certainly be some truth in this. The effect or tendency of evidence in the concrete—that is, of a

(*z*) Bentham Jud. Ev., iii. 2. (*a*) *Vide* Post, s. 201.

given quantity of proof — no doubt is to produce a well-founded persuasion; but the *object* and *design* of Evidence in the abstract — of the science or the art of evidence, is, not to produce a persuasion (which may be well or ill founded), but to ascertain or *elicit the truth.* Persuasion or conviction is the business, and its production the aim and object, neither of Evidence, nor yet of either of its sister sciences, logic or induction, but of the art of Rhetoric (*b*)—an art which has no pretensions to be called a science. Indeed, if the design of Evidence were nothing higher than 'to produce persuasion,' it would almost follow that the best qualification for the office of judge or inquirer would be credulity.

172. This second misconception, however, as I have already stated, is far less serious than the first. For there is no point which is of more vital importance to the acquisition of a clear view of Evidence than that *fact* should be carefully distinguished from *proof*—the machinery of proving from the matter to be proved.

It is scarcely surprising that Bentham's attempt to reduce Evidence to a science should have been attended with but little success, when we find him falling into this fundamental error at the very outset of his inquiry.

Whether our own definition of Evidence will lead us to any more solid results, the reader must judge. Meanwhile, we may resume our inquiry into the different *species* of Evidence.

(*b*) *Vide* Whately Rhetoric, 32 and 153 and *seq.*

CHAPTER XII

DIVISIONS OF EVIDENCE

173. THE different species or modifications of natural evidence are extremely few and simple, being all comprised under two principal heads or divisions. For the species included under the first of these two heads I have found it necessary, for reasons which will be justified in the sequel, to frame and originate suitable designations. The species comprised under the second head, being already furnished with appropriate titles, will demand no such departure from recognised phraseology.

The first of these two divisions is that into (1) *Immediate;* and (2) *Transmitted* evidence, as I shall beg leave respectively to call them. The second division is into (1) *Direct;* and (2) *Indirect* or *Circumstantial* evidence.

Besides these, there is a phase of evidence called negative evidence, by which is meant the proof of a negative fact, or, in other words, the disproof of a fact. But the distinction between the proof of positive and of negative facts can scarcely be said to constitute another division of evidence, since all evidence, as we shall see hereafter, (*c*) is in reality positive.

And with this slight exception, if exception it can be called, the four species, which I have just enumerated as being ranged under two heads, are the only genuine modifications of evidence in a natural aspect.

All other divisions of evidence, of which Bentham

(*c*) *Vide* Post, s. 213.

enumerates nine, (*d*) are either created by the rules and requirements of judicial tribunals, or are wholly superfluous and chimerical.

We may now, therefore, proceed to consider each of these two leading divisions in its turn. And first of Evidence Immediate and Transmitted.

(*d*) Bentham Jud. Ev., Bk. i., chap. 4.

CHAPTER XIII

EVIDENCE IMMEDIATE AND TRANSMITTED

174. It has been stated in a previous chapter (*e*) that all our knowledge of facts is ultimately referable to 'perception,' including within the meaning of the word that inward perception which is distinguished by metaphysicians as 'Intuition' or 'Consciousness.' It was subsequently remarked, however, that a very small proportion of the knowledge which we possess is derived from what we personally observe or perceive; that we are, each of us, compelled to rely in great measure on the perception of other men, as a means of ascertaining external facts. (*f*)

And this circumstance forms the foundation of the first great division of evidence, viz., into (1) *Immediate*, where the inquirer or recipient of the evidence ascertains the proximate fact, *i.e.*, the fact, whether principal or evidentiary, which is the actual subject of proof, by means of his own individual perceptions; and (2) *Transmitted*, where he ascertains the same fact through the medium of the perceptive faculties of some other person, whose knowledge of the fact is manifested to him by some *voluntary* act; that is to say, either by the utterance of language written or spoken, or by voluntary signs or gestures, or even by general conduct and behaviour; all which spontaneous manifestations or indications of knowledge may be summed up under the title of 'communications.'

And with regard to these two phases of evidence it is

(*e*) *Vide* Ante, s. 24. (*f*) Ante, s. 25.

to be observed, that while in the case of the former, or *immediate* evidence, the recipient of the evidence, or Inquirer, is himself the percipient of the fact in question; on the other hand, in the case of *transmitted* evidence, the Inquirer is percipient, not of the fact itself, but only of the *Communication.*

175. It might possibly be urged, however, by way of objection to this division of evidence, that since a voluntary action is itself a fact, a 'communication' ought to be regarded, not as a separate *modus probandi*, or species of proof, but as an evidentiary fact—a fact evidentiary *i.e.* of the knowledge possessed by the author of the communication, and thus evidentiary of the fact which forms the subject-matter of that knowledge; which view, it might be contended, would simplify the whole system, by doing away with the distinction between immediate and transmitted evidence, and thus reduce the species or modifications of natural evidence to two only, viz., Direct and Circumstantial. This simplicity, however, would be too dearly purchased. For it would be a fatal mistake to lose sight of the distinction between a voluntary manifestation of knowledge or 'communication,' and an evidentiary fact properly so called. The function of an evidentiary fact is to raise an inference as to the existence of some other fact; in other words, to render the existence of some other fact probable, and in order to give rise to this probability, it is indispensable that the inference should rest on some known law of nature, such as is commonly embodied in a general proposition, since, to place the matter in its logical aspect, we can never draw a real inference without the aid of a general proposition to form the major premiss of our syllogism. (*g*) But there is no known law of nature which entitles us to draw a conclusion, even probable, that a voluntary communication truly

(*g*) *Vide* Ante, s. 138 and 147.

or faithfully represents the knowledge of the person who is the author of it; nor should we be warranted in stating as a general proposition that it does so. From the knowledge of a rational being we might fairly argue to the fact to which that knowledge relates. But a voluntary communication, so far from being the picture or natural image of the *knowledge* of the person who imparts it, is the mere creature and expression of his *will*. To establish the precise relation between the knowledge of a rational agent and his will is a problem which metaphysical science has not yet succeeded in solving. 'The metaphorical expression, *laws of nature*, which arises from the agreement of natural facts with each other,' says M. Dumont, (*h*) 'does not extend to the class of moral and psychological facts, for two very obvious reasons: First, the irregularities and disorders to which the human microcosm, the moral and intellectual world, is liable; secondly, the difficulty of becoming well acquainted with it.' And there is nothing in the whole range of existences —of facts physical or psychological—which appears less amenable to uniform laws than what is called a 'volition.' Whether the will of man be, or be not, subject to any laws of causation at all, has been the theme of much controversy; but even if it be so, it seems to be universally admitted that these laws are at present buried in obscurity. In estimating evidence, therefore, it is of the most vital importance to discriminate between the proof of those facts, which either reach our perceptions directly, or which we arrive at by *legitimate* inference or conclusion from other facts of which we are ourselves the percipients, and the proof of those which reach our minds only through the medium of a voluntary communication emanating from some other human being. There is no question of evidence which occupies the

(*h*) Dumont Ev., 19, and *Vide* Bentham Jud. Ev., iii. 380, 381.

attention of judicial tribunals, or taxes their sagacity more, than the distinction between voluntary communications and other phases of proof.

176. But it should be carefully observed that it is only where the communication is made by a *voluntary* action that this distinction is necessary. *Involuntary* indications of knowledge, *i.e.*, involuntary acts or exclamations which betoken some knowledge possessed by their author, are entitled, as far as they go, to rank as evidentiary facts, inasmuch as the *will* has no part in producing them. An involuntary act or exclamation, so far as it indicated anything at all in reference to an extrinsic fact, is, at the least, *likely* to represent the knowledge of the person from whom it proceeds. There is, at any rate, a considerable amount of probability that it will do so, since he himself has no power to prevent or control it. The scope of such evidentiary facts in raising inferences is, however, extremely limited. In the first place, it is often very difficult, if not impossible, to determine that a given act or exclamation is purely involuntary. Secondly, even if this be ascertained, it is not often that we can infer much to the purpose from it. Involuntary actions are far from possessing that wide significance which attaches to voluntary acts, including, as these do, the voluntary utterance of written, as well as of spoken, language. The principal field for the operation of involuntary acts as evidentiary facts is to be found in what is termed in legal phraseology, 'Evidence *extra causam*,' *i.e.*, as tokens by which we judge of the sincerity of a person who imparts, or professes to impart, information to us; or, in other words, by which we test the credibility of a witness; for the involuntary demeanour of witnesses is universally acknowledged to furnish no mean criterion of their veracity. (*i*) So far, however, as they have any significance, involuntary

(*i*) *Vide* Taylor Ev., s. 52 (44), and Best Ev., s. 21.

acts must be regarded as evidentiary facts; and the term, 'transmitted evidence,' must consequently be restricted to the case of communications imparted by means of *voluntary* acts. (*j*)

177. The important modifications of Evidence now under consideration have not entirely escaped the notice of Bentham, who distinguishes them respectively by the designations, 'Evidence *ab intra*,' and 'Evidence *ab extra*'; (*k*) the former (Evidence *ab intra*) corresponding to our immediate evidence, and the latter (Evidence *ab extra*) to transmitted. These terms, however, are not only somewhat too cumbersome to suit our purpose, but are also too suggestive of the distinction between a psychological and a physical *fact* to be quite satisfactory. For it is a psychological fact only that can properly be said to be ascertained by evidence *from within* (*ab intra*): *all* evidence of physical facts, though it must penetrate *into* the mind of the Inquirer, comes to him, through his senses, *from without* (*ab extra*). So that Bentham's description of this division of Evidence is tainted with the same confusion between fact and proof, which, originating in his general definition of Evidence, more or less pervades the whole of his treatise upon Evidence. In the language of philosophy, again, these two phases of evidence, or, what is equivalent, these two sources of our knowledge, are usually distinguished as 'Observation' and 'Testimony.' (*l*) But the word, 'Testimony,' has acquired in legal phraseology a meaning too restricted and technical to suit our present design, being limited in its legal acceptation to designate the oral testimony of a sworn witness. Thus I have been constrained to seek for other expressions more

(*j*) *Vide* Best Ev., s. 28 and note.

(*k*) *Vide* Bentham Ev., i. 51 and 52, and Best Ev., s. 14.

(*l*) *Vide* Whately Logic, 160; Mill Logic, i. 349, P. 186b; and Abercrombie Intell. Powers, 31, 13th ed.

suitable to the present exigency. And the terms, 'Direct' and 'Indirect,' being already appropriated to distinguish the species comprised under the second division of evidence, I have finally resolved to adopt the titles *immediate* and *transmitted* as the best available to express the distinction which they are designed to indicate.

178. Before we conclude the present chapter, we must not omit to observe that 'communications' may be made in numberless ways—by a variety of tokens or signs audible or visible. (*m*) Information may be conveyed, not only by speaking or writing, but also by signs or gestures, or even by other acts not apparently designed, or, at least, not exclusively devoted to the purpose of imparting it. We may derive our knowledge, or presumed knowledge, of external facts from conversation addressed to ourselves, or to other persons in our hearing; from letters addressed to ourselves or to others; from speeches, from sermons, from papers, or from books of known or unknown authors, or of doubtful authorship; or, in a more limited degree, from signs or gestures, or the general conduct or demeanour of the supposed percipients of the fact or facts in question: but in each and all of these cases we owe our knowledge of the facts so communicated to us to the *will* of another person (whether that person be or be not known to us), and the evidence we obtain of the facts in question is, therefore, *Transmitted*.

(*m*) *Vide* Bentham Jud. Ev., i. 155.

CHAPTER XIV

COMPARATIVE FORCE OF IMMEDIATE AND TRANSMITTED EVIDENCE

179. It must be obvious at once to anyone who gives the matter a moment's serious reflection that transmitted evidence is, and of needs must be, intrinsically inferior to, or, in other words, less cogent and convincing than immediate.

But in case there should remain the shadow of a doubt on the subject, let us imagine a case of transmitted evidence, where our informant professes to have had the evidence of his own senses for the fact which he communicates to us; and let us suppose further that his powers of observation are equal, and no more than equal, to our own. It is manifest in this case that we are not so well assured of the fact as we should have been if we had witnessed it ourselves. In the first place, we may have misunderstood our informant's meaning. This, however, it is but just to say, is not a danger or weakness peculiar to transmitted evidence; for a misconception of this kind is in the nature of a false inference or conclusion, and the liability to draw a false conclusion is an imperfection that is equally shared by circumstantial evidence in general. The peculiar danger or characteristic infirmity, however, of transmitted evidence, by which it is distinguished from circumstantial, is this—that it is always possible that our informant may *wilfully deceive* us. However trustworthy he may be, there must still remain some chance

of falsehood, total or partial — of misrepresentation, exaggeration, or suppression.

Again, we might, if necessary, carry the comparison still farther by supposing the original eye-witness or percipient to be the same in either case. Let us imagine, for instance, that I see B knocked down by a carriage and injured, and that I tell A of it. Surely I must possess more cogent evidence of the fact—the accident to B—than A obtains. I have the evidence of my own eyes; A has only the very same evidence impaired, not only by the chance of misapprehension on his own part, but also of wilful falsehood on mine. Hence it appears undeniable that transmitted evidence is essentially inferior to immediate.

180. It does not, however, necessarily follow from this that a fact can never be as conclusively proved by transmitted, as by immediate evidence; that where, for instance, there exists both immediate and transmitted evidence of the same fact, it cannot possibly be established as conclusively by means of the latter as by the former. This is far from being universally true. Let us suppose, for example, that I am present at a public meeting, and that, being somewhat near-sighted, or unfavourably placed for purposes of observation, I see at some distance a person whom I believe to be A. Let us imagine, on the other hand, that B, C, and D all see him distinctly, or converse with him there, and unite in telling me so: I am probably better assured of the fact, viz., A's presence at the meeting, in the latter case, where the evidence is only transmitted, than in the former, where it is immediate. But this is only because what may be called the *quantity* of evidence is not equal in each case, and does not, in the least degree, tend to prove that the *quality* of transmitted evidence is not, in the *abstract*, inferior to that of immediate perception. And this intrinsic inferiority of transmitted evidence is,

of course, aggravated, where our informant is untrustworthy or unknown to us. And if, again, he derives his information, not from his own observation, but from the narrative of a third witness, our source of knowledge is still more doubtful: and so, in proportion to the number of hands, or rather, of *minds*, through which the story passes, does the evidence become less and less trustworthy.

181. *Immediate* evidence, on the other hand, is the highest species of proof attainable by human beings, at least for the ordinary purposes of everyday life. As Horace truly remarks, (*n*) '*Segnius irritant animos demissa per aurem, Quam quæ sunt oculis subjecta fidelibus, et quæ Ipse sibi tradit spectator*'; and we have the proverb, 'Seeing is believing,' (*o*) to the same effect. Any doubts which may have been entertained, or expressed by writers, as to the transcendent value of immediate evidence, have arisen from the accidental circumstance that it is seldom, at least in judicial proceedings, available to establish *principal* facts.

182. The manner in which this comes to pass may be briefly explained as follow: It is abundantly obvious that the actions of human beings must ever form the chief subject of judicial investigation. 'An action,' however, to speak in general terms, is a fact of a highly transient order, (*p*) and is, for that reason, incapable of being observed or 'perceived' by an Inquirer who does not happen to be personally present at the precise time and place where it is performed. As M. Dumont remarks with regard to such facts, (*q*) the evidence (*i.e.*, the *immediate* evidence) 'must be laid hold of where it is, or lost altogether.' But inasmuch as Judicial investigations are conducted at a fixed time, and that a time necessarily subsequent to the performance of the

(*n*) Horace Ars Poetica, 180. (*o*) *Vide* Ante, s. 51.
(*p*) *Vide* Ante, s. 121. (*q*) Dumont Ev., 301.

acts that are the cause of litigation, and form the subject of inquiry, it follows that the *principal* facts in the case have, for the most part, faded into the category of the past by the time that the proof of them is demanded. Consequently it is impossible that they should be manifested to the actual perceptions of the tribunal, which, it is to be remarked, occupies in judicial matters the place of the *Inquirer*, or recipient of the evidence.

183. From this it ensues, too, that the operation of immediate evidence in courts of law is in general restricted to furnishing proof of those permanent traces which the principal facts, or *actions*, may chance to have left behind them, and which assume, in relation to the actual topic of inquiry, the shape of evidentiary facts. But before an evidentiary fact can be rendered available to establish a principal, it is in every case indispensable that an inference or conclusion should be drawn—a process always attended by more or less of danger or uncertainty. It should never be forgotten, however, that this process is totally independent of the perception or immediate evidence by which the *evidentiary* fact is made manifest. The danger attending the process is an infirmative element (*r*) inherent, not to *immediate*, but to *circumstantial* evidence. For instance, suppose that I see A lying motionless on the ground, and B standing by his side with a bloody knife in his hand: very probably I conclude that B is guilty of homicide; and what is more, I may be quite right in my conclusion; but, on the other hand, it is at least possible that I may be deceived by appearances. A may have committed suicide with the very knife which I see in B's hand, and which B may have just withdrawn from the wound which A has inflicted upon himself. But if such should turn out to be the case, can it reasonably be said that my error consists in yielding too ready an

(*r*) *Vide* Best Ev., s. 202, and Bentham Jud. Ev., iii. 35 and *seq.*

assent to the evidence of my own eyes; or, what is equivalent, placing too great faith in immediate evidence? Hardly so; for of the homicide itself, since I did not actually see the blow struck, I have no immediate evidence whatever. All that is established by immediate evidence is precisely what I see, and nothing more, viz., that A is lying there; that B is standing by his side; and that the knife is in B's hand. Of these three facts there cannot be the shadow of a doubt in my mind, nor can there be any danger in believing them. In believing that B is guilty of homicide there may be much danger, but it lies, not in trusting too readily to the facts that I perceive, but in drawing too hasty an inference from them. The uncertainty, in short, resides, not in the immediate evidence, but in the process of inference.

All which, when fairly stated, appears so clear and simple that it is difficult to realise what is, nevertheless, undoubtedly true, viz., that the greatest misconception has arisen from confusing the fact that is established by perception with the ulterior fact that is inferred from it; or, in other words, from confounding immediate with circumstantial evidence.

184. Demonstration, upon which mathematical truth is chiefly based, is frequently cited as a higher species of evidence than that of the senses. (*s*) But this comparison is calculated to produce an erroneous conception of the relative functions of these two methods of inquiry. A demonstration, as may be gathered from what has been said in a previous chapter, (*t*) is merely a species of necessary conclusion or consequence resulting from antecedent data or facts not themselves capable of demonstration. (*u*) These data may, it is true, be feigned or imaginary only; but in this case the demon-

(*s*) *Vide* Taylor Ev., s. 1. (*t*) Ante, s. 126.
(*u*) *Vide* Mill Logic, i. 6, P. 3b, and i. 342.

stration can prove nothing real, nothing, *i.e.*, as fact. In order to ascertain, therefore, whether the conclusions of demonstration apply to real existing facts, we must ultimately have recourse to perception. Thus demonstration, so far as real existence or fact is concerned, is subordinate to immediate evidence. Demonstrations may be necessary truths, in the sense that they necessarily follow from the data on which they are founded, (*v*) but unless the data themselves are verified by perception, the demonstrations can prove nothing as fact. Though it is not perhaps scientifically accurate to say that demonstration is the highest form of circumstantial evidence, it would at least afford a more correct view of the relation in which it stands towards evidence to regard it in that light than to compare it with immediate evidence to the disadvantage of the latter. (*w*)

185. The great certainty which attends the operations of the physical sciences is chiefly due to their extensive command of immediate evidence—to the ample facilities which they possess for verifying their facts by observation and experiment at every stage of their investigations. In judicial inquiries, on the contrary, the scope of immediate perception is comparatively limited; besides which it is, generally speaking, clogged with an inference that is very far from a 'necessary' one. So far, however, as it is available, its force is most transcendent. Such being the comparative strength, or proving power, of immediate and transmitted evidence, it is obviously most important that the distinction between them should be clearly apprehended.

This distinction, therefore, will form the subject of the next chapter.

(*v*) *Vide* Mill Logic, i. 300, P. 149b. (*w*) *Vide* Post, s. 278.

CHAPTER XV

OF THE DISTINCTION BETWEEN ACTS AND COMMUNICATIONS

186. On a superficial view of the matter it may perhaps seem scarcely conceivable that any doubt or difficulty should ever arise in discriminating whether we are indebted to our own senses, or to those of some other person, for our knowledge of any given fact; but a closer examination will, I think, show, not only that the subject is a most perplexing one, but also that i has proved a fertile source of confusion, if not of actual error.

The knowledge of facts, acquired by one person through the medium of his own perceptive faculties, may be voluntarily manifested to another, (*x*) either by language written or spoken, or by signs, such as the deaf and dumb alphabet, or a telegraphic code of signals, or by mere ordinary gestures, to all which modes of communication some kind of conventional meaning is attached. But the same kind of knowledge may also be manifested, or at least indicated, by acts to which no particular meaning is annexed by convention, and which are not usually applied to the purpose of imparting information. But inasmuch as 'communications,' or voluntary indications of knowledge, are most commonly made by the use of language, written, spoken, or otherwise, it seems desirable that we should make a few observations, at this stage of our inquiry, on the nature of language as it affects evidence.

(*x*) *Vide* Ante, s. 174.

187. In the first place, then, language is the instrument whereby we convey information to each other in the shape of propositions, including those specific propositions by which we assert or deny the existence of external facts. But this is by no means the whole end of language, though it may form an important part of it.

Language, again, has been truly said to be the means whereby we communicate to each other our thoughts or ideas. (*y*) But even this, though it may be construed to embrace more than the previous description, does not exhaust the purposes to which language is applied. We use language not only for the purpose of stating propositions or conveying information, not only as the means of communicating our ideas to each other, but also as an instrument in the performance of a variety of *acts* which cannot be accomplished without its aid.

188. For it should not be forgotten that the utterance of language, to whatsoever purpose that language may be applied, and whatever be the mode of its utterance, is still an action, and therefore in itself a fact, which fact may well become *per se* a subject of inquiry, without reference to any assertion or denial which the language or sentence may possibly contain. (*z*) Thus, for instance, when I say to another person, 'I promise,' or 'I engage,' to do so and so, though the sentence may possibly contain or involve somewhat of an assertion as to the state of my mind, or my intention at the time; yet the communication of this extrinsic mental fact to the hearer is not the principal nor even the ostensible object that I have in view when uttering the words. The object of such a form of speech is to ratify a contract between the speaker and the person addressed, and (granting of course that mere words are legally sufficient for the

(*y*) Locke Hum. Mind, iii. 1, s. 2.
(*z*) *Vide* Taylor Ev., s. 576 (516).

purpose) the language actually has that effect, and, what is more, would do so even in spite of any intention I might secretly entertain to the contrary. So also, if I hand to another person any movable chattel, such, for instance, as a book, and at the same time pronounce the words, 'I give you this book,' or other words to the like effect, the design, and, what is more, the consequence of my utterance is actually to transfer the property in the book to the recipient, which (it may be remarked) would not be the case if I were simply to hand him the book without uttering the words.

And if it be true that we can perform many significant acts by the use of spoken language, still more numerous and important, as will appear hereafter, are the transactions which may be accomplished by means of written language or writing; and for this simple reason, that our law gives effect to many matters when transacted by writing which it will refuse to recognise if performed, or rather undertaken, by mere word of mouth.

The use of language, then, is not confined to the communication of our knowledge or the transmission of our ideas; we employ it also to give orders, notices, or warnings, to prefer requests or petitions, to ask questions, to utter threats or menaces, to prefer charges, to publish libels or slanders, to execute gifts, bequests, conveyances, or releases, to ratify promises, agreements, or contracts, to make, accept, or decline offers, to grant or revoke licenses, to make claims, and, in short, to perform a countless variety of acts, any one of which may in endless shapes become material to our inquiries, judicial or extra-judicial.

189. In all such cases the language by which the act is performed may, or may not, contain an *assertion*, either expressed or implied. But whether it do so or no, the utterance of the language is still a substantive fact, which may become a subject of investigation,

either in the character of a principal or an evidentiary fact.

Indeed, even language, the sole design of which seems to be the enunciation of a proposition, or the statement of extrinsic matter, may assume the aspect of a substantive fact, and itself become the subject of inquiry in that character. Thus, suppose, for instance, I say to A, 'Your tenant B is dead.' At first sight this seems nothing but an assertion, material only in reference to the question of B's death, and true or false according to the fact. But the question may arise whether A *received notice* of B's death. It will then become at once apparent that the mere utterance of the phrase, 'B is dead,' was in itself the act of giving the notice in question to A, as well as the fact of his receiving it; and thus the language assumes the aspect of a substantive fact in relation to the question of notice. And if this may possibly take place even in the case of language that assumes the form of a proposition, it is obvious that it will be still more likely to happen where, as in some of the previous instances, the language does not take that shape.

190. But, on the other hand, there is scarcely any phrase of language, to whatever purpose it be applied, that may not contain some kind of proposition, or statement of extrinsic fact, either expressed or implied. Whenever, therefore, we are called upon to estimate the proving power of a given piece of language or portion of discourse, we must be careful to distinguish between the mere fact of the utterance of the words, and any extrinsic fact which may be propounded or communicated by them. Of the former, the language, so far as it is manifested to our perceptive faculties, furnishes immediate evidence; of the latter, only transmitted. For it is obvious that, when the substantive fact of the utterance of a particular series

of words forms the subject of our investigation, we actually obtain immediate evidence of our principal fact by the mere operation of hearing or reading the discourse in question. (*a*)

And this is equally true even where the actual subject of inquiry is some ulterior fact deducible by *legitimate* inference (*b*) from the utterance of the words. For even if the subject of inquiry should be something that is *inferred* only from the language; the evidence, though in that case *indirect*, is not, therefore, the less immediate.

191. In short, the nature and value of the evidence furnished by the utterance or delivery of language depends in no degree on the matter of that language, but is measured solely by the aspect which the discourse presents towards the subject of inquiry. An instance or two will perhaps best illustrate this. Suppose, for example, that A were to assert in my hearing that B had committed a larceny, or were to write me a letter containing a statement to that effect; it is clear that while, on the one hand, I should obtain mere transmitted evidence to prove that B had actually committed the theft of which he was accused; on the other, I should have the evidence of my own senses for the fact that A had made the accusation in question against him. If then we suppose the subject of inquiry to be the question whether B is guilty or innocent of the crime imputed to him, it is obvious that I obtain only transmitted evidence of his guilt, since my assurance of that fact is derived from the knowledge of A betokened by his voluntary act in uttering the language; or, as it would be expressed in more ordinary phrase, since the proof I obtain of B's guilt rests on the credit or veracity of A; veracity—or, as it is designated in the case of implied statements, sincerity—being nothing else than a certain harmony or congruity that

(*a*) *Vide* Taylor Ev., s. 576 (516). (*b*) *Vide* Ante, s. 175.

takes place between the knowledge possessed by a rational agent, and the voluntary action whereby he evinces or manifests, and communicates to others, that knowledge; in other words, between his internal consciousness and his outward expression of it. But if, on the other hand, instead of B's guilt or innocence, we imagine the point in dispute to be the question whether A has or has not slandered B; in that case it is clear that the utterance of the language is the very fact in question, and that in hearing or reading it (as the case may be) I acquire immediate evidence of the slander (if slander it be)—evidence not based in any degree on the credit or veracity of A, but resting on the faith of my own hearing or eyesight merely.

192. In this last instance the delivery of the language constitutes the principal fact in the inquiry; but it may be only an evidentiary one. For instance, let us suppose the injurious statement uttered by A to have reached B's ears; and let us suppose further that A has been found murdered by an unknown hand a short time afterwards. If any suspicion of complicity in the crime should fall upon B, it might become a most material question to inquire whether B was likely to have entertained any ill feeling against A at the time of the murder. Now it is obvious that this fact, viz., B's animus, is deducible from the mere utterance by A of the injurious language; deducible, *i.e.*, by a *legitimate* inference, inasmuch as it is not founded in any degree on the knowledge of A, evinced by his voluntary action. Indeed, so far is the inference from resting on the credit of A, that the truth or falsehood of his statement is entirely beside the question, since the probability of the existence of B's ill feeling arises equally whether the imputation cast upon him be true or false. The delivery of the language, therefore, constitutes *per se* a fact *evidentiary* of B's animosity, which latter stands towards it in the

relation of a principal fact. It is to be observed, too, that in this case the evidence, so far as it is addressed to the senses of the Inquirer, is equally *immediate*, as in the preceding instance. It is true that it is indirect, and therefore far less cogent to establish the principal fact. The infirmity, however, resides in the inferring part of the process, and not, strictly speaking, in the evidence itself, *i.e.*, not in the proof of the evidentiary fact.

193. So much for 'communications' made by the use of language or discourse. But it is not by language alone, whether written or spoken, that the knowledge of facts possessed by other human beings is manifested to us. Such knowledge may also, though to a much more limited extent, be communicated by voluntary acts which do not consist in the utterance of language—by what Mr. Taylor very aptly calls 'the language of conduct, instead of the language of words.' (*c*) But precisely as in the case of the language of words, we are liable to be deceived by the wilful falsehood of our informant, so in the case of the language of conduct may we be misled by spurious acts assumed for the very purpose of conveying a false impression to our minds. Thus, for instance, suppose that we meet a man running away with fear depicted in his countenance, we naturally infer that there is some danger or cause of alarm existing in the direction from which he is hastening. But this inference is not what has been before distinguished as a legitimate inference. (*d*) It is founded on the knowledge, or supposed knowledge, of another person, expressed by the voluntary act of running, which act, as well as the expression of his face, may possibly be assumed for the very purpose of misleading us. It is founded, in short, on his sincerity, and the evidence we obtain of the existence of the supposed danger is therefore only transmitted.

(*c*) *Vide* Taylor Ev., s. 571 (511). (*d*) *Vide* Ante, s. 175.

194. Or again, to borrow an instance from our legal authorities, (*e*) suppose the subject of inquiry to be the question whether a particular ship, in the safety of which we happen to have an interest, is sound and seaworthy; and suppose further, that we see the master of the vessel, a person, it may be observed, who from his technical experience would probably be well qualified to decide such a question, in the act of embarking valuable property of his own on board the ship in question, we should be apt to infer from this behaviour on his part, not only that the ship was seaworthy, but that the fact of her seaworthiness was a reasonable inference from what had fallen under our own personal observation. But, as in the previous case, it is not a *legitimate* inference. It is based on the master's knowledge of the seaworthiness of the ship as evinced by his voluntary action or conduct; and, therefore, the evidence which we obtain of the ship's seaworthiness from our observation of his behaviour is only transmitted. We are, in fact, in much the same position as if the master had said to us in so many words, 'I know the ship to be seaworthy.' It is true that in the case supposed we obtain no slight guarantee for the sincerity of our informant in the consequences to himself and his interests that would result from his acts, in the event of their not honestly reflecting the state of his mind. (*f*) But as it would seem impossible to lay down any uniform rule as to the amount of interest which would in each case afford a sufficient guarantee for the sincerity or veracity of the person from whom the information was derived, such evidence can only be regarded, in principle at least, as transmitted. This kind of evidence is exactly analogous in this respect to, what is termed in legal phraseology, a 'declaration against interest,' that is

(*e*) *Vide* Taylor Ev., s. 571 (511).
(*f*) *Vide* Taylor Ev., s. 572 (512).

to say, a statement expressed in the 'language of words,' and tending to the prejudice of the person by whom it is uttered, which for similar reasons has been found to be indistinguishable in general principle from any other kind of 'communication.' (*g*)

195. Now it is to be observed that in the case of the language of words we are very apt to mistake what is really either a substantive fact, or a legitimate inference from a substantive fact, for a communication or statement, simply because the language of another person is the source of the evidence. (*h*) Whereas, on the other hand, in the case of the 'language of conduct,' we are rather prone, as we have just seen, to fall into the opposite error, and to accept as a substantive fact, or as a legitimate inference from it, what is nothing else than a voluntary communication of knowledge emanating from the author of the conduct in question. A familiar instance of this latter species of error is afforded by the case of a person reading aloud the contents, or supposed contents, of a letter or paper. We are apt to assume, rather, it would seem, from his conduct in holding the paper before his eyes, and simultaneously uttering vocal sounds, than from anything that we gather from the language he employs, that the words which we hear fall from the reader's lips, must *ipso facto* be a true counterpart of the contents of the paper, and consequently to conclude that we obtain immediate evidence of what is contained in the document by merely listening to what he says. Whereas, in reality, it depends entirely on the sincerity and good faith of the reader whether his words be identical with the terms of the document, or totally at variance with them. It is obvious that he can misrepresent them to an indefinite extent at his own good will and pleasure; and the evidence that we

(*g*) *Vide* Taylor Ev., s. 669 (603), and Post, s. 362.
(*h*) *Vide* Taylor Ev., s. 576 (516).

acquire as to the true contents of the document is in such a case, therefore, only transmitted.

196. So where a person affects to take down in writing the substance of a speech delivered in his presence, we are prone to assume from his attitude of attention, and so forth, that the characters which he traces on the paper must of needs represent, word for word, the sounds that issue from the lips of the speaker, and to take it for granted that the mere perusal of the notes or report furnishes us with immediate evidence of the matter of the speech. But here, again, it is perfectly clear that we are entirely at the mercy of our informant, the reporter, who can easily misrepresent the words that are actually spoken to any extent that he pleases.

Another instance of the same kind of misapprehension occurs also where some other person points out to us a *locus in quo*, or place where some particular event is supposed to have taken place. We are apt to assume, because the source from which we derive our information consists, mainly at least, of a visible action, that in witnessing that action we are obtaining the evidence of our own senses for the fact that the spot pointed out to us is the spot in question. But all that our own senses can tell us in such a case is, that our informant points out to us some spot. For proof of the fact that the spot he thus indicates is also the spot where the particular event in question actually occurred, we are indebted to the knowledge of our conductor, manifested either by his outward action or gesture in pointing it out, or by language accompanying that action. It is evident that he can point out to us any spot he pleases, and deceive us at his will by indicating a wrong one ; just as a man, when asked the road to London, can mislead the inquirer by turning his finger in some other direction.

197. So, the position of the hands on the face of a clock is, I fancy, very generally regarded in the light of an evidentiary fact, from which the real time of day, or place of the sun in the heavens, may be legitimately inferred. In reality, however, it is nothing else than a species of statement; for though a clock works automatically when set going, and not interfered with, its proper adjustment and accuracy depend on the voluntary act of the person who controls it. Moreover, as remarked in a previous chapter, (*i*) it is a statement of a very doubtful and questionable kind—a statement for which, generally speaking, no one in particular is responsible; which is in danger of being falsified by anybody who has access to the clock, and which is liable, moreover, to become erroneous of itself, if the clock be not carefully regulated and kept going. It is only from the coincidence of several independent clocks that we can draw any *legitimate* inference as to the time. It is worthy of notice that a clock or watch differs entirely in this respect from a sun-dial, an instrument which is completely beyond the control of the human will, and which, if once properly constructed, points out the time of day as unerringly as the sun which casts its shadow upon it.

198. It is in distinguishing between facts that are communicated to us by language, on the one hand, and facts that either actually consist in the utterance of language, or are legitimately deducible from the fact of its utterance, on the other, that most of the difficulty encountered in the application of the science of evidence to practice consists.

The true test of the distinction between immediate and transmitted evidence—between facts that are either actually perceived or legitimately inferred from others that are perceived, and facts that are only communicated

(*i*) *Vide* Ante, s. 159.

—is the question, whether, in each case, the fact which is the subject of our inquiry be, or be not, as it were, *vitiated* by passing in its course to us through the mind (*i.e.*, from the knowledge to the will) of some other rational agent.

CHAPTER XVI

EVIDENCE DIRECT AND CIRCUMSTANTIAL

199. THE next subject which demands our attention is the division of Evidence into (1) Direct, and (2) Indirect or Circumstantial. The distinction between these two modifications of proof is common alike to judicial and to natural evidence; and the designations which they have acquired in legal phraseology are equally appropriate, and possess precisely the same significance when applied to non-judicial inquiries.

200. It is necessary to premise, however, that there is an ambiguity in the terms 'circumstantial' and 'circumstance,' against which it may be well to be on our guard.

The term, circumstantial, is not applied to evidence alone; we speak also of a 'circumstantial account.' Now the circumstances which compose a circumstantial account are not by any means the same thing as the circumstances of which circumstantial evidence consists. The circumstances of a circumstantial account are, generally speaking, the details or actual components or constituent parts of the complex fact, or series of facts, which form the subject of the account or story.

But in 'Evidence' the components of a principal fact are never properly called circumstances. The circumstances of circumstantial evidence are the evidentiary facts from which the principal fact, with all its details or components, or some one or more of these details (which are themselves minor principal facts), are inferred or deduced. Where a fact formed any constituent part

of a principal fact, it would not be itself an evidentiary fact, nor would the proof of it offer an instance of circumstantial evidence. In short, the 'circumstances' of circumstantial evidence are entirely extrinsic to the principal fact with all its components or details, and form no part of it. They are, as we shall see directly, extrinsic facts which raise a fair inference or presumption of a principal fact, and not the actual details or minutiæ of which it consists.

201. To revert to direct and circumstantial evidence: The foundation of the distinction between these two phases of proof has already been suggested in the chapter on facts principal and evidentiary, (*k*) and may be stated as follows: Where the principal fact which is the subject of inquiry is itself either verified by the perceptive faculties of the Inquirer, or voluntarily communicated to him by some other person, or, in other words, is itself established either by immediate or transmitted evidence, there the proof is said to be *Direct*. Where, on the other hand, instead of the principal fact itself, some evidentiary fact, or, as it is usually styled in legal parlance, some 'circumstance,' or assemblage of evidentiary facts or circumstances is thus established, from which the principal is inferred or deduced, the evidence is then said to be *Indirect* or *Circumstantial*.

202. The expressions, 'indirect evidence,' and 'circumstantial evidence,' are to some extent convertible terms: Any evidence which was circumstantial might, without impropriety, be designated indirect, and *vice versa*. But I think there is just this amount of difference between the two: that there is at least a greater tendency to employ the word 'indirect' where the conclusion is drawn from a single evidentiary fact; and to reserve the term 'circumstantial evidence' for those cases where the minor premiss of the syllogism

(*k*) Chap. 8.

is made up of a series or assemblage of several evidentiary facts or 'circumstances.' (*l*)

203. With the operation of drawing an inference or conclusion, and the rules for correctly conducting the process so as to ensure its validity, 'Evidence,' in our sense of the term, has no direct concern—this part of the process of investigation being the special province, not of 'evidence,' but of logic or reasoning. In practice, however, this latter operation is, to a great extent, inseparable from evidence. (*m*) For among the numerous questions of fact which we are called on to solve in the course of our lives, we encounter many for the elucidation of which no direct evidence is procurable, but which may, nevertheless, be decided with a sufficient approach to certainty by means of a deduction or inference drawn from other facts more amenable to proof. This is more particularly the case in establishing the proof of crimes or offences—acts which, for obvious reasons, are usually committed in secret. For instance, if my servant steals my purse, he is not likely to do so in my presence, or in the presence of any other member of my household. He watches for an opportunity when no human eye is upon him, and then commits the theft. Therefore, I can obtain no direct evidence, either immediate or transmitted, of the act itself. But I may be able to procure ample proof of evidentiary facts. For instance, I find my purse missing from a drawer where I had left it safely locked up: I find this drawer unlocked: On searching the culprit, I find the missing purse in his possession: I also find in his pocket a key which fits the lock of the drawer: and so on. From these evidentiary facts I have no difficulty in arriving at the conclusion that he is the person who has committed the crime.

(*l*) *Vide* Ante, s. 151. (*m*) *Vide* Ante, s. 17.

Thus, although the inferring process forms no proper part of the art of Evidence in the restricted sense in which we view it, yet the two are to a great extent inseparable from each other. I have, therefore, in a previous chapter, attempted to give a brief outline of the operation of drawing an inference; and it is consequently unnecessary in this place to do more than refer the reader to the chapter in question. (*n*)

204. It should be observed, however, that the transit from the evidentiary fact — the fact *i.e.* actually established by direct evidence—to the principal one, the subject of inquiry, may, and frequently does, consist of more than one step, including one or more intermediate evidentiary facts, and involving in reality more than one inference. For instance, a man has been stabbed: Another man is found whose clothes appear to have been recently washed in certain places. From this circumstance it is inferred that these spots were previously stained with blood: from which latter fact it is inferred that this blood was the blood of the wounded man: from which it is finally inferred that the wearer of the clothes is the person who inflicted the wounds.

Or, again, my orchard has been robbed. I find there the recent impression of a man's boot, which is subsequently found to correspond in shape with a boot worn by a neighbour: from this correspondence I infer that it was his boot that made the footmark in question: from this I infer that the wearer has been in my orchard: from which last fact I ultimately infer that he is the person who has stolen my apples. This is what is properly called a *chain* of circumstantial evidence; each step introduces a fresh inference, and resembles an additional link, which has a tendency to weaken the chain, and to enfeeble the connection

(*n*) Ante, i., chap. 9.

between the two extremes—the original evidentiary, and the ultimate principal fact. (*o*) For our purpose, however, it makes no practical difference whether we regard such a chain as one single inference, or as a series of inferences; the only material question being, what the strength is of the total resulting inference by which the two extremes are connected.

205. It is but seldom, however, that a principal fact can be satisfactorily inferred, whether mediately or immediately, from a single evidentiary fact or circumstance. (*p*) Nevertheless, as I have observed in a previous chapter, (*q*) exceptions to this do occur even in judicial matters.

For instance, the felonious receipt of stolen goods is often considered to be sufficiently established by proof of the single evidentiary fact of recent possession. (*r*) But, as previously remarked, (*s*) in the vast majority of cases the principal fact can only be safely inferred from an assemblage or coincidence of several evidentiary facts, each connected by a separate inference with the principal. Such an assemblage of evidentiary facts is often, but improperly, called a *chain* of circumstantial evidence. (*t*) Whereas it rather resembles a web, or network, or tissue of circumstances: Here every additional link strengthens the—so-called—chain, and if the evidentiary facts are independent of each other, each of them adds a fresh rivet to it in the shape of a coincidence. (*u*)

Thus, for example, a house has been robbed: The goods stolen from it are found in the possession of A: In addition to this, some article belonging to A is found

(*o*) *Vide* Dumont Ev., 181; Bentham Ev., iii. 222; Mill Logic, ii. 147, P. 391b, and Post, s. 270.

(*p*) *Vide* Ante, s. 151. (*q*) Ante, s. 151. (*r*) Ante, s. 151.

(*s*) Ante, s. 151. (*t*) Bentham, iii. 223, note, and Best Ev., 370.

(*u*) Ante, s. 164.

in the house immediately after the robbery. Not only does each of these two circumstances strengthen the presumption of A's guilt by its own added weight, but the coincidence between them also contributes, as it were, a fresh evidentiary fact to strengthen the aggregate inference. (*v*) This kind of chain offers a striking contrast to a chain of evidentiary facts properly so called. The difference between the two cases may be clearly illustrated by an analogous instance borrowed from transmitted evidence. (*w*) Let us suppose A, B, and C to be three witnesses: If A informs me, that B told him, that C told him, that he was the spectator of some occurrence which forms the subject of inquiry, this resembles the first kind of chain; the evidence of the event in question being weakened by the addition of each intermediate link or witness, which introduces a fresh chance or danger of falsehood or misapprehension.

On the other hand, if A, B, and C, each and all inform me that they witnessed the same occurrence, this is an illustration of a web or chain of the second sort: Every fresh witness strengthens the chain; and if the witnesses are independent of each other, *i.e.*, if there be no connivance between them, the *coincidence* in the story of each additional witness adds a fresh rivet to the total of proof.

206. To revert, however, to evidentiary facts: 'A number of circumstances,' as Mr. Best remarks, (*x*) 'each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact they tend to establish.' 'Not to speak of greater numbers; even *two* articles of circumstantial evidence, though each taken by itself weigh but as a feather,—join them together, you will

(*v*) *Vide* Ante, s. 164. (*w*) *Vide* Mill Logic, ii. 147, P. 391b.
(*x*) Best Ev., s. 297.

find them pressing on a delinquent with the weight of a millstone.' (*y*) But it must not be forgotten that the evidentiary facts must all be consistent with each other. (*z*) A single incompatible evidentiary fact may, if sufficiently well established, and connected by a sufficiently strong inference with the principal, avail to subvert the strongest chain or tissue of circumstantial evidence; for the truth must have been consistent with *all* the circumstances. (*a*) An alibi in criminal cases affords a striking illustration of this: The strongest case of circumstantial evidence may be overthrown by an alibi, if only the alibi itself be established by sufficient evidence.

It is hardly necessary to remark that *direct* evidence may also unite or coincide with circumstantial, and that the two combined may furnish satisfactory proof, which either alone would fail to supply.

207. The precise boundary line between direct and circumstantial evidence is by no means well defined; the transition from one to the other being almost imperceptible. Many inferences are so obvious that we draw them almost unconsciously. Indeed, as Mr. Mill points out, (*b*) there is scarcely any act of supposed perception, in which somewhat of inference is not involved. But happily in such cases the question, whether the evidence be rightly classed as direct or as circumstantial, is for practical purposes wholly immaterial. If the inference be of so shadowy a nature as to leave us in doubt whether there be any inference at all involved in the matter, its presence can scarcely exercise any detrimental influence on the proving power of the evidence. The proof of the evidentiary fact must in such a case be practically

(*y*) *Vide* Bentham Jud. Ev., iii. 242.
(*z*) *Vide* Best Ev., ss. 298 and 451. (*a*) *Vide* Best Ev., s. 451.
(*b*) *Vide* Mill Logic, ii. 202 and *seq.*, P. 420a.

equivalent to the proof of the principal. So far, however, as aught of inference is involved in the proving process, so far is the evidence properly classed as Circumstantial.

CHAPTER XVII

ON THE COMPARATIVE FORCE OF DIRECT AND CIRCUMSTANTIAL EVIDENCE

208. Of the relative proving power of direct and circumstantial evidence, regarded from an abstract point of view, there ought not to be two opinions. Given the same *quantity* of evidence in either case, and circumstantial must of necessity be less cogent than direct evidence in exact proportion as the inference, inseparable from the former mode of proof, is uncertain. (*c*) And since an inference, properly so called, must always, as we have seen, (*d*) involve more or less of uncertainty; it follows that circumstantial evidence must, theoretically speaking, be less trustworthy than direct. In order to illustrate this, let us first suppose a case of direct evidence, in which I am myself the Inquirer, and where the vehicle of proof is my own perception or faculty of sight. I see A shoot at B, and kill him on the spot: In this case it is obvious that I can scarcely entertain any doubt whatever of the fact that A has killed B. Then let us imagine a case of circumstantial evidence of the same fact, where I am still the Inquirer, and the vehicle of proof is the same as before, viz., my own eyesight. I see B lying dead on the ground, with a gunshot wound visible in his forehead: At the same time I see A hurrying from the spot with a gun in his hand, which he drops in his haste: On examining

(*c*) *Vide* Bentham Jud. Ev., iii. 249, and Dumont Ev., 184.
(*d*) *Vide* Ante, ss. 143 and 151.

this gun, I find that it appears to have been recently discharged. From these circumstances I naturally infer the same fact that I actually beheld in the former case, viz., the fact that A has killed B: And I am probably right in my conclusion; but still it is at least *possible* that I may be mistaken: Of the facts which come under my own observation in either case I can entertain no real doubt whatever; but in the second case I may be deceived in drawing the conclusion; while in the first case there is no conclusion to draw.

209. And yet we should scarcely be justified in asserting that in practice circumstantial evidence does not yield proof to the full as satisfactory as direct. Indeed, it has even been ably argued that circumstantial evidence is upon the whole superior to the other. (*e*) But this is merely because in what we may call the '*method* circumstantial' the *quantity* of evidence not only may be, but also very generally is, much greater than in the 'method direct.' This characteristic feature of the circumstantial method of proof is principally due to two causes. First, that the *number* of evidentiary facts or circumstances, tending to the proof of a single principal fact, is, or at least may be, almost unlimited. The principal fact itself is a solitary fact: The circumstances which surround it, and which may possibly become evidentiary facts, are legion. Secondly, that evidentiary facts are not only prone to multiply, but also generally consist of, or at least include, some of those permanent or continuing facts which are commonly distinguished by the name of *States*: these being, indeed, usually selected to do duty as evidentiary facts on the very ground of their permanency; while the place of the principal fact, the actual subject of inquiry, is almost invariably filled by some matter of that transient order, which falls within the description of an act or event, and

(*e*) *Vide* Paley Moral Phil., Bk. vi., chap. 9, p. 495, and Best Ev., s. 295.

which, owing to its evanescent nature, will usually be found to present to the Inquirer the aspect of a terminated or bygone fact. (*f*) Thus, in the case that we have just been considering, the actual infliction of the wound is a fact of the most transient kind, and from its fleeting character affords but the very slightest opportunity for the exercise of the perceptive powers of an observer. On the other hand, the existence and state of the corpse, and of the deadly weapon, and the like, are permanent facts, which for that reason are capable of the most absolute or conclusive proof by immediate or other evidence.

210. It is this capacity for absolute proof, doubtless, which has given rise to the popular saying that 'Circumstances cannot lie'; (*g*) a false position indeed, if propounded in the sense that an inference in general, or that any given inference in particular, must of necessity be correct. There can be little doubt that the dictum in question has originated in an improper application of the Truth to which I have just adverted, viz., that evidentiary facts, being in general facts of a permanent kind, are susceptible, as a rule, of the most convincing proof. It is in judicial matters, however, than the diversity, in this particular, between evidentiary and principal facts makes itself most distinctly felt; for while we can seldom, in a court of justice, obtain anything better than *testimony* to establish the principal fact itself, its attendant circumstances are often to a considerable extent capable of being manifested to the actual senses of the tribunal.

211. Attempts have frequently been made to institute a comparison between the practical results of the direct and circumstantial methods of proof. Any such undertaking, however, appears to me an endless and

(*f*) *Vide* Ante, s. 120.

(*g*) *Vide* Paley Moral Phil., Bk. vi., chap. 9, p. 495, and Best Ev., s. 469; also Taylor Ev., s. 66 (57).

unprofitable task. It involves, among other things, a consideration of the relative effect of *transmitted* direct, and of *immediate* circumstantial evidence; in other words, an estimation of the comparative value of the evidence, where the principal fact is established by the direct *testimony* of a witness, and where it is *inferred* from other facts falling under the personal observation of the inquirer himself.

Now to me it has always appeared equally futile to attempt to gauge by any fixed scale either the credit of a witness or the force of an inference;—to measure with any precision either the veracity of the one or the probability of the other. The attempt, therefore, to institute a satisfactory general comparison between matters, in which *both* are involved, seems to me to be wholly impracticable and Utopian. The particular result must depend in each case on the *quantity* of evidence procurable. If there be *no* direct evidence forthcoming, it is obvious that any circumstantial evidence that can be obtained is the best in the particular instance: And if some of each kind be procurable, it is obvious that the existence of the one is no sufficient ground for discarding the other; unless, indeed, the direct evidence be so copious and overwhelming as to need no corroboration. But this at least may be safely asserted, that in *principle* the proving power of direct evidence must ever be greater than the proving power of circumstantial, by reason of the inference which the latter involves.

212. The fairest way of testing the relative force, in the abstract, of the direct and circumstantial methods of proof is to take a case of circumstantial evidence, and to contrast our assurance of the truth of the evidentiary fact, or facts, with our assurance of the truth of the principal fact which we infer from them. Thus, suppose that I see a mark resembling the impression of a human foot in the soil of my garden: I infer that some one has

been trespassing there. But of which fact am I best assured—of the existence and shape of the mark; or of the former presence of the trespasser in my garden?—of the *evidentiary* fact; or of the principal? No one, I conceive, would contend that the proof of the evidentiary fact was not the more cogent of the two. And of these, the evidentiary fact—the existence, etc., of the foot-mark—is established by *direct* evidence; the principal one—the presence of the supposed trespasser—by circumstantial.

Finally, therefore, whatever may be the *quantity* of evidence usually procurable in the circumstantial mode of proof, there can be no question that in *quality* it is essentially inferior to direct.

CHAPTER XVIII

OF NEGATIVE EVIDENCE

213. THERE is a phase of Evidence called 'Negative,' which seems to demand some notice.

Negative evidence differs from other, or, as it may be called, *positive* evidence, only in being employed in the proof of a negative instead of a positive fact; and since a negative fact is nothing more than the non-existence or absence of a positive one, (*h*) negative evidence may also be described as the disproof of a fact.

The disproof of a fact will generally be found to present peculiar difficulty,—a difficulty which arises from the *indefinite* quality of the negative (*i*)—a quality which renders it in general incapable of being perceived. There are, indeed, as we have previously remarked, (*j*) some negative facts of an exceptional kind, which, if not actually perceptible, are so nearly so that the consciousness of them which we may obtain is scarcely distinguishable from perception itself. But, as a general rule, a negative fact is not perceptible, and therefore, since all evidence is ultimately referable to perception, not capable of direct proof.

In short, we cannot, in general, disprove a fact directly, though we may be able to prove some other positive fact, or series of positive facts, which shall be inconsistent with it, and from which its absence or non-existence may be inferred. It is true that we often assert to each other our knowledge of the absence of a

(*h*) *Vide* Bentham, i. 50. (*i*) Ante, s. 103, and Best, s. 270.
(*j*) Ante, s. 105.

fact; but if we examine the real source of our knowledge in these cases, we shall find that what we really know is, not actually and directly the absence of the fact, but the presence of some other fact or facts, which are incompatible with it.

214. Hence it ensues that though a negative fact may frequently be established by the direct testimony of a witness, yet the evidence, though in some sense *direct*, is not obtained by actual perception. In such cases, if the inquirer himself does not infer, the witness, his informant, at least must have inferred. Negative evidence, therefore, is always in some sort circumstantial or indirect, and the difficulty of proving the negative lies in discovering a fact or series of facts inconsistent with the fact which we are seeking to disprove, from which it may be possible to infer its absence with anything like an approach to certainty. This may be feasible enough where, as is sometimes the case, we comprehend within the range of our senses the whole situation,—the whole time and place to which the negative fact is limited. But when this is not the case, when the negative expression of fact, which we are seeking to prove, outreaches, so to speak, the compass of our perceptive faculties, the task of finding incompatible facts sufficient to serve our purpose may become extremely difficult, or even hopeless from its infinity. Such incompatible facts are not at all of necessity indicated or suggested by the negative expression of fact itself; and, moreover, it may possibly require an indefinite number of them to raise a sufficient inference of the non-existence of the fact in question. Thus the affirmative expression, 'The King was in London yesterday morning,' asserts a definite and specific fact, obviously capable of being verified by direct perception at the time; but the proposition, 'The King was not in London yesterday morning,' asserts little or nothing that

is definite—nothing that can be perceived—but merely suggests the King's existence and presence somewhere else, without specifying where ; and we may be driven to explore the whole world in order to discover in what other place he was at the time specified, with a view to disprove by inference his presence in London.

215. Where, however, the fact which we are seeking to disprove, the negation or contradiction of which, in other words, we are called on to establish, is fully stated, with all its incidents of *time* and *place*, (*k*) it may not be difficult, in many instances, to discover a fact, or series of facts, from which, when proved, its non-existence may be sufficiently inferred. And it is to be observed that time and place, whether they be expressed or no, are in reality necessary ingredients in every fact. (*l*) Every existing fact must comprehend a certain period of time, and must also occupy a certain part of space. When, therefore, we are fully informed as to these incidents, our search after inconsistent facts is brought within a comparatively narrow compass. But this is not always the case. We are frequently left in ignorance of these incidents. The expression of fact—the language in which the fact is enuntiated or clothed—is silent on these points, or on one or other of them. The fact, in short, which we are called on to disprove, is incompletely stated and defined, and our search for inconsistent facts takes, in consequence, a far wider range, and may very possibly be hopeless from its infinity. Thus, the proposition, 'He died intestate,' is a negative expression of fact, the contradictory of the expression, 'He made a will.' But it is the contradictory, not of the fact that he made a will at any particular time, but of the fact that he *ever* made a will—ever, that is to say, in his lifetime. But this assertion, though announced in a single expression of fact, comprises in reality an infinite series

(*k*) *Vide* Best Ev., s. 270, p. 373. (*l*) Ante, s. 82.

of successive positive facts, each and all of which we are called on to disprove, in order to establish the negative proposition that 'he died intestate.' We may be called on to prove not merely that he did not make a will at one particular juncture, but that he did not do so at each and every successive period of his life of sufficient duration for the purpose. This we might possibly have no means of establishing, except by showing that he was otherwise occupied on each and every such occasion, which would involve the proof of an almost infinite series of incompatible facts.

216. Hence arises the difficulty that attaches to the proof of expressions of fact which contain the negations 'never,' 'nowhere,' and the like. Such expressions are in truth the negation or denial, not of one single positive fact, but of an indefinite series of positive facts.

From which it appears that a negative fact, though under certain conditions it may be established by the direct assertion of a witness, is at bottom unsusceptible of *direct* proof. It can only be established by proof of evidentiary facts or circumstances, and possibly only by proof of an infinite series of them.

CHAPTER XIX

BENTHAM'S DIVISIONS OF EVIDENCE

217. WITH negative evidence our list of the scientific modifications of natural proof is complete; but before finally quitting the subject it is necessary to advert to certain of the numerous species of evidence enumerated by Bentham, which might otherwise appear to clash with and mar the simplicity of the arrangement that we have prescribed for ourselves.

Bentham does in fact enumerate, in all, *nine* principal heads or divisions of evidence, (*m*) not to mention various subdivisions or branches which he afterwards speaks of as subordinate to these. The divisions in question may be briefly recapitulated as follows, viz. :

(1) Real, and Personal evidence.

(2) Voluntary, and Involuntary personal evidence.

(3) Depositional, Testimonial, and Documentary evidence.

(4) Oral, and Scriptitious depositional testimony.

(5) Direct, and Circumstantial evidence.

(6) Ordinary, and Makeshift evidence.

(7) Preappointed, and Unpreappointed evidence.

(8) Original, and Unoriginal evidence ; and

(9) Evidence *ab intra*, and Evidence *ab extra ;* which last, though not included in the catalogue, is mentioned previously, as being a division of Evidence in general, or of natural evidence, as distinguished from judicial.

218. Of these nine divisions we have ourselves already adopted two, namely, (1) Evidence *ab intra* and

(*m*) *Vide* Bentham Jud. Ev., Bk. i., chap. 4, p. 51 and *seq.*

ab extra, corresponding respectively to our Immediate and transmitted evidence; and (2) Direct and circumstantial evidence. The divisions which are severally numbered 3, 4, and 6 in Bentham's list we do not propose to deal with in this place, inasmuch as the discussion of them would occupy more space than can well be spared from a work not specially designed to operate as an exposure of Bentham's errors of classification; and since, moreover, they may all be sufficiently disposed of at a later stage of our inquiry. The remaining divisions, however, namely, those respectively numbered by Bentham 1, 2, 7, and 8, appear to demand some notice here, both for the reasons stated above, and also because they have all been recognised, and for the most part adopted by Mr. Best. (*n*) We therefore propose, before proceeding any farther, to treat them separately in the following order: namely, first, the division into Preappointed and unpreappointed; secondly, that into Real and personal, which will be found to include No. 2, or 'Voluntary and involuntary personal evidence'; and thirdly, the division into Original and unoriginal evidence.

First, then, Preappointed and Unpreappointed.

(*n*) *Vide* Best Ev., ss. 28, 29, and 31.

CHAPTER XX

EVIDENCE PREAPPOINTED AND UNPREAPPOINTED

219. BENTHAM distinguishes all Evidence as either (1) 'Preappointed,' or (2) 'Unpreappointed.' (*o*) But though this division of evidence would appear to have been originally suggested by Bentham, yet as it has been adopted by Mr. Best, whose account of it combines a concise statement of Bentham's description with his own views on the subject, we shall find it, I think, more convenient to refer to Mr. Best's account, which embodies at once the views of both these writers. 'Evidence,' says Mr. Best, then, (*p*) 'is either *pre-appointed*, otherwise called *preconstituted*, or casual.' 'Preappointed evidence,' he proceeds to say, 'is defined by Bentham, in one place, (*q*) to be where "the creation or preservation of an article of evidence has been, either to public or private minds, an object of solicitude, and thence a final cause of arrangement taken in consequence (viz., in the view of its serving to give effect to a right, or enforce an obligation, on some future contingent occasion); the evidence so created and preserved comes under the notion of *preappointed* evidence."' 'In another place,' (*r*) continues Mr. Best, 'he speaks of it as *written* evidence, created with the design of being employed on the occasion and for the purpose of some suit or cause not individually determined.' 'Under this head,' adds Mr. Best, 'come public documents, such as records, registers, etc., together with deeds, wills,

(*o*) Bentham Ev., i. 56 and ii. 435. (*p*) Best Ev., s. 31.
(*q*) Bentham Ev., ii. 435. (*r*) Bentham Jud. Ev., i. 56.

contracts, and other instruments for the facilitating of proof on future occasions, which are drawn up by individuals either in compliance with the positive requirements of law, or with a view to the convenience of themselves or others.' 'But,' observes Mr. Best, and not unreasonably, 'it is a mistake to assume that this kind of evidence must necessarily be in a *written* form. When a party about to do a deliberate act calls particular persons to witness, in order that they may be able to bear testimony to it on future occasions, their evidence is preappointed or preconstituted, as much as a deed which professes to be made *in witness* of the matters which it contains.' In which view, we may observe, the oral evidence or testimony of the subscribing witnesses to a deed or will is a good instance of unwritten, preappointed evidence. 'Any evidence,' adds Mr. Best, 'not coming under the head of "preappointed evidence," may be denominated "casual evidence."' (*s*)

220. From this account it appears obvious that this, if entitled to be regarded as a division of evidence at all, is rather a division of judicial, than of natural evidence, since the design with which preappointed evidence is created or preserved is stated to be the enforcement of rights or obligations, or its employment in a suit or cause.

But even as a division of judicial evidence, I cannot agree with Mr. Best when he asserts that 'its value has been too much overlooked'. (*t*) It is doubtless quite true that the *creation* of 'preappointed evidence' is of the utmost importance to social interests; and to secure its creation, where feasible, a most useful object of legislation; but in the first place, preappointed evidence, *when created*, differs little, if at all, as evidence, from casual. Whether the matter offered in proof of a

(*s*) Best Ev., s. 31. (*t*) Best Ev., s. 31.

given fact has been called into existence with the design of being employed to prove that fact hereafter, or without any such design, is a circumstance which does not at all affect the proving power of the evidence itself. For example, a Deed is a preappointed written instrument created by the parties for the express purpose of being afterwards used, if necessary, in a court of justice, to establish some important transaction, say, the conveyance of an estate, for instance. On the other hand, a letter containing libellous matter is a casual or 'unpreappointed' writing, created, not with the design of being used as evidence of the libel, but for the purpose of damaging the character of some particular person mentioned in it. Yet it is obvious that the power of the letter, as evidence to prove the fact of libel, is not one whit inferior to the force of the Deed as evidence to prove the conveyance.

221. Nor, in the second place, can it even be asserted with justice that the *creation* of 'preappointed evidence' has been at all neglected by our law. Deeds and other preappointed instruments have existed from time immemorial; and as a knowledge of the art of writing has gradually become more general among all classes of society, the legislature has from time to time insisted more and more upon its use in all transactions of importance; until, in the present day, the prevailing tendency seems to be rather to overrate the importance of creating preappointed evidence than to undervalue it. I say to overrate its importance, because there appears to be a growing disposition to assume that every kind of fact may be perpetuated for evidentiary purposes by framing a well authenticated written narrative or statement of it. The fallacy of this assumption will be exposed hereafter. (*u*)

Without wishing, however, to disparage in the slightest

(*u*) *Vide* Post, ii., chap. 13.

degree the uses, in its own proper sphere of 'pre-constituted evidence,' I must still maintain that the division of evidence into preappointed and unpre-appointed, if it be worthy of being regarded as a division of Evidence at all, is obviously a division, not of natural, but of judicial evidence, and not a very significant division even from a judicial point of view.

CHAPTER XXI

EVIDENCE REAL AND PERSONAL

222. BENTHAM also distinguished Evidence as (1) Real; and (2) Personal. (*v*) Here, also, as in the preceding case, and for similar reasons, we shall find it better to adopt Mr. Best's account of this division of evidence, which he states as follows: 'By real evidence,' he says, (*w*) 'is meant all evidence of which any object belonging to the class of *things* is the source, persons also being included, in respect of such properties as belong to them in common with things.' (*x*) 'This sort of evidence,' says Mr. Best, 'may be either *immediate*, where the thing comes under the cognisance of our senses, or *reported*, where its existence is related to us by others.' 'Personal evidence,' he adds, 'is that which is afforded by a human agent; either in the way of discourse, or by voluntary signs.' 'Evidence,' he goes on to say, 'supplied by observation of *involuntary* changes of countenance and deportment, comes under the head of real evidence.' For this description of real and personal evidence Mr. Best refers the reader to the authority of Bentham. (*y*) But there is, as he himself intimates in a note, this discrepancy between the two—that whereas Bentham divides personal evidence into *voluntary* and *involuntary*, under which last he instances 'all involuntary modifications of which the deportment, and all involuntary changes of which the countenance

(*v*) Bentham Jud. Ev., i. 53, 54, and iii. 26 and 33.
(*w*) Best Ev., s. 28. (*x*) Bentham Jud. Ev., i. 53 and iii. 26.
(*y*) Bentham Jud. Ev., i. 53, and iii. 26.

is susceptible.' (*z*) Mr. Best, as we have seen, ranks 'evidence supplied by observation of involuntary changes of countenance and deportment' under the head of real evidence, and defines personal evidence as that supplied by voluntary acts only. (*a*)

223. So far as this last distinction is concerned, there can be no doubt that Mr. Best's account is the more satisfactory of the two; but none the less does it afford a striking illustration of the confusion engendered by the failure to distinguish between the *quid probandum* and the *modus probandi*;—between the fact the subject-matter of proof and the means of ascertaining it, or Evidence. Facts, as we have seen, are either *physical* or *psychological*; the former relating to *things* or material substances, including the outward persons and movements of animate beings; the latter having their seat in the mind only. (*b*) On the other hand, *Evidence*, the means or instrument by which we ascertain facts of either kind, consists in the exercise of the senses; is referable to the perceptive faculties either of the inquirer himself, or to those of some other person who voluntarily manifests to him his own knowledge of the fact in question.

Now it is by no means clear to which of these two distinctions the present division is intended to relate. The description of *real* evidence, as 'all evidence of which any object belonging to the class of *things* is the source,' would seem to point at the distinction between a physical and a psychological fact, and to be intended to define real evidence as the proof of a physical fact, as contradistinguished from the proof of a *psychological* one. The description of *personal* evidence, on the other hand, as 'that which is afforded by a human agent; either in the way of discourse, or by voluntary signs,' appears to

(*z*) Bentham Ev., i. 54. (*a*) Best Ev., s. 28.
(*b*) *Vide* Ante, s. 109.

point, not at the proof of a psychological fact in particular, but at the proof of any fact, whether physical or psychological, by means of a *communication* or voluntary manifestation of knowledge. In short, it precisely delineates that species of evidence which we have designated by the epithet of 'transmitted,' and which has been previously described by Bentham as 'Evidence *ab extra*.' (*c*)

224. If this be the true meaning of the term *personal evidence*—and it is difficult to see what other meaning the description admits of—then *Real* evidence, if it be intended to stand for the complement of personal, or, in other words, to include all evidence that is *not personal*, should be described, not as 'all evidence of which any object belonging to the class of things is the source,' but as the evidence of immediate perception exercised by the inquirer upon the thing, or rather upon the fact, the attribute of the thing, itself; which phase of proof has been previously described by Bentham under the name of 'evidence *ab intra*, (*d*) and which we ourselves have hitherto distinguished by the title of *Immediate evidence*.

This is in truth the only rational explanation of the term 'Real,' as applied to evidence, and will always, I believe, be found to lurk at the root of the matter, however dimly the truth may be apprehended by those writers who have undertaken to define or expound its meaning. In confirmation of this view, let us examine an instance of real evidence cited by Mr. Best himself in a subsequent page of his work. (*e*) 'Where an offence,' he says, 'or contempt is committed in presence of a tribunal, it has direct real evidence of the fact.' In this I perfectly concur. It has direct real evidence. But why? Not certainly because 'any object belonging to the class of *things* is the source of the evidence,' for here

(*c*) Bentham Jud. Ev., i. 51 and 52.
(*d*) Bentham Ev., i. 51 and 52. (*e*) Best Ev., s. 196.

the fact in question is the act of a *person*—the voluntary act of an animate being, involving, as we have seen, (*f*) a psychological fact; but the evidence is real because the fact or act is itself manifested to the perceptive faculties of the tribunal, which in judicial investigations occupies, it may be remembered, (*g*) the place of the Inquirer or recipient of the evidence.

225. From this it follows that what Mr. Best, under Bentham's auspices, calls 'Real reported evidence' (*h*) is not *real* evidence at all, but *transmitted*, or rather a particular phase of transmitted evidence. What they both had in their minds when speaking of real reported evidence was, I have little doubt, the transmitted or reported evidence of those continuing facts or *states*, which from their permanent character either are, or might under more favourable circumstances possibly become, capable of being manifested to the actual senses of a tribunal. But Evidence is none the less 'transmitted,' none the more real or immediate, merely because the fact with which it has to deal is capable of being manifested, and might possibly have been manifested, to the perceptions of the inquirer, unless it actually be so manifested. For it is not the quality of the *fact* which is the subject of proof, that must determine how evidence should be classed, but the nature of the *means* employed to prove it.

Thus, as we have just seen, even a human action may, under exceptional circumstances, become the subject of direct real evidence in a court of law. Moreover, if the commission of an offence or contempt in the presence of a tribunal affords real evidence of that offence, surely when any other offence is committed, or any other act performed in the presence of a *witness*, and by him reported or communicated to the court, it

(*f*) *Vide* Ante, s. 109; Bentham Ev., i. 46; and Mill Logic, i. 71, P. 35a.
(*g*) *Vide* Ante, s. 182. (*h*) *Vide* Best Ev., ss. 28 and 198.

must follow that his testimony can be nothing else than 'real reported evidence,' as it is defined by those two writers; and if this be so, then in no conceivable respect does their real reported evidence differ, either from *Personal* evidence in general, as they describe it, or from what we prefer to designate transmitted evidence; since it appears that it does not of necessity differ from these last even as regards the nature of the fact with which it has to deal.

226. In short, real reported evidence, as distinguished from 'personal,' from Bentham's own 'evidence *ab extra*,' or from our 'transmitted evidence,' is a mere chimera originating in the false view taken of real evidence itself. For the truth is that real evidence differs from personal or transmitted, not in the nature of the fact, whether conversant about things or about persons — whether physical or psychological — whether transient or permanent — whether state or event — which forms the subject of investigation, but in the mode in which that fact is proved or laid before the tribunal. It is the evidence obtained by the court through the mere exercise of its own perceptive faculties: while 'personal,' as defined by Mr. Best, is the evidence acquired through the perceptions of other persons or *witnesses*, who report or communicate their experience to the tribunal. The phrase, 'personal evidence,' however, appears to me an objectionable one, especially when used in connection with natural proof, since it would seem to imply the personal presence of the narrator, or percipient of the fact in question, and I have therefore preferred in this part of the present work to use the expression 'transmitted' for the purpose of designating this species of evidence. It is not to the name, however, if properly applied, that I wish to take exception. What I am especially anxious to insist upon is this: that the division of Evidence into real

and personal, except so far as those terms may be taken respectively to coincide with 'immediate' and 'transmitted,' is entirely imaginary and delusive.

227. It is much to be regretted that Bentham, having, in the difference between evidence *ab intra* and evidence *ab extra*, struck the very keynote, as it were, of Evidence, should, instead of adhering to and following out that scientific division of proof, have abandoned it immediately in favour of the present fallacious distinction.

For this distorted view of real evidence, as the evidence of *things*, is the first false step, which has inaugurated a long train of errors in the theory of proof. Among other misapprehensions, it has contributed largely to increase that confusion between real and circumstantial evidence to which we have already had occasion to advert. (*i*) For inasmuch as the acts of mankind, which are among the most transient of facts, generally form the actual questions in issue, or *principal* facts in judicial inquiries, it follows that those continuing facts or states of *things*, which, though not, as supposed, the *invariable source*, are certainly by far the *most usual subject-matter* of real evidence, can only, if relevant at all, come in question indirectly, and thus assume, as a rule, the aspect of *evidentiary facts* or circumstances in such investigations.

228. The result of this is, that real evidence is constantly spoken of in our books as if it were a species of indirect proof, and Bentham even goes so far as to assert expressly that *all* real evidence is circumstantial. (*j*) Whereas the truth of the matter is, that the coexistence of those properties which render evidence real with those which make it circumstantial is not

(*i*) *Vide* Ante, s. 183.

(*j*) Bentham Jud. Ev., i. 55, and iii. 33, and Ante, s. 183, and Dumont Ev., 13 and 143.

necessary or essential, but accidental only. Real evidence is neither of necessity employed only in the proof of permanent facts or *states*, for we have just seen that an offence or contempt of court may be established by real evidence; nor, on the other hand, is a continuing fact necessarily an evidentiary one. It is quite possible for a fact of that permanent order which is peculiarly capable of being manifested to the senses of a judicial tribunal, to be directly in issue, if not as the whole issue, at least as a *component* part of it. For example, the fact of *pregnancy* not infrequently comes in question in the trial of a woman on a capital charge, and is usually proved by the inspection of the person of the prisoner by the tribunal itself, as represented by a jury of matrons impanelled for the purpose. (*k*) So also formerly on an appeal of mayhem the court would in some cases inspect the wound, in order to see if it were mayhem or not. (*l*). Nay, more, it will be one of the principal objects of the present work to show that even in judicial investigations the operation of *direct* real or immediate evidence is much more extensive than is generally believed or understood. (*m*)

229. To revert, however, to the division of evidence into real and personal: The expression 'real' may be a very useful equivalent in a judicial aspect for our 'immediate' evidence. The term 'personal,' however, is not so free from objection as a substitute, even in a legal sense, for our 'transmitted.' But, as before observed, the division itself of evidence into real and personal, except so far as those terms may be taken respectively to coincide with immediate and transmitted, is at once unsound and superfluous.

(*k*) *Vide* Taylor Ev., s. 554 (498). (*l*) Best Ev., s. 196.
(*m*) Post, s. 264, and ii., chap 6.

CHAPTER XXII

EVIDENCE ORIGINAL AND UNORIGINAL

230. THE last of Bentham's divisions of Evidence, to which we shall have occasion here to refer, is that into (1) *Original;* and (2) *Unoriginal*, (*n*) or, as Mr. Best also styles it, *Derivative* or *Secondhand* evidence. (*o*)

Now it cannot be denied that there is a certain amount of plausibility about this division, because it is quite true that Evidence is original and unoriginal, in the sense that all evidence is more or less original, or more or less derivative. For every 'piece of evidence,' or mode of establishing a fact, is, when compared with any other mode of proving the same fact, either more original, or less original than the latter, or exactly on a par with it in point of originality.

But when we come to regard the originality of proof as the foundation of a scientific division of Evidence, we become at once conscious of the difficulty of drawing the line between what is original and what is not so. For in a natural point of view no evidence can be said to be absolutely original, except the evidence acquired by direct perception—evidence which is neither transmitted nor circumstantial—evidence which is at once immediate and direct—where the inquirer is himself the percipient of the principal fact to which his inquiries are directed. As compared with this, all other evidence is more or less derivative; and since, as Mr. Mill points

(*n*) *Vide* Bentham Ev., i. 57, and iii. 396 and 434, and *seq.*

(*o*) Best Ev., ss. 29 and 492.

out, (*p*) 'there is scarcely any act of supposed perception in which somewhat of inference is not involved,' it follows that very little even of what passes for immediate direct evidence can be said in an unqualified sense to be absolutely original.

231. Waiving this last objection, however, and accepting as direct evidence all that is commonly regarded in that light, it is not easy to see what practical advantage would be gained by thus dividing evidence. For if we restricted ourselves to the use of evidence original in this sense, we should have but little knowledge of facts to guide us. A very small part only of what we know—of the knowledge upon which we regulate our conduct—is derived from our own personal observation. We are absolutely compelled, even in the ordinary avocations of life, to rely and to act, not only upon knowledge acquired by reasoning and inference, but also upon information obtained from our fellow-men. And if this holds good of the knowledge obtained by ordinary individuals, still more true is it, as we shall see hereafter, (*q*) of the proof of facts laid before judicial tribunals. And accordingly we find that Bentham does not fix the standard of originality in evidence so high as this. He describes evidence as original, wherever the 'fact in question' (by which I presume he means, not necessarily the *ultimate* subject of inquiry, but the fact, whether it be a principal or an evidentiary one, that forms the actual subject-matter of proof) is transmitted to the inquirer by the percipient of the fact himself.

Unoriginal evidence, on the other hand, he defines to be where the 'fact in question' is not transmitted to the inquirer by the percipient himself, but by some other, or intermediate person. (*r*) Thus, according to Bentham, original evidence need be neither direct nor immediate,

(*p*) Mill Logic, ii. 202 and *seq.*, P. 420a.
(*q*) *Vide* Post, s. 245. (*r*) *Vide* Bentham Ev., i. 57.

so only that the fact which is the actual subject of proof, or *proximate* fact, be communicated to the inquirer by the percipient.

232. Now though the line which he thus draws is an arbitrary one—though the epithet, 'original,' as applied to transmitted evidence of any kind, is to some extent a misnomer—still so far he is at least consistent;—his 'original evidence' does reach a certain standard of originality;—whether direct or indirect, it is at the worst transmitted evidence at first hand; while all that is inferior to it is unoriginal.

But when in a subsequent page of his work (*s*) he comes to enumerate the different modifications of *unoriginal* evidence, he includes under this latter head several phases of proof which fully satisfy his previous definition of *original* evidence. Of the five forms or ramifications of unoriginal evidence which he there enumerates, three will be found on examination to be neither more nor less than transmitted evidence at first hand. The species to which I refer are: '(2) Supposed written, delivered through written': '(4) Supposed written, delivered through oral': and '(5) Reported real evidence.'

233. Let us in the first place consider the two former, viz.: Supposed written evidence delivered through written, or through oral.

What Bentham intends by the epithet, 'supposed,' is not very clear, except it be to imply that the proposed mode of proof is unsatisfactory. And as any evidence, or rather, to speak more accurately, any fact proposed for proof, may be fairly said to be 'supposed,' until it has actually been proved to the satisfaction of the inquirer, we will beg leave to omit the word 'supposed,' notwithstanding that Bentham declares it to be 'an indispensable adjunct.' (*t*) These two phases of proof

(*s*) Bentham Ev., iii. 396. (*t*) Bentham Ev., iii. 396.

then resolve themselves into, Written evidence delivered (or transmitted to the inquirer) by writing or by word of mouth; in other words, by a written or a verbal communication or narrative: In short, these two phases of proof are reducible to written evidence *transmitted* to the inquirer.

Bentham, doubtless, would have us to believe that in these cases there are *two* steps from the percipient to the inquirer; whereas the truth of the matter is that, generally speaking, there is in reality only one. If, indeed, by 'written evidence' is meant a written account or narrative of some extrinsic fact,—*i.e.*, of some ulterior fact which forms the actual subject of inquiry,—then certainly the fact in question is not transmitted to the inquirer by the percipient himself. The original writer in such a case may be the actual percipient, but not so the person by whom the contents of the writing are transmitted to the Inquirer.

But, as a general rule, what is meant by the term, 'written evidence,' is the proof of the contents of a writing, of which the substance or purport constitutes the very fact in question. Now it must be obvious that any person who reads such a writing becomes *ipso facto* a percipient of the *fact*, and obtains thereby real or immediate evidence of it.

234. But, as it may perhaps make the matter clearer to put it into a more tangible shape, we will suppose the subject of inquiry to be a libel contained in a letter. The publication of a libel, it is to be observed, is a complex or compound fact, (*u*) an important part or component of which is the nature or character of the libel; a fact which, though it does not comprehend the whole field of inquiry, is, nevertheless, a necessary ingredient in, or component part of, the libel, (*v*) and, therefore, a principal fact in the investigation. Now

(*u*) Ante, s. 123. (*v*) *Vide* Post, s. 296.

this fact, which involves the question whether or no the terms of the writing be libellous at all, and if libellous, in what manner, and to what extent they are so, is actually contained in the letter itself, and *perceived* by any one who happens to read it. If, then, the terms of the letter be communicated (whether orally, or by means of writing) to the inquirer by a person who has himself seen and perused it, the fact itself is in that case transmitted to the inquirer by the actual percipient. Both these cases of so-called *unoriginal* evidence, therefore, are found, when analysed, to fulfil all the conditions of Original.

Of 'Reported real evidence' I have spoken in the preceding chapter, (*w*) where I attempted to show that *Real* evidence means neither more nor less than the evidence acquired by perception. If, therefore, the fact be reported to the inquirer by a person who has obtained real evidence of it, it is reported or transmitted to him by the percipient himself.

Out of Bentham's five phases or examples of unoriginal evidence, therefore, we find that three are indistinguishable from original evidence, as he has himself previously defined it.

235. While speaking of Bentham, however, it seems necessary to advert to a circumstance that occasions some slight awkwardness in dealing with this division of evidence, which is this—that Bentham, when first alluding to it, speaks of it as a division of *testimonial* evidence, (*x*) a view which he afterwards appears entirely to abandon; since, when enumerating at a later page (*y*) the modification of which unoriginal evidence is susceptible, he mentions two as being delivered to the judge or inquirer by *writing*. Now, if evidence be delivered to a tribunal by writing, it can hardly be properly said to

(*w*) Ante, s. 225.

(*x*) Bentham Ev., i. 57. (*y*) *Ibid.*, iii. 396.

be *testimonial*. I have therefore felt justified in treating it as it is more conveniently dealt with, namely, as a division of Evidence at large, or of *all* evidence: a mode of treatment which makes little change in the division beyond this—that real or immediate evidence, as well as transmitted evidence of the higher order, is included under the head of original.

236. And this appears also to be the view of the subject taken by Mr. Best. For Mr. Best, too, adopts the division of evidence into original and unoriginal or derivative, as well as Bentham's general account of it. Moreover, he states that this division 'deserves particular attention, both for its own sake, and because it will be found to run through the whole system of English forensic procedure.' (*z*) In the same sense in which the distinction between original and unoriginal may be said to pervade the science of natural evidence, it may also be said to run through every system of Judicial evidence founded upon that science, the English law of evidence, of course, included. But Mr. Best would fain carry the matter much further than this. He endeavours to show that the admission of evidence under the English judicial system is precisely regulated by its originality. (*a*) Having divided all evidence into original and derivative, he attempts to demonstrate that, while original evidence is uniformly received in our courts of law, all that is derivative is as uniformly rejected. (*b*) With a view to accomplish this object, he is compelled to adopt Bentham's arbitrary and fluctuating boundary line between original and unoriginal. But a slight scrutiny will suffice to show that it is not the original quality of the evidence which determines its admissibility, but its admissibility which determines whether it shall be classed by him as original or as derivative.

(*z*) Best Ev., s. 29. (*a*) Best Ev., ss. 472 and 492, and *seq.*
(*b*) Best Ev., *uti supra.*

237. We cannot as yet, however, go fully into this question, without overstepping the limits of our present inquiry, which we wish to restrict as far as possible to the discussion of the science of evidence apart from judicial rules.

We will, therefore, conclude the present chapter by remarking, that neither the value of evidence in a natural view, nor its admissibility in a judicial one, is, or possibly can be, determined exclusively by a reference to its originality. The reception of evidence, as well as its cogency when received, is, and of necessity must be, partly dependent on other considerations : such, for instance, as the character of the fact itself as regards its susceptibility to proof; its antiquity; the quality of the narrative — by which (if transmitted) it is communicated to the tribunal or the inquirer, and so forth.

The division of evidence, therefore, into original and unoriginal is both arbitrary and unmeaning, and may with advantage be rejected.

238. Having thus disposed of these three would-be divisions of evidence, which owe their origin to Bentham's fertile brain, we may now proceed to sum up in a few words the results of our inquiry into the science of Natural evidence.

Natural evidence, as we view it, may truly be said to lie in a nutshell.

All evidence is either immediate or transmitted; either direct or circumstantial; of which immediate evidence is essentially superior in proving power to transmitted, and direct to circumstantial.

In this short phrase is comprised the whole scheme of proof, viewed apart from every kind of subsidiary process, and it is this very simplicity which has prevented evidence from being regarded as a science worthy of serious study. It is not until it comes to be applied

to judicial purposes that the necessity for any systematic treatment of the subject makes itself felt.

Elementary as it is in itself, however, evidence is so intimately connected with the intricate science and art of reasoning, and is employed upon a subject-matter so complicated and perplexing, that, even in a natural aspect, its operations are not altogether so plain and simple as the elementary character of its own principles might lead us to anticipate.

In the second part of this work we shall see how this simplicity is further affected by the application of Evidence to the ends of judicial investigation.

Part II

JUDICIAL EVIDENCE

CHAPTER I

JUDICIAL EVIDENCE

239. HITHERTO we have discussed the subject of Evidence as far as possible without reference to any rules of positive law by which its reception in courts of justice may be regulated.

In the present book we propose to treat of Judicial Evidence, particularly as exemplified in the procedure of our own common law tribunals, and to ascertain the relation in which the rules of the English law of evidence stand towards these natural principles which we have endeavoured to trace out in the preceding book.

And as a first step towards the attainment of this object, we must inquire how far, and in what respects Judicial proof in general, and the English system in particular, differs from natural or non-judicial evidence, and why it does so. And first it will be necessary to say a few words concerning the *subject-matter* of Judicial evidence.

240. Judicial, like natural evidence, is wholly occupied in the investigation of *facts;* but we must not omit to observe that the legal acceptation of the word 'fact' is somewhat narrower than the meaning of the same term when employed in a philosophical or a popular sense. Its meaning is narrower in this particular, that all matters of *law*, including, of course, the positive law and rules of evidence, are excluded from the category of legal facts, and from the operations of judicial proof.

In a philosophical, as in a popular sense, the state

of the law is itself a fact; (*c*) and *that*, whether it be considered in the abstract apart from any other fact, or viewed in conjunction with other facts, and applied to an individual case. (*d*) Thus, in a philosophical view, it is a fact that *in England freehold land descends to the eldest son.* It is a fact that *certain acts amount to the crime of larceny*, or that *any man who commits such acts is liable to punishment as a thief.* And it is likewise a fact that *A, being the eldest son of B, who has just died intestate, is lawfully seized of his freehold estates;* and that *C, having taken away the property of D without his consent, and with a felonious intent, is guilty of larceny.* But in a legal aspect, all matters of law, whether standing alone or 'compounded' with other questions of fact, are excluded from the operations of Judicial evidence. In a legal view, Law is one thing, Fact another. Questions of law, and questions of fact apart from law, are decided by distinct departments of the tribunal; and it is to the latter only that the rules and methods of Judicial evidence apply. All questions of law are decided by the judge, by the light of his own previous legal knowledge, or by such knowledge as he may acquire from any source or any authority which he may think fit to consult at the time. Of these questions he is the sole arbiter; but his decision on them is, generally speaking, subject to review, while questions of fact—of fact in its legal acceptation—are decided by the jury according to the rules of evidence, from the proofs laid before them at the trial; and on these questions their decision is, for the most part, final.

241. This division of the functions of the judge and the jury is expressed by the maxim, 'Ad quæstonim facti non respondent judices, ad quæstonim juris non respondent juratores. (*e*) But in individual cases we

(*c*) *Vide* Best Ev., s. 33. (*d*) *Vide* Ante, s. 156.
(*e*) *Vide* Best Ev., s. 82.

almost invariably find questions of both kinds originally combined in one compound question. Thus the question, whether a given man is guilty of a particular crime, or liable to certain penalties, resolves itself into two questions or components; viz.: (1) What acts constitute the crime in question, and render the author of them liable to such penalties; which is matter of law, to be decided by the judge; and (2) Whether the accused did actually commit these acts; which is a question of pure fact, to be decided by the jury, according to the evidence laid before them at the trial, and subject to the rules of Judicial proof.

In some of our inferior tribunals the same person, or the same assemblage of persons, is frequently in fact judge of both questions; but, nevertheless, the two are always considered as distinct, and decided by different methods.

Fact, therefore, in its legal sense, and viewed as the subject-matter of judicial evidence, is always kept separate from matter of law, which, though often originally blended with it, is, so to speak, strained off from the pure fact, before the rules of evidence are brought into play, and applied to the latter.

242. It would transcend the limits of the present work to explain in detail the various modes in which this separation of law and fact is accomplished in the different cases which occur in practice. For information on this subject we must refer the reader to the able work of Mr. Taylor, who devotes a considerable chapter to the discussion of 'the functions of the judge as distinguished from those of the jury.' (*f*) The line of demarcation between law and fact—between matters to be judicially noticed, and those requiring proof by evidence, is frequently a perplexing one to draw. But here again we must be content to refer

(*f*) *Vide* Taylor Ev., Part i., chap. 3., and *vide* also Best Ev., s. 82.

the reader to that chapter of Mr. Taylor's work which is dedicated to this subject. (*g*) It will be sufficient for us to notice that while it is always for the jury to decide upon the *weight* of the evidence—on the force of any inferences that may arise, and the *credit* to be attached to the testimony of the witnesses, the question of the *admissibility* of the evidence, including that of the *competency* of the witnesses to testify at all, falls within the province of the judge, who, moreover, is called upon to decide those matters of pure fact upon which the admissibility of the evidence depends, and is thus required, in some measure, to usurp the functions of the jury in estimating the weight of testimony and the force of inferences. (*h*)

243. But it is not in respect of its subject-matter alone that judicial differs from natural evidence. Other and more serious points of diversity occur in the actual methods of gathering evidence adopted by legal tribunals on the one hand, and by ordinary individuals on the other. The ground of the distinction between the two may, I think, be summed up in a few words, as follows: Judicial tribunals are, on the one hand, exposed to peculiar difficulties, impediments, and dangers in their search after truth, from which private persons are exempt: while, on the other, they are armed with exceptional powers for compelling and extracting evidence, of which the latter are destitute.

244. And first, there is this broad distinction between the case of evidence collected by an ordinary person for his own guidance and action, and that of evidence presented to a legal tribunal as a basis of its decision, that whereas the former can gather his knowledge from time to time by personal observation of facts as they occur, and by inquiry in different quarters as to others

(*g*) *Vide* Taylor Ev., Part i., chap. 2, and *vide* also chap. 3.

(*h*) *Vide* Taylor Ev., s. 22 (21), and Best Ev., ss. 82, 133 and 602.

which do not happen to fall under his own notice, and can move about from place to place in order to perform these operations more effectively; the evidence addressed to a legal tribunal must be all produced at a certain fixed time and place, namely, the time and place of trial, of which the former is necessarily subsequent, for the most part, to the occurrence of any events which may form the subject of its investigations.

This incident is, I think, the chief cause of the conspicuous place which judicial evidence occupies as an *art*, when compared with proof as applied to any other than judicial purposes. A private person, as Bentham observes, (*i*) frequently decides upon evidence unconsciously, just as M. Jourdan talked prose, without having heard of any such word perhaps in the whole course of his life. But it is imperative on the party to a judicial proceeding at least, if not on the tribunal, to know beforehand precisely what evidence he can command, and to come to trial armed once for all with all that he is prepared to adduce.

245. Unlike an ordinary inquirer, a judicial tribunal also, though chiefly engaged in investigating the most transient kind of events, namely, the acts of mankind, (*j*) is rendered incapable by its very constitution of observing such facts from time to time as they occur. The 'observation' of a tribunal is limited in its exercise to the actual time of the trial, when the events which form the topic of its inquiry are, as a general rule, already terminated. A legal tribunal, it is true, is capable, to some extent at least, of applying its own perceptive faculties to the permanent 'states' or circumstances, to which these events have given rise, but is incompetent to observe the actual events themselves. The 'perception' of a tribunal is thus in general limited, so far as such transient facts are concerned, to the acquisition of

(*i*) *Vide* Bentham Ev., i. 18, (*j*) Ante, s. 186.

indirect or circumstantial evidence. For direct proof of such evanescent matters, legal tribunals are compelled to rely almost entirely upon the transmitted evidence or narratives of the personal observers or witnesses of the events in question. In a word, a judicial tribunal is from its nature incapable in general of obtaining *real* evidence of facts of the more transient order; and since the *principal* facts in judicial inquiries are usually of this character, it follows that the tribunal is debarred to a great extent from obtaining any real evidence but what is indirect.

This incident has caused many writers on the theory of Evidence to confuse real or 'immediate' evidence with circumstantial. Bentham, in particular, goes so far as to assert that *all* real evidence is circumstantial, (*k*) which, as we have formerly observed, (*l*) is very far from the truth. Real evidence is by no means necessarily circumstantial: its indirect character in matters legal not being an essential feature, but a mere accident arising partly from the fixity of place, but still more especially from the fixity of time, to which all judicial tribunals are subject.

246. Moreover, there is yet another way in which this restriction to one particular time affects judicial evidence. The perceptive faculties of the tribunal can only be exercised or brought into use at the time of the trial; and as it cannot receive or obtain evidence beforehand, so as to embrace facts that are already terminated, so neither can the court postpone its decision or wait for further evidence till after the trial is over. The necessity for immediate decision imposed, in most cases, on courts of justice, forms another important feature of distinction between judicial and extra-judicial evidence. For whereas a private person can suspend his judgment,

(*k*) *Vide* Bentham Ev., i. 55 and iii. 33, and Dumont Ev., 13 and 143.
(*l*) Ante, ss. 183 and 228.

and consequent action, on any doubtful question almost indefinitely, until he has acquired a sufficient amount of evidence to justify him in acting upon it, a legal tribunal is bound to act—*i.e.*, to decide at once. And on this subject I cannot, I think, do better than quote the remarks of Mr. Best. 'The duty,' he says, (*m*) 'of a judicial tribunal in dealing with facts is not limited to the abstract question of their existence; for whether materials for definite judgment or belief respecting it are forthcoming or not, a *decision* must be given, to be followed by speedy, if not immediate action. Questions of philosophy, whether natural or moral, as well as questions of history, rest for the most part in speculation, and may be undertaken, dropped, and renewed at pleasure or convenience. Whether, for instance, the law of gravitation extends beyond the solar system; whether there is any determinate law of relation between the magnitudes of the planets, and their distances from the sun; whether the motion of each of what are inaccurately termed fixed stars is independent, or only forms part of some gigantic system, are at present matters for investigation lying open to men in general; and the astronomer who considers that the materials before him are insufficient to warrant his forming a positive opinion on any of these subjects, may suspend his judgment, in the hope that the observation of additional phenomena, or an improved analysis, or both combined, will disclose the truth to more fortunate generations. So whether the army with which Xerxes invaded Greece consisted of thousands or millions of men; whether Cæsar was implicated in the Catilinarian conspiracy; whether King Richard III. murdered his nephews, and a host of such like questions, are questions the solution of which may be deferred, or even pronounced impossible, without in the least affecting the

(*m*) Best Ev., s. 41.

rights of individuals, or the peace and good order of society. In the general course of everyday life also, we are rarely compelled to *act* on mere conjectures, and commonly remain passive as long as possible in the hope of procuring satisfactory evidence to confirm or dissipate them. But judicial inquiries differ widely from all these. "Interest (or 'expedit') respublicæ ut sit finis libium": "Ne libes immortales essent dum litigantes mortales sunt." The plaintiff and defendant stand before the tribunal, and both individual and social interests require from it a decision, and that too a speedy decision, one way or the other. It will not do for the judge to say, "This matter seems doubtful, I suspend my judgment," and dismiss it, to be renewed indefinitely from time to time; keeping alive all the annoyance and irritation of a lawsuit; holding out to each of the parties a manifest temptation to fabricate evidence in order to turn the scale in his favour; and injuring the community by distracting the attention of at least two of its members from the exercise of more useful avocations.' 'The duty of a legislator, therefore,' he goes on to say, (*n*) 'is not discharged by framing substantive laws and establishing forms of judicial procedure; in order to do complete justice he must go farther, and supply rules for the guidance of tribunals in the *disposal* of all matters of fact which come before them, whatever the nature of the inquiry, or however difficult or even impossible it may be to get at the real truth.'

247. It is to this necessity for immediate decision that the comparative absence of *hypothesis* from judicial inquiries must be referred. Not, however, that hypothesis is not frequently involved in the elucidation of questions which are debated in courts of justice; but the hypothesis is all antecedent to the actual trial,

(*n*) Best Ev., s. 42.

and forms, therefore, no part of the evidence judicially considered. In criminal matters, for instance, the hypothesis is the province, not of the judge, the jury, or even of the advocate, but of the officer of justice, or detective. And inasmuch as hypothesis in judicial matters is conspicuous only by its absence, we have not thought it necessary to allude to the subject at all in the preceding book, where natural evidence has been treated, as far as possible, in the same aspect as that presented by judicial evidence; *i.e.*, as consisting in the actual verification of certain ascertained individual questions of fact principal or evidentiary. Nevertheless it is true that a considerable portion of extra-judicial inquiry consists in the framing and adopting or rejecting of hypotheses.

248. To explain precisely what is meant by hypothesis is no very easy task. As generally regarded, hypothesis is the supposing or imagining of several different causes to account for a known effect; or of various effects probably resulting from a known cause. Hypothesis, too, is generally said to be the supposition of laws rather than of facts. How far this view be a sound one we need not pause to discuss further than to state that, as it concerns us at least, hypothesis relates exclusively to facts. And whether it proceed from cause to effect, or from effect to cause, or otherwise, hypothesis is uniformly the supposing or imagining of diverse principal facts, which might be inferred with some degree of probability from other known facts as evidentiary ones. In short, hypothesis, as we view it, consists in the drawing of inferences from known evidentiary to unknown principal facts in a doubtful and tentative kind of way;—in inventing or supposing two or more principal facts as alternative inferences from one and the same evidentiary fact, or group of evidentiary facts, to be afterwards severally adopted or discarded accordingly as they come to be

confirmed or contradicted by subsequent investigation. For instance, I miss my watch, which I had left a short time before on a table in my room: I happen to know that three persons, A, B, and C, and these only, have entered the room, since the time when I last saw my watch safe there: From these facts I instantly construct three alternative inferences or hypotheses; namely, that either A; or that B; or that C has taken my watch: But subsequent investigation reveals the fact that C has been dealing with a watch resembling the one I have lost;—that he has, for instance, been offering such a watch for sale: whereupon I immediately discard the two hypotheses, that A, or that B has taken the watch, and adopt the third, namely, that C is the culprit; a conclusion which then ceases to be, in a proper sense, an hypothesis, and becomes a well-grounded inference or conclusion drawn from the evidentiary facts of the disappearance of the watch, of C's presence in my room, and of his subsequent possession of the lost property.

249. This kind of process, as before remarked, forms no inconsiderable part of extra-judicial inquiry. But when a question is brought to trial, it is obvious that the hypothesis must be all closed, the principal facts or conclusions to be aimed at all selected and ascertained—not indeed as facts, but ascertained as questions; for the necessity for immediate action precludes the tribunal from awaiting the result of ulterior investigation. At the trial itself, there can be at most two hypotheses—one adopted by each of the contending parties respectively. But it more frequently happens, where the evidence is indirect, that a single conclusion is suggested by the party claiming the interference of the court; while the mere absence of that conclusion,—the mere failure to establish it as fact,—is relied on by the other side. For which reason the comparative absence of hypothesis is a feature which distinguishes judicial from non-judicial inquiries.

250. It appears, then, that the peculiar difficulties and impediments with which judicial tribunals have to contend in seeking to verify facts arise chiefly from the fixity of time and of place, which are among their characteristics. The former of these, — the fixity of time,—operates as an impediment in two ways. First, it debars the tribunal from obtaining real or immediate evidence of any but continuing facts or 'states,' and compels it, when inquiring into bygone *acts* or *events*, either to rely upon the transmitted evidence or narratives of witnesses, or else to resort to indirect or circumstantial proof; and secondly, it precludes the court from awaiting the result of future investigation, and forces it to act upon the evidence before it, however incomplete or unsatisfactory that evidence may be: While the latter,— the fixity of place,— prevents it, in a great degree, from exercising its perceptive faculties even upon those subjects of inquiry which fall within the category of continuing facts or 'states.'

251. But besides these disadvantages, legal tribunals have to encounter peculiar *dangers* in their researches after truth. For whereas in many of the investigations which come before us as private individuals, such as questions of history, of natural philosophy, of chemistry, or of physical or moral science in general, no one has any motive for deceiving us, or for falsifying our evidence; in legal inquiries, one party or the other is always supremely interested in misrepresenting, exaggerating, or suppressing the truth, namely, the party against whose case such truth, if fully and accurately elicited, would tell. And in relation to this part of the subject I am again tempted to quote the very pertinent remarks of Mr. Best. 'Another great difference,' he says, (*o*) 'between legal and historical evidence lies in the securities for truth, and the sources of danger and

(*o*) Best Ev., s. 50.

deception peculiar to each. Posterity and future ages are not unfrequently spoken of as a tribunal, to whose judgment appeals may be made from the decisions of the present; and viewed as a figure of speech, there is no impropriety in this. But figures must not be mistaken for facts. The tribunal of posterity differs immensely from all others; for it is one of unlimited jurisdiction both judicial and inquisitorial; it is ever sitting, ever investigating, ever judging; barred by no prescription, bound by no estoppel, and responsible to no human authority. The securities for the truth of the records and traditions of the past, which time has brought down to us, consist in the multitude of sources to which they can be traced, the large number of persons whose interest it has been to preserve them from oblivion and corruption; above all, the *permanent effects* of events, visible in the shape of monuments and other pieces of real evidence, customs, ceremonies, and the like; and finally, the actors in the scene having passed away, there is rarely either opportunity or interest to fabricate evidence, in furtherance of their views or justification of their conduct. Now in the case of a legal investigation before a judicial tribunal, properly so called, all this is reversed. The judge or jury, as the case may be, must decide once for all on such evidence as may come before them; the facts—the *res gestæ* of the dispute—are known but to few, and are matter of interest to fewer; while the parties who are best acquainted with the truth stand in a hostile position to each other, and have a stake at issue which places them under the strongest temptation to misrepresent it. Hence it is obvious that without peculiar guarantees for the veracity and completeness of the evidence adduced in courts of justice, they would, when investigating disputed facts, be exposed to the same risks of error as the historian, without the safeguards which he possesses—in a word,

the legislator dealing with judicial evidence is bound to frame characteristic securities to meet characteristic dangers.' 'Although, in the ordinary affairs of life,' remarks Mr. Taylor also, (*p*) 'temptations to practise deceit may be comparatively few, and therefore men may in general be disposed to rely upon the statements of each other; yet in judicial investigations the motives to pervert the truth are so greatly multiplied that if statements were believed in courts of justice with the same indiscriminating credulity as in private life, much wrong would unquestionably be done.'

In short, while ordinary or non-judicial evidence is, generally speaking, the proof simply of unknown facts, judicial evidence is the proof of disputed or controverted ones; while the former is, in general, a mere peaceable process of discovery, the latter is, in great measure, a hostile proceeding, or contest between the parties.

Such are some, at least, of the difficulties and dangers with which legal tribunals have to contend in endeavouring to ascertain the truth of the facts submitted to their decision.

252. But, on the other hand, judicial tribunals are armed with power to frame and enforce such rules of positive law as they may judge to be most effectual for the purpose of meeting and surmounting these disadvantages. The rules of positive law which our tribunals have laid down to assist them in the *disposal* of the doubtful questions of fact which come before them, have reference, generally speaking, either to the burden of proof, 'by attaching,' as Mr. Best expresses it, (*q*) 'an artificial weight to the natural principles by which the burden of proof is governed,' or to the establishing of what are termed in legal language *presumptions*, whereby a fictitious weight is annexed by the law to natural inferences. (*r*) The difficulties arising from

(*p*) Taylor Ev., s. 1,342 (1,210). (*q*) Best Ev., p. 44.
(*r*) *Vide* Post, s. 491.

fixity of time and place our tribunals endeavour in some degree to meet by making compulsory in some cases the creation of preappointed evidence, and by enforcing the attendance of all persons who are qualified to furnish them with trustworthy information concerning the matters in dispute.

253. But it is in guarding against the characteristic dangers of deception and fraud, to which judicial tribunals are exposed, that these positive rules find their most extensive sphere of action. To this source may be referred most, if not all, of the exclusionary rules which form so prominent a feature in the English law of evidence. Among these last is the rule that the contents of a writing shall in general be proved only by the production and inspection in court of the document itself, and that all other modes of proving the contents shall be excluded, at least until a sufficient legal excuse has been given for the absence of the original writing.

But foremost among these exclusionary rules, as it is foremost among all our positive rules of evidence, and the most prominent feature wherein the procedure of legal tribunals, in ascertaining the truth of questions of fact, differs from the course adopted with the same object by ordinary individuals, stands the rule which excludes all transmitted evidence, or narrative of extrinsic fact, excepting that which is delivered openly in court by a sworn witness. The rule of our law on this subject is expressed by the maxim, 'In judicio non creditur nisi jurabis,' and is as follows: viz., that all narratives or statements of extrinsic fact brought before a court of justice must be delivered to the tribunal openly by the percipient of the facts himself, who is sworn to speak the truth, and is amenable to punishment should he do otherwise; and who, moreover, is liable to be cross-examined on all the details of his story.

254. How far these precautions are calculated to

secure the veracity of the narrator or witness it would be foreign to our purpose to inquire; but it is obvious that, having once laid down the principle that this form of narrative is more trustworthy than any other, it would be the height of inconsistency to admit any inferior form of narrative, at least upon equal terms with the first. And accordingly, it is a *general* rule of our law that no other species of narrative or statement, whether verbal or written, is receivable as evidence.

The effect of this rule is to divide all *transmitted evidence*, in a legal point of view, into two branches; viz: (1) The sworn statements or narratives of witnesses, usually called 'Oral evidence,' which is of course admissible as such by our rules; and (2) Inferior narrative, which is, generally speaking, not receivable, and is for the most part comprised under the designation of 'hearsay evidence,' or 'Hearsay,' and is frequently said to be 'no evidence.' This last phrase is indeed more felicitous than it may at first sight appear, since it will be found exactly to describe the real state of the case. For all statements not falling within the description of Oral evidence or Testimony must be excluded from the category of 'evidence,' or means of proof, and relegated to the domain of fact—of fact in one case completely relevant to the issue—in some few others *deemed* by our law to be irrelevant as hearsay.

255. The one case in which an unsworn statement is completely relevant to the issue, is where it comes within the description of an *admission* or *confession*, terms which, as I shall endeavour to explain hereafter, (*s*) have no proper place or definite meaning, except in the rules of judicial evidence. But there are other cases in which unsworn statement or narrative is *deemed* by our law to be relevant to or evidentiary of

(*s*) Post, s. 283.

the issue; in other words, cases where unsworn statements are admitted as proof of the facts to which they relate. Some of these are recognised as exceptions to the rule which excludes hearsay; but there are others, not generally recognised as exceptions to that rule, and which are created by peculiar, and, as I venture to think, somewhat questionable doctrines of our law. Of these we shall treat in their proper place. (*t*)

256. Meanwhile the use of the word, 'relevant,' requires some explanation, which renders it desirable that we should say a few words concerning the phraseology of judicial evidence; for jurists have to some extent created a nomenclature of their own, in connection with evidence, beyond that which is generally recognised or adopted in philosophy. The whole question or subject of inquiry in a judicial proceeding is distinguished as the *issue*, or the whole fact in issue. It is obvious that a single issue, or question, is sufficient to supply matter for an inquiry; but a single legal inquiry may, and frequently does, include several distinct issues.

Every legal issue, however, is in the nature of a complex or compound fact, which, like all other facts, may, and for purposes of proof *usually must*, be broken up or decomposed into several minor or component facts, (*u*) and each of these component facts is technically distinguished as a *fact in issue:* Facts in issue form constituent portions of the actual subject of investigation, and correspond with what we have hitherto, in deference to Bentham, (*v*) described as 'principal facts.' In short, facts in issue are the 'principal facts' of a judicial investigation, being the components of the whole issue or question in dispute.

(*t*) Post ii., chap. 13. (*u*) Ante, s. 123.
(*v*) Bentham Ev., i. 18 and 40.

So much for principal facts. But, as we have already seen, (*w*) there are other facts which, though they form no integral part of the actual topic of inquiry, but are wholly extrinsic to it, are yet fit subjects for proof, inasmuch as they tend to raise a probable inference of the existence or non-existence of some principal fact. These, which we have thus far distinguished as 'evidentiary facts,' are known in legal language as *facts relevant to the issue*, or *relevant facts*, and are identical with the 'circumstances,' from which circumstantial evidence derives its name, and to which it owes its existence. In short, 'facts relevant to the issue,' or 'relevant facts,' are the evidentiary facts, or 'circumstances,' of judicial evidence. But further, there are other facts, which, though they are not themselves facts in issue, and cannot even fairly be said to raise a *legitimate* inference (*x*) of the truth of any principal fact, are yet admitted by peculiar doctrines of our law, as being in some measure relevant to the issue. And to these the appropriate title of facts *deemed to be relevant* has been applied by some modern writers.(*y*) The facts, which are the appropriate subjects of proof in a trial at law, are therefore ranged in three classes: namely, (1) Facts in issue; (2) Relevant facts, which coincide respectively with Bentham's principal and evidentiary facts; and (3) Facts deemed to be relevant, which have no precise counterparts in natural evidence, but are a species of imperfect evidentiary facts, consisting for the most part of legalised hearsay of various kinds.

257. It now remains to make a few remarks upon the subject of the *Rules* of evidence. Mr. Best divides all rules of evidence into Primary and Secondary, (*z*) 'the former,' to quote his own words, 'relating to the *quid probandum*, or thing to be proved; the latter to the

(*w*) Ante, ss. 122 and 126. (*x*) Ante, s. 175.
(*y*) Stephen Ev., art. 1 and 2. (*z*) Best Ev., ss. 111 and 249.

modus probandi, or mode of proving it.' But surely this is reversing the order of things. The peculiar province whether of the science or the art of evidence is not to ascertain what we have to prove, but to teach us *how to prove it*. It is true enough that, in order of time, we must first discover what it is that we want to know, before we can take the necessary steps for acquiring that knowledge; but this does not render the ascertainment of the *quid probandum* the primary business of Evidence, any more than the necessity of procuring bricks as a preliminary to building, or marble for purposes of sculpture, makes the art of brickmaking the first business of the builder or architect; or the quarrying of marble the principal concern of the sculptor.

The primary rules of evidence (if we can so distinguish them) are those which relate to the *modus probandi*, which teach us how to prove what there is to prove. The *quid probandum* must of necessity be determined by many considerations very distantly connected with the art or science of proof. It is liable to be affected by the state of the pleadings, by rules of practice, or by those principles of substantive law which bear upon the subject of inquiry. At the same time, certain of the rules relating to the *quid probandum* are so closely connected with the art of proof that they cannot well be excluded from consideration in the study of evidence; but these are not primary, but secondary rules of evidence. The primary rules are those which relate to the *modus probandi*.

258. A complete enumeration of the rules of evidence is, it appears to me, scarcely possible, as is sufficiently evinced by the fact that no writer has yet attempted to frame one. Nor would such a list serve any useful purpose if it were made: for the discussion of evidence involves much more than mere rules—the actual rules

being so closely interwoven with principles, doctrines, and maxims, with substantive law and rules of practice —that even if we could succeed in disuniting them from their surroundings, the process would necessarily deprive them of much of their meaning and significance. I shall, therefore, follow the example of previous exponents of the art, and treat of the whole subject of Judicial Evidence under different heads, leaving the rules to unfold themselves in the course of the discussion of the various matters, which come under the titles of the succeeding chapters.

259. We have seen that all evidence, or means of proof, from a natural point of view, is included under one or other of the two heads: (1) Immediate or real; and (2) Transmitted; and since all immediate or real evidence is receivable by our law to prove material facts, while of transmitted evidence, that portion only which falls within the description of Oral evidence is admissible or legitimate, it follows that all legally admissible evidence may be referred to one or other of the two heads, Real or Oral.

And this leads to the consideration of the *divisions* of evidence in a legal point of view; a subject which forms the title of the next chapter.

CHAPTER II

LEGAL DIVISIONS OF EVIDENCE

260. In the field of judicial, as in that of natural evidence, there are two great leading divisions: the one having reference to the means of proof, or vehicle or instrument of evidence employed; the other to the aspect which the fact thus proved presents towards the actual or ultimate subject of inquiry.

To begin with the former division: The distinction between *evidence*, or the means of proof, and *fact*, the subject-matter of evidence, must inevitably be to some extent arbitrary, for this reason: that while, on the one hand, any extraneous fact which tends, when established, to generate a probability as to a fact in issue, is in some sense a medium or means of proof; on the other, all *means* whatever of proving facts are themselves, at bottom, neither more nor less than facts. That a given material object, for instance, has been produced in court, inspected by the jury, and the fact which it embodies verified by them by the exercise of their perceptive faculties—that this process, this event, has taken place, is obviously itself a fact. And still more obviously is it a fact that a witness has been sworn, and has made a particular statement in court concerning the matters in dispute.

But though the means of proof be themselves facts, yet it is indispensable to a clear conception of Evidence that we should not regard them in that light. (*a*) If we wish to avoid endless perplexity, it is absolutely

(*a*) *Vide* Ante, s. 168.

necessary that the means employed in furnishing the tribunal with the information they require should not be confounded with the information itself; that the *modus probandi* should be separated and distinguished, as far as possible, from the *quid probandum*. In short, it is indispensable that we should draw the line between Evidence and fact *somewhere*; the only question being where the line ought to be drawn.

261. Now, careful reflection has convinced me that the only way of rendering the study of judicial evidence in any degree simple and symmetrical is to treat nothing but real evidence and the testimony of witnesses as modes of proof, and to regard all other matters as facts to be proved. My reasons for adopting this view may be shortly stated as follows: In the first place, all other matters whatever must of necessity be brought to the knowledge of the tribunal by one or other (if not both) of the two methods just specified, *i.e.*, either by being actually manifested to their senses at the trial, or else through the oral account of a personal observer or witness. Moreover, though it may be true that there are many facts, especially of the more transient order, which are practically incapable of becoming the subjects of real evidence in a court of justice; yet there is absolutely no fact whatever which is not subject to be brought to the knowledge of the jury by means of the testimony of a witness. Even the terms or contents of a written document, though usually proved by its production, are liable, in the absence of the original writing, to be established wholly or in part by oral evidence. (*b*) Now it will be observed that in a case of real evidence, the fact—*i.e.*, the proximate fact, whether principal or evidentiary—is itself established by manifestation to the perceptive faculties of the tribunal: In a case of oral

(*b*) *Vide* Post ii., chap. 8.

evidence, the proximate fact is proved by the testimony or statement of the witness, which same testimony or statement is itself brought under the cognisance of their senses—or, in other words, is established by real evidence. But if we go farther, and treat any other matter as a mode of proof—if we regard an admission, for instance, as a means of proving the fact admitted, designating it, for example, as Bentham does, (*c*) 'self-disserving evidence'—we shall, wherever a witness intervenes, necessarily introduce another or third step between the fact to be proved and the mind of the tribunal: we shall then have (1) the fact established by self-disserving evidence; (2) the self-disserving evidence or admission proved by oral evidence; and finally the oral evidence itself established by real evidence or manifestation. Now this is a complication which is at once confusing and unnecessary, since it may be completely avoided by treating the admission itself as the proximate fact; by regarding it as an evidentiary fact giving rise to an inference of the existence of the fact admitted. (*d*) For which reason, as I have said, it will be found a much more simple and convenient arrangement to regard all such matters in the light, not of evidence, but of facts.

262. It must be observed, however, that our jurists usually reckon *three* distinct species of evidence or modes of proof, namely (1) Real evidence; (2) Documentary or written evidence; and (3) Oral evidence. 'The instruments of evidence,' says Mr. Best, (*e*) 'are of three kinds: (1) Witnesses—persons who inform the tribunal respecting facts; (2) Real evidence—evidence from things; (3) Documents—evidence supplied by material substances, on which the existence of things is recorded by conventional marks or symbols.'

(*c*) *Vide* Bentham Ev., v. 204, and Best Ev., s. 519.
(*d*) Post, s. 284. (*e*) Best Ev., s. 123.

263. Now in the first place it is necessary to point out that the term, 'Instrument of evidence,' though a convenient expression for some purposes, can be applied with strict propriety to nothing but a witness. In all cases of Real evidence the fact itself is manifested to the perceptive faculties of the tribunal without the intervention of any medium or instrument; so that unless we regard the material object, which, so to speak, embodies the fact, as the instrument of evidence, there is absolutely nothing concerned in the process to which the name can be rationally applied. And though it may be true that the physical object, which is produced in court, does thereby in a certain sense become for the occasion an instrument of proof; yet it would seem absurd to apply the term, 'instrument of evidence,' in a general sense to every material object that is capable of being brought into a court of justice, or viewed elsewhere by the jury.

But though it may be true that the term, 'instrument of evidence,' is somewhat of a misnomer as applied to Real evidence, still it is obvious that the physical manifestation of facts must be classed as a means of proof distinct from Oral evidence.

264. But as regards documentary evidence, which has always hitherto been regarded as a means of proof distinguishable from either real or oral, I think reflection will show that it is nothing else than a phase of real evidence. For documents are after all neither more nor less than material objects, which do but resemble other physical objects in being the possible repository of facts. It is true that the facts which they embody are usually facts of a peculiarly momentous kind in a judicial view; but this does not render the mode of proving those facts essentially different from that of proving any other fact, which, like the former, has its permanent seat in a material substance. Where the contents of a writing are made perceptible to the

senses of the tribunal by production of the document in court, the evidence of those contents is then *Real.* So far as the contents are established (as is sometimes the case) (*f*) by the testimony of a witness who has seen and read the document, the *modus probandi* is *Oral.* For this reason I maintain that what is usually designated in our books 'documentary' or 'written evidence,' by which I understand to be meant, the proof of the contents of a document by its production in court, is nothing else than a particular instance of real evidence, distinguishable only from other instances of real evidence by the circumstance that documents are a more fertile repository of important legal facts than any other class of material objects.

265. The effect of what is called documentary evidence, however, is apt to be most cogent, because the fact embodied in a document not infrequently forms a constituent part of the actual issue; and this fact being established by real evidence, the tribunal obtains, by production of the document, real evidence of a fact in issue, or, in other words, *direct* real evidence. But in estimating the force of documentary evidence it should not be forgotten that the value of the result is entirely contingent on the *relation to the issue* of the fact embodied in the writing. Now, it is true that documents often contain facts in issue: but, on the other hand, the contents may amount merely to admissions, to evidentiary facts of other kinds, or even to mere statements; for written statements, though, strictly speaking only hearsay, are by no means uniformly excluded by our judicial rules. In short, the contents of a document may amount either to a fact in issue, to a fact relevant to the issue, or to a fact deemed relevant merely; and it is only in the first of the three cases that written evidence is entitled

(*f*) Post ii., chap. 8.

to any greater degree of veneration than Oral. In other cases, the effect of documentary evidence may well be comparatively insignificant. In the first of the three cases, it is true that its probative force is most transcendent, but its conclusive effect is entirely due to the circumstance that the evidence is at once direct and *real.*

266. Thus it appears that what is usually known in our books as documentary or written evidence, is merely a modification of real, differing, indeed, somewhat from ordinary real evidence in the nature of the fact which is the subject of proof, but precisely identical with it as regards the mode of proving that fact. Consequently all evidence may now be divided, in conformity with the vehicle of proof employed, into (1) Real; and (2) Oral evidence. Real evidence, as formerly stated, being the evidence obtained by the exercise of the perceptive faculties of the tribunal upon the fact itself; while Oral evidence is the proof afforded by the narratives of sworn witnesses as to facts of which they have been, or are, themselves the percipients.

It will be seen, therefore, that this division of Judicial evidence remains precisely identical with the natural division into 'immediate' and 'transmitted,' (*g*) with this exception: that a large portion of transmitted evidence, which does not fall within the definition of Oral evidence, is, so to speak, cut off from evidence and relegated to the domain of fact: while the place of the Inquirer or Recipient of the evidence is in every case occupied by the tribunal, *i.e.*, by the jury, or other judge of fact.

267. But legal, like natural evidence is also either (1) Direct; or (2) Indirect or Circumstantial; accordingly as in the one case, a principal fact, or fact in issue, is proved by real or oral evidence; or, on the other, an evidentiary fact, or 'circumstance' only, is thus established.

(*g*) Ante i., chap. 13.

And this division, as we have already seen, (*h*) belongs no less to natural than to judicial evidence. Moreover, in its judicial aspect, it includes all evidence, whether real or oral; as the former division, into real and oral comprises all evidence, whether direct or circumstantial.

In short, these are *cross* divisions of evidence, and, moreover, complete cross divisions, since each of them embraces the whole subject. They are also the main, though we cannot quite say only, important divisions of evidence in a legal point of view. We shall have occasion hereafter to consider each of them more particularly in its proper place.

268. Meanwhile it may not be amiss to make a few remarks on the various meanings of the word 'Evidence.' Not only is this term used in the abstract to denote the science and art of proof; but it is also employed to describe in the concrete a given quantity of proving matter, as well as *its effect* in establishing the issue or question. (*i*) Now, since the instruments or means of proof are but two—real and oral—the use of the word 'evidence' in this last sense ought, in strict scientific accuracy, to be restricted to the proving effect of the testimony of a witness, or of the manifestation of the fact itself to the senses of the jury. But the term is commonly employed by jurists in a much wider sense. *Facts* of all kinds are said to be receivable or not receivable 'as evidence.' Anything which has a tendency to generate a conviction of a fact in issue, is said to be 'evidence' of it. The term is constantly applied to the effect of one fact in rendering probable the existence of another. Thus an *evidentiary fact* is said to be 'evidence' (or proof) of the principal one. An *admission* is said to be 'evidence' of the fact admitted; and a *statement* (where receivable) of the fact stated. Nay, I think that even a minor principal fact is some-

(*h*) Ante, s. 199. (*i*) Ante, s. 1.

times said to be 'evidence' of the whole question or issue of which it forms a constituent part. This last use of the term, evidence, is extremely improper, and may always be avoided. But it is not so easy to refrain from employing the word, evidence, when we wish to describe the effect of one fact in generating a probability of the existence of another; because in many cases there is absolutely no other way of expressing the matter without awkward circumlocution; and because the use of the term in this sense is so deeply rooted in our legal phraseology that one cannot venture sometimes on any other mode of expression, without running the risk of being misunderstood. I have thus been compelled, in many instances, to bow to the prevailing practice in this respect; but I have endeavoured to mark this somewhat loose application of the word 'evidence' by the use of inverted commas.

CHAPTER III

EVIDENCE DIRECT AND CIRCUMSTANTIAL

269. THE subject of direct and circumstantial evidence in its Judicial aspect is so similar in all respects to that which it presents, when regarded from a natural or a philosophical point of view, that little more need be said on the subject, beyond what is contained under that title in the former part of this work. (*j*) Still, there are a few points connected with this division of evidence which seem to belong rather to the judicial than to the natural side of the question ; and these would seem to render a separate chapter on the subject of direct and circumstantial evidence in its legal aspect in some measure necessary.

270. In the first place, then, it has already been clearly shown that the methods of circumstantial evidence are purely deductive. (*k*) Every inference in judicial matters—every step by which the jury proceeds from the evidentiary fact, or 'circumstance,' to the fact in issue—is capable of being exhibited in the form of a syllogism, (*l*) of which the minor premiss consists in the assertion of an evidentiary fact established by evidence, or of a combination or coincidence of several such evidentiary facts ; while the major premiss is a general proposition, which is supplied by the jury, who in legal cases usually occupy the place of the Inquirer, from their stock of previously acquired general information ; (*m*) and the conclusion, where the inference is a single one, is a

(*j*) Ante i., chap. 16. (*k*) Antes, 151. (*l*) Ante, s. 130.
(*m*) Taylor Ev., s. 1,379 (1,244), and Best Ev., s. 187.

principal fact, or fact in issue. Where, however, a series or chain of inferences is necessary, (*n*) the conclusion of the first syllogism forms the minor premiss of the second, and the conclusion of the second, the minor premiss of the third, and so on, until the fact in issue is ultimately deduced; while the jury must still supply the general proposition to form the major premiss of each successive syllogism from their own store of general knowledge.

271. It not infrequently happens, however, that the jury, from lack of scientific or technical knowledge, are unable of themselves to supply some recognised Truth or general proposition which is necessary to complete the process of inference; and in these cases the general proposition is often, as we shall see hereafter, (*o*) imparted to the jury by means of what is known as 'opinion' or scientific evidence. This is the usual course where the jury are ignorant of some general Truth or law of nature, which is known only to the initiated.

272. But instances are not wholly wanting where a jury has been called on in such cases to perform an *inductive* process, and to construct the general proposition necessary to enable them to draw the conclusion from materials established as facts at the trial. In the cases referred to, however, the inductive process was not used (as theoretically speaking it might have been) as a *complete* substitute for scientific or opinion evidence; but was employed to supplement and fortify such proof. An instance of this process occurred during the celebrated trial of William Palmer, the poisoner. (*p*)

273. In that case the question, or at least one question, was whether or no X, who exhibited certain symptoms, was poisoned by strychnine. It having been proved that X had exhibited these symptoms, the jury were

(*n*) Ante, s. 204. (*o*) Post ii., chap. 25.
(*p*) *Vide* Stephen Ev., art. 50.

asked to infer from that fact that X had been poisoned. To enable them to draw this inference, the following general proposition was required, viz., that '*All persons who exhibit these symptoms—are—persons who have been poisoned by strychnine.*' This proposition they were unable, from lack of chemical or physiological knowledge, to supply of themselves. And medical or scientific witnesses were called to prove the general Truth by propounding it on oath: But their testimony being more or less uncertain or inconclusive on this point, it was supplemented by the following evidence. The prosecution adduced proof of the following facts or propositions, viz., that '*A, who exhibited these symptoms—was—poisoned by strychnine*': that '*B, who exhibited, etc.—was—poisoned, etc.*': that '*C, who exhibited, etc.—was—poisoned, etc.*,' and so on; from which individual facts the jury were asked to construct the general proposition, that '*All men who exhibit, etc.—are—persons who have been poisoned, etc.*'; which would enable them to draw the individual conclusion of fact that '*X who exhibited these symptoms—was—poisoned by strychnine*'; which when displayed in due syllogistic form would appear thus:

All who exhibit, etc.—are—probably poisoned, etc.
X—was—one of those who exhibit, etc.
(Therefore) X was probably poisoned, etc.

This part of the process was of course deductive: But the earlier part of it, wherein the jury were called on to construct the general proposition, '*All* men who exhibit, etc.,' from the specific facts, that A, B, C, etc., who severally exhibited the symptoms in question, were poisoned by strychnine, was clearly inductive.

274. Another case of the same kind is cited by Sir James Stephen in juxtaposition with Palmer's, (*q*) where, in order to enable the jury to infer that an obstruction

(*q*) Stephen Ev., art. 50 and *Vide* also Taylor Ev., 316.

in a particular harbour was due to natural causes, evidence was adduced to show that similar obstructions existing in several other harbours, similarly situated, and therefore presumably exposed to the same physical influences, were likewise due to natural causes; or, to put the matter in a more concise shape—in order to induce the jury to infer that the obstruction in question was due to natural causes, it was proved that a series of similar obstructions were also due to natural causes. Cases of this kind are, however, to say the least of it, not common; general knowledge of the kind being usually supplied (where wanting) to the jury by the testimony of scientific witnesses or 'Opinion evidence'; and even in these, as in every other case of circumstantial evidence, a deductive process is ultimately necessary.

275. In a previous chapter devoted to this subject, it was stated that the boundary line between direct and circumstantial evidence is in some instances extremely faint. (*r*) This arises chiefly from the nature of perception, which renders it extremely difficult in many cases to distinguish between a perception and an inference from perception; *i.e.*, between the fact that we actually perceive, and the fact that we infer from what we actually perceive. (*s*) But it is to be observed that this difficulty arises only in the case of real evidence. Wherever a witness intervenes, the line between direct and circumstantial evidence is, generally speaking, broad and well defined. In the case of Oral evidence, the witness must necessarily depose to a particular fact; and if that fact be a fact in issue, or principal fact, the evidence is deemed direct. On the other hand, if the fact, to which he testifies, be merely an evidentiary, or, as it is termed, a relevant fact, so as to involve

(*r*) Ante, s. 207.

(*s*) *Vide* Mill Logic, i. 7, and ii. 202, P. 4a and 420a.

an inference before arriving at the principal fact, there the evidence is properly regarded as indirect or circumstantial.

The difficulty of distinguishing between a perception, and an inference from perception, shows itself, in the case of oral evidence, in a totally different manner. The question arises in determining whether the witness shall be allowed to depose to the fact at all. A witness, as we have seen, (*t*) is allowed to testify only to facts which have fallen under his own observation—to facts, *i.e.*, which he has himself *perceived;* and further, he is not allowed to speak as to any fact which he may infer from what he has perceived; in other words, a witness must not only have had *real*, or rather *immediate*, evidence for every fact to which he deposes, but the evidence of it which *he* obtains must also be *direct; i.e.*, it must be direct to him. (*u*) This rule, however, as we shall see hereafter, (*v*) is subject to considerable qualification. But wherever a witness is allowed thus to depose to a fact, if that fact be a fact in issue, the evidence is then direct. If, on the other hand, it be only an evidentiary fact, the evidence is then circumstantial. (*w*)

276. But though in the case of *testimony* the line of demarcation between direct and circumstantial evidence is, comparatively speaking, broad and well defined, I think there are still cases where a doubt may arise as to whether the method of proof employed is purely direct or no. Suppose, for example, that in an action on a written agreement, the terms of the contract are established, in the absence of the original writing, by the testimony of a witness, who has seen and read the instrument. The precise fact thus deposed to is the

(*t*) Ante, s. 266.

(*u*) *Vide* Post, s. 347, and Stephen Ev., art. 62, and note 27.

(*v*) *Vide* Post, ii., chap. 25. (*w*) *Vide* Powell Ev., p. 57.

existence and shape of certain characters visible to the witness on the paper. On the other hand, *the whole fact in issue* is the *act* of the contracting party in tracing these characters. And it is, I think, just open to question whether the written characters are more properly regarded as the actual terms of the contract; or as the *traces* of the act performed by means of the instrument, from which traces the jury are to *infer* the nature of the act, or terms of the contract. In other words, it may be just open to doubt whether the precise fact to which the witness deposes—the written characters—are the actual terms of the contract, or the *traces* only of those terms. The question, however, is a purely speculative one; for even if the evidence be in theory circumstantial, practically speaking, and in proving power, it must be quite equivalent to direct. (*x*)

277. It has already been shown that circumstantial evidence is essentially weaker than direct. (*y*) So long as the *quantity* of evidence on either side is the same, this must perforce be the case; because the process of drawing an inference is always attended by more or less of uncertainty; inasmuch as every real inference rests on the truth of a general proposition, and the truth of a general proposition can never be more than highly probable. (*z*) The mere machinery of deduction is infallible; but in every case of real inference the major premiss must always be more or less doubtful. The greatest results in circumstantial evidence are obtained by *coincidences*—by the coincidence of evidentary facts—where, in some cases, the truth of the general proposition approximates very closely to absolute certainty.

Take a simple case—the coincidence of two circumstances: A house has been robbed: All the property stolen from it is found directly after the robbery in the

(*x*) Ante, s. 207. (*y*) Ante i., chap. 17.
(*z*) *Vide* Ante, ss. 138, 143, and 151.

possession of A: Besides this, at the time when the robbery is discovered, a hat, usually worn by A, is found in the house. It is *almost* certain, as a general proposition, that any man, of whom these facts are true, must be the robber. And assuming it to be *conclusively* established that both these facts are true of A; we may conclude with an approach to absolute certainty that A is guilty of the robbery.

So far as the truth of the general proposition, or major premiss, is concerned, the process of inference approximates very nearly to *demonstration*.

278. But there can never be any such thing as demonstration in establishing matters of *fact;* because, independently of the inherent uncertainty that resides in the general proposition, the fact or facts, which go to make up the minor premiss, can only be known to us by *evidence*. Even if it were absolutely certain that any man, of whom the two facts in question are proved to be true, must be the robber; the truth of the two facts must still rest upon *evidence*—at best upon *real* evidence, or the evidence of the human senses: And thus in questions of fact the evidence of perception is the highest form of proof attainable; whether we arrive at our facts directly, or through the medium of an inference. It is idle, therefore, to speak of establishing *facts* by demonstration. Demonstration is the certainty of *relation* only —of the relation of the conclusion to the premises. (*a*) And as in matters of fact we can never demonstrate our premises, so neither can we demonstrate the fact that we deduce from them.

279. With these brief remarks we may close the subject of direct and circumstantial evidence. The division of evidence into Real and Oral still remains to be considered. But as I propose to show that the contents of 'documents' form the most important subject-

(*a*) *Vide* Mill Logic, i. 342, and Ante, s. 184.

matter of real evidence; it seems desirable that the discussion of real evidence itself should be preceded by a few remarks on documents or writings.

And as writing is but a species of *language*, it would also seem necessary to preface the topic of writings by a short inquiry into Language, viewed as a fact, the subject-matter of judicial proof.

CHAPTER IV

OF LANGUAGE

280. LANGUAGE or 'discourse' is called into existence by the act of mankind, and is the result of human volition. It has, at least, three uses. First, we employ language to express or communicate to others our thoughts or ideas, or the consciousness we have of internal or mental facts. Secondly, we use it to communicate our knowledge, or the perception we obtain of external or physical facts. Thirdly, we employ it to perform certain acts, which have the effect of modifying our rights, obligations, and liabilities towards our fellow-men or the State. (*b*) It is in this last aspect that language forms the most prominent topic of judicial inquiry. But as the other two uses of discourse have also a certain bearing on judicial evidence, it will be in some measure necessary to scrutinise it in all three aspects.

281. At the outset of this inquiry, however, we find ourselves embarrassed by the circumstance that there exists no well recognised or convenient generic term to denote language in the concrete; *i.e.*, to describe without distinction any given quantity of language, or series of words. We have hundreds of terms to express different forms or species of discourse, printed, written, or verbally uttered: We speak of 'deeds,' 'instruments,' or 'documents;' of 'books,' 'pamphlets,' or 'papers;' of 'chapters,' 'paragraphs,' or 'sentences;' of 'orders,' 'questions,' 'answers,' and 'notices;' of 'conversations,'

(*b*) Ante, ss. 187 and 188.

'exclamations,' 'tales,' and 'statements;' and a host of others of various kinds. But all these expressions without exception beg some question concerning the language: Either they imply the distinction between writing or speaking; or they suggest some particular purpose to which the words are applied; or they indicate the length of the series; or in some other way are rendered unfit to describe language of all kinds indiscriminately. We are, therefore, driven to invent a suitable term for ourselves, and will select for the purpose either of the two expressions, a 'phrase of language,' or a 'portion of discourse,' which have, indeed, already been used in this sense in an earlier part of the present work. (*c*)

282. A phrase of language, then, or portion of discourse, may be verbally uttered, or even expressed, by conventional signs or gestures, or it may be delivered by means of written or printed characters: It may form a part or the whole of a conversation, a speech, a sermon, or a lecture; a part or the whole of a letter, paper, deed, instrument, pamphlet, or book. But whether it be verbal, written, or printed, and whatever be its shape, a phrase or piece of language is capable of presenting itself in several different aspects with reference to a given subject of inquiry. It may, as we have already seen, (*d*) constitute in itself either a principal or an evidentiary fact in the investigation, in which case the language affords to the hearer or reader immediate or real evidence of that principal or evidentiary fact. Or, on the other hand, it may not be connected with any fact material to the inquiry, except as a statement or narrative, in which case the language furnishes only transmitted evidence of the fact in question, and (unless it comes within the description of Oral evidence) falls, in a judicial view, into the predicament of hearsay.

(*c*) Ante, s. 190. (*d*) Ante, i., chap. 15.

283. But there is still a third aspect which a portion of discourse may present towards the fact that we are seeking to establish, where the language occupies an intermediate station between a substantive fact and a narrative of the ordinary kind, and partakes of the nature of both: I mean the case where it assumes the form of an 'Admission' or 'Confession;' terms which have no proper place or definite meaning, except in the field of judicial evidence.

It is obvious that the trustworthiness or credibility of a statement depends, not only on the veracious character of its author, but also in some considerable degree upon the motives by which he is likely to be swayed when making it. If he be interested in inducing us to believe his tale (whether true or false), we are justified in receiving it with a corresponding amount of distrust. If, on the other hand, the state of facts disclosed by the story be adverse to the interests of the person who tells it, we are warranted in accepting his account with a proportionate degree of confidence. In the case of natural or non-judicial inquiries, however, it is difficult to ascertain and define *a priori* how far a given narrative is favourable or adverse to the narrator with sufficient precision to enable us to lay down any general rule as to accepting or rejecting it. It is not until the attitude of the narrator has been fixed and determined by his relation to other parties in a given judicial proceeding that we are qualified to prescribe any precise rule by which statements against interest may be distinguished from any other kind of unsworn narrative. When that has been done, however—when each of the parties stands in a hostile attitude towards the other in a legal suit or proceeding—the difficulty vanishes, and our jurists have been able to lay down the following rule of law with regard to this kind of narrative, viz.: That the statements, verbal or written, of either party may be

'given in evidence' by his adversary, and used against him. Such statements, so offered, are distinguished from ordinary narratives, in *civil* cases by the title of 'Admissions'; in *criminal* cases by that of 'Confessions.' (*e*)

284. An admission or confession is in reality only a species of narrative, being obviously not in the least degree identical with the fact that is admitted or confessed. Thus, if a person charged with committing an assault were proved to have made use of the phrase, 'I admit I struck him,' it is clear that his act in uttering the words could have no share in the infliction of the blow. The two events—the utterance of the language, and the act of striking the blow—would be totally distinct and independent facts, and either of them might obviously take place or exist perfectly well without the other. But though an admission be thus, in form and theory at least, a species of narrative, yet it is something far more cogent than a mere ordinary narrative, inasmuch as it raises a fair and *legitimate* inference of the truth of the fact which is admitted—an inference, *i.e.*, which is in great measure independent of the veracity of the author of the statement, or the credit that is due to his assertions. For this reason an admission may fairly be regarded as an evidentiary fact or 'circumstance'—a fact, *i.e.*, evidentiary of the matter admitted, which latter stands towards the admission itself in the relation of a principal fact. And not only is this phase of language fully entitled to take its place among evidentiary facts, but, moreover, it is frequently, when unexplained, a relevant fact of a very cogent kind; since the person who makes the statement, being himself a party to the suit or proceeding, has every opportunity of explaining and qualifying it, if untrue. In short, an admission or confession, though from its narrational form it bears a

(*e*) *Vide* Post, s. 461.

strong resemblance to 'hearsay,' is so far from being infected by the weakness inherent to that phase of language, that it is in reality an evidentiary fact of a very cogent order, and 'relevant' to the fact admitted in the fullest sense of the word.

285. Admissions and confessions being thus consigned to the class of evidentiary facts, the different aspects which language, or rather which a given portion of discourse, is capable of presenting towards the subject of inquiry, are now reducible to two. It may be connected with the subject of inquiry, (1) As a fact principal or evidentiary; or (2) As the statement of some such fact. Each of these will demand some notice. A given phrase of language may become relevant to the inquiry as a fact, in three different ways, if not more.

286. The first and most important of these is where the *act* of the speaker or writer is directly or indirectly in question. As we have already had occasion to remark, (*f*) there are an infinity of acts which consist in, or are accomplished by, the use of language. Of these, some are of the most momentous character, while others are comparatively insignificant in their effect. But, whether important or trivial, each and every one of them may become the subject of judicial inquiry in the character either of a principal, or, at least, of an evidentiary fact. It is for the most part by the use of language that we transfer our property, real or personal, while living, and devise or bequeath it after our death. And acts of this formal kind frequently form the very *fact in issue* in a judicial proceeding.

But it is equally by the use of language that we perform a multitude of minor acts, such as the giving of orders, notices, licences, and so forth, including the making of admissions, all which may at least become facts 'relevant to the issue.' Moreover, it is not only

(*f*) Ante, s. 188.

our mutual rights and obligations that are determined or modified by the use of language; we may also commit wrongs or even crimes by uttering or penning a certain series of words. It is by the instrumentality of language that we publish slanders or libels; make false representations, or false pretences; and even commit forgery, conspiracy, or treason. And here again the act perpetrated by the use of the language constantly forms the whole fact in issue in the trial. Hence it is manifest that the act of using a certain form of words, or portion of discourse, constitutes a most important topic of judicial inquiry. The actions of men form the chief subject of legal investigation; and of these none are more momentous than those which are accomplished by the 'utterance' of language written or spoken.

287. But besides the case where the act of the speaker or writer is directly or indirectly in question, a phrase of language, though assuming the shape of a *statement*, may become relevant to the inquiry as a fact, where it forms a *coincidence* by its correspondence, either with another statement or narrative of the same fact, or with the fact itself as ascertained by other evidence. Thus, if two eye-witnesses of some transaction, material to the inquiry, give precisely the same account of what took place, the simple coincidence or correspondence in their stories, assuming that there is no collusion or concert between them, has a proving power totally independent of the credit due to either. (*g*) Such statements, however, would not be received in a court of justice (unless, indeed, they issued from the mouth of sworn witnesses), for the simple reason, I presume, that neither of them would be relevant by itself. The principal field for the operations of this kind of proof is to be found in the solution of historical questions. But in a judicial view, the effect of a coincidence between two narratives seems limited to the

(*g*) *Vide* Taylor Ev., s. 51.

purpose of strengthening and fortifying Testimony or Oral evidence.

As for the case, where evidence of a previous statement made by a witness is received for the purpose of corroborating or invalidating his own testimony, here the mere consistency of the two accounts has little or no effect in raising an inference of the existence of the fact to which he deposes; since the coincidence is sufficiently explained by the assumption that both narratives—the previous statement, and the subsequent testimony—proceed from the mind or memory of the witness as a common source, without resorting to the fact itself to account for it. It is only the negative side of the question—the absence of coincidence—that has any real force or significance. For when the witness's former statement *conflicts* with his oral testimony as to the *same* fact, it is clear that on one or other of the two occasions (if not on both) he must have misrepresented the fact and his own knowledge of it. *Here*, therefore, the witness's *act* in making the previous statement raises an inference as to the state of his own mind, and is relevant to the inquiry as an evidentiary fact, affecting the question of his veracity. In a word, it is simply a case where the act of the author of the language is *indirectly* in question.

288. But again, if a person gives either a verbal or written account of some occurrence, which we ascertain from other sources to be a true one; though his statement would not be relevant to prove the fact or occurrence itself, being mere hearsay for that purpose, yet when we come to know the fact *aliunde*, the coincidence of the narrative with the fact itself, as it actually occurred, raises a fair and legitimate inference of the *knowledge* or cognisance of the author of the story; from which mental fact we may in some cases infer his presence on the scene of the event or series of events in question. It is to be observed, however, that

this *ulterior* inference arises only in so far as the narrator is debarred from obtaining his information from any other source than his own personal observation. This result is to some extent secured by minuteness of detail; yet the mere minuteness of the account he gives is scarcely sufficient to exclude the hypothesis of his having derived his knowledge from other sources, where the narrator is allowed to select his own details; since a minute account of any transaction may be 'communicated' equally with a more general one. The inference of personal presence is only effectually raised—the hypothesis of his having derived his knowledge from other sources only completely excluded—where the narrator is not allowed to choose his own details, but they are selected for him; in other words, where he is interrogated on the subject, and his personal presence is evinced by his ability to answer correctly any question that is propounded to him concerning the matter.

Not a little of the evidence in the celebrated Tichborne trial was of this nature; for though it so happened in that case that most of the narrative was presented in the shape of oral evidence, yet the principle was precisely the same. The claimant endeavoured to persuade the jury that he was Roger Tichborne, by showing, or attempting to show, that he could give a correct account of numberless minute events which actually took place in the life of the real Sir Roger; from which they were asked to infer that he knew of, or was acquainted with all these details; from which they were to infer that he was present in person on all these occasions; from which they might ultimately infer that he was no other than Sir Roger himself. And although most of these accounts were given by the claimant in the character of a witness, yet they would have been perfectly relevant, and in many cases equally effective in raising the required inference, had they been ordinary unsworn

statements, elicited by questions, and established as *facts* at the trial.

289. But this ulterior inference, as to the personal presence of the narrator on the scene of action, is not always necessary in order to render the coincidence arising from his statements available. His knowledge of the fact he relates may be relevant in other ways. Thus, if a man were suspected of the robbery of some property which could not be found, and he were to make a statement as to the place of concealment of the stolen articles, which subsequent investigation proved to be a true one; or if a paper in his handwriting were found containing a memorandum to the same effect, which led to the discovery of the property; the coincidence (in either case) of his own statement with the fact itself—the presence of the missing property in the place indicated by him—would evince his knowledge of the fact; and in this case his mere knowledge would, unless he satisfactorily explained it, imply a dealing with the property amounting almost, if not quite, to felonious possession, which in its turn would obviously be highly relevant to the question of his complicity in the robbery itself.

It is to be observed, however, that, in a judicial view at least, the effect of language as a coincidence seems limited to raising inferences of psychological or mental facts; *i.e.*, to raising such inferences in the first instance. Moreover, since even in the case of a coincidence of this last kind, the proof of the nature or words of the statement would be useless, without proving also that they emanated from the person whose *knowledge* or mental state is the proximate subject of inquiry, as the first step in the chain of inference; it would seem hardly necessary, for judicial purposes, to distinguish the case of a coincidence of this kind from any other instance where a phrase of language is relevant because the *act* of the speaker or writer is indirectly in question.

290. But thirdly, a phrase of language may be relevant as a fact to a judicial inquiry in consequence of its effect upon the mind of the hearer or reader of the discourse; (*h*) and that too, as before, even where the language assumes the form of a statement. For it frequently becomes material even in legal investigations to discover whether a given person has received information of a particular fact, as supplying a motive for his conduct or otherwise. This is perhaps more especially the case in the trial of criminal indictments, where the question of motives and of guilty knowledge play so important a part. For instance, if a man were charged with breaking into and robbing a house, and it transpired that previously to the robbery he had, either by word of mouth or letter, received information (no matter from whom) to the effect that a large sum of money had been deposited in the house in question; the nature of this information, the terms of the statement which reached his knowledge, would, in a natural view at least, be relevant as a fact to the question of his guilt; since it would tend to show that he knew of, or had reason to believe in, the existence of the money, and suggest to his mind a motive for the robbery.

Moreover, I think that such a 'portion of discourse' would be accepted as relevant even in a court of law; though it is not unusual, when evidence is tendered of such matter, to justify its reception by saying that the language is 'evidence against the accused,' because it was addressed to him, or traced to him, or because he was present when the words were uttered; implying that it operates in some sort as his own admission or confession on that account. But the relevancy of such discourse to the question of the belief or mental condition of the recipient stands on entirely different

(*h*) *Vide* Taylor Ev., s. 321, and Harrat *v.* Wise, 9, B and C, 712.

grounds. The reception of a mere statement made in the presence of the party against whom it is offered, or traced to his knowledge, as proof of the fact stated, can be justified only on the plea of his assent to or acquiescence in the *truth* of the account. (*i*) But the relevancy of such a 'phrase of language' as the one now under discussion depends in no degree upon its truth as a statement: It is not at all necessary that it should be true.

For if we may be permitted to vary the case slightly, let us suppose the statement to be untrue; let us assume that no sum of money had in fact been deposited in the house, or stolen from it, but that the accused was simply charged with feloniously breaking into the house with intent to steal. The nature of the information he had received would be none the less material to the case because it happened to be untrue; for it would still supply and suggest a motive for the burglary. All that is required, therefore, to render such a communication material is that it should have reached the understanding of the accused, in which case the mere tenor or substance of the language, whether it be true or untrue as a statement, becomes relevant as a *fact*. The effect of language, however, in this last aspect, as in the preceding one, is necessarily limited to establishing psychological facts, in the first instance.

291. It appears, therefore, that a phrase of language may become relevant as a fact to a judicial inquiry in three different ways. First, as the act of its author: secondly, as a coincidence, which, however, is, practically speaking, comprised under the first head: and thirdly, in its effect on the mind of the hearer or reader of the discourse. These, as far as I know, are the only ways in which language can become relevant to judicial inquiry as a fact. It is possible that there may be other ways in

(*i*) *Vide* Post, s. 462.

which this may happen; but if so, I have not succeeded in discovering them.

292. But a phrase of language may also present itself in the aspect of a bare statement or narrative. In this aspect language is generally rejected by our rules as irrelevant; except, indeed, where the statement assumes the form of Testimony or oral evidence, with which phase of language we have no concern in this place: For it must be remembered that we are now treating of language, not as *evidence*, but as *fact;* not as a means or instrument of proof, but as the subject-matter or material of evidence. In this view, a statement, whether verbal or written, is, generally speaking, *irrelevant*, and rejected as hearsay. To this rule, however, there are several recognised exceptions, which will be noticed hereafter in their proper place. (*j*) But further, there are many cases where statements—or, at least, where *written* statements—are admitted as relevant to the fact stated, by virtue of a peculiar and somewhat anomalous doctrine of our law, which renders all writings required by law to be kept for the public benefit admissible 'as evidence of' the facts recorded in them. (*k*) In all these cases, the language cannot properly be said to be relevant, since it raises no *legitimate* inference of the fact which it is designed to establish; *i.e.*, no inference but what is contingent on the veracity of the author of the statement. Still, inasmuch as these statements are receivable by law, they cannot be excluded from consideration, or treated as wholly irrelevant facts; and may be appropriately said to be 'deemed relevant.' (*l*)

293. A phrase of language, therefore, considered as a fact, the subject-matter of judicial evidence, may present itself as the fit subject of proof:

(*j*) Post, s. 353.

(*k*) *Vide* Taylor Ev., ss. 1,591, 1,592 (1,429) and (1,430).

(*l*) Ante, s. 256; Stephen Ev., art. 2.

(1) As a fact in issue.

(2) As a fact relevant to the issue.

(3) As a fact deemed to be relevant to the issue.

Or, on the other hand, it may be totally irrelevant, and that, even if it contain the statement of a material fact.

And having thus dealt with language in general, regarded as the subject-matter of judicial proof, we will now turn our attention to that species of language which is expressed by means of written characters, and contained in a 'document' or 'writing.'

CHAPTER V

OF WRITTEN LANGUAGE

294. A PHRASE of language may be contained in a 'writing' or 'document,' under which terms are properly included all material substances on which the thoughts of men are represented by writing, printing, or any other species of conventional mark or symbol. (*m*) We say that the language may be 'contained in' a document, because it is highly necessary to distinguish between the document itself, and the language of which it is the repository—between the physical object and the fact or facts which it embodies — in short, between the material substance itself and its visible attributes, (*n*) *i.e.*, the form and order of the characters legible on its surface.

295. The *contents*, then, of a document, the series of words which it contains, constitute a species of discourse, which in many of its incidents is indistinguishable from spoken language. But there is one important feature in which written language does differ widely from verbal, namely, its *permanence*, and consequently its physical aptitude for proof. 'Vox audita perit; litera scripta manet.' (*o*) In the case of spoken language, the words fall upon the ear of the listener, and vanish immediately into empty air. In the case of writing, they fall upon the paper, and remain, or, at least, leave lasting *traces* capable of being made the subjects of perception at any place or subsequent time. The effect, therefore, of putting language into writing, or (if we prefer the expression) of using

(*m*) *Vide* Best Ev., s. 215. (*n*) Ante, s. 41.
(*o*) Best Ev., s. 223.

writing as the medium of the utterance or delivery of language, is to convert the words of which it consists, which, when verbally uttered, are fleeting as the act of speaking itself, into a visible and permanent shape, capable of being manifested to the senses of a judicial tribunal.

296. But it must not be forgotten that proof of the act of using a particular phrase of language consists of something more than mere proof of the words of which it is composed. When we have ascertained what the words are, there still remains the question, By whom are they used? who is the author of them? The act of using or 'uttering' a phrase of language may be regarded in the light of a compound fact, to be resolved or split, for purposes of proof, into two component questions; namely, (1) What the language is—the *quid factum*, or nature of the contents (for though the term, 'contents,' is usually limited to the purpose of denoting what is contained in a writing, yet there seems no reason why we should not apply it also to the substance or matter of a speech, conversation, or any other phase of spoken language); and (2) by whom is the discourse uttered or delivered—the *quis fecit*, or authorship.

In the case of spoken language, the hearer is usually the percipient simultaneously of both these component facts. He hears what the words are, and sees at the same time by whom they are uttered. And it is the same with a reader, in whose presence a phrase of language, for instance, a letter, is written. He sees what the language is, and he sees also by whom it is penned. But written language is usually read, and intended to be read, by persons who are not present at the time of writing. In this case, the reader has the evidence of his own senses for the *nature* of the language, or *quid factum;* but the second question, namely, the authorship, or *quis fecit*, cannot be ascertained by mere inspection of the writing:

that fact the reader must learn (if at all) from other sources, *i.e.*, from sources extrinsic to the document. It is, in short, the first component fact only—namely, the nature of the contents—that is converted by the use of writing into a permanent continuing fact, and of that fact alone, that the writing or document, when produced, affords *real* evidence. Written language, then, differs from spoken language in this respect—that the contents, or words of which it consists, are by the act of writing made permanent, and thus rendered capable of becoming the subjects of perception at any place where evidence of them is required, and at any time subsequent to the creation of the document.

297. But in many of its incidents, as before remarked, a written phrase of language differs not at all from a spoken one. Being a species of discourse, written language is capable of presenting itself in precisely the same aspects towards the subject of inquiry, as we have shown language in general to be. In common with any other sort of discourse, a phrase of writing may present itself either in the aspect of a fact principal or evidentiary; or in that of a mere statement of some such fact. Like language in general, it may become relevant to the inquiry as a substantive fact in at least three different ways; viz.: (1) As being created by the act of the writer; (2) As giving rise to a coincidence; and (3) In consequence of its effect on the mind of the reader. And like language in general, the contents of a document may constitute either a fact in issue; a fact relevant to the issue, or a fact deemed relevant; or they may, of course, be irrelevant, either as 'hearsay,' or as being totally unconnected with the subject of inquiry. (*p*) In short, written differs from spoken language in little else than the facilities it affords for proof, and in certain consequences that flow necessarily from this. This diversity

(*p*) Ante, s. 293.

however, in the mode of its proof renders it desirable, even at the risk of repeating what has been said in the last chapter, that we should review briefly the various phases of written discourse.

298. First, then, where the act of the writer is in question, the contents of the writing may constitute the very fact in issue — not indeed the *whole* issue, since without proof of the authorship the terms of the writing would be nothing to the purpose, but the principal component or larger half of the issue. Thus, in the case of a deed: Suppose the question to be B's title to certain land, of which A is admitted to have been previously the owner; and let it be taken for granted that the deed has been duly executed by A; and let us suppose it to contain the words, 'I grant unto B certain land,' etc., being the land in question. On reading these words (assuming the deed to be a valid one for the purpose) we actually see with our own eyes that A has conveyed the land to B, and in what manner and form he has done so; and our knowledge of that fact is quite independent of any credit that we may attach to A's veracity. The words employed in the deed do not constitute a mere formal *statement* that A has conveyed, or is conveying the land to B; but are *ipso facto by their use the very act of conveyance.* So where a written agreement or contract contains the words, 'I agree,' or 'I promise,' etc., such and such matters, the use of these expressions does not constitute a mere narrative or statement of the contract, but is the very act itself of agreeing, promising, and so forth; where, therefore, the inquiry turns upon the existence, nature, or terms of such a contract, the mere inspection or perusal of the writing affords immediate or real evidence of those facts. So, in the case of a will, where the testator (with proper formalities) writes down the words, 'I devise,' or 'I bequeath,' followed by due execution of the instrument, or, which is the same thing,

executes in due form an instrument containing such words, the act of writing the words followed by due execution; or the act of execution preceded by the words (as the case may be) is the very act of devising or bequeathing, and not merely a formal statement that the act has been, or is being performed. And this is equally true of less solemn and important documents. There are a host of minor acts of greater or less significance in modifying our mutual rights and obligations, (*q*) such as the giving of orders and notices, the granting and revoking of licences, the making of admissions, the preferring of claims or requests, and so forth, (*r*) which may all be performed by the use of pen, ink, and paper, and any of which may become relevant to judicial inquiries in the character, either of principal or of evidentiary facts.

299. A written admission furnishes a sufficient example of the case where the act of the writer comes in question indirectly, *i.e.*, as an evidentiary fact. An admission can never, it is obvious, form a principal fact in any inquiry; because its purpose must of needs be limited to establishing by inference the fact admitted. This latter fact, it is true, may be a fact in issue; but the admission itself can be, at most, evidentiary of it, or *relevant to the issue*. (*s*) A 'receipt,' or written acknowledgment of the payment of money due, is a familiar instance of a written admission. The fact which forms the actual subject of inquiry in those cases, where a 'receipt' is used 'as evidence,' is invariably the payment of the money: the act of the creditor in writing or signing the receipt is obviously not in the least degree identical with this fact; but, on the contrary, quite extrinsic to and independent of it. For it is quite possible for the creditor to give the receipt without the transaction of payment taking place at all: He might, for instance, give it by

(*q*) Ante, s. 280. (*r*) Ante, s. 286. (*s*) Ante, s. 284.

mistake, or in immediate anticipation of payment. In a word, the act of writing or signing the acknowledgment merely raises a strong *inference* of the fact of payment; and thus in the case of a written admission, the act of the writer comes only indirectly in question, as a fact relevant to the issue.

300. But the effect of the act of writing is not limited to the purpose of modifying our rights or obligations; we may also, as previously remarked in the case of language generally, (*t*) commit wrongs or even crimes by the same means. Thus a libel may be published, a false representation or false pretence made, or forgery, conspiracy, or treason perpetrated by the use of the pen. And in these cases, as in that of written instruments, it may well happen that the contents or terms of the writing may form the chief fact in issue. Take the case of a libel,—a libellous letter, for instance, written by A accusing B of theft. Here the *whole* fact in issue is the *act* of A in inditing and publishing the letter, and one principal component of this complex fact is the *nature* of the libel. Now this fact is actually *contained in* the letter, and conclusively ascertained by the mere perusal of it. When we see and read the letter, we obtain immediate or real evidence of the character of the libel-evidence, not resting in any degree on the credit of A, the writer, but based on the faith of our own eyesight itself. In believing the fact that the letter is libellous, we are so far from being called on to place any credit in A's statement that B has committed the theft imputed to him, that it is precisely the falsehood of the statement that makes the publication of the letter tortious and actionable.

So, also, a false pretence may be made by letter, and when we read such a letter, we actually see the nature of the pretence made; and here, too, the falsehood of the

(*t*) Ante, s. 286.

pretence or statement goes to make up the whole issue or criminal act.

301. In all such cases the framing of the document is an act, and when this act comes in question, whether in a civil or criminal proceeding, and proof is required of its existence, nature, or extent, the production in court and inspection of the writing, furnishes real evidence of those facts to the tribunal; just as much as the production and inspection of any other material object, such as a hat, for instance, affords to the tribunal real evidence of the existence, size, shape, colour, or condition of the hat. (*u*) Yet many writers on evidence seem unable to divest themselves of the notion that language generally, and writing as a form of language in particular, can only be relevant to any judicial inquiry as an *allegation* or statement. 'Thus a contract,' says M. Dumont, (*v*) 'though admitted to be genuine, is available only to prove the *allegations* which form its essence.' Whereas, in reality, the 'utterance' of language, spoken or written, is just as much an act, and for the purposes of some inquiries, a substantive fact, as the act of striking a man is a substantive fact in relation to the question of assault. 'The force of a contract,' says M. Dumont again, (*w*) 'rests on two propositions: I. It is conformable to my will at the moment when I sign it. II. I sign it with a view to my own interest, and this interest is not such as would lead me to say I will, when I do not will.' Now, if we substitute the word *know* for the word *will* in the latter of M. Dumont's two propositions, this language exactly describes the ground on which an *admission* is receivable to prove the extrinsic fact admitted or stated, as raising a legitimate inference of its truth. M. Dumont might justly have said: The force of a *written admission* rests on two propositions: I. It is conformable

(*u*) Post, s. 314. (*v*) Dumont Ev., p. 121.
(*w*) Dumont Ev., p. 121.

to my will at the moment when I sign it. II. I sign it with a view to my own interest, and this interest is not such as would lead me to say I *know* that so and so is the case (or to say that so and so is the case), when I do not *know* that so and so is the case. But the proving power of a written contract, or other written act, stands on far higher ground than this. To put such a case fairly, M. Dumont should have said, not that I am not *likely* to say 'I will,' when I do not will; but that I cannot say 'I will' without willing; I cannot say 'I grant' without granting; I cannot say 'I convey' without conveying; I cannot say 'I promise' without binding myself; any more than I can strike another person without inflicting a wrong. In considering a contract, or other written act, the question is, not what the parties *meant* to do, but what they have actually done; not what their intention may have been at the time, but what intention they have *expressed* by the words of the document: *non quod volnerunt, sed quod dixerunt.* (*x*) The end and object of a contract or other similar transaction is, not to furnish a statement of the intentions of the parties, but to perform a substantive act, to the validity of which their actually existing intentions, if incompatible with that act, are practically immaterial.

302. Moreover, even where the primary object of the use of language, spoken or written, is to state an extrinsic fact, the act of employing the language may still become relevant to the inquiry as a substantive fact. Thus, as we have seen in the previous instance of a libellous letter; (*y*) though the immediate purpose of the document is to inform the reader of the extrinsic fact of B's guilt; yet in relation to the question of libel, the contents of the letter become one of the chief facts in issue; and so far is that fact from depending on the truth of the statement contained in the letter, that the more false

(*x*) *Vide* Taylor Ev., s. 1,089. (*y*) Ante, s. 300.

that statement is, the clearer does the evidence of the libel, afforded by the mere perusal of the letter, become. In all these cases the *act of the writer* is either directly or indirectly in question.

303. But a written statement also, like any other, may become relevant to our inquiry as a substantive fact, by forming a coincidence with the fact stated. (*z*) Thus, if during my absence from home I were to receive a letter from a friend informing me that my house had been burnt down—a fact which I afterwards found to be true, however little confidence I might repose in my correspondent's veracity, I should still feel assured, from the coincidence of the statement contained in his letter with the fact itself, that he was aware of the fire at the time that he wrote; and if he had described the details of the occurrence with minute accuracy, I might possibly infer further that he was himself an eyewitness of the scene which he thus depicted. Even here, however, it would be necessary to prove the authorship of the letter, in order to render its contents available to raise the inference as to the knowledge of the writer, (*a*) and a coincidence of this kind, therefore, is only a particular instance of the case where the act of the writer in framing a document comes in question indirectly, as an evidentiary fact.

304. But it must not be forgotten that any phrase of language, whether spoken or written, may become *per se* material, not only when the act of its author is in question, but also, though generally speaking in a less direct manner, when we have cause to inquire into the effect of the language upon the mind of the hearer or reader, (*b*) and that, even without reference to the authorship of the discourse. Thus it frequently becomes material even in legal investigations to discover whether a given person has received information of a particular fact, as supplying

(*z*) Ante, s. 287. (*a*) Ante, s. 289. (*b*) Ante, s. 290.

a motive for his conduct or otherwise. This, as we have already remarked, (*c*) is perhaps more especially the case in the trial of criminal indictments, where the question of motives, and of guilty knowledge, play so important a part. For instance, if a man were charged with robbing a house of a large sum of money, or other valuable property, the fact that he had previously received information (no matter from whom) of the existence, value, and whereabouts of the property which was afterwards stolen, would be a most momentous one. (*d*) The contents, therefore, of a letter supplying such information, if found in his possession, or otherwise traced to his knowledge, would assume the aspect of a substantive fact evidentiary of his guilt.

It is to be observed that in such a case the authorship of the letter would be, comparatively speaking, immaterial; but the place of this component fact would be supplied by the necessity of bringing home the contents of the writing to the knowledge of the accused. It should be remarked, also, that in the case of some written *acts*, such as that of giving (and receiving) notice, it may frequently become necessary to add proof of both these component facts to the evidence afforded by the production of the writing, in order to render its contents available 'as evidence.' In all these cases the contents of the writing are relevant to the inquiry as a substantive fact, either principal or evidentiary.

305. But secondly, a document, like any other phrase of language, may contain nothing more than a mere *statement* of some fact material to the inquiry, in which case the knowledge of the fact in question, that we gain from a perusal of the writing, is contingent on the veracity of the writer. Thus, if A writes me a letter, in which he states that B is dead, not only is A's act in writing this letter wholly extrinsic to, and independent

(*c*) Ante, s. 290. (*d*) Ante, s. 290.

of the fact stated in it, namely, B's death; but it does not even raise a *legitimate* inference of it; *i.e.*, the letter raises no inference of B's death that is not drawn from the supposed knowledge of A, expressed by his will. (*e*) In short, the letter is mere hearsay in relation to the question of B's death; and the perusal of it, though it affords to the reader real or immediate evidence of its own contents, *i.e.*, of the nature of the statement made by A, yet furnishes no real evidence either by B's death, or of any fact evidentiary of it.

306. We may illustrate the wide distinction between a written fact and a written statement further, by supposing, in either of the instances just cited of a deed, a written contract, or a will, that a third person was present as a spectator during the whole transaction, and immediately wrote us an account of it: Thus, 'A has just executed in my presence a deed in the following terms: *I grant unto B, etc., etc.*' It is obvious that our correspondent's act in writing such a letter would be quite a distinct fact from A's act in writing or executing the deed: It would have no effect whatever to convey the land to B, etc.: In short, it would be a mere narrative of the act of conveyance, and our knowledge of that transaction, and of its terms, would be measured by our correspondent's veracity. And the result would be precisely the same, even if one of the parties, or the testator (in the case of a will) were the author of such an account.

The distinction is well illustrated also by the case of a libel cited above, published in the shape of a letter written by A, and charging B with theft. (*f*) For if we suppose the subject of investigation in that case to be, not the libel, but the question of B's guilt or innocence of the crime imputed to him, A's letter, though constituting, as we have seen, a substantive fact in relation to the

(*e*) *Vide* Ante, s. 175. (*f*) Ante, s. 300.

question of libel, would now assume the aspect of a mere statement or narrative; since our knowledge of B's guilt, obtained by reading the letter, would be based, not upon the mere existence of the contents of the letter, but on the truth of the statement contained in it, and consequently, would be contingent on the veracity of A, the author of the writing.

307. It is obvious, therefore, that the production of a document may afford, on the one hand, the most transcendent evidence, or, on the other, but very questionable proof, according to the aspect which the writing presents towards the actual subject of inquiry;—accordingly as, on the one hand, the act of the writer forms the very substance of the issue; or as, on the other, it amounts to a mere statement of the fact which we are seeking to ascertain. In the one case, the production of the writing affords real evidence of the main fact in issue: In the other, though the terms of the writing be established, as before, by real evidence; yet the contents, when proved, constitute only a weak form of narrative, the author of which is not sworn to tell the truth, not punishable if he speak falsely, not liable to cross-examination, not even present in person, and consequently, nothing as to his veracity can be gathered from his demeanour.

308. Unfortunately, however, this important distinction is very imperfectly recognised or preserved either by lawyers or writers upon Evidence. Among the latter, no one is more blind to its significance than Bentham. He lays great stress on the distinction between *preappointed* and *casual* writings; (*g*) and evidently regards the proving power of written contracts, and the like instruments, as a result of the formalities with which they are invested; (*h*) in other words, of the solemnities

(*g*) Bentham Ev., Bk. iv., chaps. 1, 2, 3, and Bk. vi., chaps. 1 and 2.

(*h*) *Vide* Dumont Ev., 199, and Bentham Ev., ii. 467.

which accompany their creation. But this view is a complete fallacy; for no formalities can make a writing identical with an extrinsic fact that does not consist in writing: We cannot turn an event, such as a blow, for instance, into a written shape by putting down on paper the words, 'A struck B.' The act of striking, and the act of writing, are two distinct facts, which cannot be made identical by any process, or by the use of any sort of formalities. To put a case suggested by Mr. Best, (*i*) even if a man were to put his seal to such a document, and have it attested by fifty witnesses, the writing would still remain in relation to the blow a mere narrative, and nothing more. The same observations apply to the record or register of a birth. It matters not what be the sanctions by which the authenticity or veracity of such a document is guarded, the birth of the child, and the act of writing the record of it, will yet remain distinct and independent facts. And the case is precisely the same, even if the extrinsic fact should consist of verbal matter; *i.e.*, of spoken words, that are taken down in writing, or, as it is frequently, but most improperly expressed, 'put into,' or 'reduced to, writing.' I say improperly, because the two facts—the act of uttering the words, and that of writing down the supposed image of them—are not in the least degree identical, but perfectly distinct and independent matters. Not only so, but they are not even connected by a *legitimate* inference; (*j*) in other words, nothing as to the nature or terms of the verbal matter can be legitimately deduced from a perusal of the writing. And this must ever be the case with reports of verbal matter, unless some process can be discovered by which the words of a speaker can be made to fall of their own accord upon the paper, independently of the will of any individual writer. (*k*) Until this can be

(*i*) Best Ev., s. 223. (*j*) *Vide* Ante, s. 175.
(*k*) *Vide* Appendix, art. 3, Remarks on the Phonograph.

accomplished, the writing will, and of needs must remain, in relation to the spoken words, a mere statement or narrative. (*l*)

309. Yet so great is the veneration paid by our law to what is called documentary or written evidence—*i.e.*, to the proof afforded by the production of a document in court—that when once a written statement is admitted 'as evidence' (and, as I have already observed, (*m*) *written* statements are by no means uniformly excluded), it becomes, according to the prevailing doctrines, 'written evidence' of the fact which it tends to establish, and, as such, is invested in the eyes of the law with much of that conclusive effect that truly and naturally belongs only to the evidence resulting from the production of a document whose contents form a constituent part of the actual issue. And so far is this veneration carried, that written statements have even been allowed in some cases to supersede and exclude legitimate Oral evidence of the same fact.

310. Now all this confusion may, I think, be traced to a want of discrimination between the *modus probandi* and the *quid probandum*—between evidence or the means of proof, and fact, the subject-matter of evidence. (*n*) Documents are often called instruments of evidence; but the contents of documents are not evidence; they are facts. A document may in a certain sense be an instrument of evidence, (*o*) for the production of a document is a means of proof; but what does it prove by its production? Simply the fact or facts that it contains, and nothing more. But owing to the equivocal character of the term, 'written,' or 'documentary evidence,' the *contents* are too apt to be confounded with the material object or document

(*l*) *Vide* Ante, s. 196. (*m*) *Vide* Ante, s. 292.
(*n*) *Vide* Ante, s. 260. (*o*) *Vide* Ante, s. 263.

itself, and to be looked upon as instruments of evidence, and accepted as written evidence of the ulterior fact which they imply. Whereas, in reality, the contents or terms of a writing are nothing but facts; and though they may be conclusively established by manifestation to the senses of the tribunal, yet their importance or value, when proved, is entirely contingent on their relation to the issue, which, it is scarcely necessary to remark, may vary in an almost infinite degree. If the contents of a document amount to a fact in issue, we obtain by its production real evidence of a principal fact: If the contents be merely evidentiary of a fact in issue, we obtain by production of the document real evidence of an evidentiary fact; and the value of the total resulting proof is impaired by the uncertainty inseparable from the inferring process: If the writing contains nothing more than a statement or narrative of some material fact, then, though the terms of the writing be established, as before, by real evidence, yet the knowledge we obtain of the fact in question is still contingent on the veracity of the writer, and measured by his credit.

311. And here it is worthy of notice, that while written evidence, or the proof afforded by the production of documents, has met with undue veneration at the hands of our jurists; the value of real evidence of the ordinary kind, *i.e.*, of the proof furnished by the production of other material objects, has been as unduly depreciated. This admits, I think, of a simple explanation, which is this—that written documents frequently contain or embody facts in issue of the most momentous kind; while those other material objects, which are the instruments of real evidence of the ordinary kind, seldom embody anything more important than evidentiary facts, and those, too, but remotely connected with the issue. The proximate fact established by real evidence of the

ordinary kind seldom amounts to more than one of several evidentiary facts, whose coincidence is necessary in order to raise any sufficient inference of the existence of a fact in issue. Hence jurists, looking to the general result of the proving process, have fallen into the error of attributing to the means of proof the strength or weakness which was really due, in either case, to the nature of the fact established.

312. To return to the subject of written language. It appears that a written phrase of language, like any other, may present itself either as

(1) A fact in issue:

(2) A fact relevant to the issue: or

(3) A fact deemed only to be relevant to the issue: which fact is, in every case, capable of being established by real evidence, or production of the writing; but which is also liable, like any other fact, to be laid before the tribunal, either partially or wholly, by the oral evidence of a witness. (*p*)

(*p*) *Vide* Post, s. 338.

CHAPTER VI

WRITTEN REAL EVIDENCE, OR THE REAL EVIDENCE OF WRITINGS

313. I BELIEVE I am responsible for the theory that the proof of the terms of a writing by what, in our legal phraseology, is called 'primary evidence,' *i.e.*, by the production in court of the document itself, and the manifestation of its contents to the senses of the tribunal, is neither more nor less than a phase of real evidence.

And although, to myself, the truth of the principle seems perfectly obvious directly it is suggested to the mind; yet as no other writer, as far as I am aware, appears to have entertained it, the doctrine may perhaps be thought to require some further and special justification at my hands.

314. My contention is this, that inspection by the tribunal of the contents of a writing is just as much *real* evidence of those contents as the inspection or perception of the features or peculiarities of any other material object which may be produced in court, such, for instance, as a knife, is real evidence of those same features and peculiarities. Precisely as the tribunal, in the latter case, perceives the shape, size, and other characteristics of the knife, so, in the former, does it behold the shape and order of the marks or letters imprinted on the surface of the paper. Both appeal equally to its senses, *i.e.*, in both the cases here suggested to its sense of sight. Now if real evidence be truly, as I have endeavoured (and I trust successfully) to establish, neither more nor less than the proof acquired by the

tribunal through the use of its own faculties of perception ; (*q*) then there is this difference, and this only, between real and 'written' evidence—that in the case of writing, an ulterior meaning is attached by convention to the characters ; *i.e.*, to the shape and order of the marks which are seen to be imprinted on the face of the document.

315. But this conclusion as to the ulterior meaning of words and phrases, which we draw, in the case of writing, from our perception of the form and arrangement of the letters visible on the paper, if it alters the character of our evidence at all, is simply in the nature of a very obvious, and, in most cases, almost *necessary* inference from that which we actually perceive, depending for its validity and correctness on our previous knowledge of the conventional meaning of words and phrases, as expressed by written symbols. Such an inference, if it alters the case at all, merely converts our *direct* real evidence into *indirect* or *circumstantial* real evidence. But the inferring process in such a case is, generally speaking (*i.e.*, where the writing is legible and the language clear), so shadowy in its action, so certain in its results, as to leave our evidence barely, if at all, distinguishable from direct. And in any case, whether we choose to regard the evidence as direct or as indirect, it is still, to the person who peruses the document, 'immediate' evidence, and where the reader is represented by a judicial tribunal, *Real*.

316. Even Bentham appears to have apprehended in a confused manner the analogy between the two cases, *i.e.*, between the production in court of a written document, and that of any other kind of material object. At page 691 of the second volume of his treatise upon Judicial Evidence the following passage occurs: 'Imprinted upon any subject-matter of property, the

(*q*) *Vide* Ante, s. 224.

proprietor's name at length would be unquestionably an article of written evidence: no less so the initials, as in the case of G. R. for George Rex. But when instead of the G. R. comes the *broad arrow* on timber, or the *strand* in sail-cloth, then comes the doubt (happily altogether an immaterial one) as between written and real evidence.'

Now, though we must not be taken to assent to Bentham's position, that a mark on timber or on sail-cloth is in itself real evidence; since we regard such matters, not in the light of evidence at all, but in that of facts; yet such marks precisely resemble characters written or printed on paper, in being facts of that permanent and continuing kind which are peculiarly capable of being established by real evidence. Not only, therefore, must we cordially agree with Bentham as to the difficulty of distinguishing between the two cases, but further, we must insist that, so far as concerns the *real* quality of the evidence afforded by the production of either, there is no difference whatever between them: not only does the manifestation of such marks, as he describes, to the senses of a judicial tribunal afford real evidence of the marks; but equally does the manifestation of written characters traced upon paper, or the production in court of paper displaying such characters, furnish real evidence of the writing. And it is precisely because there is no solid difference in principle between the two cases that the 'doubt,' to which Bentham refers, is, as he observes, 'altogether an immaterial one.' In the following page, also, we find him again forced to recognise the same resemblance. 'Mint marks,' he there observes, (*r*) 'applied in the same view, wear an ambiguous aspect, being referable either to the head of *real or written* circumstantial or direct official evidence.' (*s*)

317. Mr. Best, too, is compelled to admit the difficulty

(*r*) Bentham Ev., ii. 692. (*s*) *Ibid.*

he experiences in drawing the line (as he expresses it), between *real and documentary evidence.* 'The remaining instruments of evidence,' he says, (*t*) 'are Documents, under which term are properly included all *material substances*, on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol. Thus the wooden scores on which bakers, milk-men, etc., indicate by notches the number of loaves of bread or quarts of milk supplied to their customers; the old exchequer tallies, and such like, are documents as much as the most elaborate deeds. In some instances, no doubt, *the line of demarcation between documentary and real evidence seems faint;* as in the case of models and drawings, which clearly belong to the latter head, but differ from that which we are now considering in this, that they are *actual*, not *symbolical* representations.' As to which distinction I must beg leave again to remark, that the symbolical quality of written characters in no wise alters the nature, as real or otherwise, of the evidence afforded by the production of the writing; but merely interposes a very simple and obvious process of inference between that which is actually verified by perception, namely, the written character or symbol itself, and that which is actually in question, viz., the *meaning* of the symbol; an inference which, though it may possibly affect the nature of the evidence as direct or indirect, has no influence upon its character as *real.*

318. In further confirmation of the principle now under consideration, let us observe also the analogy existing between the evidence afforded by the copy of a writing, and that furnished by the model of any other material object (such, for instance, as the model of a house) produced in court. In the former case, the nature of the contents of the original writing, which is a single fact, capable of being established in its entirety by real

(*t*) Best Ev., s. 215.

or immediate evidence, is, as it were, split or divided for purposes of proof into two components; namely, (1) the identity or correspondence of the contents of the copy with those of the original writing (which fact cannot well be proved by real evidence, for in that case the tribunal itself must institute the comparison, and for that purpose must have the original before them, which would render presence of the copy superfluous and unnecessary); and (2) the actual nature of the contents of the copy, of which latter fact the production and inspection by the court of the copy furnishes real evidence.

Precisely similar is the process that takes place in the case of the model. The features and details of the actual house—the compound fact—is split into two component facts; viz., (1) the identity or coincidence of the various features of the model with those of the real house—a fact not capable of proof by real evidence; and (2) the actual details or features of the model, of which latter fact its own production affords real evidence.

The analogy between these two cases is also alluded to by Mr. Dumont. 'In real evidence,' he observes, (*u*) 'representations given by drawings, paintings, or models are much analogous to copies of writings.'

319. Having proceeded so far, the writers referred to would hardly, I think, have failed to recognise the truth of the principle under consideration, had not their judgment been obscured from the outset by the false and confusing view of the true nature of real evidence induced by their definition of it as 'the evidence of which any object belonging to the class of *things* is the source.' (*v*) The fallacy of this view has already, I trust, been sufficiently exposed. (*w*) Real evidence is neither peculiarly the evidence of '*things*,' nor necessarily the proof of any particular kind of fact: It is the

(*u*) Dumont Ev., 306. (*v*) *Vide* Best Ev., ss. 28 and 196.
(*w*) Ante i., chap. 21.

evidence furnished by the perceptive faculties of the tribunal applied to the fact itself; and whether the fact in question be the contents of a document, or the features of any other material object, the proof of it is then, and then only, *real*, when the fact is itself manifested to the senses of the tribunal.

320. The evidence obtained by the production of writings differs, therefore, from the real evidence furnished by the production of any other material objects in nothing but the inference from the written symbol itself to the conventional *meaning* of the symbol, which is inseparable from the proof of written documents. The presence or absence of this inference may affect the nature of the evidence as *direct* or *circumstantial*, but can have no bearing on its character as *Real*. I may add, too, that the evidence in these cases is not, properly speaking, even indirect; because the meaning that is attached by convention to a particular word or phrase is a specific fact, and not a general truth; and the sentence which declares that meaning is no general proposition, but merely a specific assertion of a comprehensive kind; (*x*) consequently the deductive process which takes place is not a case of *real* inference, but merely what we have formerly described as a mechanical deduction; so that the evidence in these cases is, strictly speaking, not only real, but also direct. (*y*)

(*x*) *Vide* Ante, s. 156. (*y*) *Vide* Ante, s. 136.

CHAPTER VII

REAL EVIDENCE

321. HAVING already, I trust, satisfactorily ascertained the true nature of real evidence, we will now proceed to take a short survey of its principal modifications;—in other words, of the principal forms in which a judicial tribunal is capable of applying its own observation to the facts which it is called upon to decide, and of the rules respecting the production of real evidence which prevail in English courts of justice. Confining our attention in the first instance to the real evidence of such facts as are not contained within the four corners of a written document, we will begin by dealing with that more fugitive class of facts usually known as 'events,' a class which, comprising as it does within its limits the whole range of human actions, necessarily forms by far the most important subject of ultimate inquiry in courts of law.

322. The cases in which a legal tribunal is qualified to bring its own senses to bear upon facts of this transient kind are, to say the least of it, somewhat rare. Mr. Best, as we have seen, (*z*) cites the instance of a contempt of court, or offence committed in the presence of a tribunal, in which case the act occurs, as it were, at the very time and place of trial, or, which is the same thing, is investigated at the very time and place at which it occurs; and thus the act, though in a high degree transient, does not assume towards the judicial proceeding the aspect of a terminated fact. In this case, as Mr. Best

(*z*) Best Ev., s. 196; *vide* Ante, s. 224.

justly observes, (*a*) the evidence is both real and direct. An admission, confession, or other acknowledgment made in open court is another instance of an act upon which a judicial tribunal is capable of exercising its perceptive faculties; though in this case, it should be remarked, the evidence does not assume so direct an aspect in relation to the questions at issue, as in the preceding instance.

323. So, also, the *demeanour* of a witness who gives evidence in a court of justice is cited by Mr. Best as an illustration of real evidence. (*b*) But it is not the demeanour only of the witness that is made manifest by real evidence: In the case of oral evidence, the *whole act* of the witness in making his statement is brought home to the senses of the tribunal: Not only do the jury hear the words of which the statement consists, but they see, moreover, who is the speaker, as well as his manner or demeanour when telling his story. This, however, can scarcely be regarded as a good instance of real evidence, because the matter established,—the statement made by the witness,—is not fact, but evidence; but it may be useful, when comparing the proving power of oral testimony with that of a written statement produced in court, to bear in mind that 'testimony' is itself addressed entirely to the senses of the jury. (*c*)

324. In like manner, the *behaviour* of a lunatic, who appears personally before the Lord Chancellor with a view to having his commission superseded, (*d*) is a species of involuntary act (or series of involuntary acts), which the tribunal verifies by the evidence of its own senses. It should be observed, however, that in this last instance the act is of so passive a kind, and so continuous a character, that it scarcely comes within the ordinary notion of an event, and belongs rather to the more permanent, than to the comparatively transient

(*a*) Best Ev., s. 196. (*b*) Best Ev., s. 197.
(*c*) Post, ss. 345 and 422. (*d*) *Vide* Best Ev., p. 253, 2nd ed.

class of facts of which we have thus far been treating. These last, it is obvious, do not afford much scope for the operations of real evidence, to the acquisition of which it is indispensable that the fact should be *continuing* at the very time when the proof of it is demanded.

325. But with facts of the more permanent class, such as commonly fall within the designation of 'states,' the case is otherwise. A vast number of these are capable of being manifested to the perception of a tribunal by the production in court of the external objects in which they have their seat. It is true that such permanent facts do not usually form the specific subjects of judicial inquiry. If relevant at all, they are generally relevant, not as principal, but as evidentiary facts only. Even to this position, however, there are some exceptions. Thus, when pregnancy is pleaded to an indictment for a capital crime, the bodily state of the prisoner, which is the principal fact in the case, is ascertained by the examination of her person by a jury of matrons empanelled for that purpose. (*e*) So also, formerly, on an appeal of mayhem, the court would in some cases inspect the wound in order to see whether it were a mayhem or not. (*f*) In both these instances the proof is not only real, but direct also; the 'state' itself being the principal fact to be investigated. But as a general rule these permanent facts, or 'states,' only come in question indirectly, *i.e.*, as evidentiary facts; an incident which has led many of our jurists to confound real with circumstantial evidence. (*g*)

326. But whether it comes in question directly or indirectly, a fact of this last kind, as before remarked, is peculiarly susceptible of being manifested to the senses of a judicial tribunal by the production in court of the

(*e*) *Vide* Taylor Ev., s. 498. (*f*) *Vide* Best Ev., s. 196.
(*g*) *Vide* Ante, ss. 183, 228, and 245.

material object in which it is embodied; subject, however, to this proviso, that not only must the object itself be sufficiently durable to retain its condition substantially unaltered up to the *time* when its production is required; but it must also be sufficiently *portable* to be conveyed to the *place* of trial.

327. It should be observed, however, that this last requirement may sometimes be dispensed with. For even where the object, either from its bulk or any other cause, is of so immovable a nature that its conveyance to the court would be impossible or highly inconvenient, it may still be manifested to the perception of the jury by means of what is technically called a 'view'; a proceeding which forms a slight exception to that fixity of place which is the usual characteristic of judicial tribunals. Where this method of obtaining real evidence is resorted to, the tribunal (which, so far as *fact* is concerned, is usually represented in our judicial system by the *jury*) repairs to the place or object in dispute, and there obtains ocular or other real evidence of such of its characteristics as may be relevant to the case.

This is obviously the only way in which a judicial tribunal can obtain purely *real* evidence of local matters; such as the extent, limits, or condition of a piece of ground; the shape or state of a house; the width or depth of a canal or river; the height or length of a bridge, or the like, (*h*) and consequently the proceeding was formerly much resorted to. But in modern practice, as Mr. Best informs us, (*i*) this mode of proof has been almost superseded by the use of 'accurate and verified models.' This, I think, is to be regretted; because, although a model, when produced in court, affords the most transcendent evidence of *its own* features; yet the correspondence or coincidence of the model with the object, which is the actual subject of inquiry, must

(*h*) *Vide* Dumont Ev., 101. (*i*) *Vide* Best Ev., p. 253, 2nd ed.

always depend, at best, upon *Oral* evidence; upon the testimony of the person who has constructed the model, or of a witness who has himself compared the two.

328. So much for the real evidence afforded by the production in court, or inspection by the tribunal, of material objects which do not fall within the description of written documents. As a general rule, our courts do not exact such real evidence as a matter of law, but will admit the sworn testimony of witnesses who have themselves verified the facts in dispute by a personal observation of the objects in which they have their seat. Nor can it justly be said that their practice in this respect is unduly lax. For though it is quite true, theoretically speaking, that real evidence is vastly more cogent than any other, yet material objects in general vary so much in respect of those qualities which render their presence before the tribunal desirable, or even possible, that it would be futile to attempt to lay down any fixed uniform rule as to exacting their production.

329. Mr. Best, however, mentions one or two exceptions to this rule, or rather, want of rule. 'Thus,' he says, (*j*) 'a coroner's inquest to ascertain the cause of the death of a person who has died suddenly can only be held *super visum corporis*.' (*k*) 'So when a fine was levied,' he says, (*l*) 'the parties were required by the ancient statute, 18 Edw. i., St. 4, Modus levandi fines, to appear personally before the justices, in order that it might be discerned by them' (*sc.*, from the appearance and involuntary demeanour of the parties) 'if they were of full age and good memory, etc.' 'And the same,' he says, (*m*) 'seems to hold in the case of a recognisance; which is always expressed to be entered into on the personal appearance of the party before the justice who

(*j*) Best Ev., s. 197. (*k*) *Vide* Blackstone's Com., i. 348.
(*l*) Best Ev., s. 197. (*m*) *Ibid.*

takes it.' 'On this principle,' he adds, (*n*) 'in a great degree, rests the just and sound rule of English judicature, that the evidence of witnesses must in general be given by them personally in open court—the real evidence afforded by their' (involuntary) 'demeanour, being one of the most powerful securities against perjury and fraud.' 'So, generally speaking at least,' he says, (*o*) 'a lunatic, whose commission is sought to be superseded on the ground that he has recovered the use of his reason, must appear personally before the Lord Chancellor to be examined in order that that fact may be ascertained.'

330. 'There are likewise instances,' he says, (*p*) 'where the production of real evidence is exacted by practice. Thus, on an indictment for larceny, if the stolen property has been found, the court usually insists on its being produced before the jury.' But here he adds: 'When the goods stolen are of a perishable nature, this is of course frequently impossible; neither would it be required when likely to be inconvenient or offensive, as where flesh stolen is in an advanced state of decomposition, etc.' Indeed, I think that Mr. Best is scarcely accurate in stating that in any such case the production of the stolen property would be insisted on by the court, whether as a matter of law or a rule of practice. Cases frequently occur in which its production could have no influence whatever on the issue of the trial.

For instance, suppose an article exposed for sale to be stolen from the door of a shop, and the thief to be detected in the act by a passer-by, and arrested after direct pursuit. It may be the practice in such an event to hand over the stolen article to the police; but frequently it might just as well be restored to the owner at once. For not only is the identification in such case superfluous, but it often happens that the

(*n*) Best Ev., s. 197. (*o*) *Ibid.*, p. 253, 2nd ed. (*p*) Best Ev., s. 197.

owner is unable to recognise his own property at all by its appearance, and only learns that it belongs to him from the testimony of the witness, who has seen the article in question abstracted from his premises: To require its production would in such case be absurd. And therefore I venture to think that the production or non-production of stolen property is always left by our courts to the discretion of the advocate. At any rate, we may safely assert that, subject to the foregoing, and possibly a few other exceptions, our courts do not insist on the production of any material objects that do not fall within the description of written documents; but will admit oral or any other legitimate evidence of such of their features or characteristics as may be relevant to the issue.

331. But in dealing with *writings*, the rule is reversed. Our courts recognise the transcendent power of real evidence by peremptorily insisting on the production of all writings whose contents are in any way in question. And this is a reasonable rule. For a written document differs from all other material objects in these points, namely, that it is always *portable*, and always, at least to an indefinite extent, durable. And besides these properties, when a writing contains, as it frequently does, any legal phraseology, the tribunal is far better qualified than any uninitiated or unprofessional witness to settle any question as to the meaning of the document that may arise from the language employed in it. Moreover, writings frequently contain a multiplicity of details, which it is not easy for a witness to retain in his memory. Add to this that a writing is frequently preappointed, *i.e.*, created for the very purpose of being afterwards produced, if necessary, in a court of justice, and we must perceive that the rule which exacts the 'primary evidence' (*q*) of written documents

(*q*) Post ii., chap. 8.

is a most reasonable and salutary one, and founded on the strictest scientific principles. To revert to the subject of real evidence in general.

332. A remarkable illustration of the tendency of true principles to assert themselves in practice, even in the absence of express recognition, is afforded by the history of our modes of trial. Real evidence has asserted its transcendent effect in a very striking manner, in spite of the misapprehension that has prevailed universally as to its true nature. On reviewing the history of our modes of trial, we find that in every case in which the *whole issue* or question turns upon a fact which is capable of verification by means of direct real evidence, the 'court' (in its technical signification), *i.e.*, the judges have uniformly dispensed with the assistance of a jury, and decided the question by the exercise of their own perception. In short, our judges, whose peculiar province it is to determine questions of *law* only, have arrogated to themselves the right of deciding also those issues of fact which turn entirely upon direct real evidence.

333. Thus, a trial by record is an instance in which the whole issue turns upon the existence and nature of a particular record, a fact which is properly established by mere inspection of the record itself. And this inspection was always made by the court itself without the aid of a jury. 'The trial therefore of this issue,' says Blackstone, (*r*) 'is merely by the record, for, as Sir Edward Coke observes, a record or enrolment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself.' While quoting this passage, however, with a view of showing the mode in which such an issue of fact was to be tried, namely,

(*r*) Blackstone's Com., iii. 331, 7th ed.

by the court, and not by a jury, we must not be taken to assent to the grounds which Sir Edward Coke assigns for dispensing with the assistance of a jury in such a case. It is not because a record possesses a greater proving power than any other writing that this form of trial came to be adopted, but because the *whole* issue or question turned upon the existence and nature—upon the contents, in short, of a document ; a fact which was capable of manifestation to the senses of the tribunal by the simple production of the record itself.

334. Trial by *inspection* or *examination* furnishes another instance, in which the whole issue turns upon a fact capable of proof by direct real evidence, and which, consequently, has usually been decided by the court itself, without the intervention of a jury. 'Trial by *inspection* or *examination*,' says Blackstone, (*s*) 'is where for the greater expedition of a cause, in some point or issue, being either the principal question, or arising collaterally out of it, but being evidently the *object of sense*, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute.' 'For,' he proceeds to explain, (*t*) 'where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it ; who are properly called in to inform the court in respect of *dubious* facts ; and therefore when the fact, from its nature, must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone.'

335. A third instance in which the intervention of a jury is dispensed with, is a trial by *certificate*, (*u*) where the court before which the question is tried, having no

(*s*) Blackstone's Com., iii. 331, 7th ed.
(*t*) Blackstone's Com., iii. 331, 7th ed. (*u*) *Ibid.*, iii. 333.

jurisdiction to inquire into the real truth of the fact which is certified, is only empowered to decide how the fact is certified to be ; and where, consequently, the whole issue turns upon the existence of the written certificate, and the nature of its contents ; a fact which can be ascertained by a simple inspection of the document itself ; or, in other words, can be established wholly by direct real evidence.

336. And I would also venture to suggest that this was the true origin and ground of the summary power with which courts of record are armed by our law to punish contempts of court by attachment without trial. I would venture to suggest that this summary process in its inception contemplated only those cases in which the contempt falling under the immediate cognisance of the court was brought home to the perceptions of the tribunal itself, and where the intervention of a jury to try the facts might, therefore, be reasonably deemed superfluous. But whatever may have been its origin or its history, there can be no doubt that this summary power, as exercised in the present day, has been carried to a somewhat dangerous length. It is not only that the offence itself is ill-defined in law, but that our judges also arrogate to themselves the right to decide questions of fact which do not fall under their own observation, and to usurp the functions of a jury by drawing inferences and weighing testimony. It is necessary that a judicial tribunal should have absolute power to control its own subordinates and officers. When dealing, therefore, with offences committed by inferior judges or magistrates, by sheriffs, bailiffs, gaolers, or the like, or by their own attorneys or solicitors, (*v*) our superior courts are fully justified in taking judicial notice of the facts of the case, and in using any means of satisfying themselves as to their truth, which they may deem sufficient for the purpose. But in the case of offences against their

(*v*) *Vide* Blackstone's Com., iv. 284.

authority committed by private individuals, and which do not fall under the observation of the tribunal itself, there does not appear to be any reason why the offender should be deprived of that constitutional protection which was secured to every subject of this realm by the statute of Magna Charta.

The legal definition of 'contempt of court,' however, is a question of substantive law, the discussion of which does not fall within the design of the present work, and which may, therefore, be left to abler hands to decide. But with regard to that with which we are more peculiarly concerned, namely, the *proof* of the offence, we would humbly venture to suggest that this arbitrary power should, against private individuals at least, be restricted to cases where the offence is committed in the face of the court, and is brought home to the actual perception of the tribunal; and where the evidence is, consequently, not only direct, but also wholly *Real.*

CHAPTER VIII

PRIMARY AND SECONDARY EVIDENCE

337. 'PRIMARY evidence' of a writing is the term applied by our jurists to the real evidence of its own contents afforded by the production in court of the document itself; any other mode of proving the terms of the document being designated by the phrase, 'Secondary evidence.' And it is a settled and salutary rule of English law that no secondary evidence of the contents of a writing can be received, until an excuse, such as the law deems sufficient, has been given for the non-production of the original writing. Whether a proper foundation has been laid for the admission of secondary evidence—in other words, whether a sufficient excuse has been given for the non-production of the original writing—is to be determined by the judge, and not by the jury; and even if this depends on a question of fact, the judge must decide it. (*w*)

338. Secondary evidence may assume several different forms. Thus it may consist of a memorial, a copy, or an abstract of the original writing. In all these cases, as previously observed, (*x*) the fact—*i.e.*, the contents or terms of the original writing—which, if the original were produced, would be wholly established by real evidence, is split or divided into two component facts, one of which,—namely the identity or correspondence of the copy with the original, cannot be proved by real evidence (for in that case the court itself must institute the comparison, and for that purpose must have the

(*w*) Best Ev., s. 472. (*x*) Ante, s. 318.

original writing itself before them); and the other, of which two facts, viz., the nature of the contents of the copy, memorial, or abstract, is proved by the real evidence afforded by its own production in court. Or the secondary evidence may consist exclusively of the *oral* evidence of a witness, who has read and remembers the contents of the original.

339. But our law draws no distinction between different kinds of secondary evidence, so long as it is otherwise *legitimate* evidence; and very properly so, for it would be unreasonable to insist on the production of a supposed copy, when the actual question is, not what the contents of the copy may be, but what are the contents of the original itself. But the secondary evidence must of course be *legitimate* evidence, (*y*) *i.e.*, it must satisfy the usual standard established by our law for the reception of evidence in general. As far as it consists of narrative, it must be narrated only by a sworn 'witness,' who is, or has been, the actual percipient of all that he narrates. Such, in theory at least, is the rule, and such also is the practice where the secondary evidence consists entirely of verbal description. But it is impossible to deny that considerable laxity prevails in proving the identity or correspondence of the contents of copies with those of original writings. As this subject will be more fully discussed hereafter, (*z*) it is unnecessary in this place to do more than advert to it as a qualification of the rule that requires secondary evidence to be legitimate. The excuses, which the law admits as a ground for dispensing with the primary evidence of writings, are, the loss or destruction of the original document; or that it is in the possession of the adversary, who refuses or neglects to produce it, after due notice calling on him to do so; or in the possession of a party privileged to withhold it, who insists on his

(*y*) *Vide* Best Ev., s. 483. (*z*) Post, s. 416.

privilege ; or who is out of the jurisdiction of the court, and consequently cannot be compelled to produce it. (*a*)

340. Mr. Best also mentions several *exceptions* to the rule which requires primary evidence of the contents of a writing to be given. (*b*) First, where the production of the writing is *physically impossible ;* as where the characters are traced on a rock. Secondly, where it would be highly *inconvenient* on *physical* grounds ; as where they are engraven on a tombstone, or chalked on a wall or building, or contained in a paper permanently fixed to such immovable objects. Thirdly, where the production of the original writing would be highly inconvenient on *moral* grounds, as where it is contained in some record or other public document of general concernment. Such documents, says Mr. Best, (*c*) 'are, comparatively speaking, little liable to corruption, alteration, or misrepresentation, the whole community being interested in their preservation, and in most instances, entitled to inspect them ; while private writings, on the contrary, are the objects of interest but to few whose property they are, and the inspection of them can only be obtained, if at all, by application to a court of justice. The number of persons interested in public documents also renders them much more frequently required for evidentiary purposes ; and if the production of the originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time, but the continual change of place would expose them to be lost, and the handling from frequent use would soon ensure their destruction.'

341. These exceptions to the rule requiring the production of all writings, whose contents are in question, furnish a further illustration of the analogy that exists

(*a*) Best Ev., s. 482. (*b*) Best Ev., s. 484.
(*c*) Best Ev., s. 485.

between writings, and other material objects, in respect of the nature of the evidence afforded by the production of either. (*d*) These exceptions show us that the rule, which exacts the primary evidence of written documents, is founded, not on any fundamental natural difference between writings and any other class of material objects, but merely upon the accidental circumstance that the former are, generally speaking, physically, as well as morally, fitted for production before a judicial tribunal. For we find that when this physical or moral aptitude ceases, the rule is relaxed, that writings are then placed on the same footing with other material objects, and that our courts accept, as in the case of the latter, any legitimate evidence of their contents that may be forthcoming.

342. Before quitting this subject, we must not omit to notice another, and a totally different modification of evidence, which is also frequently dignified by the title of 'Primary evidence,' and the exacting of which, like that of Primary evidence generally, is cited as an exemplification of the rule that requires the *best* evidence to be produced. (*e*) The phase of evidence to which I refer is the proof of the execution of a written instrument by means of the oral evidence of an attesting witness.

It will be remembered that the whole act performed by means of a writing (whether that act amounts to the conveyance of an estate, a testamentary disposition of property, or the ratification of a contract, or be directed to some less formal or far humbler purpose) may, and for purposes of proof generally must, be resolved into two component facts or questions; viz., (1) The nature of the act, or terms of the writing; and (2) The author-

(*d*) Ante ii., chap. 6.

(*e*) *Vide* Taylor Ev.. ss. 392 (363) and 394 (365), and Post, chap. 22.

ship, or execution of the document by the particular party to whose agency it is ascribed. (*f*)

Of these two component facts, the first is in general susceptible of proof by real evidence, or production of the document; and, as we have just seen, the first and more important branch of the rule under discussion is directed to the purpose of exacting that mode of proof. The second component question, however—the authorship—can in general be established only by the oral evidence of a personal observer of the act of writing or of execution. In the case of attested instruments, the subscribing witness is fixed upon and chosen beforehand, as the most proper person to establish by his testimony the fact of execution. In short, his testimony is *preappointed* for this purpose, (*g*) and the function of this second and less important branch of the rule against secondary evidence is to require this second component question, viz., the execution, to be proved exclusively by the means thus preappointed, wherever the instrument is such as to need attestation to give it legal validity: (*h*) Any other mode of proving the execution being designated, in this view, secondary evidence. The scope of this latter branch of the rule, however, is far less extensive than that of the former, which relates to the proof of the *contents* of writings; and the latter too stands on very different grounds, being founded on the superiority of preappointed over casual testimony merely; while the former is based on the superiority of *real*, and moreover, in many cases, of *preappointed real* evidence over oral. Indeed, the discussion of this latter phase of evidence is somewhat out of place here; but as it is often associated with the former under the head of 'Primary and Secondary evidence,' it appeared necessary not to omit all notice of it in the present chapter.

(*f*) Ante, s. 296. (*g*) *Vide* Ante, s. 219
(*h*) *Vide* Taylor Ev., s. 392 (363).

343. And for the same reason it seems desirable to remark that there is still a *third* modification of evidence, which at least one writer treats of under the same head, and distinguishes by the title of 'Secondary evidence of oral testimony.' (*i*) By this is intended the second-hand testimony of a witness, who was examined in the course of a former trial or proceeding, and has since died, or is otherwise incapable of being called, when it is used as evidence in a subsequent suit or trial between the same parties. But this arrangement, which does not seem to have been generally adopted by writers on Evidence, appears to me a most confusing and objectionable one. This kind of second-hand proof should, for reasons given hereafter, (*j*) be classed, not as 'Secondary evidence,' but as a recognised exception to the rule against hearsay, which is the mode of classification adopted by Mr. Best with regard to it. (*k*)

(*i*) Taylor Ev., s. 464 (434). (*j*) Post, s. 354. (*k*) Best Ev., s. 496.

CHAPTER IX

ORAL EVIDENCE

344. 'Oral evidence,' the meaning of which term is identical with the legal acceptation of the word 'Testimony,' is frequently designated in our books 'Parol evidence.'

The term, 'parol evidence,' however, appears to me a most objectionable one; and for this reason, that the word 'parol' is properly employed by our jurists to distinguish a contract (whether written or verbal), which is not under seal, from a deed sealed and delivered, or 'Specially.' This is the strictly scientific and technical use of the word. But it is also frequently employed in a looser sense, when it is simply equivalent to 'verbal,' and opposed to 'written.' The result of this is, that the use of the term, 'parol evidence,' tends to generate a confusion between *parol* or *oral* evidence, and evidence (*cujuscunque generis*) of a parol contract, or of other parol or verbal matter; and thus to obliterate the distinction between the evidence itself, and the fact, the subject-matter of evidence,—or, in other words, between the *modus probandi* and the *quid probandum*. For this reason the term, 'Oral evidence,' or 'Testimony,' will always be employed in the present work to denote the evidence of sworn witnesses.

345. Oral evidence, then, we have already defined as that afforded by the narratives of sworn witnesses, delivered orally to the court itself. (*l*) And here it

(*l*) Ante, s. 253.

is worthy of remark that oral evidence is invariably brought home *in toto* to the mind of the tribunal by direct real evidence, or what is analogous to it, namely, by the evidence of their own senses. The *whole act* of the witness in making his statement falls under the immediate observation of the jury. This, it is obvious, can be completely the case with no statement that is not made in court in the course of the trial. Even when a written statement is produced in court, and the terms or *contents* of the writing are thus established by real evidence, the *authorship* of the document must still be proved by means extrinsic to the writing, and, generally speaking, by oral evidence. But in the case of *testimony*, the tribunal not only *hears* what the statement is, but also *sees* who is the author of that statement, and scrutinises his demeanour while he delivers it. This forms an additional reason, beyond the guarantee for his veracity, which is secured by his oath, why the statement of a witness delivered in open court should be preferred to any other. And, as we have already seen, (*m*) it is a general rule of our law that no other form of narrative, whether verbal or written, shall be accepted as evidence.

346. A second rule follows as a necessary consequence or corollary from the first; namely, *that a witness must speak only as to facts within his own personal knowledge;* that is, must narrate only facts, of which he is, or has been, himself the percipient. This rule obviously follows as a necessary result from the former one. For if a witness were allowed to transmit to the court the narratives of other persons, who were not themselves witnesses, all the securities, which his personal presence, his oath, and other guarantees, might afford for the truth of his own story, would be wholly wanting to confirm the narrative of his informant. Thus, if a witness were

(*m*) Ante, s. 254.

allowed to say, 'A told me such and such a fact' (forming a subject of inquiry), though we might be perfectly well assured that the witness himself was speaking the truth in stating that A had told him the story which he related; yet we should have no security whatever for the truth of the fact thus narrated to him by A: since we should have no guarantee for A's veracity.

A witness is therefore allowed to state only facts of which he himself has, or has had *immediate* evidence. And thus the whole subject of 'immediate' and 'transmitted' evidence comes in question in considering the testimony of witnesses. The evidence of all the facts, which a witness relates, must be 'immediate' or 'real' to him. It is not, indeed, called real, as that expression is technically confined to evidence addressed to the senses or perception of the tribunal itself (without the intervention of any witness); but it must be what Bentham and Mr. Best call 'real *reported* evidence,' which, as I have endeavoured to show, (*n*) is neither more nor less than transmitted evidence at first hand. All evidence, which a witness may offer, of facts not falling under his own observation, but narrated or transmitted to him, whether verbally or in writing, by other persons, our courts uniformly and absolutely reject as 'Hearsay.' It is this form of transmitted evidence which most naturally suggests that title, and from which the expression probably took its origin; but hearsay may also occur in an immediate or real form; that is, without the intervention of any sworn witness, as we shall see in the next chapter, where 'hearsay evidence' is more particularly treated of. (*o*)

347. Lastly, however, it remains to notice, that the witness's knowledge of the fact to which he deposes must not only have been gained by his own personal observa-

(*n*) Ante, s. 225. (*o*) Post, s. 350.

tion, but it must also have reached his perceptive faculties *directly; i.e.*, he must not have *inferred* the fact from what he has observed, (*p*) for it is the function of the *jury* to draw inferences, and not of the witnesses. A witness would not be allowed, for instance, to state that he saw that a horse had just fallen down, where he really inferred that fact from seeing that his knees were cut and bleeding; he must depose only to what he actually saw, namely, the state of the horse's knees; leaving the jury, if they choose, to draw the conclusion that the horse had just fallen down. This rule, however, must be accepted with some qualification, the most prominent instance of which occurs in the case of what is technically called 'opinion' or 'scientific evidence': (*q*) but in general, all *inferences* must be left to the *jury*.

348. The very presence or intervention of the witness must necessarily render the evidence of the fact, to which he deposes, *oral*, so far as the tribunal is concerned; and if, moreover, the fact to which he speaks be only an evidentiary one, the evidence which the jury obtain of the fact in issue will also be *circumstantial*. But the evidence by which a witness acquires his *own* knowledge of the fact to which he testifies must be *to him* at once *Real* and *Direct*.

(*p*) *Vide* Stephen Ev., art. 62 and note 27.

(*q*) Post ii., chap. 25.

CHAPTER X

HEARSAY

349. 'HEARSAY evidence,' or 'Hearsay,' is the term usually employed in our law to denote all pure statement or narrative, which does not satisfy the maxim, 'In judicio non creditur nisi juratis'; *i.e.*, which is not delivered openly to the tribunal by a sworn witness, himself the actual percipient of the fact to which he deposes. Mr. Best calls it a very inadequate phrase, (*r*) and justly so, for its meaning is not confined to audible utterances. Hearsay is merely a phase of language, distinguished by the peculiar aspect that it presents towards the subject of inquiry. Every 'piece of hearsay evidence' is a portion of discourse, which, like any other phrase of language, may assume a written as well as a verbal shape, and is subject to be established, like any other fact, by real as well as by oral evidence; (*s*) in other words, hearsay may come to the knowledge of the tribunal either with or without the intervention of a witness.

350. Thus, if a letter, not being such as to fall within the denomination of an admission or confession, but containing the statement of some extrinsic fact material to the issue, were produced in court in proof of that fact, this letter would furnish an instance of written hearsay established by real evidence. On the other hand, if a verbal statement of a similar description were made in court by an unsworn person, this would be a specimen of verbal hearsay, also established by real evidence, *i.e.*,

(*r*) Best Ev., ss. 89 and 495. (*s*) Ante, s. 261.

reaching the ears of the jury without the intervention of a witness. In each of these cases the tribunal would obtain real evidence of the contents of the written or substance of the verbal statement; but the statement itself in either case, not being made on oath by a witness, would be mere 'hearsay evidence of,' or, to speak more accurately, would be *irrelevant to* the fact which was stated or asserted. Then again, either of these two forms of narrative might be presented to the jury by means of oral evidence, *i.e.*, through the agency of a sworn witness. Thus, let us imagine a witness to depose that he has read such a letter as the one we have just described; this would furnish an example of written hearsay established by *oral* or *secondary* evidence. The proving process in this case would be doubly objectionable — objectionable in respect of the mode of proving the contents of the letter; because the testimony of the witness would be secondary evidence of the contents of a written document, which should, if material, be proved by the production of the letter itself —objectionable also in respect of the matter proved; because the contents of the letter, even if legitimately established, would still constitute a mere statement, by an unsworn writer, of that which was really material, and would, therefore, be irrelevant as Hearsay.

Lastly, a witness might be imagined to depose that he had heard a similar verbal statement made in his own hearing, which is the most usual form in which hearsay presents itself, and the one which most naturally suggests the title. This last may be described as an instance of verbal hearsay established by oral evidence. In this case, as in the one that immediately precedes it, the tribunal obtains legitimate oral evidence of the substance or contents of the statement (whether verbal or written); but, as remarked in the previous instances, the statement itself, in either case, not being made

on oath, is mere hearsay in relation to the fact stated in it.

351. Thus hearsay may present itself, in the first instance, in four different shapes. The tribunal may obtain:

1. Real evidence of written hearsay:
2. Real evidence of verbal hearsay:
3. Oral evidence of written hearsay:
4. Oral evidence of verbal hearsay.

With regard to these four forms of hearsay, however, it is to be remarked that the second is scarcely likely to occur in practice. For unsworn statements are usually made, not in court, nor at the time of trial, but before the trial, and out of court; and even if such a statement should happen to be made in the course of the trial itself, the court would probably require the speaker to be sworn as a witness, and to repeat his statement, if material, upon oath. Moreover, with regard to the third form, that also is in a great degree excluded from practical consideration by the circumstance that it is not only a phase of hearsay, but furthermore, objectionable as secondary evidence of the contents of a writing. Whence it follows, that though, theoretically speaking, there are four aspects in which hearsay may possibly occur, in practice we very seldom have to deal with any but the first and last of the four forms already enumerated, viz., written hearsay presented in a *real* shape, *i.e.*, proved by the production of the document in which the statement is contained; and verbal hearsay presented in an *oral* form, *i.e.*, established by the testimony of a witness who has heard the words spoken.

352. But besides these forms of what may be called *simple* hearsay, it is obvious that 'hearsay evidence' may be multiplied or complicated to an indefinite extent. In either of the foregoing instances, the statement,

whether written or verbal, which constitutes the 'hearsay evidence,' instead of being the statement or narrative of a *material fact*, may be only the statement of a further statement (written or verbal) of the fact in question; and this last statement, again, may be merely a statement of a still further statement, and so on *ad infinitum*. It is, however, unnecessary to trace farther the various forms and windings of 'hearsay evidence,' since in practice we very seldom have to deal with anything worse than simple hearsay. It is obvious, however, that the further the tribunal, in each case, is removed from the actual percipient of the fact in question, the weaker does the evidence become. And, as we have previously had occasion to remark, (*t*) as a *general* rule, all 'hearsay evidence,' including of course the four forms of simple hearsay above described, and *a fortiori* every form of double or complicated hearsay, is rejected by our courts as being in violation of the maxim, 'In judicio non creditur nisi juratis.' (*u*)

353. There are, however, several recognised *exceptions* to the rule which rejects 'hearsay evidence' *in toto*. Mr. Pitt Taylor, in his able work on the Law of Evidence, enumerates six principal cases in which the rule against hearsay has been relaxed; (*v*) namely—first, questions relating to matters of public and general interest; secondly, questions relating to pedigree; thirdly, those relating to ancient possession; fourthly, declarations against interest; fifthly, declarations in the course of office or business; and sixthly, dying declarations. To these we may add all other cases in which general reputation, reputed ownership, public rumour, general character, general notoriety, and the like, are accepted as 'evidence of' the fact reputed, rumoured, or become notorious. (*w*) For it is idle to argue that reputation,

(*t*) Ante, s. 254. (*u*) Taylor Ev., s. 567 (507).
(*v*) *Vide* Taylor Ev., s. 607 (543).
(*w*) *Vide* Taylor Ev., s. 577 (517).

for instance, is not hearsay, for the mere reason that it is, so to speak, *much* hearsay: The individual statements of which reputation is composed are, it is true, substantive facts in relation to the question of reputation; since they are actually a part of such reputation, and (granting that a sufficient number of instances are adduced) serve to constitute or create it; but the reputation itself, viewed in its relation to the fact reputed, in whatever light it may be regarded by our law, is Hearsay, and nothing else.

354. In the list of recognised exceptions to the rule against hearsay should also be included testimony given in a former trial or proceeding between the same parties by a witness, who has since died, or is otherwise rendered incapable of being called on the present occasion. (*x*) This species of proof is designated by Mr. Taylor, 'Secondary evidence of oral testimony,' and treated of by him under the head of secondary evidence. (*y*) But, as remarked in a previous chapter, (*z*) this arrangement is a most objectionable and confusing one. For there is scarcely any analogy at all between this kind of makeshift proof and the secondary evidence of the contents of a written document, which, though secondary, must always be otherwise *legitimate* evidence. The latter is merely a substitution of *oral* or partly oral evidence for purely *real*. But the testimony of a witness given in a former proceeding wears a totally different aspect. It is not legitimate evidence at all, because the verbal statement even of a sworn witness, in order to come within the description of 'oral evidence,' should be addressed to the tribunal at first hand, and delivered by the witness himself present in person in the very trial or proceeding to which it relates. In my humble opinion, therefore, such previous testimony is more

(*x*) *Vide* Best Ev., s. 496. (*y*) *Vide* Taylor Ev., s. 464 (434).
(*z*) Ante, s. 343.

properly classed as a phase of hearsay than as secondary evidence. Consequently its admission on the second occasion is a further relaxation of the rule in question.

355. For the law which determines the scope and limit of each class of exceptions to the rule, the reader is referred to the able and elaborate work just mentioned. (*a*) We will only pause here to observe that the statements which fall within these exceptions may be either verbal or written hearsay; but in whichever form the statement occurs, it must of course be laid before the jury by the appropriate means of proof; if written, by the production of the writing itself, in which the narrative is contained; if verbal, by the oral evidence of a witness who has heard the words spoken. These exceptions to the rule against hearsay are all regarded in their proper light as such; the statements are received only, at least as a general rule, in the absence of more legitimate proof; and their weakness 'as evidence of' the facts they disclose is fully recognised. How far it is desirable to admit such 'proof' at all is a mere question of expediency, which does not fall within the scope of the present work to discuss; but, if admitted, it is obviously most important that the status of such 'makeshift evidence,' as Bentham styles it, (*b*) should be clearly defined, and that it should be treated as a 'mode of proof' inferior and subordinate to every kind of legitimate evidence, whether real or oral.

356. But although this is so with the recognised exceptions which we have just enumerated, it is unfortunately far from being universally the case. A large mass of 'evidence,' which, properly regarded, is neither more nor less than hearsay of the clearest kind,

(*a*) *Vide* Taylor Ev., ss. 607 (543) to 722 (652); Part ii., chaps. 8 to 13 and ss. 464 (434) to 553 (497).

(*b*) *Vide* Bentham Ev., iii. 393.

is every day accepted by our tribunals, not as makeshift or subordinate proof, and as such to be received with caution and weighed with circumspection, but as *best* or 'primary evidence,' and too often to the exclusion of far better and really legitimate proof. I allude to those written narratives, which are either rendered admissible 'in evidence' by express enactment, or become so in consequence of their being required by law to be kept for the public benefit, (*c*) and which are for the most part comprised under the designation of 'public documents,' or of 'official registers.' For the more special examination of this species of writing, the reader is referred to the chapter on written narrative, where he will find the nature of these documents, and of the 'evidence' they afford, more fully considered. (*d*)

357. It is sufficient for our present purpose to remark, that hearsay presented in a written form is prone, in some cases at least, to be received as trustworthy and legitimate 'evidence.' But with verbal matter or spoken words, the case is reversed. For here the tendency is to treat genuine evidence as hearsay—to regard what is really a relevant fact in the light of a statement, because that fact happens to consist of words spoken. Thus it has become almost a byword in our courts of justice, that what one man *says* cannot be 'evidence against' another man, at least, if it be said in his absence. (*e*) But though this may be true enough of *statements*, which can only become 'evidence' to prove any extrinsic fact asserted by the speaker when they take the form of admissions or confessions, and are offered either against the speaker himself, or against some other person who assents to or acquiesces in their truth, it is by no means true of language which assumes the aspect of a material *fact* towards the subject of inquiry.

(*c*) *Vide* Taylor Ev., s. 1430. (*d*) Post, s. 394.
(*e*) *Vide* Taylor Ev., s. 604.

For it is quite possible, at least in a rational view, that the words uttered by anyone should become 'evidence' against any other person, or in any cause whatever, if the point in question be the nature of the language merely, apart from its truth. We have already seen that any phrase of language may become relevant to the inquiry as a fact, not only where the act of the speaker or writer is directly or indirectly in question, but also (no matter who be the speaker or writer) by reason of its effect on the mind of the hearer or reader. (*f*) Consequently, in a multitude of cases, it does, and of needs must, happen that the question, whether certain language *was* employed, whether certain words *were* uttered—without reference to the truth of the words, or the veracity of the speaker—has a more or less important bearing on the issue as a fact. (*g*) And that fact may be either directly in question, or only indirectly so; in other words, it may be connected with the subject of investigation either as a principal or as an evidentiary fact. (*h*) Moreover, the bearing of this fact upon the issue may, on the one hand, be most momentous, or on the other, may be comparatively insignificant. Thus in a case of slander, the whole question turns upon the nature of the defamatory words which were spoken. On the other hand, the information on which a party or a witness acted, consisting of words, whether true or false, that reached his ear, though scarcely likely to have so important a bearing on the question, may yet be in some degree material, as tending to explain, or supply motives for, his conduct, and, in the case of a witness, to throw light or doubt on his story, and thereby to confirm or shake his credit. In short, there is scarcely any limit to the various aspects in which words spoken, as well as words written, may become relevant to legal inquiries in

(*f*) Ante, s. 290. (*g*) Taylor Ev., s. 576 (516).
(*h*) Taylor Ev., s. 517.

the character of facts, or to the different degrees of influence which those facts may possibly exercise on the question at issue.

358. Among instances in which the utterance of words may be material to a question, the case of words, or, as they are usually called in our books, of 'declarations' which accompany some other act, deserves particular notice. It frequently happens that the nature of an act, otherwise equivocal, is actually fixed and determined by words that are uttered by the actor simultaneously with his visible action. Thus, if I place my hand on another man's shoulder, and at the same moment pronounce the words, 'You are my prisoner'; the use of these words may actually convert my action, which would otherwise amount, at the most, to a trifling assault, into the act of apprehending or imprisoning the person whom I touch. So, if I hand a book to a friend, and accompany the act with the words, 'I give you this book'; the language that I use turns that action, which would otherwise have no effect to transfer anything more than the mere physical custody of the book in question, into the legal act of donation, so as actually to pass the property in it to the recipient.

In cases of this kind, therefore, if the act be material, the 'declaration' which accompanies it forms an inseparable part of the act, and is also itself material as a fact.

359. But in considering the relevancy of such 'declarations,' there are two points which should not be lost sight of: viz., first, that in order to render the words or 'declaration' material, the act itself should be material for its own sake, and not merely as expressing the knowledge or belief or opinion of the actor as to some ulterior fact, in which case, as we shall see presently, (*i*) the act itself is only a species of hearsay. For, as

(*i*) Post, s. 361.

observed by a learned judge, 'Where 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 where the act is in its own nature irrelevant to the issue, and where the declaration *per se* cannot be received, no case has yet established that the union of the two will render them admissible.' (*j*)

And secondly, that in a rational view at least, the 'declaration' should be one that has power to alter the character of the act, and should not be a mere statement concerning it, or simultaneous statement, which, like any other assertion, may be either true or false. (*k*) For unless the 'declaration' has some effect to qualify, or add something to, the act which it accompanies, it is absurd to argue that it ought to be received 'as evidence' merely because the language is uttered simultaneously with the act, or has some connection with it. Yet these points are too frequently overlooked; and it cannot be denied that considerable laxity prevails in admitting 'declarations' for the mere reason that their utterance is accompanied by some other visible action.

360. It is somewhat on this ground, I imagine, that expressions of the feelings, bodily or mental, are admitted to prove the feelings which they betoken. (*l*) The circumstance that it is often difficult to find any other proof of such facts, and more particularly of those psychological facts, the feelings of the mind, forms, however, no valid ground for admitting mere statements to prove them; for there is scarcely any subject on which men are more prone to practise deception than the state of their feelings, whether bodily or mental. Expressions of the feelings can never really afford a trustworthy indication of the feelings they imply, except when they are purely involuntary; and whether the outward

(*j*) *Vide* Taylor Ev., s. 524. (*k*) *Vide* Taylor Ev., ss. 526 and 530.
(*l*) *Vide* Taylor Ev., s. 518.

expression of a feeling is really involuntary or no is a question which it is in general almost impossible to determine with any approach to certainty.

361. Statements or 'communications,' however, may be made, not only by language written or spoken, or conventional signs, but may also, though in a much more limited degree, be implied by other acts or conduct. (*m*) Hearsay may consist of statements 'expressed,' as Mr. Taylor styles it, (*n*) 'in the language of conduct instead of the language of words.' Thus, if a servant were charged with robbing his master, and it appeared that the latter had discharged him from his service immediately after the discovery of the loss of the stolen property; this act of his master, considered as proof of the servant's guilt, would be a species of implied statements, and not being a sworn statement, would be mere 'hearsay evidence' of that fact.

In further illustration of this question, we may also borrow the following instances of this kind of implied statement from Mr. Taylor's work. (*o*) As proof of the seaworthiness of a particular ship; the conduct of a nautical man in embarking in it himself with his family. As proof of the loss of insured property; the conduct of other underwriters in paying on the same policy. As evidence of bankruptcy at a particular time; the conduct of certain creditors in returning to the assignees goods received by them from the bankrupt at the time in question. As evidence of the sanity or insanity of a testator; the conduct of his family or relations, or of his medical attendant, in treating him as sane, or the reverse.

362. Mr. Taylor, however, contends, and not without some show of reason, that the rule against hearsay occasionally works considerable inconvenience in exclud-

(*m*) *Vide* Taylor Ev., s. 570 (510), and Ante, s. 193.
(*n*) Taylor Ev., s 571 (511). (*o*) Taylor Ev., s. 511.

ing these statements implied by conduct, inasmuch as the 'declarations,' being accompanied by acts done in confirmation of their sincerity, are, morally speaking, entitled to great weight. (*p*) And it cannot be denied that the language of conduct affords us, in many cases, a material guarantee for the sincerity of the person from whom it emanates, which is wanting in the case of the language of words. In many cases we obtain a sort of security for his *bonâ fides*, in the consequences which would ensue to himself and his interests if his acts did not faithfully represent the state of his mind. (*q*)

But, on the other hand, this guarantee is frequently a very slight one, and is sometimes altogether absent. Thus, the act of the master in discharging his servant, which we have just cited as an instance of this kind of implied statement, (*r*) scarcely furnishes a better assurance, that the master knows or sincerely believes his servant to be guilty, than his verbal or written statement to the same effect would give us. And it is difficult to see how it would be possible to draw the line between acts which do, and acts which do not, sufficiently guarantee the sincerity of the actor. It is true that statements implied by the language of conduct bear a strong resemblance in some cases to 'declarations against interest.' (*s*) To refer the reader once more to our instances: The conduct of underwriters in paying on a policy of assurance, and that of creditors in returning the bankrupt's goods to the assignees, furnish illustrations of this kind of implied statement. And it might possibly be argued that as 'declarations against interest' are in some cases receivable, implied statements possessing the same characteristics ought also to be received. But it should be remarked, in the first place, that declarations against interest are receivable only by way of exception

(*p*) *Vide* Taylor Ev., s. 512. (*q*) Ante, s. 194.
(*r*) Ante, s. 361. (*s*) *Vide* Taylor Ev., ii., chap. 11.

to the rule against hearsay, and after the death of the declarant; and in the second place, that in order to render such declarations admissible even then, the nature of the interest must be strictly ascertained and defined by tests, which it would scarcely be possible to apply to the implied language of conduct. (*t*) On these grounds, therefore, I must presume to differ from Mr. Taylor, and to express my complete acquiescence in the expediency of the existing rule of law, by which these implied statements are excluded from the category of relevant facts.

363. In spite of the rule, however, there is undoubtedly a great tendency to accept these statements expressed in the language of conduct as legitimate proof, because the 'evidence' consists of acts and not of words. It is apt to be forgotten that in these cases the act is not in itself material, either directly or as a 'circumstance' connected by legitimate inference with any material fact; and that the true subject of inquiry is some ulterior or extrinsic fact, the knowledge of which is evinced by the conduct of the actor. The ground, on which the rejection of this kind of implied statement is based, is very commonly stated thus: viz., that the language of conduct in question merely shows the *opinion* of the person by whose act the statement is implied. But though there is usually somewhat of opinion involved in such cases—in other words, some inference drawn, or incomplete knowledge evinced, by the author of the conduct, it is a mistake to suppose that this is the true, or, at least, the main ground of objection to the evidence. (*u*) If the fact in question were ever so simple, the author of the conduct ever so well informed, his act would still be objectionable, not only as tending to show his *opinion*, but even as evincing his complete and *direct* knowledge of the fact in question. For his knowledge, if communicated at all

(*t*) Taylor Ev., ii., chap. 11, and Ante, s. 194. (*u*) Post, s. 526.

should be imparted by him orally on oath to the tribunal itself.

364. The distinction between acts and 'declarations,' which are material as *facts*, and those which are only material as *statements*, is frequently illustrated in the case of conspirators. For it is a general rule of law that a person who associates himself with others in a criminal enterprise, is responsible for the *acts* of his fellow-conspirators done in furtherance of the common design, (*v*) but is not bound by their *statements*, which can only be received as admissions or confessions against the precise person himself who is the author of them. (*w*) Hence it becomes important to distinguish between declarations, which are either in themselves acts in furtherance of the common enterprise, or which accompany and tend to qualify such acts, and those which are mere narratives or statements of extrinsic fact. (*x*) Similar questions also arise in the case of co-trespassers in civil actions, (*y*) who are each responsible for the acts, but not affected by the statements of their fellow-trespassers.

The case of co-partners, and that also of principals and agents, are mentioned by Mr. Taylor as being governed by the same rules. (*z*) But in both these last cases the distinction seems to be rather between statements made in the course of the partnership or agency business, and statements made at other times, or for other purposes, than between statements and material acts merely. For it appears that both partners and principals are bound, not only by the acts, but also, to a great extent, at least, by the admissions of their co-partners or agents respectively.

365. Mr. Taylor enumerated three cases in which

(*v*) *Vide* Taylor Ev., s. 527. (*w*) *Vide* Taylor Ev., s. 530.
(*x*) *Vide* Taylor Ev., s. 530. (*y*) *Ibid.*, s. 597 (534).
(*z*) *Ibid.*, ss. 598 and 602 (535 and 539).

apparent hearsay, consisting of words spoken or written, is, as he styles it, 'original evidence,' (*a*) or, in other words, is relevant as a fact. *First*, where the fact that the language was employed, and not its truth or falsity, is the point in question. The *second* case including expressions of bodily or mental feelings, where the existence or nature of such feelings is the subject of inquiry. And the *third* embracing all other instances where the language may be regarded as part of the *res gestæ*. (*b*) And he also states that these three are all involved in the principle of the last. (*c*) It might, however, I think, be more justly argued, that in every case where language used by a person, who is neither a witness, nor the party against whom it is offered, is distinguishable from hearsay, that distinction rests on the first ground. For with regard to the second case, it is difficult to see how voluntary expressions of the feelings can be rationally regarded in any other light than that of hearsay. (*d*) And with regard to the third, the phrase, 'res gestæ,' if it means anything else than *the facts of the case*, is merely used to denote the minor or collateral, as distinguished from the more leading or essential facts in question. To say that language forms part of the *res gestæ* is, therefore, simply equivalent to saying that it is relevant as a fact. I have thought it best, however, to devote a short chapter to the special consideration of the phrase, '*res gestæ*,' and I must, therefore, refer the reader to that chapter for the further examination of this question. (*e*)

366. To revert to the subject of hearsay: 'Hearsay evidence' may consist either in the 'utterance' of language, or in the performance of other acts, (*f*) for statements may be made by writing, by speaking, by signs or gestures, or by the implied language of

(*a*) Taylor Ev., s. 542. (*b*) *Ibid.* (*c*) *Ibid.* (*d*) Ante, s. 360.
(*e*) Post ii., chap. 24. (*f*) *Vide* Taylor Ev., s. 510.

conduct, (*g*) the reception of which last-mentioned species of acted language is not infrequently objected to as being in violation of the maxim, 'Res inter alios actæ alteri nocere non debent,' (*h*) though perhaps not improperly classed as a species of *hearsay*. On the other hand, it is obvious that any act whatever may be material to the case in hand as a substantive fact, and among other acts, the act of employing language, whether written, spoken, or otherwise expressed. Moreover, as we have already seen, (*i*) the nature or terms of any piece of language or portion of discourse may, without reference to the act of the speaker or writer, be material by virtue of its effect on the mind of the hearer or reader, as, for instance, when the information upon which a particular person has acted, or the motives by which he has been swayed, come in question. And it may be safely asserted, that the chief, if not the whole difficulty of the art of judicial evidence lies in distinguishing between the case, where the utterance of a piece of language, or the performance of some other act, is material as a fact, whether principal or evidentiary; and the case where the same kind of matter is relevant only as a statement, or, in other words, as an expression of knowledge. This difficulty is increased too by the circumstance that one and the same 'piece of evidence' often tells both ways; being material in one aspect as a fact; in another aspect as a statement or narrative. (*j*)

367. The true test of the distinction between such substantive facts and mere statements; between 'original evidence,' as Mr. Taylor styles it, (*k*) and Hearsay, is this: Is, or is not, the veracity or sincerity of any person, other than a witness, in question? The first step in such an inquiry is to determine what fact it

(*g*) Taylor Ev., s. 511. (*h*) Taylor Ev., s. 298a, and Post, s. 526.
(*i*) Ante, s. 290. (*j*) Post, s. 535.
(*k*) Taylor Ev., s. 542, and Ante, s. 365.

is that we are seeking to establish by means of the proposed 'evidence.' The second, to ascertain whether we arrive at that fact either directly or by a *legitimate* inference from the proposed 'evidence,' or whether we arrive at the same fact only through the supposed knowledge of some other person evinced or manifested by his voluntary action. (*l*) In the first case, the matter is relevant fact: in the second, mere Hearsay.

(*l*) Ante, s. 175.

CHAPTER XI

OF WITNESSES

368. The subject of witnesses, and the guarantees for securing their veracity, which our legal tribunals in the exercise of their powers have thought fit to exact, is a topic somewhat foreign to the design of the present work, which professes to deal with principles only. Little or no theoretical principle is involved in these matters, which are for the most part mere questions of expediency as dictated by experience. But inasmuch as no work, which professed in any shape to treat of judicial proof, would seem complete without some allusion at least to the subject, I have thought it desirable to give a very short sketch of the positive rules laid down by our tribunals for regulating the reception of 'testimony' or the 'oral evidence' of witnesses. It is, however, but fair to the reader to premise, that the author can lay claim to no special knowledge or originality in dealing with this particular part of the subject, and to warn him that this chapter will contain, at most, a summary of what has been compiled under this head by former writers.

369. Mr. Best defines a witness as 'a person who gives evidence to a judicial tribunal.' (*m*) We may further describe him as one whose narrative, guarded by certain precautions for securing its veracity, is accepted by a judicial tribunal as legitimate evidence of the facts which he relates. The precautions by which the truth

(*m*) Best Ev., s. 124.

of a witness's statement or narrative is ensured, are as follows:

(1) That he shall be sworn on his oath to tell the truth.

(2) That he shall be liable to punishment, if he wilfully state what is false, or, in legal phrase—commit perjury.

(3) That he shall deliver his evidence orally in open Court.

(4) That he shall be subject to cross-examination in order to test his veracity.

370. It may be stated, with some slight qualification, of which we shall speak presently, that all persons whatever are by law compellable thus to give evidence. (*n*) All persons, moreover, are *primâ facie competent* to testify, (*o*) but to this latter rule there are also certain exceptions;—*i.e.*, there are some objections to the competency of particular persons to give evidence in our courts of justice. These objections or exceptions to the competency of witnesses were formerly far more numerous than they are in the present day. Formerly the testimony of a witness was liable to be rejected on not less than four distinct grounds; namely:

(1) On the ground of *Infamy.*

(2) On the ground of *want of religious belief.*

(3) On that of *Interest;* and,

(4) On the ground of *defective understanding.*

Under the first head, all persons, who had been convicted of any crime or offence of a certain character, such as treason, felony, perjury, and the like, were rendered incompetent. (*p*)

Under the second, any person who, from want of religious principle or belief, was unable to guarantee the truth of his testimony by the sanction of an oath, was excluded from giving evidence. (*q*)

(*n*) *Vide* Best Ev., s. 125. (*o*) *Vide* Best Ev., s. 133.
(*p*) *Vide* Phillips Ev., chap. 4, Part i. (*q*) *Ibid.*, chap. 3, Part i.

Under the third, all persons who had any interest in the result of the trial or proceeding, including, of course, the parties to the suit, with their husbands or wives respectively, were incompetent as witnesses. (*r*)

And under the fourth head, all persons, who either from tender age, or want of intellect, appeared incapable of giving a rational account of the matters in question, were deemed incompetent. (*s*)

371. The effect of these rules of incompetency, and especially of those falling under the heads of Infamy and of Interest, was to exclude a very large number of persons from giving evidence; and, in the case of interest, to exclude the very persons who were best acquainted with the facts of the case. This wide principle of exclusion was the one feature in our law of Evidence which Bentham most severely assailed; and however untrustworthy a guide he may have shown himself in matters of abstract theory, it can hardly be disputed that on this practical question his judgment was sound and correct. Indeed, the result may be said to have proved it to be so; for though his views on this subject were at first treated with contempt or neglect by the profession, they won their way by degrees, and finally came to be acted upon in large measure by the legislature itself. (*t*)

372. In the first place, the objection to the competency of witnesses on the ground of Infamy was abolished by the Act 6 and 7 Vict., cap. 85, commonly called Lord Denman's Act (*u*).

In the second, the disqualification on the ground of want of religion has also been practically nullified by the fourth section of the Statute, 32 and 33 Vict., cap. 68, which enacts that, 'if any person, called to give evidence in any court of justice, whether in a civil or criminal

(*r*) *Ibid.*, chap. 5, Part i. (*s*) *Ibid.*, chap. 2, Part i.
(*t*) *Vide* Taylor Ev., s. 1212. (*u*) *Vide* Taylor Ev., s. 1215.

proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make a solemn promise and declaration; and then, if false evidence be wilfully and corruptly given by him, he shall be liable to indictment for perjury. (*v*)

As to the third, and most important ground of incompetency, that, namely, arising from *Interest*, this has been gradually narrowed by a series of enactments which it is unnecessary to enumerate here, but which have had the effect of completely annihilating this ground of objection in civil cases, (*w*) and of curtailing it also to some extent in criminal proceedings.

The last ground of incompetency, however, namely, want of reason or understanding, remains untouched; the result of all which is, that the grounds of incompetency now remaining in our law are reducible to two, namely: (1) Interest in criminal cases; and (2) Want of understanding.

373. As to the first of these: neither the person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, nor the husband or wife of the accused, is competent or compellable to give evidence in the case. (*x*) This, however, no longer applies to the case of persons charged with the crime of rape or with certain other offences of a similar character, who, together with their husbands and wives, have by a recent statute (*y*) been rendered competent, but not compellable to give evidence at any stage of the case against them.

As to the last and only remaining ground of incompetency: 'It includes,' says Mr. Taylor, (*z*) 'all

(*v*) *Vide* Taylor Ev., s. 1247.
(*w*) *Vide* Taylor Ev., ss. 1213-1355 (1221).
(*x*) *Vide* Taylor Ev., ss. 1223 and 1227.
(*y*) 48 and 49 Vict. cap. 69, s. 20. (*z*) Taylor Ev., s. 1240.

those who are incapable of comprehending the nature of an oath or affirmation, or of giving a moderately rational answer to a sensible question.' 'It makes no difference,' he proceeds to say, 'from what cause this incapacity may arise; for whether it be occasioned by a congenital want of intellect, or by some temporary obscuration of the reasoning faculties, or by mere unripeness of understanding,—whether the person be an idiot, a lunatic, a drunkard, or a child,—he cannot, so long as the defect exists, be examined as a witness.' 'The incapacity, however,' he adds, 'is only co-extensive with the defect. Thus a monomaniac, or a person who is afflicted with partial insanity, will be an admissible witness, if the judge finds upon investigation that he is aware of the nature of an oath or declaration, and that he is capable of understanding the subject with respect to which he is required to testify. So in the case of total madness, the occurrence of a lucid interval,—in the case of intoxication, the return of sobriety,—will render the witness competent.'

Formerly deaf and dumb persons were regarded in the light of idiots, and excluded from giving evidence, but this presumption is no longer recognised in our courts: Such persons are now treated, like others, as *primâ facie* competent, and if they appear to possess sufficient intelligence, may testify in court either by means of writing, or by signs. (*a*) With respect to children, no precise age is fixed by law, within which they are absolutely excluded from giving evidence. Their competency will depend in each case on the intelligence and knowledge which they manifest. (*b*)

374. Incompetency is never presumed; but if an objection is taken to the competency of a witness, the regular mode of ascertaining it is to institute a preliminary inquiry called the *voir dire* (or *vrai dire*) for the purpose. (*c*)

(*a*) *Vide* Taylor Ev., s. 1241. (*b*) *Vide* Taylor Ev., s. 1242.
(*c*) *Vide* Best Ev., s. 133.

This preliminary examination is conducted by the judge, who is the sole arbiter of competency, and is, therefore, empowered to decide any question of pure fact that may arise in the course of this preliminary process. (*d*) But when once a witness is decided to be competent, his credit, and the weight of his testimony are questions entirely for the jury.

This is all that need be said here with regard to the *competency* of witnesses, but there are a few other points connected with the subject which demand some notice.

375. The general rule, which renders every person compellable to testify, must be accepted with the following qualifications:

In the first place, it seems obvious that no person who is incompetent to give evidence can be compellable to do so.

In the second place, no person accused of an indictable offence is compellable to testify in the case against himself, even though he be rendered competent as a witness by virtue of the statute just referred to. (*e*)

In the third place, there are some more special exceptions to the rule, arising from personal position or functions.

First, the Sovereign cannot be compelled to give evidence at all, inasmuch as no compulsory process of any kind can be used against the Royal person. (*f*)

Secondly, it seems that a barrister cannot be compelled to testify as to anything that he may have said in court in his character as advocate. (*g*)

Thirdly, it appears also that no judge or arbitrator is compellable to testify as to anything which came to his knowledge in his judicial capacity. (*h*)

(*d*) *Vide* Ante, s. 242. (*e*) 48 and 49 Vict. cap. 69, s. 20.
(*f*) Best Ev., ss. 125 and 183.
(*g*) Stephen Ev., art. 111, and Taylor Ev., s. 859.
(*h*) Stephen Ev., art. 111, and Taylor Ev., s. 859.

Lastly, with regard to jurors: No petty juror is compellable, nor, it would seem, is he allowed, to give evidence as to what has passed between the jury in the discharge of their duties as such. (*i*) The same rule probably applies to grand jurors, so far as regards their own deliberations; but it seems at least extremely doubtful whether they cannot be compelled to testify as to any other facts which may have come to their knowledge at the time, including the statements made by the witnesses examined before them. (*j*)

376. But further, there are some questions which no witness whatever can be compelled to answer. In the first place, no one is bound to answer any question, if the reply would in the opinion of the judge have a tendency to expose the witness, or the wife or husband of the witness, to any criminal charge, or to any penalty or forfeiture. (*k*)

Secondly, no person is compellable to answer any question tending to show that he or she has been guilty of adultery, unless the witness has already given evidence in the same proceeding in disproof of his or her adultery. (*l*)

Thirdly, no husband is compellable to disclose any communication made to him by his wife during the coverture; nor, on the other hand, can a wife be compelled to disclose any such communication on the part of her husband. (*m*)

Lastly, no client can be compelled to disclose any professional communication that has passed between himself and his legal adviser, whether counsel or solicitor; nor, on the other hand, can the legal adviser

(*i*) Stephen Ev., art. 114. (*j*) Best Ev., s. 579.
(*k*) Taylor Ev., s. 1453, and Stephen Ev., art. 120.
(*l*) 32 and 33 Vict. cap. 68, s. 3, and Taylor Ev., s. 1355 (1221).
(*m*) 16 and 17 Vict. cap. 83, s. 3; Taylor Ev., s. 830; and Best Ev., s. 586.

be compelled, nor will he even be allowed without his client's consent, to disclose any such professional secret. (*n*)

377. It remains to be noticed that there are certain cases in which the testimony of a single witness is legally insufficient to establish the issue, unless it be corroborated by other evidence.

First, in actions for breach of promise of marriage, it is provided by section 2 of the Act 32 and 33, Vict. cap. 68, that no plaintiff in any such action 'shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise.' (*o*)

Secondly, in affiliation cases, a man cannot be adjudged to be the putative father of an illegitimate child on the unsupported testimony of the mother; but her evidence must be corroborated in some material particular by other proof. (*p*)

Thirdly, in the case of accomplices, it is the *invariable practice* in criminal cases for the judge to warn the jury that it is unsafe to convict the accused upon the evidence of an accomplice, unless his testimony be corroborated in some material particular by independent proof, and, generally speaking, by proof of the prisoner's identity. (*q*)

Lastly, in prosecutions for perjury, the unsupported testimony of one witness is legally insufficient to establish the falsehood of the matter on which the perjury is assigned. (*r*) In former times it seems to have been thought that *two witnesses* were legally necessary for

(*n*) Taylor Ev., s. 832; Best Ev., s. 581; and Stephen Ev., arts. 115 and 116.

(*o*) Taylor Ev., s. 1220.

(*p*) Taylor Ev., s. 964 (881), and Stephen, art. 121.

(*q*) Taylor Ev., ss. 887-890, and Stephen, art. 121.

(*r*) Taylor Ev., ss. 876-880.

this purpose; but this view, as Mr. Taylor informs us, (*s*) has long since been abandoned, and the only noteworthy case, in which two witnesses are actually *required by law*, is that created by section 2 of the statute 7 and 8, Will. III. cap. 3, which provides that 'no person shall be indicted, tried, or attainted of high treason, etc'—'or of misprision of such treason, but by and upon the oaths and testimony of two lawful witnesses.' (*t*) This is all that it seems necessary for us to say on the main topic of discussion in the present chapter, the matters to which it refers being in general of so purely practical a character that they are scarcely amenable to any assistance from abstract theory.

378. There is, however, one question at least connected with the subject of witnesses, in which a considerable degree of theoretical principle is involved. It is that which relates to the mode of cross-examining a witness as to the contents of a written document. This question was much debated during the progress of Queen Caroline's case in 1820, (*u*) and the practice with regard to it has since become the subject of statutory interference.

'The character of a witness for habitual veracity,' says the author of Archbold's 'Criminal Law,' (*v*) 'is an essential ingredient in his credibility; for a man who is capable of uttering a deliberate falsehood is in most cases capable of doing so under the solemn sanction of an oath. If therefore it appear that he has formerly said or written the contrary of that which he has now sworn (unless the reason of his having done so be very satisfactorily accounted for), his evidence should not have much weight with a jury; and if he have formerly *sworn* the contrary, the fact (although no objection to his competency) is almost conclusive against his credibility.'

(*s*) Taylor Ev., s. 876. (*t*) Best Ev., s. 617, and Taylor Ev., s. 869.
(*u*) *Vide* Best Ev., s. 473. (*v*) Archbold's Crim. Law, 255, 16th ed.

'A witness,' says Mr. Taylor, (*w*) 'may be cross-examined as to a *former statement* made by him *relative to the subject-matter of the cause*, and inconsistent with his present testimony; and if he either denies, or does not distinctly admit, that he made such statement, proof may be given that he did in fact make it; but 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.'

379. This appears to have always been the rule with regard to former *verbal* statements of a witness; but when the previous statement was made by the witness *in writing*, as, for instance, if it were contained in a letter written by the witness, this right of cross-examination came, or was supposed to come, into conflict with the rule against secondary evidence, as tending to establish the contents of a writing by means of oral evidence; and the result of the rules laid down by the judges in Queen Caroline's case is succinctly stated by Mr. Taylor (*x*) to be this, viz.: 'That the cross-examining counsel must produce the document as his evidence, and have it read, in order to found any questions to the witness upon it.'

But this rule, which practically formed a complete bar to any effective cross-examination of a witness on his own written statement, was felt to be an extremely inconvenient one. For, as Mr. Best very justly observes, (*y*) 'when a man gives certain evidence, and the object is to show that he had on a former occasion given some different account, common sense tells us that the way of bringing about a contradiction is to ask him if he had *ever* done so, in order that he may have no

(*w*) Taylor Ev., s. 1300. (*x*) Taylor Ev., s. 1301.
(*y*) Best Ev., s. 478.

intimation of the time, place, or circumstances alluded to, or consequently of what means are available to contradict and discredit him. Yet, according to the practice under the resolutions in *Queen Caroline's Case*, if the witness had taken the precaution to reduce his previous statement to writing, the writing must be put into his hands, accompanied by the question whether he wrote it, thus giving him full warning of the danger he had to avoid, and full opportunity of shaping his answers to meet it.'

380. The Commissioners appointed previous to the passing of the Common Law Procedure Acts of 1852 and 1854, to inquire into the Process, Practice, and System of Pleading in the Superior Courts of Common Law, thus sum up the result of the arguments on this question. (*z*)

'The inconvenience of the rule is fairly illustrated by its working in the instance of the depositions above referred to' (*i.e.*, the depositions of witnesses taken before a magistrate, of which I shall say more hereafter). (*a*) 'Its soundness has been much questioned by able thinkers and authors on the subject of evidence. It is obvious that one of the best tests of the memory or veracity of a witness, the trial of his recollection or candour as to what he himself has written on the subject on which he has just been deposing, is entirely destroyed by his being made aware of the existence and contents of the document. Lord Brougham has with much force observed: "If I wish to put a person's memory to the test, I am not allowed to examine him as to the contents of a letter or other paper which he has written. I must put the document into his hands before I ask him any question upon it; though by so doing, he at once becomes acquainted

(*z*) *Vide* 2nd Report, p. 20, and Best Ev., p. 554, 2nd ed.

(*a*) Post, ss. 405 and *seq.*

with its contents, and so defeats the object of my inquiry. Neither am I, in like manner, allowed to apply the test to his veracity; and yet how can a better means be found of sifting a person's credit, supposing his memory to be good, than examining him as to the contents of a letter written by him, and which he believes to be lost?" The chief reason assigned for the rule is, that the adoption of a contrary course would enable the cross-examining counsel to put the court in possession of only the part of the contents of a paper, though a knowledge of the whole might be essential to a right judgment. The answer, however, is, that on re-examination the witness may be asked as to any other parts of the writing which may tend to qualify, contradict, or explain the passages referred to in cross-examination. And if the objection were a valid one, it would equally hold as to verbal statements, forming part of an entire conversation, as to which there is no doubt that a witness may be now cross-examined. The judicial decisions to which we have referred have proceeded rather upon the rule as established than upon its reasonableness. (*b*) The arguments against the rule as established appear to us to prevail; and we recommend that a witness should be open to cross-examination as to previous written statements he may have made, without the writing being first put in. To such a rule we would, however, annex this limitation, that if it is intended to contradict the witness by the writing, his attention should, before doing so, be called to those parts which are to be used for that purpose. And we further think that in order to prevent any abuse of the facility thus given, it should be competent to the judge, if he deem right,

(*b*) *Vide* Macdonnell v. Evans, 21; L. I. C., p. 141; and 11, C. B. 930.

to require the writing to be produced for his inspection, and to be dealt with by him as he thinks fit.'

381. These recommendations were subsequently carried out by Section 24 of the Common Law Procedure Act, 1854, (*c*) as far as regards courts of civil judicature; and similar provisions were extended to criminal courts by the Act 28, Vict. cap. 18, by Section 5, of which it is enacted 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 indictment or proceeding, 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 may think fit.'

Since this enactment, therefore, the *mode of cross-examining* a witness for the Crown as to his former testimony given before a magistrate, and taken down or 'reduced into' writing in the depositions under Section 17 of the Act 11 and 12 Vict. cap. 42, (*d*) is no longer regulated by the rules laid down by the judges after the passing of the Prisoners' Counsel Act; (*e*) though it would seem that those rules still exercise an influence on the *mode of proving* the former testimony of the witness, and on the *effect* of the depositions as proof of such former testimony. (*f*) As far as the mode of cross-examination is concerned, however, it

(*c*) 17 and 18 Vict. cap. 125. (*d*) Post, s. 405.
(*e*) Post, s. 407, and Archbold's Crim. Law, p. 256, 16th ed.
(*f*) Post, s. 407.

would appear that all former statements of a witness, whether verbal or written, now stand on the same footing. A witness, whether in a civil or a criminal proceeding, may now be freely and effectually cross-examined as to former statements, but in all cases, if it is intended to contradict him, his attention is to be drawn to the means of contradiction, and a full opportunity of retractation or explanation is to be offered him. (*g*)

382. The foregoing may serve our purpose as a concise account of the rules that formerly obtained with regard to the cross-examination of a witness on the contents of his own written statement, as well as of the views entertained on the subject, and of the alteration in the law, to which they have led. And first, it is worthy of observation that the evil, so frequently adverted to in these pages, viz., the want of distinction between a written fact and a written statement, has been introduced to obscure this subject. For though the whole question has reference to written statements only, we find the judges in their fourth answer in Queen Caroline's case alluding to questions asked of a witness as to the contents of written contracts or agreements, and expressly grounding their answer upon the practice as applied to such documents. (*h*) And Mr. Best also informs us that in dealing with this subject, much reliance was commonly placed on an analogy drawn from the old rule of pleading, which required *profest* to be made of deeds, and some other species of writings. (*i*)

Whereas, in reality, there is not the slightest analogy between the two cases. A written act, or writing whose contents are material as a fact, and not as the mere statement of a fact in question, as, for instance, a written

(*g*) *Vide* 17 and 18 Vict. cap. 125, s. 23, and Taylor's Ev., s. 1445 (1300).

(*h*) *Vide* Best Ev., p. 600, s. 473. (*i*) Best Ev., s. 476, p. 604.

agreement, the terms of which are material to the issue, is not properly the subject-matter of oral evidence at all. A witness cannot be questioned respecting its contents, either in chief or in cross-examination. There is, therefore, no question either of crediting or discrediting a witness as to such a fact; for the writing must be produced to prove its own contents. But a written statement of an extrinsic fact relevant to the case presents a totally different aspect. A witness is competent, generally speaking, to testify as to the fact stated; he may be credited as to it, and, consequently, may be discredited by any written statement that he may previously have made with regard to it.

383. This distinction has not wholly eluded the attention of Mr. Best. 'It can hardly escape notice,' he says, (*j*) 'that throughout the answers of the judges on the occasion in question *written instrument* and *document* are assumed to be convertible terms—a fallacy which has led to more errors than one.' But the distinction, at which Mr. Best's remarks are properly aimed, is not merely that between an 'instrument' and any other species of written document, but between a document which bears upon the case as a fact, and one which bears upon it only as the statement of a fact. I have not been able to discover any authoritative definition of the term 'written instrument,' but what I understand it to denote is a formal document deliberately framed by individuals for the purpose of modifying their mutual rights and obligations.

Now, although the contents of such an 'instrument' are far more *likely* to be called in question in a court of justice than those of a document of a more ordinary kind, still the most casual writing may, and in numberless cases does, exercise the most important bearing upon the question at issue, as a fact; and that, not only as

(*j*) Best Ev., s. 475

creating or modifying a right, but also as inflicting a wrong, or even perpetrating an offence or a crime. Thus, as we have observed in a previous chapter, (*k*) not only may a promise be made, a licence granted, an order given, and so forth, by writing, but a libel may also be published, a false pretence made, a conspiracy entered into, or even treason perpetrated by the same means. In all such cases, the contents of the writing, be it the veriest scrap of paper conceivable, can never (unless lost or destroyed) become the proper subject of oral evidence—of examination in chief, or of cross-examination.

384. But with a statement it is otherwise. And the rule that required a written statement to be produced and proved, before the witness was cross-examined concerning it, was not only practically inconvenient, but was also, if not faulty in principle, at least entirely uncalled for. It was asserted as a necessary consequence of the rule against secondary evidence. But to this, as it appears to me, there is a complete answer, having reference to the fact which is immediately in question. For in cross-examining a witness as to his previous statements, what we want to discover in the first instance is, not what he has actually stated on the former occasion, but what account he will give of the matter *now*. To produce the writing, therefore, and prove what he has actually stated, before ascertaining what account he now gives, is reversing the order of events—putting the cart before the horse—or, to borrow an expressive phrase from the mouth of a learned judge, 'leaping before one comes to the stile.' (*l*)

But let me not be understood to imply that the writing is not the proper and exclusive evidence of what the witness has actually stated on the former occasion. Whenever proof of that fact is really demanded, whether to con-

(*k*) Ante, s. 300. (*l*) *Vide* Best Ev., s. 480.

tradict or discredit the witness on the one side, or to corroborate him or rectify any misapprehension arising from his answers on the other, it is only right that the written statement should be produced and proved by the party requiring such proof. But there seems no reason why the whole effect of cross-examination should have been marred by proving the statement too soon; or why either side should have been compelled to prove it, which did not require the evidence.

385. But if the rule was uncalled for in the case of a genuine written statement, it was wholly wanton and absurd to apply it to the case of the 'depositions' taken before a magistrate or a coroner,(*m*) which are not in fact the statement of the witness at all, but merely a written official *report* of what he has previously stated.(*n*) And it was precisely here, where it was least rational, that the rule also produced the greatest embarrassment. For the former practice had the result, not only of marring the effect of the cross-examination, but also of compelling the cross-examiner to adopt the written statement as his own evidence, and thereby to give his adversary the right to reply upon it. And as in criminal trials it is quite the exception for the defendant to offer otherwise any substantive evidence, the rule was especially inconvenient in such cases, since the right to reply was usually ceded and determined by putting in 'the depositions.' And the result was, that in most instances the defendant was deterred altogether from cross-examining a witness for the prosecution as to his testimony on the former occasion. Yet though both the absurdity and the inconvenience of the rule were most glaring as applied to the 'depositions,' it was in criminal cases, as we have seen, that its reign was most protracted.

The practice is now happily rendered obsolete by virtue of the enactments above referred to; (*o*) but the history of

(*m*) *Vide* Taylor Ev., s. 1305. (*n*) Post, s. 405. (*o*) Ante, s. 381.

the question is instructive, as illustrating the tendency of just principles to assert themselves in practice, and exemplifying the embarrassment engendered by a departure from sound theoretical rule.

386. Before quitting altogether the consideration of this subject, it may be well also to direct our attention to the several aspects, which the question of examining a witness as to the contents of a writing may assume, according to the nature of the document, or its connection with the subject-matter of inquiry.

First, then, we have the written *fact*, or the writing, whose contents are *per se* relevant to the case, or to some part of the case. Such is a written agreement, whose terms are in question; a libel, the nature of which forms the subject of inquiry; written instructions, as proof of authority; and the like. To question a witness as to the contents of such a document, at least without first producing and proving the document itself, would obviously be a direct violation of the rule against secondary evidence; and even if it were a document, whose contents might be 'added to or explained by oral evidence,' and a witness might possibly therefore be examined and cross-examined as to extrinsic facts tending to qualify the meaning or effect of the document, there could still arise no question of contradicting or discrediting the witness by means of the contents. Here, therefore, the production of the document can never cause either inconvenience or absurdity.

Next, we have the written *statement* penned by the witness himself, the mode of cross-examining on which phase of document has formed the subject of the preceding discussion. And that discussion has led us to the conclusion, that in this case the preliminary production of the document is both inconvenient and uncalled for. With regard to written statements of material facts made by any person other than the

witness, such documents are either inadmissible *in toto*, or if admitted as official narratives, or by way of exception to the rule against hearsay evidence, can certainly have no claim to form an obstacle to the free cross-examination of a witness as to the facts to which they relate; and though it might happen that they should conflict with his testimony, yet they could not, even then, be said to contradict or discredit him in the same sense as his own statement might be said to do.

Thirdly, we have to deal with the official written *report* of the witness's verbal or oral statement—the statement of the witness's own statement—of which species of document the 'depositions' are an instance. And it is obvious that all the arguments advanced against the premature production of the witness's own written statement apply with much increased force to the case of a document of this last kind.

CHAPTER XII

OF THE DIFFERENT FORMS OF 'WRITTEN EVIDENCE'

387. In a previous chapter (*p*) we have reviewed the various aspects, which the contents of a written document are capable of assuming in relation to any given topic of inquiry. The results of that survey may be briefly summed up as follows:

In the first place, there are two principal aspects which a writing of any kind may present towards the subject of investigation. On the one hand, it may embody in itself the proximate fact, *i.e.*, the very fact, whether principal or evidentiary, which is the actual object of proof. Or, on the other hand, it may contain nothing more than a mere statement of some fact material to the inquiry. In the former case, we may distinguish the contents of the document as a *written fact*. In the latter, as a *written statement* or narrative.

388. As regards the former of the two cases, the terms of a writing may assume the aspect of a substantive fact towards the inquiry:

(1) Where the act of the writer in framing or executing the document is itself directly in question, as a principal fact forming the whole or a component part of the issue.

(2) Where the act of the writer is only indirectly in question, as an evidentiary fact.

(3) Where the act of the writer is not in question at all, but the contents of the writing are relevant only by reason of their effect on the mind of the person who reads the document.

(*p*) Ante, ii., chap. 5.

As regards the latter of the two cases, it is merely necessary to observe, that a written statement is nothing else than a species of 'Hearsay,' since the assurance of the existence of the fact to which it relates obtained by a perusal of the writing is uniformly contingent on the veracity of the writer or author of the statement.

389. All possible phases of 'documentary evidence,' *i.e.*, of writings, whose contents may become the fit subjects of proof in a court of law, are comprised under one or other of these two heads, a written fact and a written statement. The classification of writings, therefore, in relation to evidence, would be extremely simple, were it not for the complication introduced into the subject by the variety of different aspects which the written fact is liable to present, where it is only indirectly relevant to the inquiry. And it is absolutely necessary, both for the sake of theoretical accuracy and of practical completeness, not entirely to lose sight of any the most trivial of the phases of 'written evidence.' At the same time many of these are so indirectly and remotely connected with the issue that they cannot be said to occupy a prominent place in the field of 'documentary evidence.' Questions as to the relevancy and effect of such indirect phases of language or discourse arise more frequently in the case of verbal than of written matter; so that the discussion of them belongs rather to the head of language generally, or of 'Hearsay,' than to that of 'written evidence.'

390. If, however, we dismiss from consideration certain of the less significant modifications of the written fact, we shall find that practically there remain three leading phases of 'documentary evidence,' which demand our special attention by reason of the important part which they play in judicial investigations, namely:

(1) *A written act.*—Where the act of the writer in framing or executing the document is directly in question,

as a fact forming the whole or a constituent part of the issue.

(2) *A written admission.*—Where the act of the writer is only indirectly in question, as admitting a principal fact.

(3) *A written narrative.*—Where the act of the writer is material only as manifesting his supposed knowledge of a fact in question; or, in other words, as communicating a material fact.

It should be observed, however, that this last phase of writing owes its prominence in the field of judicial evidence rather to the necessity of distinguishing it from other kinds of 'written evidence,' than to the value or cogency of the proof which it furnishes; in other words, it is more conspicuous by its rejection than by its reception. But as a written narrative is by no means invariably rejected by our law, and, when received, is often closely connected with the issue, it cannot be altogether excluded from consideration as 'written evidence.'

391. It is to be observed that in all these three cases the *act* of the writer is in some sort in question. In the first, as the fact itself, which forms the subject of inquiry; in the second, as admitting the same fact; and in the third case, as expressing his knowledge of the fact. In each of the three cases, therefore, the mere proof of the terms or contents of the document, whether by its production or otherwise, would be nothing to the purpose, unless accompanied by proof of the authorship or genuineness of the writing; in other words, in each of the three cases, the proof of the *quid factum* is useless unless supplemented by proof of the *quis fecit.* (*q*) We may now proceed to consider them in their turn; but in so doing, we shall find it more convenient to depart from the order in which they have hitherto been enumerated, and to treat first of a written narrative, secondly of a written act, and lastly of a written admission. And first of a written narrative.

(*q*) Ante, s. 296.

CHAPTER XIII

OF A WRITTEN NARRATIVE

392. A WRITTEN narrative is the statement in writing of some extrinsic matter which forms the subject of inquiry, whether in the character of a principal or evidentiary fact. Thus where the investigation involves the question of the death of a particular person, the entry made by the Registrar in the register of deaths assumes the aspect of a written narrative in relation to that part of the inquiry. So the certificate of a medical man as to the state of a patient's health is a written narrative in reference to that question.

In a natural view all written narratives are a species of transmitted evidence, and partake of its characteristic infirmity;—an infirmity which results from the circumstance that the knowledge obtained by the inquirer or recipient of the evidence is necessarily based on and limited by the veracity and good faith of the writer or author of the statement. Moreover, a written narrative, not being capable, like a verbal one, of being delivered on oath and in person to the tribunal itself, can never, in a judicial view, amount to more than a phase of 'Hearsay,' and it has accordingly been described as such in the chapter which bears that title. (*r*)

393. If, therefore, the doctrines of our law were philosophically consistent on this point, a written narrative would never be admitted 'in evidence' at all, except as falling within some recognised *exception* to the rule against hearsay; nor be treated otherwise than as

(*r*) Ante, s. 350.

'inferior,' or, as Bentham styles it, (*s*) 'makeshift evidence.' Unfortunately, however, this is far from being universally the case. For, to repeat an observation that was made in the course of the chapter upon hearsay, (*t*) a large mass of evidence, which, viewed in its proper light, is neither more nor less than 'hearsay evidence' of the plainest kind, is every day accepted by our tribunals, not as makeshift or subordinate evidence, to be received with caution, and weighed with circumspection, but as best or 'primary evidence,' and sometimes even to the exclusion of other really legitimate proof. And it will naturally be asked how this comes to pass.

The answer is simple enough. It results from the abuse of the term 'written evidence,' and from the doctrines which a misapprehension of the true nature of real evidence has tended to establish. For it is only to written 'hearsay' that these observations apply. The error is not likely to occur in the case of verbal statements. (*u*) It is only when the narrative is disguised under the title of 'written evidence,' and, moreover, sheltered under the designation of a 'Public document,' that the true nature of the 'evidence' escapes observation.

394. That legal writers, however, have not been entirely blind to the infirmity of this kind of proof appears from such passages as the following;—passages which show that the authors consider the admissibility of such evidence to require at least some vindication or apology.

'The principle of the admissibility of public writings in general,' says Mr. Best, (*v*) 'is thus clearly explained in a text work': (*w*) 'Documents of a public nature, and of public authority, are generally admissible in evidence, although their authenticity be not confirmed by the usual

(*s*) *Vide* Bentham Ev., iii. 393, etc.
(*t*) Ante, s. 356. (*u*) Ante, s. 357. (*v*) Best Ev., s. 219.
(*w*) Sharkie Ev., 272, 273, 4th ed.

and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the parties on whose authority the truth of the document depends. The extraordinary degree of confidence thus reposed in such documents is founded principally upon the circumstance that they have been made by authorised and accredited agents appointed for the purpose, and also partly on the publicity of the subject-matter to which they relate, and in some instances upon their antiquity. Where particular facts are inquired into, and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are, in fact, the agents of all the individuals who compose the public; and every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to the agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence, and it is not requisite that they should be confirmed by the ordinary tests of truth; in addition to this, it would not only be difficult, but often utterly impossible, to prove facts of a public nature by means of actual witnesses examined upon oath.'

'Official registers,' says Mr. Taylor, (*x*) 'or books kept by persons in public offices, in which they are required, whether by statute or by the nature of their office, to write down' (*i.e.*, to write an account of) 'particular transactions occurring in the course of their public duties, and under their personal observation'—'as well as others of a public nature, are generally admissible in evidence, although their authenticity be not confirmed by the usual test of truth—namely, the swearing, and the cross-examining of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly because they are required by

(*x*) Taylor Ev., s. 1,429.

law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office, or, at least, under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in their entries are of a public nature, it would often be difficult to prove them by means of sworn witnesses.'

395. Of the validity of the arguments employed in these passages in defence of the admissibility of such 'evidence,' the reader himself will be the best judge. It is not to the mere admission of the 'evidence' that I wish to take exception. The compulsory creation of such written records or registers, and their admission, when created, to prove the facts recorded by them, may be, and probably is, highly expedient and desirable, so long as such 'evidence' is limited to its proper function of supplementing more legitimate proof —of corroborating such legitimate evidence when present, and supplying its place when absent. What I do most emphatically deprecate, is that these official narratives should, under the guise of 'written evidence,' be exalted into 'Primary' or 'best evidence' of the matters recorded in them, and, as such, be allowed to exclude other and more legitimate proof of the extrinsic facts to which they relate. And that such is, in some cases at least, the result of existing doctrines, is undeniable.

396. The law on this subject is thus stated by Mr. Taylor in the chapter on 'Primary' as distinguished from 'Secondary evidence': (*y*) 'Oral evidence cannot be substituted for any *instrument which the law requires to be in writing;* such as records, public and judicial documents, official examinations.'—'In all these cases the law having required that the evidence of the transaction should be in writing, no other proof can be substituted

(*y*) Taylor Ev., s. 370.

for that, so long as the writing exists, and is in the power of the party. Thus, for example, parol evidence is inadmissible to prove at what sittings or assizes a trial at Nisi Prius came on, or even if it took place at all; but the record, or at least the postea, must be produced. So the date of a party's apprehension for a particular offence cannot be shown by parol, the warrant for apprehension or committal being superior evidence. So, whenever the testimony of a witness is required by law to be reduced into writing—as, for instance, when it is taken by depositions, either before an examiner of the court or before a magistrate on an indictable charge—the writing becomes in all subsequent proceedings, whether civil or criminal, the *best* evidence of *what the witness has stated*, and parol proof on the subject is consequently excluded in the first instance. So, also, parol evidence cannot be received of the statement of a prisoner before the magistrate, where the examination has in conformity with the Act of 11 and 12 Vict. cap. 42, in England, or the Act of 14 and 15 Vict. cap. 93, in Ireland, (*z*) been reduced into writing, and subscribed, and returned by the justice.'

397. As each of the public documents, falling within the scope of the doctrine here propounded, stands somewhat on its own grounds, and as the proving power of each species of document depends in great degree upon the relation of the writing to the fact, which it is designed to establish, it will be necessary that a few examples of such documents should be considered separately, and in their different aspects towards the subject of inquiry. And first of a Record. It may seem almost a sacrilege in the eyes of some lawyers to assert that Records, which have always been regarded by our law as 'authentic beyond all manner of contradiction,' (*a*) and said to be

(*z*) *Vide* Taylor Ev., s. 811.
(*a*) *Vide* Gilbert Ev., p. 7, 4th ed.

monumenta veritatis, et vetustatis vestigia, (*b*) are but a species of 'hearsay evidence' in relation to some of the facts of which they are deemed by our law to contain the best evidence. And be it observed, I am not now speaking of the effect of what Mr. Best styles the *judicial* portion of the record, as distinguished from the *substantive* part (*c*)—of a record as proof of the merits of the case—as evidence to prove the question in issue, or the facts on which the judgment of the Court is founded. (*d*) A salutary check has been imposed upon the effect of a record in this respect, by virtue of the doctrine embodied in the maxim: 'Res inter alias judicata alteri nocere non debet.' But here we are not speaking of what Mr. Best calls the *judicial*, but of what he styles the *substantive* portion of the record (*e*)—of a record as evidence of what the Court has actually done—of the act itself, not of anything implied by its act.

398. Up to a certain point, indeed, the document is not merely a *record* of the proceedings, but is the very transaction itself. The pleadings and issue, for instance, lying open to the court and parties at the trial, *contain*, in the strictest sense, the actual question that is tried by the court. They do, in fact, *constitute* the question, and even if incorrect, they still must, until amended, necessarily determine it.

But as regards all that follows—the postea and verdict, the judgment, and the date of the trial—the record, strictly considered, is but the written statement of the recording officer. The verdict of the jury, for instance, is delivered *vivâ voce*. It is idle to contend that the language of the record and the utterances of the jury are identical facts. The words of a speaker cannot be converted into written language by the act of another

(*b*) *Vide* Co. Litt., 1,18a and 293b, and Best Ev., s. 218.
(*c*) *Vide* Best Ev., s. 590; Post, s. 527.
(*d*) *Vide* Taylor Ev., s. 1,495, and *vide* 1,480. (*e*) Best Ev., s. 590.

person in taking down his words on paper. The writing must still remain, in relation to the vocal utterances, a mere narrative or statement on the part of the writer. (*f*)

The same observations apply to the date of a trial as stated in the record. The day on which the trial actually took place is obviously a question that is totally independent of and extrinsic to the record. The presence of an untrue date in the record could have no effect to alter the fact itself—no influence to disturb the almanac. In relation to these matters, therefore, the record, strictly considered, is but the statement of the recording officer.

399. Nevertheless, as it is highly desirable that the acts of a court of law should be put into as permanent a shape as possible ; or (if the reader prefers the expression) that the most permanent and strongest possible evidence of its acts should be created, it may be expedient that the court should adopt the record as its act, or, what amounts to the same thing, as an unimpeachable statement, or incontrovertible evidence of its act. So long as the record is freely susceptible of amendment at the suggestion of either party under the eye of the court itself, no great danger is likely to arise from the practice of treating the statements contained in it as conclusive evidence of the nature and extent of the judicial transaction.

But if the conclusive effect of a record were to be extended to the proof of extrinsic facts as actual occurrences, or for any other purpose than that of forming incidents to the judgment, the absurd result would ensue that legitimate evidence of such facts would be excluded, merely because a record happened to be in existence which contained a statement respecting them.

400. The following may serve as illustrations of the

(*f*) *Vide* Ante, ss. 196 and 308, and Appendix, art. 3.

distinction between the two cases: If a man were charged with an offence, and pleaded a former acquittal for the same offence, the record in the former trial would furnish sufficiently legitimate evidence, not only of the nature of the previous charge, but also of his acquittal, and of the date from which that acquittal took effect. But if a man were tried and acquitted in one county on a particular day, and were afterwards charged with committing a second crime in a distant county on the same day, the record of the former trial, regarded in its proper light, would be mere hearsay evidence of the fact of his presence in the former county on the day in question. And if, on the other hand, he were charged with the commission of the second offence on a different day from that named in the record of the first trial, it would be very unreasonable that he should be precluded by the existence of the record from establishing an alibi, by showing that the two days were in reality one and the same.

401. Whether the conclusive presumption in favour of the accuracy of a record (*g*) would be held to apply to a case of this last kind, is a question which lies beyond our province to determine. I am inclined, however, notwithstanding the foregoing passages of Mr. Taylor's work, (*h*) to believe that reason and common sense would prevail against arbitrary rule, and (to adopt the legal phraseology) that 'parol evidence' would be admitted. If this view be the correct one—if the conclusive effect of the record be restricted to proof of the existence and nature of the judgment with its legal consequences, (*i*) little or no mischief is likely to ensue from treating the statements contained in it as best or primary evidence of the facts it records; and much is gained from the permanent form which the act of the court, or rather the means of proving it, thereby acquires.

(*g*) *Vide* Best Ev., s. 348.

(*h*) Ante, s. 396. (*i*) *Vide* Taylor Ev., s. 1,480.

402. And now we may pass to the consideration of another species of 'Public document,' namely, the register of a birth, a death, or a marriage. These documents are enumerated by Mr. Taylor among 'Official registers,' (*j*) and are stated to be *admissible* to prove the facts recorded in them, on the ground that the law requires them to be kept for the public benefit. (*k*) Being, therefore, 'evidence' in writing, they become, according to the prevailing doctrines, 'written evidence' of the facts they record; and as 'oral evidence cannot be substituted for any instrument *which the law requires to be in writing*,' (*l*) they would, were the doctrine pushed to its logical conclusion, become 'primary evidence' of the facts they commemorate, and exclude all other, or 'secondary' evidence of those facts, at least until the absence of the original document was accounted for. (*m*)

Moreover, as 'parol or extrinsic evidence' cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument, (*n*) even in cases where secondary proof was admitted, no evidence *repugnant* to the contents of the register could be received at all. In a word, if the existing theory relating to 'written evidence' were carried out to the bitter end, the facts recorded could only be proved either by production of the register, or, in its absence, by secondary evidence of its *contents;* in other words, these facts could only be proved either *by* or *through* the register; and thus the existence of the register would have the effect of excluding all other proof of the facts recorded in it.

403. Yet it is perfectly obvious that the contents of the register, and the facts recorded therein, are, for the most part, matters perfectly distinct and independent of

(*j*) *Ibid.*, s. 1,433. (*k*) *Ibid.*, s. 1,429. (*l*) *Ibid.*, s. 370.
(*m*) Taylor Ev., s. 365. (*n*) *Ibid.*, s. 1,132 (1,035), and Post, chap. 16

each other. The entry of a birth, for instance, could have no effect to bring a living person into the world; nor the entry of a death to send one out of it: and though the entry of a marriage, if signed by the parties, may form some *part* of the act of marriage, yet it cannot, where any further solemnity, such, for instance, as a religious ceremony, is a requisite to its validity, form the whole of it. Such an entry is, in general, a mere written statement of the fact recorded; a statement by the registrar, if the fact is within his own knowledge; or by his informant, if the latter signs the entry; otherwise, it is a mere statement by the registrar of a statement made by the person who imparts the information. At best, it is but a narrative of extrinsic fact drawn up by the registering officer; and unless the statement be corroborated by his sworn testimony, it is, in a scientific point of view, mere 'hearsay evidence' of the facts which are recorded in it.

404. Now though it may be highly desirable and expedient to create written narratives of this kind with a view to preserving and perpetuating the proof of the matters which they chronicle, they should be admitted only as a kind of auxiliary or subsidiary evidence. To treat such official statements as primary evidence of the facts to which they relate, and to allow the mere existence of a register to exclude more legitimate modes of proving the same facts, would be in the highest degree absurd and inconvenient. Indeed, this has proved so obvious in the present instance, that our courts have always shrunk from treating this particular species of document as 'written' or 'primary evidence' in the full legal acceptation of the terms; and we find the actual state of the law to be this: that though a register, as being required by law to be kept for the public benefit, is *competent* evidence of the facts recorded in it, (*o*) yet

(*o*) *Vide* Taylor Ev., s. 1,577.

it does not by its existence exclude other legitimate evidence of those facts, (*p*) such as the oral testimony of a personal observer. The official statement being thus admitted only concurrently, and on a par with other and more legitimate evidence, there does not appear, in the case of a register of this kind, to be any serious practical departure from the dictates of common sense, or the laws of sound reasoning.

405. The next species of 'public document' to which we shall have occasion to advert, is the deposition of a witness taken before a magistrate in a criminal inquiry under the Act of 11 and 12 Vict. cap. 42, section 17. (*q*) The object with which the oral testimony of a witness at the preliminary investigation before justices of the peace was required (to quote the language of the statute) to be 'put into writing,' was, to preserve proof of the facts sworn to by him on that occasion, in the event of his being prevented by death or illness from giving his testimony in person at the subsequent trial. In such a case, Section 17 of the Statute provides that his deposition may be read at the trial in proof of the facts to which he has deposed at the preliminary inquiry.

But it is not with this legitimate and proper use of 'depositions' (as they are usually called) that we are now concerned. When employed for the purpose directly contemplated by the statute, and offered in proof of the *facts of the case*, in the absence of the witness himself, we find the depositions invested with their proper character of substitutionary evidence. (*r*) For as they can at best represent the previous sworn statement of the absent witness, and since it is obvious that his previous testimony, even though presented in a written form, cannot on the second occasion furnish so trustworthy evidence of the facts to which he formerly

(*p*) *Ibid.*, s. 386. (*q*) *Ibid.*, ss. 370 and 447, and Sup., s. 396.
(*r*) *Vide* Best Ev., s. 496, and Taylor Ev., s. 447.

deposed as his present testimony would afford, it was scarcely possible to be blind to the manifest conclusion that the depositions are the inferior evidence. And thus, as applied in the absence of the witness to the proof of the facts of the case, the depositions came to be viewed in their proper light, and relegated to their due station as subsidiary, or, as Mr. Taylor styles it, 'secondary' evidence. (*s*) For reasons already stated, (*t*) we have preferred to include this phase of proof among the list of recognised exceptions to the rule against hearsay. But it is worthy of remark, that where the previous oral testimony of a witness is presented to the tribunal in the form of a written deposition in proof of the facts to which the witness has deposed, the evidence is not even *simple* hearsay. (*u*) For the testimony itself, even if legitimately established on the second occasion by oral evidence, is, as I have formerly remarked, (*v*) nothing but a phase of hearsay evidence; whence it follows that the written statement or *report* of that testimony, when thus employed, is a species of double or multiplied hearsay.

406. But there is another purpose not directly contemplated by the statute, for which the depositions may be, and very frequently are used; namely, to prove what the witness has stated—what testimony he has actually given, what words he has actually uttered—on the former occasion. (*w*) And this question may become material for at least two purposes; namely, (1) To contradict or corroborate the witness himself when called at the subsequent trial; (2) For the purpose of convicting him of perjury committed in the preliminary inquiry before the magistrates. And it would seem that the 'depositions' not only may, but that they *must* be used

(*s*) *Vide* Taylor Ev., s. 434. (*t*) Ante, s. 343 and 354.
(*u*) *Vide* Ante, s. 352. (*v*) *Vide* Ante, s. 354.
(*w*) *Vide* Roscoe Crim. Ev. by Stephen, p. 62, 7th ed.

for these purposes. For as the depositions are required by law to be 'put into writing,' they become, according to received doctrines of the common law, the *best* evidence of what the witness has said; (*x*) no secondary evidence of his statement can, while the depositions are forthcoming, be received; and no other evidence is admissible to contradict, vary, add to, or subtract from, the terms of the writing. In a word, the depositions become both conclusive and exclusive evidence of what the witness has previously stated.

407. The arbitrary effect of these doctrines has, however, been somewhat modified by the operation of certain rules laid down by the judges after the passing of the 'Prisoner's Counsel Act,' 6 and 7 Will. IV., cap. 114, for the purpose of regulating the cross-examination of a witness in reference to his former testimony before the magistrates. (*y*) The substance of these rules, so far as they concern the subject now before us, is as follows: That a witness at the subsequent trial may be shown either by his own testimony (or admission), or by the testimony of another witness, to have made an *additional* statement not contained in the depositions; (*z*) the result of which, as stated in Roscoe's 'Criminal Evidence,' appears to be this: (*a*) that for the purpose of discrediting or confirming a witness, the depositions may be added to, but not varied, nor, it is to be presumed, contradicted; *i.e.*, they are conclusive, as far as they go, but not exclusive evidence. But these rules, relating as they do to the credit of witnesses, do not apply to the latter of the two cases before adverted to; viz., to the case where a witness is indicted for *perjury* committed in an inquiry before a magistrate. The depositions, which in this case are used as 'substantive' evidence, are, then, not only

(*x*) Taylor Ev., s. 370, and Ante, s. 396.
(*y*) Roscoe Crim. Ev., p. 63, 7th ed.
(*z*) *Vide* Rule 3. (*a*) Roscoe Crim. Ev., p. 64, 7th ed.

conclusive, but exclusive evidence of the statements on which the perjury is assigned. (*b*) The prisoner can neither be convicted of perjury on any further statements not contained in the depositions, (*c*) nor, it may be inferred, can he defend himself by contradicting or qualifying any statement that appears there. To sum up this slight survey of the positive law on this question: the depositions, when used for the purpose of discrediting a witness, are conclusive but not inclusive evidence of his previous statements; when used for the purpose of convicting him of perjury, they are not only conclusive, but exclusive and final. (*d*)

408. And now let us endeavour to ascertain the precise nature of this evidence, to which the law ascribes so transcendent an effect. The statute requires the testimony of the witness to be 'put into writing' by the justice; to be read over to the witness; to be then signed by him; and lastly, to be signed by the justice who takes the deposition. (*e*) If these requirements were literally and strictly complied with, the deposition would be a writing framed by the justice, read over by him *to* the witness, and confirmed by the witness's signature. In practice, however, I believe the depositions are seldom, if ever taken down by the justice himself; that duty being usually performed by the clerk to the magistrates, who also reads over his deposition to each witness before he signs it. In this latter case, the deposition is a writing framed by the clerk, read over by him to the witness, confirmed by the signature of the witness, and also by that of the justice, in whose presence the testimony is delivered.

But whichever of the two modes of preparing the depositions be adopted, it is manifest that neither one

(*b*) Roscoe Crim. Ev., pp. 64 and 801, 7th ed. (*c*) *Ibid.*, p. 801.
(*d*) *Vide* Roscoe Crim. Ev., pp. 64 and 801, 7th ed.
(*e*) 11 and 12 Vict. cap. 42, s. 17.

nor the other can render the writing identical with the oral testimony of the witness. The previous testimony of the witness, being orally delivered, is purely verbal matter, of which verbal matter the depositions are a mere statement in writing. For, I must again repeat, verbal matter, *i.e.* spoken words, cannot be transformed into written matter by the act of a person in taking down the words as they are uttered. The fact that a witness has said so and so, and the fact that a writer has *stated* that the witness has said so, are perfectly distinct matters. The writing will still remain, in relation to the words uttered, a mere narrative or statement by the writer (*f*). Consequently, the depositions are, in relation to the actual testimony delivered, nothing but a species of statement; a statement made—if the former of the two modes of taking them be adopted—by the justice himself, and confirmed by the witness; or, if the second, made by the clerk, confirmed by the justice, and also confirmed by the witness.

409. It will be observed that, in both cases, the deposition is confirmed by the witness himself, and it will perhaps be urged that this makes it also the witness's own statement. And to some extent, no doubt, it does so; but it is still not the *same* statement as that which he delivered orally on oath. It is still neither his oral statement nor his sworn statement, the truth of which is guaranteed by the penalties attaching to perjury, nor the precise statement on which the magistrates were bound to act. Indeed, practically a deposition of this kind will, I think, be found, if scrutinised, to be little more than the statement of the clerk by whom the evidence is taken down. For though it is signed by the justice, and also by the witness, I think I am justified in saying that it is very seldom, if ever, read over by either of them.

(*f*) Ante, ss. 196, 308, and 398.

The statute, it is true, requires the deposition to be 'read over to' the witness before he signs it; but this provision, if it affords some security against accidental error, is no safeguard whatever against wilful misrepresentation. For this duty is also usually entrusted to the clerk, who, therefore, not only has power, if he chooses, to misrepresent the testimony of the witness on paper, but can also misstate at will the contents of the deposition, when reading, or affecting to read it aloud. And whether it be the statement of the justice, of the clerk, of the witness, or of all three combined, the deposition must necessarily be, in relation to the oral testimony, mere narrative or transmitted evidence; and as it does not satisfy the definition of oral evidence, not being delivered openly upon oath by the author of the statement, it is, in a scientific point of view, only a species of hearsay. Its admission as evidence upon any terms is, therefore, *pro tanto*, a relaxation of the rule which is embodied in the maxim, 'In judicio non creditur nisi juratis' (*g*).

410. The reception of a memorial of this kind, however, on its proper footing as auxiliary or makeshift proof may perhaps be sufficiently justified on the ground of expediency; but to give such evidence a conclusive effect, and to allow mere statement, however responsible, to supersede and exclude legitimate oral testimony, is nothing less than a direct violation of that fundamental rule against hearsay which our tribunals have deliberately established for their own guidance, and which cannot be partially abandoned without producing serious confusion and embarrassment.

We can scarcely expect to anticipate the various ways in which mistakes, omissions, or misrepresentations may be introduced into the depositions, dependent, as that question must be, on the precise mode in which the requirements of the statute are complied with; but

(*g*) Best Ev., s. 56; Ante. s. 253.

that error does frequently creep in must be obvious to anyone who has been in the habit of listening to the proceedings in a criminal trial. He cannot fail to have been struck by the frequent exception taken by the witnesses to their own statements as represented in the depositions; he can scarcely fail to have heard witnesses under cross-examination give vent to some such expressions as these: 'It may be there' (*i.e.*, in the depositions), 'but I never said that'; or 'It may not be there, but I did say so,' or the like. The author, however, sincerely trusts that he may not be understood as casting the slightest reflection on the magistrates of this country, their subordinates, or their mode of conducting their proceedings. On the contrary, the object of the present discussion is, not to suggest that there is any want of due precaution in framing the depositions, but to demonstrate that no formalities, however carefully devised, and however scrupulously observed, can be effectual to make two facts identical, which are essentially distinct and independent of each other, or to render that really conclusive which, naturally regarded, is not conclusive evidence.

411. It will be observed that the foregoing discussion relates solely to the effect of 'the depositions' on the mode of proving the previous testimony of a witness, where the nature of that testimony is actually in question. But it is not the actual *proof* of the testimony only that is affected by the statute which requires the evidence of a witness called before magistrates to be 'put into writing.' The influence of this requirement is also extended to the rules to be observed in *questioning* the witness as to his former statements, or, as it is improperly phrased, 'cross-examining him upon the depositions.' But inasmuch as this question is closely interwoven with an inquiry into the mode of cross-examining a witness

on his previous written statements, properly so called, *i.e.*, on statements originally made by the witness himself in writing, and not verbally, such, for instance, as expressions contained in a letter penned by him, I have thought it more convenient to discuss this part of the subject in an earlier chapter under the head of witnesses and their cross-examination. We need not, therefore, in this place, do more than refer the reader to the passages in question. (*h*)

412. The next 'Public document' to which we shall have occasion to advert is the confession, or, as it is usually called, the 'examination' of a person charged before a justice with an indictable offence, which is required by section 18 of the statute just referred to (*i*) to be taken down in writing at the close of the case for the prosecution. (*j*) By this section the justice, before whom the inquiry is conducted, is required, after the depositions of the witnesses for the prosecution have been completed and read over to the accused person, to caution him in a form prescribed by the statute, and to ask him at the same time whether he wishes to say anything in answer to the charge. The statute then proceeds to enact that whatever the prisoner shall then say in answer thereto shall be taken down in writing, and read over to him, and signed by the justice, and may then be given in evidence against him at the subsequent trial as his confession. (*k*)

Here, therefore, the nature of the statement made by the prisoner is the precise fact which the writing is designed to establish; the proof of that fact being the object directly contemplated by that section of the statute which requires the document to be created.

(*h*) Ante, ss. 378-386. (*i*) 11 and 12 Vict., cap. 42.
(*j*) *Vide* Roscoe Crim. Ev., 55, 7th ed., and Taylor Ev., s. (811).
(*k*) Section 18.

With regard to the legal effect of the written 'examination' as evidence, it appears that, though oral or other legitimate proof of any *previous or subsequent* statement made by the accused is receivable, yet the written examination is by existing rules treated as both conclusive and exclusive evidence of what he said at that particular stage of the inquiry. (*l*)

413. And now, as before, let us endeavour to ascertain the precise nature of this writing to which the law ascribes so conclusive an effect. As in the case of the depositions, the confession of the accused is usually taken down in writing by the clerk to the justices, who also reads it over to him before it is signed by the justice. And it is also the practice to invite the prisoner to sign the document himself, for though the statute is silent on this point, there is a suggestion to that effect contained in the Schedule (N) appended to the Act. (*m*) If he does sign the paper, it then does certainly become, to some degree at least, his own written confession, and as such, would be properly proved by its mere production. But it is to be remarked, first, that he is not required to read it himself, and indeed may not be competent to do so, and that, though it must be read over *to* him, that process does not *necessarily* inform him of its true contents; (*n*) and secondly, that many persons, when placed in such a situation, will sign as a matter of course any document which is placed before them for the purpose. In short, his signing the document no doubt makes it his own written confession; but it is a confession which can hardly be said to be fairly obtained. Nor, moreover, is it, even then, necessarily identical with the statement which he delivers verbally.

But if he does not sign it—and he cannot be compelled to do so—it is then, not in itself his confession, but, as

(*l*) *Vide* Roscoe Crim. Ev., 58, 7th ed., and Taylor Ev., s. 816.
(*m*) *Vide* Roscoe Crim. Ev., 59. (*n*) Ante, s. 409.

in the case of the depositions, a mere statement by the clerk, confirmed by the justice of the terms of a confession verbally made. Being a statement of extrinsic fact, and not being delivered orally upon oath (for the clerk himself is scarcely ever called to support it), it is in a rational view mere hearsay, and, strictly speaking, should not be admitted at all, and still less received to the exclusion of other legitimate evidence.

414. The doctrine that a written statement of verbal matter, of whatever kind it be, or under whatever responsibility it be framed, is superior to the sworn testimony of a personal observer, who has heard the words spoken, and remembers them, is not only inconsistent in theory with the rule against hearsay, but is utterly repugnant to the dictates of common sense. No one, I apprehend, would maintain that the testimony of the clerk, or of the justice who took down the evidence or the confession in writing, with the writing itself to refer to, or, as it is phrased, to 'refresh his memory' from, would not furnish more satisfactory proof of the words used by the witness, or by the prisoner, than the 'depositions' or the 'examination' would afford *per se*. And in what respect, I would ask, is the testimony of these persons superior to that of any other credible witness, who has taken notes of the proceedings, or otherwise recollects accurately the words uttered on the occasion? The circumstance, that it would often be difficult to find a personal observer whose recollection was completely accurate on the subject, may be an excellent ground for requiring the written statement to be created, and admitted, either as legitimate evidence to refresh the memory of the writer, or even, *per se*, as 'makeshift evidence'; but it forms no ground whatever for excluding the testimony of any other personal observer or listener, whose recollection serves him sufficiently for the purpose.

415. Before quitting altogether the subject of written narratives, it will be necessary to advert to another species of 'written evidence,' which, though it does not exactly come within the description of a 'public document' or 'official register,' is still a phase of official narrative, and owes its admissibility 'as evidence' to direct statutory sanction. I refer to what may be styled the 'legalised copy' of a public document. The rule which requires the contents of a writing to be proved only by primary evidence, *i.e.* by the production in Court of the document itself, is subject, as we have seen, (*o*) to an exception, or relaxation in the case of certain public documents of general concernment; (*p*) an exception founded on the moral inconvenience that would result from insisting on the production of the originals. On this principle it has always been permissible to prove the contents of such documents by means of secondary evidence of a certain definite kind.

'It has become a common law axiom of almost universal application,' says Mr. Taylor, (*q*) 'that *whenever a book is of such a public nature as to be admissible in evidence on its mere production from the proper custody, its contents may be proved by an authentic copy.*' 'Now, an *examined copy*,' he goes on to say in the next section, (*r*) 'duly made and sworn to by a competent witness, has ever been considered as "authentic" within the meaning of the above axiom; but the Legislature has also provided a more simple mode of proof, namely, by the production of a *certified copy*. The enactment by which this salutary change in the law has been effected, is contained in section 14 of Lord Brougham's Evidence Act of 1851, (*s*) and is in the following words:

(*o*) Ante, s. 340.
(*p*) Best Ev., s. 485, and Taylor Ev., s. 1,436.
(*q*) Taylor Ev., s. 1,436. (*r*) Taylor Ev., s. 1,437.
(*s*) 14 and 15 Vict. c. 99.

'Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any Court of Justice, or before any person now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract; or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted.'

416. It is to these certified copies of public documents, and the evidence afforded by them, that I now wish to direct the reader's attention; and as I am anxious not to complicate the subject by any question as to the nature of the evidence afforded by the *original* document, I shall assume for the occasion that the contents of the original are the ultimate fact to be proved. As proof of the contents of the original, then, those certified copies are generally regarded as a species of legalised *secondary* evidence, but it should not be overlooked that they are not even *legitimate* secondary evidence. For the identity of the contents of the copy with those of the original, which in the case of an examined copy is established by the oral testimony of the person who has compared the two, rests only, in the case of certified copies, upon the unsworn statement of the officer who certifies them to be correct copies by the act of signing them.

Nay, as a certified copy is receivable in evidence if it merely '*purport*' to be signed by the proper officer, the tribunal before which it is produced does not necessarily obtain even the safeguard of his statement, since the signature may be forged, and the statement implied by it is, therefore, in some sense merely that of an unknown person who *represents* himself to be the proper officer.

Inasmuch, however, as the certified copy can hardly be treated otherwise than as a substitute for the original, and consequently as inferior evidence, there is perhaps no great danger in the mere admission of such legalised copies. But it should not be forgotten that such a mode of simplifying and facilitating proof must necessarily be attended by a corresponding infirmity in the quality of the evidence obtained.

417. The enactment, to which we have just referred, (*t*) is by no means the only one by which copies of the same character are rendered admissible in evidence, but as it is perhaps the most comprehensive measure of the kind, it may serve our purpose as a specimen of the whole tribe. But by whatever statute such copies are rendered admissible, by whatsoever name they are distinguished, whether as *certified* copies, *office* copies, (*u*) or otherwise, they stand upon the same footing, and the same observation applies to them all. Wherever the identity of the contents of the copy with those of the original is not established, either by the sworn testimony of a witness who has made the copy or compared the two documents, or by the admission of the party against whom the copy is tendered in evidence, the copy is nothing more than a species of official hearsay evidence of the original, and the facility of proof gained by its admittance is attended by commensurate infirmity in the character of the evidence obtained.

418. With legalised copies, our list of examples of Public and other kindred documents is complete, and we may now proceed to consider shortly the general results of our examination.

All official written narratives, whether rendered admissible in evidence as a consequence of their being required by law to be created, or made 'evidence' by virtue of direct statutory sanction, are, in common with

(*t*) 14 and 15 Vict., c. 99, s. 14. (*u*) *Vide* Taylor Ev., s. 1,382.

all other narratives written or verbal, divisible into three classes, distinguishable by the nature of the facts to which they respectively relate. Thus an official writing may contain either—

(1) A narrative of verbal matter, *i.e.* of words spoken; which may be termed a *report*: Or it may contain (2) a narrative of written matter, *i.e.*, a recital of the contents of another writing; in which case it is usually called a *copy*: Or lastly, it may contain (3) a narrative or account of some fact which does not consist of language either verbal or written, such as a birth, or death, a payment made, or the like; which may for distinction's sake be styled a *history* or *memoir*. And it will be found that the rules which regulate the reception of written evidence (*v*) have had a somewhat different result in the case of each of these three classes of document.

419. To take them in inverted order: We find that official narratives of the last class, or *histories*, though admissible as evidence to prove the facts recorded in them, are, in general, received only on a par with other more strictly legitimate evidence. For the facts to which they relate, as not consisting of language or the delivery of language, are so obviously extrinsic to, and independent of the written statement which chronicles them, that the absurdity of treating the two as identical, or, which is practically the same thing, of accepting the one as conclusive evidence of the other, has forced itself on the attention of our jurists; and hence the arbitrary doctrines, whereby a writing is constituted 'primary' or exclusive evidence of every fact which it is admissible to prove, have gradually yielded to more rational views, and undergone a considerable and salutary modification in actual practice.

420. In the second case, where the official narrative represents, or professes to represent, the contents of

(*v*) *Vide* Taylor Ev., ss. 370 (1,035), and Ante, ss. 396, 402.

another document, both documents being equally 'written evidence' in the eye of the law, the original document has obviously the prior claim to rank as 'primary' evidence; and the copy, therefore, necessarily comes to occupy a subordinate place as compared with the other. And thus official narratives of the second class, like all other copies, are usually regarded in the light of mere secondary evidence, and placed on a level with any other secondary evidence. But it should not be forgotten that wherever the identity of the contents of the copy with those of the original is not established either by the testimony of a witness who has compared the two writings, or by the admission of the party against whom the copy is tendered in evidence, the copy is less than legitimate secondary evidence; being indeed nothing more than a species of official statement or 'hearsay evidence' of the contents of the original document.

421. But it is in dealing with official narratives of the first class, or *reports* of verbal matter, that the existing rules of law, as actually applied, appear to be most directly in conflict with true scientific principle. For here, the momentous circumstance that the verbal matter, or words spoken, are entirely distinct from, or non-identical with, the written report, seems almost entirely to have escaped attention. In this case, we find the writing regarded as if it were absolutely identical with the verbal matter, and treated as primary and conclusive evidence of the words as orally uttered. In short, we find the written narrative accepted as conclusive evidence of the extrinsic fact narrated in it. And the result, as might be anticipated, is confusion and embarrassment.

422. The doctrine, that wherever a document is receivable in evidence, the writing becomes the primary and best evidence of every fact which the document is

legally admissible to prove, is, in my humble opinion, the most unsound and dangerous one known to our law. So far, indeed, as the contents of the writing are actually in question, the rule is perfectly rational and scientific. But where, as in the case of these official narratives, the document is admitted to establish extrinsic facts, there the doctrine becomes in the highest degree absurd and inconvenient. It is a complete fallacy to imagine that a written statement, however responsible, can in general afford higher evidence than an oral, not to say a sworn declaration to the same effect. It is true, that in the case of the former, the production and inspection of the writing proves by the cogent evidence of perception the exact nature of the statement itself; but it must be remembered that any verbal communication which actually reaches the ears of the inquirer, is none the less conclusive in that respect than a written one. Thus a tribunal is equally percipient of a verbal statement made in open Court, whether by a sworn witness or otherwise, as of a written statement submitted to their inspection. It is true that a different sense is employed in each case; in the one, the sense of hearing; in the other, of sight; but in both cases alike the tribunal obtains real evidence of the nature or substance of the statement. And the real evidence, thus gained, of a verbal statement is in this respect superior to the evidence obtained by the perusal of a written one, that in the former case the tribunal not only hears the nature or words of the statement, but also sees who is the author of it, and thus obtains real evidence of both these component facts. (*w*)

And further, regarded as proof of the *ulterior* fact to which the narrative relates, the verbal statement, when established, is far superior to the written one. For the truth of the ulterior fact rests on the veracity of the

(*w*) *Vide* Ante, ss. 323 and 345.

author of the statement. This veracity in the case of a verbal declaration may be weighed by the *demeanour* of the speaker, and furthermore, if he be a sworn witness, is secured by his oath, by the test of cross-examination, and all the other sanctions by which the truth of judicial testimony is guaranteed ; which securities are all absent in the case of a written narrative. A written narrative, therefore, so far from affording by its production better evidence of the extrinsic facts to which it relates, than oral testimony to the same effect, is in some respects less trustworthy than a casual verbal statement would be, which actually reached the ears of the tribunal.

423. It is clear, therefore, that the doctrine in question, when applied to written *statements*, is not only a violation of the established rule against hearsay, but is wholly untenable on any rational ground. It is directly opposed to scientific principle as tending to subvert the fundamental distinction between a fact and the statement of a fact, and consequently, between 'immediate' and 'transmitted' evidence. And its evil tendencies would doubtless have produced most disastrous results, if it had been uniformly and rigidly carried out in practice. But this vicious principle, so boldly enuntiated in theory, being found unfit to endure the ordeal of practical application, has been constantly modified in practice to suit the exigency of the occasion. That its dangerous tendencies, however, have not been wholly neutralised by these piecemeal concessions to true principle is evinced by the following passage of Mr. Best's treatise on Judicial evidence.

'By various recent statutes,' he says, (*x*) 'many species of documents have been invested with the character of public documents, and made evidence against all persons of the facts which they record or attest; the proof of public documents in general has

(*x*) *Vide* Best Ev., s. 118.

been rendered more simple and less expensive,' etc. 'While these (with other) alterations,' he goes on to say, 'must on the whole be viewed as improvements, it may be a question whether they have not, in some cases, *been carried too far*. The principle which *attaches so much faith to public documents*, for instance, rests in a great degree on the rule, *Omnia presumuntur ritè esse acta*, a maxim unquestionably just when restrained within its due limits, but which loses much of its force when the document is only of a *quasi* public nature, *i.e.*, drawn up by individuals acting in some sense indeed on the part of the public but having a personal interest in the existence of the facts they profess to record or attest. And there is another maxim equally valuable which must not be lost sight of—*Res inter alios acta alteri nocere non debet*.' To which he might well have added another still more to the purpose, and equally valuable—*In judicio non creditur nisi juratis*. 'In one instance at least,' he proceeds to say, 'that relating to entries in the official log books of merchant ships—the Legislature found it necessary to *retrace its steps* in this respect; and several cases illustrate the danger of the enactments in the 8 and 9 Vict. c. 16, s. 28, and 25 and 26 Vict. c. 89, s. 37, which, in an action by a railway company for calls, render the register of shareholders *primâ facie* evidence of the defendant being a shareholder, and of the number and amount of his shares.'

424. The maxim, *Omnia presumuntur ritè esse acta*, may perhaps suffice to justify the admission of written statements made by agents of the state under the responsibility of official duty, as *primâ facie* evidence of the facts recorded in them; but to carry this principle to the length of allowing such narratives to supersede and exclude all other proof of those facts, is indeed an undue straining of the maxim. Such a doctrine, if consistently pursued, would render it impossible to prove against

a person in an official station any misconduct or dereliction of duty whatever, and would place all officers of the state on a level with the sovereign, who 'can do no wrong.' (*y*) The perplexity and confusion, not to say substantial injustice, occasioned by the 'depositions,' both in reference to the mode of proving the previous testimony of a witness, and of cross-examining him upon it, sufficiently evince the detrimental effect which this principle still exercises in the case of official narratives of verbal matter, or legalised written *reports*.

425. The doctrines which regulate the reception of 'written evidence' are properly and rationally applied to the proof of the contents of a document, where its contents are really in question. The rule that, where the law prescribes the use of writing as an indispensable requisite to the valid performance of a particular act, the nature and limits of that act shall be proved by the production of the document itself, and determined exclusively by a reference to its contents, is a most sound and consistent one; but it is a complete perversion of this rule to apply it to the proof of extrinsic facts which the law requires to be related or recorded by writing.

An unwritten fact cannot, even if it consist in the utterance of vocal sounds, be transformed into a written fact by the use of any kind of formalities. The practical effect of making a written statement conclusive evidence of the fact stated is, not to render the two facts identical (that being a moral and physical impossibility), but virtually to substitute the fact as stated or described in the written document for the fact as it occurred in real life.

In some few cases, as in that of a Record, it may be expedient to adopt this mode of creating permanent and incontrovertible evidence of important facts; but, even here, the artificial nature of the process should be

(*y*) *Vide* Blackstone Com, I. 246, III. 254, and IV. 32.

steadily kept in view, and every precaution taken for securing, by amendment or otherwise, the truth or authenticity of the document. And in the majority of cases it may be safely affirmed that such a course is the very reverse of expedient.

426. I have dwelt at considerable length upon the subject of officially written statements — of public documents, official registers, and legalised copies— because it is principally in the case of such writings that this specious fallacy — the want of distinction between a written fact and a written statement—makes itself felt. Written statements of a private character, not being in general admissible at all, do not come under the designation of 'written evidence,' or fall within the scope of the doctrines by which the reception of such evidence is regulated. But official written narratives, being once admitted as evidence, become 'written evidence,' and are invested with all those conclusive properties which are the true attributes of a written fact only. And though in practice our Courts of law have shrunk from giving to them the conclusive effect ascribed to them in abstract theory, still the doctrine that every document receivable to prove a fact is written evidence of that fact, and that all written evidence is intrinsically superior to oral, is by no means obsolete. And as one of the principal objects, if not the main design of the present work, is to explode this dangerous error, it can scarcely be deemed that too much space has been devoted to the subject of official narratives.

427. Nor will it be advisable to conclude the present chapter without endeavouring to ascertain the ultimate source from which the evil really proceeds. Sensible of the conclusive results obtained by the production or manifestation of a certain kind of document, our ancestors committed the error of attributing to the written shape

of the evidence that transcendent effect, which should have been ascribed to the direct exercise by the tribunal of its own perceptive faculties upon the very fact in question.

The true explanation of the conclusive effect produced by 'written evidence' of the higher order is this—that the transaction performed by an act of writing frequently forms the very subject of judicial inquiry, and in inspecting the document, the tribunal, if it does not actually witness the act or transaction itself, at least beholds the permanent traces from which the nature of the transaction may be conclusively inferred ; (*z*) so that the production of the writing is simply a phase of real evidence, the highest evidence which human nature is capable of attaining. (*a*)

In short, wherever a conclusive effect is obtained by the production of a writing, that conclusive effect is due not to any probative force inherent in the writing, but to a power inseparable from the direct exercise of the perceptive faculty. In other words, what is *essential* to the conclusiveness of the process is, that the fact itself is subjected to perception ; and the circumstance that the fact is contained or embodied in a written document is only *accidental.* Accordingly evidence of this kind should properly have been classed, not as *written* evidence, but as *real* evidence, and thus distinguished, not by the character of the fact established—the writing, but by the means of verification employed,—the senses of the tribunal. Indeed, if we designate the proof obtained by the inspection of a writing, 'written evidence,' we should, if philosophically consistent, call that which is furnished by the production of a model, model evidence, and by the production of a knife, 'knife evidence,' and so on.

428. It is true that writings, and their proof, play a

(*z*) Ante, s. 296. (*a*) Ante, s. 181.

vastly more important part in judicial inquiries than any other class of material objects. The cause of this is not very difficult to explain. The acts of mankind, as we have formerly remarked, (*b*) form the most frequent and important topic of inquiry in courts of justice; and of all human actions, the most significant, in a legal view, are those which are performed by the utterance of language verbal or written. Moreover, the acts accomplished by the use of written language are, generally speaking, far more significant than those that are performed by mere word of mouth. Indeed, it is by the use of writing that men perform most of the momentous actions of their lives. (*c*) For not only do they elect to perform them in that shape for the sake of the lasting traces which the act of writing leaves behind it, and by which the nature of the transaction may be conclusively proved at any future time; but in numberless cases they are required and compelled by law, for the same reason, to do so. The cause, therefore, of the conspicuous place which writings occupy in the arena of judicial proof, is shortly this: that they contain the visible traces of a vast number of legal facts of the most significant kind, which facts are easily and conclusively established by producing the writing in court.

429. Still, however, the frequent use of writings as the medium of proof does not give them any greater title to be regarded as instruments of evidence, than that which may be claimed by any other kind of material object that is employed for a similar purpose. (*d*) And, as I have formerly remarked, (*e*) the proof obtained by the production in court of a written document, whose contents are in question, should be classed, not as written evidence, but as *Real*.

And this truth would probably have been recognised

(*b*) Ante, s. 182. (*c*) Ante, s. 286. (*d*) *Vide* Ante, s. 263. (*e*) Ante, s. 264.

long ere now, had not the subject been obscured from a very early period by the false view adopted of Real evidence itself. Real evidence was regarded as the evidence of *things* as distinguished from persons,—an error which appears to have been introduced by the civilians, who distinguished such proof as Evidentia rei vel facti, (*f*) and which appears to be adopted by at least the greater number of the writers of the present day. (*g*) Whereas, as I have already observed, (*h*) the difference between things and persons cannot be made the foundation of a solid distinction between species of evidence. We find the physical state of a person, as in the case of a mayhem, the conduct or demeanour of a person, as of a lunatic or of a witness, and even the momentary act of a person, as in the case of a contempt of court, each cited by Mr. Best himself (*i*) as instances of real evidence, in those cases where the fact itself comes under the immediate observation of the tribunal; the exercise of that observation upon the fact itself being the true test and token of *Real* evidence.

430. And it is to this false view adopted of Real evidence as the evidence of things that the whole error of which we have been treating, viz., the want of distinction between a written fact and a written statement, is ultimately to be traced. Had the architects of our system of judicial evidence only realised the truth of the principle that real evidence is the evidence of immediate perception—whatever the subject-matter perceived,—they would not have failed to discern also that the production in court of a writing simply furnished real evidence of its contents;—that its production was conclusive only so far as the contents were actually in question;—and that in pro-

(*f*) *Vide* Best Ev., s. 196.

(*g*) Best Ev., ss. 28 and 196, and Benth. Ev., i. 53, and iii. 26 and 33.

(*h*) Ante, i. s. 223. (*i*) Best Ev., ss. 196 and 197.

portion only as the contents bore on the subject of inquiry, so far and no farther was the evidence conclusive.

They would have perceived that where the contents constituted the fact in question, there the evidence was wholly conclusive: That where the contents only raised an *inference* of the fact in question the conclusiveness of the evidence was measured by the strength of the inference: That where the writing contained a mere *statement* of the fact in question, there the conclusive nature of the proof was impaired by all the infirmity inherent to transmitted evidence or narrative. (*j*)

But having christened the evidence 'written evidence,' they naturally referred all its cogency to its written form, and were led to ascribe the same force and proving power to every document that was receivable in evidence, whatever its relation to the actual subject of inquiry.

(*j*) Ante, s. 305.

CHAPTER XIV

OF A WRITTEN ACT

431. We call a document a 'written act,' not necessarily from any peculiarity in the document itself, but in consequence of the aspect which the writing presents towards the subject of inquiry, and because the act of the writer forms the whole or a component part of the issue.

Every writing is equally the result of a human action, and in every instance in which writing is used,—in which pen is put to paper, the act of the writer in framing the document (or of its author in signing or executing it) may become directly material to some question of fact debated in a court of justice. In the case of preappointed documents or written instruments framed by individuals for the purpose of modifying their mutual rights, (*k*) the document is created expressly with a view to such a contingency. A writing, however, may become thus material, not only as modifying a right or creating an obligation, but also as inflicting a wrong or injury, as committing an offence, or even as perpetrating a crime. Thus not only may an estate be conveyed or devised, a contract or agreement ratified, a promise made, a licence granted or revoked, an order given, and so forth, by the act of writing; but a libel may also be published, a false representation or false pretence made, a menace conveyed, a conspiracy engaged in, or forgery or even treason perpetrated by the same process. (*l*)

In short, it would be idle to attempt a complete enumeration of the numberless acts, which are at once

(*k*) Ante, s. 383. (*l*) Ante, ss. 188 and 286.

capable of being accomplished by the use of pen, ink and paper, and of becoming material to judicial inquiries, or, we might add, of the various ways in which such acts may bear upon the question at issue. But wherever the act of the writer is directly material to the inquiry, the proof of the contents of the writing is proof of the nature, limits and extent of his act, and the production and inspection of the document affords to the tribunal real evidence of those facts.

432. Of all the writings which furnish to judicial tribunals evidence of this high order, perhaps the most important is that form of document which is called in the technical language of the law a 'Deed' or 'Specialty,' and which is distinguished from all other written documents by the further solemnities of sealing and delivery which attend its execution. A deed is stated by Blackstone to be 'the most solemn and authentic act that a man can possibly perform with regard to the disposal of his property.' (*m*) And certain it is, that there are a multitude of important transactions which can only be accomplished by the instrumentality of a deed sealed and delivered. Thus, for instance, no incorporeal right or hereditament can be created or transferred, no freehold estate can be completely conveyed, and no lease of lands granted to endure for more than three years, except by means of a Deed: And a Deed is also necessary for the transfer of Stocks and Shares in a Railway or Joint Stock Company, and of shares in a registered British ship; nor, lastly, can a debt be gratuitously released, or a gift of undelivered chattels effectuated without one.

Another species of writing, which is scarcely less important in the same view, is a Will signed and attested, by which form of instrument, and, generally speaking, by which alone, a man can make a disposition of his property to take effect after his death.

(*m*) Blackstone Com. II. 295, 7th ed.

433. But though a deed is a most momentous and forcible act, and a will scarcely less so, it would be a complete fallacy to suppose that, in a natural point of view, either the one or the other can afford higher or more cogent evidence of what it *does* achieve, than the most insignificant or casual writing which bears directly upon the case as a written act.

In other words, a Deed or a Will can *accomplish* far more than can a less formal document; but neither a deed nor a will can *prove* by more conclusive evidence than the most trivial document, that which it *does* accomplish. A deed sealed and delivered may, indeed, convey vast estates, and affect immense and varied interests; while, on the other hand, a letter may be employed merely to communicate some trifling request, yet it cannot be seriously argued that the nature of the request preferred is less conclusively established by a perusal of the letter, than is the nature of the conveyance effected, by a study of the deed.

434. In the case of all written acts, from the highest to the lowest, the writing shows by its contents the nature of the act which is performed by its agency; proof of the contents is proof of the nature of the act; and the production of the writing furnishes real evidence of that fact. And all writings are on a par in this respect, that they are capable of being produced and manifested to the senses of a judicial tribunal; and all written acts are thus far alike, that the production of the writing shows by real evidence the nature of the act performed, be that act momentous or trivial. Moreover, as far as proof of the nature of the act is concerned, the writing is, and obviously must be, evidence not only against the writer, but also against all the world; the only question in each case being, whether the act itself is material to the inquiry. For if the act be material, it can hardly be contended that the nature of it may not be established by the

production and inspection of the permanent traces which it has left behind it upon the paper.

A written act of this kind is 'written evidence' in the highest sense of the term, and it is to this phase of proof, and, to a great extent, to this phase alone, that the rules of positive law, by which the reception of 'written evidence' is regulated, are properly and rationally applied.

435. But it must not be forgotten that, even where the written act forms the actual subject of inquiry, the mere production and inspection of the document can never have the effect of establishing the *whole issue*. For even if the whole issue turns, for instance, upon the question whether A has performed a particular written act, the inquiry must almost inevitably resolve itself, for purposes of proof, into two component questions: viz., (1) What are the nature, extent and limits of the act, which we have designated the *quid factum;* and (2) Whether or no A is the author of the writing; whether or no it emanates from him; a question which we have distinguished as the *quis fecit*, or genuineness of the document. And it is the first of these only, the *quid factum*, that is established by the manifestation of the writing. The second question—the *quis fecit*—cannot under ordinary circumstances be established by *real* evidence; but must be proved, if at all, by other means. (*n*)

But as a separate chapter will be devoted to the consideration of the proof of 'genuineness,' we must refer the reader for the further discussion of this subject to the chapter in question. (*o*)

436. To return to the *contents* of documents. Though a deed, as we have attempted to show, is powerless to prove, by more cogent evidence than any other writing, that which it does accomplish, yet a deed sealed and

(*n*) Ante, s. 296. (*o*) Post ii., chap. 17.

delivered does possess a more conclusive effect than a less formal document, to prove, as against the grantor, or author of the deed, those matters which it states *by way of recital or averment;* and this, not from any proving power naturally inherent to the solemnities which accompany its execution; but by virtue of an artificial force with which those solemnities are invested by the doctrines of positive law.

For a deed, besides the substantive act which it is designed to perform, almost invariably contains statements of extrinsic fact, intended to define and ascertain the position of the parties, and their relation to the property upon which the deed is destined to exert an influence. Thus, when a man is about to convey an estate, he usually begins by describing the land, and by stating that he is seized in fee, or otherwise entitled to the ownership of the property, and so on. Now these recitals or statements of extrinsic fact, when contained in a deed, are held to be conclusive evidence against the grantor of the facts to which they relate. In the technical language of the law, they are said to work *an estoppel* against him; and he is not allowed, in an action on the deed, to disprove them.

Thus, where the heir to an estate, during the lifetime of his ancestor conveys the estate by deed to a stranger, reciting that his ancestor is dead, and that he is seized in fee, and entitled to convey; he is estopped, when the estate afterwards descends upon him, from proving that his ancestor was alive at the time, and that he had no title to convey. (*p*) So also, where a man gave a bond to secure the payment of rent, and recited that the amount of the rent was £170; he was held to be estopped from showing that the real rent intended to be secured was only £140. (*q*)

437. In one view, an estoppel by deed wears the

(*p*) *Vide* Taylor Ev., s. 82. (*q*) *Vide* Taylor Ev., s. 84.

aspect of a conclusive kind of admission—of an admission, *i.e.*, rendered conclusive by doctrine of law; since, like any other written admission, it is receivable only against the party from whose pen it emanated: but, on the other hand, it is not an admission in the ordinary sense of the term. An admission, properly so-called, merely raises an *inference* of the existence of the fact admitted, and is properly classed, therefore, as an evidentiary fact; (*r*) while a recital or averment of this kind, being rendered by law conclusive as to the fact recited, ceases to be an evidentiary fact, and becomes to all intents and purposes a principal one. (*s*) Recitals by deed, therefore, are more properly regarded as ingredients in, or component parts of, the act performed by means of the deed than as admissions; more especially as it may be questioned whether a recital would be accepted in proof of the facts recited, even against the grantor or author himself, except for the purpose of interpreting the particular instrument in which it is contained. For which reason, I think that the definition of an estoppel given by Sir Edward Coke, that it is 'where a man's own act or acceptance stoppeth or closeth his mouth to allege or plead the truth, (*t*) is unexceptionable. It is because the subject of inquiry is *the nature of the act performed*, and not the state of the surrounding facts as they actually exist, that the grantor is debarred from proving the truth as to those facts. For example, in the preceding case of the Bond, the obligor is precluded from proving that his rent is really only £140, because he has entered into a solemn obligation to pay a rent of £170, and since the nature of his obligation is the sole question in issue, it is immaterial what his actual rent, irrespective of the Bond, may happen to be. In short, in cases of estoppel, the truth is excluded, but it is excluded because it is irrelevant to the issue.

(*r*) *Vide* Ante, s. 284. (*s*) *Vide* Post, s. 441. (*t*) *Vide* Best Ev., s. 533.

438. We may observe here that estoppels are not created by Deed only, but arise also in the case of Records, and of some other formal and solemn acts, as *livery*, *entry*, *acceptance of an estate*, and the like, (*u*) which last are distinguished as 'Estoppels by matter in pais.' But the law on the subject of estoppels, being perhaps as intricate and technical as any to be found in our books, cannot be suitably discussed in a work like the present. Besides which, the doctrine of estoppel is a study that belongs rather to the substantive law, than to the adjective law of evidence. (*v*) The reader must, therefore, be satisfied, in this place at least, with the hasty sketch of Estoppels by deed, which has just been presented to his notice. We may now pass to the consideration of written admissions, properly so called, of the ordinary kind.

(*u*) Best Ev., s. 543. (*v*) Best Ev., s. 532.

CHAPTER XV

OF A WRITTEN ADMISSION

439. THE only phase of 'written evidence' which remains to be considered is a written admission; *i.e.* a written statement of extrinsic fact made by the party against whom it is 'rendered in evidence,' or by some other person, by whose statement that party is bound. Admissions, as Mr. Best tells us (*w*) 'may in general be made either by a party himself, or by those under whom he claims, or by his attorney or agent lawfully authorised.' The question, however, whether a party is, or is not, bound by the statement of another person, is a matter rather of substantive, than of adjective law, which it is unnecessary for us here to discuss, since our present purpose will be sufficiently fulfilled by supposing the admission to be made by the party himself. Nor will it be necessary for us to say much on the subject of written admissions; not, however, because this kind of document is by any means of small consequence in a judicial view; since, on the contrary, the practical value to legal inquiries of this species of writing is exceeded only by that of writings whose contents are directly in issue; in other words, of written *acts*. But little needs to be said on the subject of written admissions, because we have already explained the nature of an admission in general, (*x*) and shall have occasion to refer to the subject hereafter, (*y*) and because a written admission differs from any other in nothing but its written shape

(*w*) Best Ev., s. 531. (*x*) Ante, s. 283.
(*y*) Post ii., chap. 18.

and its consequent permanence and capability for proof, by production of the document in which it is contained.

In short, a written admission differs from a verbal one only in the mode of its proof; when proved, its effect is precisely the same.

440. It will be sufficient for us to remark here, therefore, that it is a phase of writing that stands midway between a written act and a written statement, and that while in some of its features it resembles the latter, it differs from a mere statement in this important particular, that it raises a legitimate inference of the fact stated or admitted, and is therefore entitled to rank as an evidentiary fact, and as an evidentiary fact too, generally speaking, of a very cogent order, and relevant in the fullest sense to the fact which it admits. (*z*) A written receipt or acknowledgment for the payment of money due is a familiar instance of a written admission. Such a document resembles a statement in this respect, that the admission itself is entirely extrinsic to the fact admitted or stated in it, namely, the payment, since it has no power to effect the physical transfer of the money, and therefore, though the receipt raises a strong inference of that transaction having taken place, it cannot be rationally regarded as conclusive of the actual payment. Nor is it treated so by our law; for as Mr. Taylor informs us, (*a*) a written receipt 'amounts only to *primâ facie* proof, and is capable of being explained,' (*b*) a rule which applies to all admissions properly so called.

441. A receipt under hand and *seal*, which is treated by our laws as conclusive of payment, (*c*) appears at first sight to offer an exception to this rule. A document of this kind, however, like the conclusive averment or recital contained in an instrument under *seal*, (*d*) is not in

(*z*) Ante, s. 284. (*a*) Taylor Ev., s. 1,037. (*b*) *Ibid.*, s. 786.
(*c*) Best Ev., s. 406. (*d*) *Vide* Ante, s. 437.

the ordinary sense an admission, but falls within the description of a written *act*. For wherever an apparent admission is rendered by law conclusive as to the fact which it purports to admit, the act of the writer in framing or executing the document is, for all practical purposes, tantamount to the existence of the fact admitted: and the proof of his act is equivalent to the proof of that fact, so that the act of making the admission becomes virtually the fact in issue. Thus, in the case of a receipt under hand and seal, it is quite immaterial, practically speaking, whether the money has actually changed hands, or not, since the act of executing the instrument, even if unaccompanied by payment, operates as a virtual extinguishment of the debt; just as in the case of a Bond, the mere execution of the instrument creates the Bond debt, whether that debt had, or had not, any previous existence; in other words, whether there was really any consideration for the bond or no.

442. It is worthy of remark, however, that a document may assume the aspect of a written act for one purpose, while at the same time it is no more than a written admission for another. Thus, a bill of exchange, or promissory note, may be regarded in the former light, so far as the acceptance in the one case, or the promise to pay in the other, is concerned; but as proof of a pre-existing debt or obligation, or in other words, of a consideration, such documents are mere written admissions. The distinguishing characteristic of an admission is, that being totally extrinsic to the fact admitted, it cannot prove it conclusively. It can only at most raise a very strong inference of it; and thus, even if the fact admitted be a fact in issue, the admission itself can only be an evidentiary fact in the inquiry. (*e*) But this evidentiary fact, in the case of a written admission, is so far conclusively established by a perusal

(*e*) *Vide* Ante, s. 299.

of the document, that the reader obtains ocular evidence of the nature of the admission made, and the production in court and inspection of the writing furnishes real evidence of that fact to the tribunal.

443. The question of admissions in general will require a further chapter for its discussion; (*f*) but this is all that seems necessary to be said on the subject of written, as distinguished from verbal, admissions. We may, therefore, now proceed to sum up the results of our examination of the three leading phases of 'written evidence,' namely, a written act, a written admission, and a written statement or narrative.

In each of the three cases—*i.e.* whether the act of the writer in penning the document be the fact in question itself,—an admission of the fact,—or a mere narrative of the fact,—the writing shows by its contents the nature of the act performed by the writer, and of that, and that alone, does the production of the document afford to the tribunal *real* evidence.

The *subject of inquiry*, on the other hand, may be either:

(1) The act itself of the writer.

(2) A fact *admitted* by the act of the writer; or

(3) A fact *narrated* or communicated by the act of the writer.

Now it is obvious that the rule against secondary evidence is rationally applied to the proof of the contents or terms of the writing, and to that alone; whence it follows, that it is only in the first of the three cases, that the rule is rationally applied to the proof of the *fact in question;* since in that case alone do the contents of the writing form any component or constituent part of that fact.

In the two remaining cases, the existence of the written admission, or of the written narrative, can form

(*f*) Post ii., chap. 18.

no valid ground for excluding any other legitimate evidence of the fact in question.

444. But in either of these last cases, the rule against secondary evidence is properly applied to the proof of the nature or terms of the admission or of the statement made. For the nature of the admission, or of the statement (as the case may be) is actually contained in the writing, and determined by its contents; and the production of the document in these last cases furnishes *real* evidence of those facts, just as much as, in the first instance, it affords real evidence of the nature of the act, the subject of inquiry. Wherever, therefore, it is proposed to establish the fact *through* or by means of the writing; whether that writing bears upon the inquiry as an admission or as a bare statement only, there the rule against secondary evidence is properly and reasonably enforced. In a word, that rule is rationally applied to the proof of the contents of a document, and of the contents only. Where the nature of the contents is the fact itself in question, the rule is rationally employed to exclude all other proof of the fact. But when the writing merely contains an admission or a narrative of the fact, the rule is, indeed, rationally applied to exclude all other proof of the admission or of the narrative; but not to exclude other legitimate evidence of the fact admitted or narrated; or, in other words, other legitimate evidence of the *fact in question.*

445. With regard to the other leading rule, by which the reception of 'written evidence' is regulated, viz., that parol or extrinsic evidence is inadmissible to contradict, vary, add to, or subtract from, the terms of a valid written instrument. (*g*) This can only be rationally applied to the first of the three cases, the proof of a written act; for there only are the contents really in question. It is manifestly absurd to apply this rule,

(*g*) *Vide* Taylor Ev., s. 1,035, and Post II., chap. 16.

in the second and third cases, to proof of the subject of inquiry. When a particular fact is in question, and there is found to exist a written admission or a receivable written statement relating to it, that circumstance can form no valid ground for excluding 'parol or extrinsic,' *i.e.*, other legitimate, evidence to show that the fact is otherwise than as it is described to be by the writing; and it is sheer nonsense to characterise that process as 'varying' or 'contradicting the contents' of the written admission or statement. This rule should therefore be restricted to regulate the proof of written acts, as will be more clearly shown in the next chapter, where the rule in question is more fully discussed.

CHAPTER XVI

'PAROL TESTIMONY CANNOT BE RECEIVED TO CONTRADICT, VARY, ADD TO, OR SUBTRACT FROM, THE TERMS OF A VALID WRITTEN INSTRUMENT.' (*h*)

446. SUCH is the wording of a rule frequently appealed to in dealing with the proof of writings. And I trust that I shall not be understood as taking exception to the spirit of this rule, if I venture to suggest that the language in which it is propounded is most objectionable from its ambiguity. The rule furnishes a striking illustration of the confusion engendered by the use of the term, 'parol,' when applied to evidence—an evil to which I have already had occasion to advert incidentally in the course of the chapter on 'Oral Evidence.' (*i*) The term, 'parol,' is peculiarly and properly employed to distinguish an ordinary contract or agreement, whether verbal or written, from a deed, specialty, or instrument *under seal*. By some writers, however, the term is used simply to distinguish a verbal contract from a written one. With the ambiguous meaning of the word as applied to contracts or agreements, however, we have nothing to do. It is the application of the word 'parol' to *evidence* which I deprecate, as tending to engender confusion between the parol or verbal contract, the fact, the subject matter of evidence, or *quid probandum*, and the oral evidence, the means by which the fact is sought to be established, or *modus probandi*, which, indeed, is precisely the result that has ensued from the misuse of the term 'parol' in the present instance.

(*h*) Taylor Ev., s. 1,035. (*i*) Ante, s. 344.

447. The wording of the rule under discussion would naturally lead to the belief that it is the 'oral' or 'parol' nature of the evidence, or means of proof, which is to be excluded; whereas, if verbal matter, *i.e.* spoken language, is to be proved *at all*, no mode of proof is so legitimate or appropriate for the purpose, as the oral testimony of a witness who has heard the words spoken.

As we have already remarked, (*j*) a verbal fact, by which I mean a series of spoken words, cannot be turned into a written fact by any ordinary process of reporting. (*k*) The words may, it is true, be *taken down* in writing by any person present at the time they were uttered, but the writing will still remain, notwithstanding, a mere narrative or statement penned by the writer, and will furnish to the reader who peruses it, or to the tribunal before whom it is produced, nothing but transmitted or hearsay evidence of the original words. If indeed, in the case of a contract, both *parties* should mutually agree to put it into writing—*i.e.* to substitute written terms for verbal, this would alter the aspect of the question, and would have the effect of annihilating, as it were, the verbal matter altogether. The actual subject of inquiry, where the contract was in question, would then become, not the words, but the writing itself, which would be properly proved by the production of the document. If, however, verbal matter *be* the fact in question, that fact can only, I repeat, be legitimately proved by oral testimony.

448. Hence it is clear that it is not the 'oral' nature of the means of proof or evidence which the rule really strikes at, but the verbal matter or fact itself. The objection is to the proof of the verbal matter, not only by *oral evidence*, but by any means whatever. The rule is in reality directed, not against the improper mode of *proving* the contract, but against the improper mode of making it, or attempting to make it. So far, therefore,

(*j*) Ante, s. 308, 398, and 408. (*k*) *Vide* Appendix, art. 3.

as the rule under discussion has reference to *verbal* expressions or *verbal* terms sought to be annexed to the writing, it would be more accurately stated somewhat as follows: 'The terms of a binding contract or other valid act in writing shall not be contradicted, varied, added to, or subtracted from, by any verbal expressions used by the parties or the writer at the time.' The effect of such a rule being to render such verbal expressions, if used, wholly null and void, and therefore irrelevant to the inquiry, and consequently not fit subjects of proof by any means, whether legitimate for the purpose or otherwise.

449. Viewed in this light, the rule under discussion, so far as it has reference to verbal matter, is not, strictly speaking, a rule of evidence proper, but a rule of substantive law; though, like all other rules of substantive law which affect the relevancy of a particular fact, it is closely connected with the domain of evidence. And the soundness of the rule as applied to contracts or other acts, for the validity of which the use of writing is required by law, is unimpeachable. It follows obviously as a corollary from the law which exacts the use of writing for the effectual performance of the transaction. For it would be a manifest absurdity to lay down a rule that a particular kind of contract, for instance, should be expressed in writing, unless it were also intended that it should be expressed by writing only. If verbal terms were allowed to be imported into the transaction, we should gradually get rid of the writing, as nearly as possible, altogether. If the licence were pushed to its furthest limits, it would be unnecessary for the parties to do more than write down *something* (their names, for instance), in order to comply with the letter of the law; and the contract itself might be constructed entirely of verbal matter. Where, therefore, writing is *required* by law, the wisdom of the

auxiliary rule which excludes verbal matter is manifest. But where the use of writing is not exacted by law, but left to the discretion of the parties, the necessity for the rule is not so obvious. It has *then* the effect of establishing this doctrine: that the parties to a contract (for the rule in this particular relates principally, though perhaps not exclusively, to contracts), though not compelled in a particular instance to employ writing, cannot resort to it at all without embodying the whole of the contract in the written document. (*l*) How far this result is desirable is a mere question of expediency, which we need not stop to discuss, but may content ourselves with remarking that such is obviously the effect of the rule.

450. We must now pass to the consideration of a second branch of the rule in question, for its operation is not confined to the exclusion of verbal matter only. It is also construed to exclude the evidence of any *extrinsic facts* or *circumstances*, which might have the effect of contradicting, varying, adding to, or subtracting from, the terms of a valid written instrument. The absurdity of applying the appellation of 'parol evidence' to the proof (*quocumque modo*) of such external facts or circumstances is so palpable that some writers, Mr. Best among the number, (*m*) have attempted to amend the language of the rule under discussion by substituting the term 'extrinsic' for the word 'parol.' 'Extrinsic evidence is not receivable to contradict, vary, etc.'

But this alteration, though it meets the enlarged scope of the rule to some extent, does not improve matters much as regards the confusion between the *quid probandum* and the *modus probandi*. For what is extrinsic evidence but the proof, by whatever means, of an extrinsic fact or extrinsic facts. And thus, as before, the rule is really directed, not against the *mode* of

(*l*) *Vide* Taylor Ev., s. 1,036. (*m*) *Vide* Best Ev., s. 226.

proving the extrinsic fact, but against the extrinsic fact itself (howsoever proved) as affecting the meaning of the written instrument. This second branch of the rule, therefore, is no less a rule of substantive law than the first, and it might, I think, be more suitably expressed somewhat as follows: 'Every valid written instrument shall be construed as far as possible without reference to any extrinsic facts or circumstances' (which might have the effect of contradicting, varying, adding to, or subtracting from, its terms). As in the preceding case, this rule would have the effect of rendering all such extrinsic facts irrelevant, and consequently of excluding all evidence of them.

451. And it appears to me very desirable also, that this second branch of the rule in question should, as far as possible, be separated and distinguished from the first. For I believe I am not far wrong in stating that the exclusion of extrinsic circumstances occasions far more difficulty than the exclusion of verbal matter, and consequently that this second branch of the rule must be accepted with considerably more qualification than the first. For it is a manifest impossibility, in construing the terms of a written instrument, to avoid *all* reference to external circumstances. The very *language* of a document requires a reference to the conventional meaning of words and phrases, which convention is itself a species of extrinsic fact. And there are numberless other points in which it is impossible to disregard matters extrinsic to the writing.

Thus if a testator, for instance, bequeaths property to 'George Stiles,' or to 'the eldest son of George Stiles,' we must necessarily refer to external circumstances in order to ascertain who is George Stiles, or who is his eldest son. On the other hand, it would be unreasonable to allow the plain language of a written instrument to be contradicted, varied, added to, or

cut down to an indefinite extent by the existence of external circumstances, such as customs, usages, peculiar or unusual meanings attached to words, intentions of the parties, and the like. Such licence, if pushed to an extreme, would have the effect of rendering the terms of the writing almost nugatory. The rule in question, therefore, as applied to the exclusion of extrinsic matter of fact, is a most valuable one; but it should be accepted with this qualification, that though evidence of external circumstances will not be admitted to contradict or vary what is plain in a writing, such facts may be resorted to for the purpose of explaining what is doubtful or obscure.

452. The application of this second branch of the rule under discussion to practice must always, I fear, occasion considerable embarrassment from the obvious difficulty of defining its precise limits—of drawing the exact line between contradicting or varying on the one hand, and explaining on the other. But the process would, I feel sure, be greatly facilitated if the rule were more clearly stated, so as to avoid the confusion between the *quid probandum* and the *modus probandi*—between the fact and the evidence of it; and if, moreover, the second branch of the rule having reference to extrinsic circumstances were kept separate and distinct from the branch relating to the importation of verbal matter. Both branches of the rule, also, should be limited to the interpretation of written *instruments* properly so-called—*i.e.* of written acts—of deeds, wills, contracts, agreements, and the like; if not of acts which the law *requires* to be performed by means of writing.

453. For when applied to the case of writings of a different order, such as written statements, records, reports, or depositions, the rule in question is liable to be confounded, and is, in fact, frequently confounded with the rule against secondary evidence. The province of the two rules ought, indeed, to be quite distinct. For

the rule against secondary evidence relates properly to the proof of the *contents* of the document—to the *modus probandi* of its contents, the rule insisting on the proof of the contents by production of the document itself; whereas, in a common view, whenever the rule under discussion comes into play the document is supposed to have been produced, and its contents established by the proper means; that, against which the present rule is directed, being the proof by *any means whatever* of *something else* not contained in the document.

454. And this misconception as to the respective function of these two rules could never have arisen had the distinction between a written fact and a written statement been duly preserved. But when once that distinction has been lost sight of, when once the contents of the writing come to be confounded with the extrinsic fact recorded in or narrated by the writing, the confusion of the two rules not only does occur, but must follow as a necessary consequence.

The proof of the contents of a written document by its production (or, as we should style it, by 'real evidence'), is denominated *primary* evidence of its contents, all other modes of proof being designated *secondary* evidence of the contents, and, as such, rejected in the first instance. (*n*) But when the production of the writing comes to be regarded as constituting primary evidence, not of its own contents merely, but of some *extrinsic fact* narrated or recorded in the writing—and all other evidence of that fact comes consequently to be excluded as secondary—the rule against secondary evidence becomes almost completely identified with the auxiliary rule by which 'parol evidence,' or evidence 'extrinsic' to the contents of the writing is excluded. As the former rule prohibits proof of the extrinsic fact, erroneously supposed to be *contained* in the writing, by

(*n*) Ante ii., chap. 8.

any other means than the production of the document, so the latter, or auxiliary rule, forbids any proof of the extrinsic fact incompatible with the contents or terms of the writing. And thus the broad distinction, that the one rule relates to the proof of the contents of the writing, and the other to the proof of *something else* not contained in the writing, is wholly annihilated. Both rules are deemed to apply equally to the proof of the extrinsic fact, there being this difference only in the operation of the two, that while the former excludes *all* extraneous evidence only in the first instance as *secondary*, the latter leads to the rejection of extraneous evidence repugnant to the writing *in toto*, as tending to contradict its terms. But if the rule now under discussion were restricted to its proper function of interpreting written *instruments* properly so-called, no such misconception could possibly occur, since in their case the 'parol,' or 'extrinsic fact,' can in no sense be contained in the document.

455. I trust that enough has been said to convince the reader that the rule under discussion, though a most wise and salutary one in spirit and design, stands much in need of amendment as regards the language in which it has hitherto usually been enuntiated. The true principles of a science can never be well understood till they are propounded in accurate language. And though the application of theory to practice can never be free from difficulty, still that difficulty will certainly be reduced to a minimum by a correct apprehension of the theory; to which consummation nothing contributes so much as the use of accurate phraseology.

CHAPTER XVII

OF THE PROOF OF GENUINENESS

456. We have spoken of the contents of a writing as affording evidence, and of its production as furnishing real evidence of the *nature, limits, and extent* of the act performed by the writer, and not of the act *in toto;* because proof of the whole transaction,—proof, for instance, that A has given an order of a particular kind,—involves something more than mere proof of the nature of the act performed (of the terms of the order given) by means of the writing: when that is ascertained, there still remains the question of the authorship or genuineness of the document. In short, the total proof of the transaction accomplished by the agency of a writing involves proof of two component or constituent questions of fact, which we have distinguished respectively as the *quid factum* and the *quis fecit* (*o*), viz.: (1) Of what kind the act is, or its nature; and (2) Whose act it is, or the authorship. And it is the first of these two component facts only that can be learnt from a mere perusal of the document, or conclusively established by its production. The second constituent,—the authorship,—cannot be ascertained from the contents alone.

The writing, it is true, may, and indeed usually does, indicate the writer by name; but this cannot *prove* the person thus named to be the true author, that being an extrinsic fact which is invisible to the reader of the document, and of which fact the signature can at most amount to a *statement.* For it is hardly necessary to

(*o*) Ante, s. 296.

observe that the act of the framer of a document in writing down or signing a name does not make the writing in question the act of the person thus named, otherwise it would be physically impossible to commit the crime of forgery. And though the authorship may possibly be inferred from the character of the handwriting visible on the paper, of which the reader obtains real evidence, this characteristic of the writing is only an evidentiary fact, which, besides the inference which it involves as such, must necessarily be supplemented by evidence extrinsic to the document before it can be rendered available to establish the genuineness.

457. In short, the act of writing, like all other human actions, is a fact of the transient order, but though transient in its performance, it leaves permanent traces of its nature or *terms* in the letters and words visible on the surface of the paper. But of its authorship the act of writing leaves no traces on the face of the document, unless it be by way of statement, or in the remote inference that may possibly be drawn from character of the handwriting. The *nature* of the act is created and determined *by* the writing; but the authorship can, at most, be asserted *in* the document by the writer's act in naming the author; which assertion may or may not be true at the will of the actual writer. The second constituent fact, or authorship, must therefore be ascertained, if at all, by evidence mainly if not entirely extrinsic to the document. (*p*)

458. The modes of proving the authorship or genuineness of a document, *i.e.* of proving that it is the act of the person whose name it bears, or to whose agency it is ascribed, are various. 'When writings are produced,' says Mr. Taylor, (*q*) 'and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call the *writer*

(*p*) Ante, s. 296. (*q*) Taylor Ev., s. 1,660.

himself, or some person who actually saw the paper or signature written. When such evidence cannot be procured, as must often be the case, recourse may be had, either to the testimony of witnesses who are *acquainted with the handwriting*, or to a comparison of the document in dispute with any writing proved to the satisfaction of the judge to be genuine.' As regards the proof of *handwriting*, Mr. Best states it to be 'a species of proof which presents many difficulties, and has in every age been found a source of embarrassment to legislators, jurists and practitioners.' (*r*)

Fortunately, however, our purpose does not require us to go deeply into this question. The reader will find the whole subject of the proof of the genuineness of documents, including the different modes of proving handwriting, ably discussed in most of the practical treatises on the law of evidence now extant, and especially so in the works to which we have just referred. (*s*) My purpose in glancing at the subject was merely to point out that wherever the act of the writer of a document is in question, there are always two component facts involved in the proof of the document; viz. (1) the contents, and (2) the genuineness; and that in order to render the evidence afforded by the production of the document available, the genuineness of the writing must also invariably be established; and that by means of proof to a great extent, if not wholly, extraneous to the document; except, indeed, in the comparatively rare case cited by Mr. Taylor, (*t*) where the writing consists of two parts, one of which is formally admitted to be genuine, and the authorship of the other, which is in dispute, is inferred by the jury from its resemblance to the former.

(*r*) Best Ev., s. 232.

(*s*) *Vide* Taylor Ev., s. 1,660 and *seq.*, and Best Ev., s. 232, etc.

(*t*) Taylor Ev., s. 1,668.

459. Nor, we may add, can the genuineness of a document ever be wholly established by *direct real* evidence, unless it be in the case, scarcely conceivable, where the author actually writes or signs it before the eyes of the tribunal. But there are one or two ways in which the genuineness of a writing may be completely established by real evidence of an *indirect* kind: namely, first, where the supposed author himself admits the authorship in court; and secondly, where he is required by the judge to write in his presence, (*u*) or voluntarily admits to be genuine, a specimen of his handwriting, which is afterwards compared *by the jury* with the document in question under the eighth section of the Act 28 and 29, Vict. cap. 18, (*v*) and the genuineness of the latter is inferred by them from the resemblance between the two.

In both these cases, the whole of the facts proved are established by real evidence. For instance, in the second case, the jury *see* the supposed author write the specimen, or *hear* him admit it to be genuine; they examine that and the document in dispute with their own eyes, and detect the resemblance by the immediate exercise of their own senses. But these facts are only evidentiary; an *inference* is still necessary before the jury can arrive at the principal fact,—the genuineness of the principal document; and the proof, therefore, though wholly *real*, is indirect or circumstantial. And in the first case, likewise, though the tribunal obtains real evidence of the admission made in their presence, this is still, as before, only a species of evidentiary fact. And in all other cases, the genuineness, whether of the document in dispute, or of the specimen with which it is compared, can only, I apprehend, be established by means of the oral testimony of a witness. At the same time, it must be confessed that the proof of handwriting

(*u*) *Vide* Taylor Ev., s. 1,669. (*v*) *Ibid.*

is capable of assuming aspects so infinitely diversified, that it is scarcely safe to attempt to lay down any comprehensive dicta as to the nature of the evidence which it may involve.

460. It remains to be noticed that there is one case in which evidence of a particular kind is exacted by law to establish the genuineness of a writing. This occurs only where the document in question is an instrument of that formal kind which requires *attestation* in order to give it legal validity (*w*). Whenever this is the case, it is an inflexible rule of our law, that one, at least, of the attesting witnesses shall be called, and the fact of execution established by his testimony. (*x*) And no other mode of proof, however otherwise legitimate, will be accepted in such a case, until the absence of all the attesting witnesses is adequately accounted for. (*y*)

(*w*) *Vide* Taylor Ev., s. 1,637, and Post, s. 484.
(*x*) *Vide* Taylor Ev., s. 363, and Ante, s. 342.
(*y*) Taylor Ev., ss. 363 and 1,851 (1,649), and Best Ev., s. 220.

CHAPTER XVIII

OF ADMISSIONS IN GENERAL

461. THE species of 'evidence' (to adopt the ordinary legal phraseology), which next claims our attention, is an admission or confession, or, as it is designated by Bentham, 'self-disserving evidence.' (*z*) 'Self-disserving statements in civil cases,' says Mr. Best, (*a*) 'are usually called admissions, and those in criminal cases confessions.' Mr. Taylor, however, draws the distinction between an admission and a confession, with somewhat greater precision, as follows: 'In our law,' he says, (*b*) 'the term *admission* is usually applied to *civil transactions*, and to those matters of fact, in criminal cases, which do not involve criminal intent; the term *confession* being generally restricted to *acknowledgments of guilt*.' And the distinction is by no means unimportant, for whereas an admission may be made, not only by the party himself, against whom it is offered, but also (to borrow Mr. Best's language) 'by those under whom he claims, or by his attorney or agent lawfully authorised;' (*c*) a confession is receivable only to prove the guilt of the particular person from whom it emanates. The civilians, as Mr. Best informs us, (*d*) express self-disserving statements of both kinds under the term 'confessio.' And it will obviate inconvenience if we employ the term 'admission' in the present chapter to denote both kinds, and understand the word to include confessions, wherever a distinction is not expressly drawn between the two.

(*z*) Benth. Ev., v. 204, etc., and Best Ev., s. 518, etc.
(*a*) Best Ev., s. 523. (*b*) Taylor Ev., s. 724 (654).
(*c*) Best Ev., s. 531. (*d*) *Id.*, s. 523.

462. An admission, then, may be defined generally as a statement made by the party against whom it is offered by his adversary in a legal trial or proceeding. Being a species of statement, it may be made by the same means, by which any other kind of statement may be made; namely, by writing, by speaking, by signs or gestures, or by the implied language of conduct. (*e*) Moreover, an admission may also be made by acquiescence in the statement of another person. Viewed simply as a statement, such matter would, of course, be regarded as the statement of the person from whom it originally emanated; but in order to render it available as an admission, it must be imputed to the particular party against whom it is to be offered, and consequently his acquiescence becomes essential, while the question, from whom the statement originally proceeded, fades into insignificance. This acquiescence in the statement made by another person may be evinced also in several ways, namely, by language, by conduct or demeanour, or lastly, by silence. (*f*)

463. Admissions, as Mr. Taylor informs us, (*g*) are usually treated of in our books under the head of exceptions to the rule against Hearsay. Mr. Taylor himself, however, contends that 'such evidence' is more properly regarded in the light of a *substitute* for ordinary and legal proof, than as a form of evidence properly so called; such being also the view adopted by the civilians, as appears from the following passage of Mascardus, which he cites; 'Illud igitur imprimis, ut hinc potissimum exordiar, non est ignorandum, quod etsi confessioni inter probationum species locum in præsentia tribuerimus; cuncti tamen fere Dd. unanimos sunt arbitrati ipsam potius esse ab onere probandi relevationem, quam proprie probationem.' (*h*)

(*e*) Ante, s. 361. (*f*) Best Ev., s. 521. (*g*) Taylor Ev., s. 653.
(*h*) Mascard. de Prob., vol. i., quæst. 7, n. 1, 10, 11.

Strictly speaking, however, nothing which requires proof can be justly regarded as a complete substitute for evidence. It is only where the court takes *judicial notice* of an admission, as in the case of an admission by pleading, that this view is completely true. But an acknowledgment of this formal kind, though it may be properly designated an admission, is not that phase of admission with which we have to deal, since it is not the subject-matter of evidence at all. For though it forms a part of the proceedings in a trial, it is a step in the proceedings which is anterior to the evidence—a step in that process by which the *quid probandum* is ascertained and defined, which is therefore necessarily wholly conclusive, and is properly regarded as a complete waiver of all proof of the facts to which it relates.

464. But there is another class of admissions, which, though they do require to be proved, yet differ materially from ordinary admissions, inasmuch as they are regarded by law as wholly conclusive of the facts which they purport to admit. I allude to those formal and deliberate admissions, which are frequently made for the purposes of a specific suit then pending, (*i*) and which, in particular, are largely used as a substitute for the regular proof of written documents. (*j*) Now formal admissions of this kind, though they cannot, strictly speaking, be said to operate as complete substitutes for proof, inasmuch as they require to be themselves established by some kind of evidence, are yet not matters of evidence in the same sense as ordinary admissions. An ordinary admission, as we shall see presently, is properly treated as an *evidentiary fact.* But an admission of this last kind, being deliberately made with a view to the suit, and being on that account always treated by our law as conclusive of, or tantamount

(*i*) Taylor Ev., s. 700. (*j*) Taylor Ev., s. 703.

to, the fact admitted, is not properly regarded as an evidentiary fact, but as a *principal* one ; (*k*) since, when the admission is once established by sufficient evidence, there remains no inference for the jury to draw. A formal admission of this sort, therefore, though it can hardly be said to be a complete substitute for evidence, yet operates, when proved, as a complete waiver of all *other* proof of the facts to which it relates. So much for formal and deliberate admissions, whether judicially noticed, or not, which are made with a view to a particular suit or judicial proceeding. In a certain sense these may all be regarded as substitutes for evidence, and as such scarcely come within the scope of our present inquiry.

465. But with regard to all other, or, as they may be called, *casual* admissions, whether made in court or elsewhere, (*l*) these cannot in any proper sense be said to be substitutes for evidence, or a waiver of proof, for they are never regarded by our law as conclusive, but may be contradicted or neutralised by other evidence ; while their weight as proof of the fact admitted may vary in every conceivable degree, and, like the weight of any other kind of 'evidence,' is to be estimated by the jury. In short, they are nothing else than a phase of 'evidence,' in the common acceptation of the term, and not a substitute for it, except in the sense in which any one mode of proof, or 'piece of evidence,' may be said to be a substitute for any other process by which the same fact might possibly be established.

466. Nor, on the other hand, does it seem to me quite satisfactory to treat the reception even of casual admissions as a relaxation of the rule against Hearsay. For all 'hearsay evidence,' properly so called, is infected by the same characteristic infirmity, that, namely, involved in the circumstance, that the knowledge of the

(*k*) *Vide* Ante, s. 441. (*l*) Post, s. 468.

fact in question obtained by the tribunal is contingent on and limited by the veracity or sincerity of the author of the statement. Whereas an admission, though it be in form a species of statement or narrative, possesses elements of strength—*i.e.* of power to establish the fact stated or admitted, which are absent from every kind of 'hearsay evidence.' An admission, as previously remarked, (*m*) raises a fair and legitimate inference of the truth of the fact admitted—an inference quite independent of the veracity of the person who makes it. The proving power of an admission is based, not on the veracity or sincerity of its author, or of human beings in general, but on the improbability of the assumption that any man would make a statement to his own prejudice, unless he himself believed that statement to be true. For which reason, as formerly observed, (*n*) an admission is fairly entitled to rank as an evidentiary fact or circumstance connected by legitimate inference with the fact admitted, which latter stands in the relation of a principal fact towards the admission itself.

467. In short, all *casual* admissions, with which we are principally, if not exclusively concerned, should be regarded, neither as a *substitute* for evidence, nor as *exceptions* to the rule against hearsay, but as evidentiary facts furnishing a species of indirect or circumstantial evidence. (*o*) And this arrangement is not only perfectly defensible in theory, but will be found a simple and convenient one, whenever it becomes necessary to consider an admission either in its connection with the fact admitted, or with reference to the mode of proving the admission itself. Moreover, it has the further advantage of simplifying the whole system of judicial proof by getting rid (by a species of merger) of what must otherwise appear as a somewhat anomalous and exceptional modification of 'Evidence.'

(*m*) Ante, s. 284. (*n*) Ante, s. 284. (*o*) *Vide* Taylor Ev., s. 68 (59).

468. Admissions have also been distinguished in our books as *judicial* and *extra-judicial*, according as they are made in the course of a judicial proceeding, or under any other circumstances. (*p*) But from our previous observations it may be gathered that this distinction is of little importance, except so far as the epithet 'judicial' is limited to denote those formal admissions or acknowledgments deliberately made for the purposes of the trial, which are either a complete waiver of proof, or, at the least, a complete substitute for the facts which they admit, and consequently do not properly come within the scope of our present inquiry. (*q*) Any other—*i.e.* any *casual* admission made in the course of the trial—differs only from an admission made under any other circumstances, in the means by which it is proved, or, in other words, the mode in which it is laid before the tribunal.

A verbal admission made in open court is addressed to the senses of the tribunal itself, and thus established by *real* evidence; while a verbal admission made elsewhere can only be transmitted to the jury by the *oral* evidence of a witness who has heard the words spoken; and there is a corresponding difference between a written admission which is acknowledged in court, and one which is not thus acknowledged, so far as the authorship of it is concerned. But in its weight and effect *when proved*, it is obvious that a casual admission, made in the course of the trial, differs not at all from one made elsewhere. It appears, therefore, that the distinction drawn between *judicial* and *extra-judicial* admissions is of small importance as a division of casual admissions, and is only significant in so far as it marks the difference between those formal admissions which are deliberately made for the purposes of a particular suit or proceeding, and those which are made without any such design.

(*p*) *Vide* Best Ev., s. 522. (*q*) Ante, ss. 463 and 464.

469. Mr. Best also divides admissions into *plenary* and *not plenary*, a division which appears to have been originally suggested by Bentham. (*r*) 'A plenary confession,' says Mr. Best, (*s*) 'is when a self-disserving statement is such as, if believed, to be 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 such cases the proof is in the nature of *direct* evidence. and the maxim is, "Habemus optimum testem confitentem teum."' A confession *not plenary* is, where the truth of the self-disserving statement is not absolutely inconsistent with the existence of a state of facts, different from that which it indicates: but only gives rise to a presumptive inference of their truth, and is therefore in the nature of *circumstantial* evidence—*e.g.* A is found murdered, or the goods of B are proved to have been stolen, and the accused or suspected person says: 'I am very sorry that I ever had anything to with A,' or, 'that I ever meddled with the goods of B.' 'These expressions,' he remarks, 'are obviously ambiguous; for although consistent with an intention to avow guilt, they are equally so with an expression of regret, that circumstances should have occurred to cast unjust suspicion on the speaker.' 'So,' he proceeds to say, 'where a person accused of an offence admits that he intended, or even threatened, to commit it, or that he fled to avoid being tried for it.'

470. Such is Mr. Best's explanation of this distinction; but a very little reflection will, I believe, suffice to show that it is artificial and unsound. For though, no doubt, some admissions are, comparatively speaking, *more* full and satisfactory, while others are *less* so; yet it is obvious that the bearing of an admission upon the fact which is sought to be inferred from it, or established by

(*r*) *Vide* Benth. Ev., iii. 107. (*s*) Best Ev., s. 524.

its means, must necessarily be infinitely various. In short, the distinction between admissions in this respect is not absolute, but relative only; or, in other words, it is merely one of *degree*. And this supposed distinction, which does not appear to have been adopted by other writers on the subject of evidence, would scarcely be worthy of notice, had not Mr. Best attempted, as we have just seen, to make it the foundation of a distinction between direct and circumstantial evidence,—a distinction which tends to subvert the views already advanced in the present chapter, viz., that all casual admissions are most properly and conveniently treated as a species of evidentiary fact, and the proof which they furnish as indirect or circumstantial evidence.

471. Now though it is quite true that a full and complete admission affords very *satisfactory* 'evidence' of the fact admitted, yet the *nature* of the evidence afforded by an admission is precisely the same, so far as its directness or indirectness is concerned, whether the admission be equivocal or the reverse. Direct evidence, as we have defined it, and, I think, as it is generally accepted to be, is where the principal fact is itself established, either by the immediate perception of the tribunal, or by the testimony of a sworn witness,—in other words, either by real or oral evidence;—or by a combination of the two. But in the case of 'self-disserving evidence,' it is the *admission* which is established by one or other or both of these two modes of proof. Whereas the principal fact,—*i.e.*, the fact which is sought to be ascertained for its own sake,—is, not the admission, but the *fact admitted*, and as the two facts are not identical, but quite independent of each other (the admission having no power to make the principal fact such as it is admitted to be), it is obvious that we cannot proceed from the former to the latter without the intervention of some inference, or at least of something in the nature

of one. The power or strength of that inference may, it is true, be affected by the equivocal chararacter of the admission; but, on the other hand, however clear and explicit the admission may be, there must still remain an inference of no inconsiderable kind to be drawn, before we can arrive at the fact admitted. Nothing, for example, is more notorious than the fact that the most explicit and unequivocal confessions of crime are constantly turning out to be false.

472. Nor is it possible to get rid of this step in the proving process — of the inference — by placing 'self-disserving evidence' on a level with *Testimony*, and considering it as an additional instrument of evidence, or vehicle of proof. (*t*) This view might, indeed, be a feasible and legitimate one, if all admissions were made openly in the course of the trial, and were thus, as oral evidence uniformly is, (*u*) addressed immediately to the senses of the tribunal. But, as a matter of fact, many admissions, indeed by far the greater proportion of casual admissions, are made elsewhere, and consequently can only be established, either wholly or in part, by means of the testimony of a sworn witness. For an admission, like any other statement, not to say any other fact, may, as we have just remarked, be laid before the tribunal either by real, or by oral evidence, or by a combination of the two. Thus, when an admission is made in open court, whether verbally, or by the acknowledgment of a written statement, the evidence is purely *real*. On the other hand, a verbal admission made out of court can only be established by the testimony of a witness, who has heard the words spoken; and the evidence is wholly *oral*. Lastly, a combination of both real and oral evidence is necessarily employed in the proof of a written admission made out of court. For by our rules, the nature or terms of the admission

(*t*) Ante, s. 261. (*u*) *Vide* Ante, s. 345.

must be proved by production of the writing, or by real evidence, while the authorship or acknowledgment of the document can only be established by the oral evidence of a personal observer of the transaction.

473. As it appears, therefore, that admissions are themselves subject to different modes of proof, it can hardly be contended that an admission can be legitimately or conveniently regarded as an instrument of evidence, or *mode of proving* the fact admitted; and in no other sense can a casual admission be said to afford *direct* evidence of that fact. But on the other hand, there seems no reason why we should not treat an admission like any other evidentiary fact, and regard proof by admission as a form of indirect or circumstantial evidence. For, as we have previously remarked, this arrangement is not only wholly unobjectionable in *principle*, but has also the merit of securing simplicity and convenience; since it obviates the necessity of encumbering ourselves with an exceptional and irregular branch or modification of evidence. (*v*)

474. Having thus consigned self-disserving statements to a place among evidentiary facts, we are now in a condition to deal with a question connected with admissions which, according to Mr. Best, has caused at least as much difference of opinion, as any other to be found in the whole Law of England; (*w*) namely, whether an admission is properly receivable to prove the contents of a written document; or whether, on the other hand, such proof ought to be rejected as a violation of the rule against secondary evidence. It is hardly necessary, even if our space would allow us, to review in detail the various arguments advanced for and against the reception of such 'evidence.' Suffice it to say generally, that according to the latest authorities, even a mere verbal admission is by law

(*v*) Ante, s. 467. (*w*) *Vide* Best Ev., s. 525.

receivable to prove the contents of a writing; (*x*) and that while Mr. Best attempts to defend the doctrine thus established, (*y*) Mr. Taylor, on the other hand, severely assails it. (*z*)

475. And I am not sorry to find so great an authority as Mr. Taylor enlisted on this side of the question; because I think that a close examination of the subject leads irresistibly to the conclusion, that the proof of the contents of a written document by means of a casual admission is entirely repugnant to the rule which requires in general the production of the writing itself. Indeed, I feel persuaded that the question of the reception of such 'evidence' would never have been entertained at all, if the distinction between deliberate and formal admissions, on the one hand, and casual admissions, on the other, had received the atttention which it deserves. For it is the reception of casual admissions only which is so objectionable for this purpose,—the reception, *i.e.*, of those admissions which are in a proper sense matter of evidence; and, according to the arrangement which we have chosen to adopt, evidentiary facts. In considering this question, therefore, we will for the present confine our attention to the case of admissions *casually* made.

476. And as the objection to the doctrine in question is founded on its inconsistency with the general rule of law, which requires the contents of every written document to be proved by the production of the writing itself, and excludes all other evidence of its contents as secondary; the validity of the objection will be fairly tested by comparing the assurance afforded by casual admissions as to the contents of written documents with that furnished by secondary evidence of the ordinary kind. And it is to be observed, that whether or no, in

(*x*) *Vide* Slatterie *v.* Pooley, 6 M. and W., 669.
(*y*) *Vide* Best Ev., ss. 525, 526. (*z*) *Vide* Taylor Ev., s. 382.

the discussion of this question, any distinction has been drawn between written and verbal or other admissions, or between admissions established by various modes of proof; (*a*) the doctrine established by the case of Slatterie *v.* Pooley, which is the leading case on the subject, applies equally to all admissions, whether written, verbal, or otherwise, and in whatever manner they be laid before the jury, so only that the mode of proof be *legitimate*. The doctrine applies equally to a verbal admission established by oral evidence, as to a written one proved by production of the writing, or an admission made in open court, and thus manifested by evidence wholly real. We are therefore justified in selecting the weakest form of admission, viz., a verbal admission established by oral evidence, equally with any other, as a criterion of the soundness of the doctrine under discussion.

477. We will therefore begin by comparing a verbal admission, as to the contents of a writing, established by the testimony of the person who heard the admission made, with that form of direct secondary evidence which most nearly corresponds to it, and with which, therefore, it may be most fairly compared, namely, a description of the contents given from memory by a witness who professes to have read the document. Now it will be observed, that while in the latter case the jury obtain oral evidence of the fact itself,—the contents of the document in dispute; in the former, they obtain oral evidence, not of the fact itself, but of the admission only,—an evidentiary fact, giving rise to an inference of the fact in question. Thus in each case there is a certain fact which is established by means of direct oral evidence; and the assurance, therefore, of the fact so established, which is gained in either case, is (*ceteris paribus*) equal; but there is this important difference

(*a*) *Vide* Taylor Ev., s. 382.

between the two cases, that in the latter the jury obtains that assurance as to the principal fact itself; while in the former that assurance relates only to an evidentiary fact. In this instance, therefore, the evidence furnished by the admission is just so much weaker than secondary evidence, as *indirect* or circumstantial evidence is intrinsically weaker than direct. (*b*) So much for the lowest form of admission.

478. And we will now pursue our scrutiny a little further by instituting a comparison of the same kind between a written admission made out of court, and that phase of secondary evidence which most nearly corresponds to it, and which may, therefore, most fairly be compared with it, namely, proof by a *copy* of the document in dispute. In the former case, the fact which is proved by *direct* evidence, and which we may designate the *proximate* fact, is the admission. In the latter, the proximate fact is the tenour or *contents* of the original document. In the former case, this proximate fact,—the written admission,—is established, partly by the production of the writing itself, which affords real evidence of the nature of the admission, and partly by the oral evidence necessary to connect the writing with the party against whom it is offered. In the second case, the proximate fact,—the contents of the original document,—is established, partly by production of the copy, which affords real evidence of the contents of the copy, and partly by the oral evidence of a witness, who has made the copy, or compared it with the original, and establishes the identity between the two documents. In each case, therefore, we have the proximate fact established by a combination of real and oral evidence. Or, to go somewhat more closely into the question: In each case we have the proximate fact resolved into two components, one of which is established by real evidence,

(*b*) *Vide* Taylor Ev., s. 382, note 2.

and the other by oral. In the first case, the proximate fact,—the admission made,—is resolved for purposes of proof into two components, viz: 1, the contents of the writing, or nature of the admission; and 2, the authorship of the writing. Similarly in the second case, the proximate fact,—the contents of the original writing,—is resolved into two components, viz: 1, the nature or contents of the copy; and 2, the identity of the copy with the original document. In each case, the first component is established by real evidence, *i.e.*, by production of the writing, of the written admission, in the first case; in the second, of the copy. So far, therefore, as the first component is concerned, it can scarcely be contended that the evidence in each case is not precisely equipollent. To proceed, therefore, to the second component, which must in each case be established by oral evidence. The second component in the first case is the authorship of the admission. In the second case, it is the identity of the copy with the original writing. And there does not seem to be any possible ground for contending that there is any essential difference in the strength of the oral evidence by which either of these component facts is established. If aught of inference be involved in this part of the process, in the one case, it extends equally to the other. And if the proof of each component is equivalent in either case, it follows that the evidence by which the whole or *compound* proximate fact is established in either case, is also exactly equipollent. But, as before, there is this difference between the two cases, that in the latter case the proximate fact, thus established by a combination of real and oral evidence, is the principal fact itself, the contents of the document in dispute. Whereas in the former, the proximate fact is only an evidentiary fact—the admission—and, as before, there still remains an inference to be drawn before the jury

can arrive at the principal fact—the contents of the document in question. In short, as before, the evidence afforded by an admission of this kind is just so much weaker than the secondary evidence obtained by the aid of a copy, as indirect evidence is weaker than direct.

479. So much for the strength or proving power of a verbal or written admission made out of court, as compared with the strength of secondary evidence in general.

But there still remains the case of a verbal admission made, or a written admission acknowledged in the course of the trial.

In this last case, the whole fact of admission is manifested to the senses of the tribunal, and thus proved entirely by real evidence. In this case, therefore, the jury obtains *real* evidence of an evidentiary fact, or, in other words, real *indirect* evidence, as compared, in the case of secondary evidence, with *oral*, or partially oral *direct* evidence. And it is, we must confess, quite open to argument that the former combination of evidence is superior in proving power to the latter. For it does not appear, at first sight, so easy a matter as before to determine the relative value of the evidence in either case. But I think it may be shown that there is in fact no essential difference between the two.

In the one case, we have the admission established by real evidence; in the other, the sworn statement made in open court, and therefore also established by real evidence. (*c*) And for the purposes of this comparison, it is quite legitimate to treat the latter—the sworn statement—equally with the former, as an evidentiary fact. Indeed, in a purely natural view it is so. For, naturally speaking, wherever a conclusion as to the existence or truth of one fact is drawn from the existence of another,

(*c*) Ante, s. 345.

the two facts must stand towards each other in the relation of principal and evidentiary facts. For our present purpose, therefore, the sworn statement may be regarded, equally with the admission, as an evidentiary fact, from which the principal fact—the contents of the document in question—may be inferred. In each case, therefore, we have an evidentiary fact established by real evidence; and though the relative proving effect of the evidence in each case may vary indefinitely, according to the nature and circumstances of the admission on the one hand, or the credibility of the testimony on the other, there seems no ground for asserting that either of these two proving processes is essentially superior to the other.

480. But even if we have failed in this last instance to establish our position that the admission of a fact made in open court is no more than equivalent in proving power to direct oral evidence of the same fact, our argument against the reception of casual admissions to prove the contents of a written document is not seriously impaired thereby. For in practice we can scarcely conceive an actual case of a casual admission as to the contents of a writing being made in court, unless it be one that occurs in the course of the examination of a party who is called as a witness. And with respect to such so-called admissions, it is to be remarked, that a statement to his own prejudice made by a party, who is called as a witness, is not properly regarded as an admission at all, but as *testimony*. For the statutes, which rendered a party compellable to give evidence against himself, (*d*) did not thereby render him compellable to make admissions (in the technical sense of the term) against himself; and such self-disserving statements should consequently be treated, not as admissions, but as sworn statements or oral evidence

(*d*) *Vide* Taylor Ev., ss. 1,213, 1,221, and Ante, s. 372.

simply. And this view appears to have been so far adopted by our tribunals, that a party, though now compellable to give evidence against himself, cannot by law be questioned as to the contents of a document. (*e*)

481. The general result of our comparison between casual admissions, and direct secondary evidence of the ordinary kinds, appears, therefore, to be this. That in the vast preponderance of cases (to say the least of it) the evidence afforded by the former process of proof is essentially inferior in proving power to that afforded by the latter; and in no conceivable case is more than equivalent to it. We are, therefore, I think, fully justified in maintaining that the doctrine, in virtue of which the former is receivable to prove the contents of a written document, is wholly inconsistent with the general rule of law which excludes the latter.

The arguments by which Mr. Best endeavours to defend the doctrine in question, (*f*) tend only to show that the proof by admission is *legitimate* evidence. But direct secondary evidence is also legitimate; and the rule against secondary evidence goes precisely to establish this position, that in the case of written documents the law is not satisfied with legitimate evidence. What the law says, in the case of the contents of a writing, is this: Here, we can uniformly obtain something better than legitimate evidence; we can obtain direct real evidence by the production of the document, and the document itself shall be produced: Here, at least, we can uniformly procure the *best* evidence, and the best evidence we will have. It is no argument, therefore, in favour of the doctrine in question to show merely that an admission affords *legitimate* evidence of the contents of a document.

482. The general result of our examination of this

(*e*) Powell Ev., 195 and 357, and Taylor Ev., s. 380.
(*f*) *Vide* Best Ev., s. 526.

much vexed question may therefore be summed up once more as follows: Proof by means of a casual admission being upon the whole essentially inferior to secondary evidence of the ordinary kind, the reception of the former to establish the contents of a written document is directly repugnant to the general rule of law which excludes the latter. On the other hand, the rule which exacts the production of every document whose contents are in question, is at least as rational, as sound, and as time-honoured a rule as any to be found in our positive system of judicial proof.

Consequently, the doctrine under discussion, as it tends to undermine and sap the foundations of this valuable principle, might be overruled with great advantage, so far as *casual* admissions are concerned, which should be consigned to their proper place as a phase of secondary evidence.

Formal admissions stand, of course, upon a totally different footing. For, where an admission is deliberately made for the purposes of a particular suit, even if it be not judicially noticed, it may, when proved at least, be fairly regarded as a perfect substitute for the document in question, and treated as a complete waiver of the strict proof of its contents.

483. The laxity of the doctrine which permits the contents of a written document to be proved by means of a casual admission, appears all the more striking by contrast with the strictness of the rule which excludes the same kind of evidence to establish the *execution* of an instrument attested by witnesses, and requiring such attestation for its validity. (*g*) The inconsistency of this latter rule with the doctrine established in the case of Slatterie *v.* Pooley will appear, I think, from the following considerations: Every written act, as has been

(*g*) Taylor Ev., ss. 384 and 1,641, and Best Ev., s. 527.

stated more than once elsewhere, (*h*) may for purposes of proof be resolved into two components, viz.: 1. The nature of the act, or contents of the writing; and 2. The authorship or execution of the document by the particular person to whose agency it is ascribed. Of these two component facts, the first is in general susceptible of proof by real evidence, or production of the document; and the first and more important branch of the rule against secondary evidence is directed to exacting that mode of proof. The second component can in general be established only by the oral evidence of a personal observer of the act of execution. In the case of attested instruments, the attesting witness is fixed upon and chosen beforehand as the most proper person to establish by his testimony the fact of execution. In short, his testimony is *preappointed* for this purpose; and the function of the second and more questionable branch of the rule against secondary evidence is to require this second ingredient, viz., the execution, to be proved by the means thus preappointed, wherever the instrument is such as to need attestation to give it validity. (*i*) Now, while the doctrine recognised in the case of Slatterie *v.* Pooley permits the former component, *i.e.*, the *contents* of the document, to be established by means of a casual admission, the rule last adverted to excludes the same kind of evidence when offered in proof of the second component, *i.e.*, the execution of the instrument, at least wherever the law requires it to be attested by witnesses. That is to say, while a casual admission is placed on a par with primary evidence properly so called, it is treated as inferior to primary evidence of the second kind. This necessarily involves a gross anomaly. For primary evidence of the higher order, as I have so often had occasion to observe, is *real*

(*h*) Ante, ss. 296 and 456.

(*i*) *Vide* Taylor Ev., ss. 363 and 365, and Ante, s. 342.

evidence; and moreover, as formal instruments are framed with a view to their being used for purposes of proof, it is in their case *preappointed* real evidence. The evidence of an attesting witness, on the other hand, is merely preappointed *oral* evidence, not superior to any other legitimate proof, except in respect of its being preappointed. Thus, while a casual admission is placed on a level with preappointed *real* evidence, it is treated as inferior to preappointed *oral.*

Nor is this all. For it would appear further, that the doctrine of Slatterie *v.* Pooley is carried so far that a casual admission is held to be receivable, not only as a substitute for the primary evidence of the contents of an instrument, but also to establish *in toto* the act performed by its means, (*j*) a fact which involves the proof of both components, the terms of the document, and its authorship. If this view be correct, it ensues that while a party is not allowed to admit the execution of an instrument which lies before the eyes of the tribunal, he may yet admit both the execution and the terms of an instrument which is withheld.

484. Standing alone, however, the latter rule, which appears to relate to casual admissions only, (*k*) is perhaps defensible enough, being founded on the presumable superiority of preappointed over casual evidence; but it is worthy of remark that the Legislature has found it expedient to narrow considerably the scope of the rule as formerly established at Common Law.

'Formerly,' says Mr. Taylor, in reference to this question, (*l*) 'a rule prevailed that, if an instrument, on being produced, appeared to be signed by *subscribing witnesses*, one of them at least *should be called* to prove its execution; but this rule, after having worked gross injustice for a long course of years, was at length

(*j*) *Vide* Taylor Ev., s. 384. (*k*) Taylor Ev., s. 1,647, and Best, s. 527.
(*l*) Taylor Ev, s. 1,637.

abrogated by the Legislature. The Common Law Procedure Act of 1854, (*m*) among other enlightened provisions, contains the following clause: "It shall not be necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto." The operation of the rule in question is, therefore, now confined to the case of instruments which require attestation to give them validity. And thus restricted, at any rate, the rule does not appear unreasonable in itself; but it affords a striking contrast to the doctrine which would place a casual admission on a par with the *real* evidence of the contents of a document, which is obtained by its production.

485. An admission, as previously remarked, (*n*) though it frequently affords most satisfactory proof, or, to speak with more scientific precision, though it frequently raises a very strong inference or presumption, of the fact admitted, is not generally (except where it is made expressly with a view to the suit) regarded by our law as conclusive 'evidence' of it. But besides those deliberate admissions to which we have already alluded, there is a certain class of 'self-disserving statements,' closely resembling admissions, which the law invests with a conclusive effect. These conclusive statements are generally such as are contained in a Deed or instrument under seal, (*o*) or are implied by some solemn and formal act. For as a man may make an admission (or any other kind of statement), not only by words, but also by the implied language of conduct; (*p*) so by a solemn and deliberate act he may make an implied statement, which shall be conclusive against himself, and which he shall not be allowed by law to

(*m*) 17 and 18 Vict. cap. 125, s. 26. (*n*) Ante, s. 440.
(*o*) Ante, ss. 436-438. (*p*) Ante, ss. 193 and 361.

gainsay. Such conclusive statements are said in the technical language of our law to work an 'estoppel' against the author of them. But, as we have previously observed in the case of Deeds, (*q*) estoppels are not properly regarded as admissions at all, but as incidents to, or component parts of, some act or transaction performed by the party who is concluded thereby. For it is not that a statement of this kind actually *proves* the fact stated or implied by it conclusively; but that for the purpose of interpreting and explaining a particular act or transaction, the fact must be taken to be such as it is represented to be: the question being, not what the true state of the case may really be, but how it has been accepted to be by the parties to the transaction, of which it forms, as it were, a constituent part.

486. Before concluding the present chapter, I cannot refrain from making a few observations on a subject which, if little theoretical principle be involved in it, seems nevertheless to demand some attention from its practical importance. It is the question of admissions arising from acquiescence in the verbal declarations or statements of other persons, more particularly those in which the supposed acquiescence is evinced by silence (*r*), or, as Bentham expresses it (*s*), by 'non-responsion.' 'In regard to admissions inferred from *acquiescence in the oral statements of others*,' says Mr. Taylor, (*t*) 'the maxim, "Qui tacet consentire videtur," is to be applied with careful discrimination. Nothing, it has been observed, can be more dangerous than this kind of evidence. It should always be received with caution; and never ought to be received at all, unless the evidence is of direct declarations of that kind which naturally calls for contradiction.' 'The silence of the party,' he

(*q*) Ante, s. 437.

(*r*) Taylor Ev., s. 828, and Best Ev., ss. 521 and 574, and Ante, s. 462.

(*s*) Bentham Ev., iii. 81. (*t*) Taylor Ev., s. 737.

says further on (*u*), 'even where the declarations are addressed to himself, at a time, too, when he is at full liberty to reply as he thinks fit, is, at best, worth very little as evidence of acquiescence; and if he has no means of knowing the truth or falsehood of the statement, the fact that he did not in terms deny it is almost valueless. In all these cases it must be distinctly remembered, that the statement made in the party's presence or hearing is not evidence against him, but his own conduct in consequence of such statement is the sole evidence. Magistrates often make mistakes on this subject; but it is highly important that the distinction should be observed.'

487. In these remarks I must express my entire concurrence; and if the practice with reference to such evidence were usually conducted in conformity with the views thus expressed by Mr. Taylor, I should not have alluded to the question at all. It is precisely because the actual practice, generally speaking, departs so widely from the precepts thus inculcated, that I have been induced to advert to a question somewhat foreign to the design of the present work. For it has become almost a settled maxim, especially in criminal cases, that, though what is said in a man's absence is 'no evidence' against him, all that is said in his presence is receivable as a matter of course; and that, too, in the total absence of any acknowledgment on his part of the truth of the statement. But, rationally speaking, unless he do recognise the statement in some way, either by words, acts, demeanour, or *significant silence*, it is difficult to understand why statements uttered in a man's presence should be accounted better or more legitimate evidence against him, than words spoken behind his back. Both are alike pure hearsay, unless the statement be in some manner adopted or acquiesced in by him, and be thus

(*u*) Taylor Ev., s. 740.

converted into his own admission. Unfortunately, however, it is the undoubted practice to admit statements made in the presence of an accused person, without the slightest token of his acquiescence in their truth.

The following may serve as instances of the length to which this practice is sometimes carried. An accused person is found in possession of recently stolen property. He accounts for his possession by asserting that he received the property from a particular person whom he names. According to decided cases, this throws on the Crown the onus of proving that his account is false. (*v*) And how is this done? not by calling the person so named as a witness to contradict the prisoner's statement on oath, but by calling another witness to prove that the prisoner was confronted with the person thus referred to, who in his presence denied the prisoner's story, to which the latter made *no reply*. But the prisoner's silence in such a case could not be reasonably interpreted as acquiescence; for how could he be deemed by mere silence to acquiesce in the truth of a statement, the contrary of which he had already asserted. Let me adduce one more instance of the laxity that prevails in this respect, at least in our criminal courts of inferior jurisdiction. A woman is charged with larceny, the case against her being, that when taken into custody and searched, the stolen articles were found upon her. One would have thought that the only proper and legitimate mode of proving this important fact would be to call the person who searched her as a witness. But for some reason it is inconvenient to produce this person at the trial. So this momentous fact in the case is proved by calling a third person to whom the searcher has made a statement, *within hearing of the prisoner*, as to the finding of the stolen articles upon her; and upon this

(*v*) *Vide* Best Ev., s. 214, and R. *v.* Crowhurst. 1. Car. and K. 370, and per Alderson B. in R. *v.* Smith. 2. Car and K. 207.

evidence the prisoner is convicted. And I would ask if a more direct violation of the maxim, 'In judicio non creditur nisi juratis,' can be conceived.

There are no doubt many cases in which acquiescence may be reasonably inferred from the absence of a reply; but the assumption of assent is carried much too far, when *all* statements made in a party's hearing are received 'as evidence' against him, and permitted to supersede legitimate proof by sworn testimony.

488. Finally, we must not omit to notice, that a confession in criminal cases, in order to be legally receivable, must be voluntarily made; that is to say, it must not have been elicited by any promise of favour or immunity, or threat of punishment, held out to the accused by a person in authority. (*w*)

(*w*) *Vide* Taylor Ev., ss. 797-799, and Best Ev., s. 531.

CHAPTER XIX

OF PRESUMPTIONS

489. THE term 'presumption,' in its ordinary or popular acceptation, or rather in that one of such acceptations with which we are here concerned, (*x*) is nearly equivalent to the word 'inference'; both terms being alike used to designate the link of probability that connects the principal fact with the evidentiary one. In short, the two words denote precisely the same thing regarded from different points of view. We speak of *drawing* an inference (or conclusion) from the evidentiary fact to the principal one. We do not, on the other hand, speak of *drawing* a presumption in the same manner; but we say that the evidentiary fact (or 'circumstance') *raises* a presumption of the principal one.

The difference between the two terms answers to that existing between the two words *infer* and *imply*: We infer the principal from the evidentiary fact; while the evidentiary fact may be said to imply the principal one. Hitherto, however, we have somewhat violated the correct use of the word 'inference,' by speaking of the evidentiary fact as *raising an inference* of the principal. It would have been more accurate to employ the word 'presumption' in such a context; but we have generally refrained from doing so, because we wished to avoid the premature use of a term, which has received a technical meaning in legal matters. For though a *natural* presumption is nothing else than an inference regarded from a different point of view; yet there are also what

(*x*) *Vide* Best Ev., s. 300.

are called *presumptions of law*, of which I shall have to say more very shortly.

490. First, however, we must observe that circumstantial evidence is not infrequently called presumptive, as resting on inferences or *natural* presumptions raised by evidentiary facts. Mr. Best, however, distinguishes circumstantial evidence as conclusive *or* presumptive, (*y*) thereby treating presumptive evidence as a branch or division only of circumstantial. But this distinction, as I must venture to assert, is chimerical and unsound. It would be far more correct to say that *presumptive* evidence is either circumstantial or conclusive; inasmuch as presumptions are frequently rendered conclusive by arbitrary doctrine of law, and in that case the evidence ceases to be in any proper sense circumstantial, and becomes virtually direct. (*z*) But circumstantial evidence, properly so called, can never be actually conclusive; because all inferences or *natural* presumptions rest, at best, upon a probability only, (*a*) though it may be a probability amply sufficient, practically speaking, to justify the action of a tribunal. All circumstantial evidence, therefore, is presumptive; though it may be that all presumptive evidence is not circumstantial. The term 'presumptive evidence,' however, is very frequently used elsewhere in our books as an equivalent for circumstantial; and that even by Mr. Best himself, who more than once speaks of presumptive evidence as opposed to direct. (*b*) In these cases the term presumptive evidence is employed in the sense of evidence grounded on a *natural* presumption or inference.

491. But, as previously remarked, the word presumptive has received a further and more special meaning in legal phraseology. For besides natural

(*y*) Best Ev., ss. 27, 199, 255, and 293.
(*z*) Ante, ss. 155 and 441. (*a*) Ante, s. 143.
(*b*) Best Ev., ss. 376 and 409.

presumptions, there are also what are called *presumptions of law*, which are nothing else than natural inferences or presumptions of fact, which the law invests with an artificial or preternatural weight. (*c*) Of these artificial or legal presumptions some are conclusive or *irrebuttable*, which were called by the civilians *Presumptiones juris et de jure;* while others are inconclusive or *rebuttable* presumptions, and were designated by the civilians *Presumptiones juris*, or *juris tantum*. (*d*)

492. There are, therefore, not less than three classes of presumptions; namely:

1. Natural presumptions, or simple inferences of fact, which were called by the civilians *Presumptiones hominis*. (*e*)

2. Rebuttable presumptions of law; *i.e.*, natural presumptions, artificially strengthened by the operation of judicial rules, but capable, nevertheless, of being rebutted by counter-evidence. For instance, the law presumes all bills of exchange and promissory notes to have been given for good consideration; but this presumption may be contradicted by other evidence. So, every child born in wedlock is *primâ facie* presumed to be legitimate; but this presumption may be refuted by proof of non-access of the husband within the period of gestation. So also, a child between the age of seven and fourteen is presumed, in the first instance, to be incapable of committing a felony, as being *doli incapax;* which presumption may, nevertheless, be controverted by evidence of a mischievous discretion, in conformity with the maxim, 'Malitia supplet ætatem.' (*f*) In the case of these rebuttable presumptions, the jury is directed by the judge to draw the inference, unless and until the presumption is disproved; in other words, on proof of

(*c*) *Vide* Best Ev., ss. 303-306. (*d*) *Vide* Best Ev., ss. 43 and 306.
(*e*) *Vide* Best Ev., s. 303. (*f*) *Vide* Best Ev., s. 314.

the evidentiary facts from which it arises, a presumption of this kind has the effect of shifting the burden of proof.

3. *Irrebuttable* presumptions of law, or *presumptiones juris et de jure;* where the evidentiary fact is accepted as tantamount to the principal; since here the jury is not only *directed* by the judge, and *bound* as a matter of law, to draw the conclusion in the first instance; but no evidence can be received afterwards to contradict it. Thus, a receipt under hand and *seal* is conclusive evidence of the payment of the money, or extinguishment of the debt in question, and no proof can be admitted to the contrary. So also, a child under the age of seven years is not only presumed *primâ facie* to be incapable of committing felony, but the presumption cannot be rebutted by the clearest evidence of precocious depravity. (*g*) Under this head, too, come Estoppels, a species of conclusive statement or act, to which I have already had occasion more than once to allude. (*h*)

493. And in connection with estoppels, it is worthy of observation that as an ordinary admission is a species of evidentiary fact, raising a natural presumption of the truth of the fact admitted; so, where the force of the presumption that arises naturally from an admission is artificially strengthened by law, as in the case of the *primâ facie* presumption of *consideration* that arises from the acceptance of a bill of exchange or the issue of a promissory note, there the admission gives rise to a presumption of the second class—a rebuttable presumption of law—as to the fact admitted: and that where an admission is rendered *conclusive* by doctrine of law, as in the case of a formal admission which works an estoppel, there the admission raises a *presumptio juris et de jure*, or irrebuttable legal presumption, of the existence of the

(*g*) *Vide* Best Ev., s. 306. (*h*) *Vide* Ante, ss. 436 and 485.

fact which is acknowledged thereby; all which shows that admissions tread in the steps of other 'circumstances,' and tends to confirm the soundness of the theory that classes admissions among evidentiary facts.

494. To revert to presumptions in general: These legal presumptions of either kind are, generally speaking, founded on natural presumptions of greater or less weight, which, though they may, or may not, be true in the particular instance, are more or less probably true in general. Arbitrary assumptions of law, which are wholly unsupported by any natural probability, are, I imagine, more properly classed as *fictions* than as presumptions, though fictions of law are said to be not only not probable but palpably and avowedly false. (*i*) This position, however, I apprehend, relates only to the particular instance; as a matter of *inference* a fiction is only more or less *improbable*, for it is laid down as a rule respecting fictions that the matter assumed must not be anything impossible. (*j*)

495. But besides natural presumptions and legal presumptions of either kind, our jurists also recognise a third class, called *mixed* presumptions, lying on the boundary line between the other two. These, I think, are merely natural presumptions, which, from their inherent weight and frequent occurrence in legal investigations, have gradually come to occupy a position intermediate between rebuttable legal presumptions and ordinary presumptions of fact. (*k*) In the case of mixed presumptions, the jury is not, even in the total absence of proof to the contrary, actually *directed* or *bound by law* to draw the inference, but is usually *advised* or *recommended* by the judge to do so. (*l*)

The precise line of demarcation, however, between the different species of presumptions is by no means

(*i*) *Vide* Best Ev., s. 309. (*j*) *Vide* Best Ev., s. 312.
(*k*) Best Ev., s. 324. (*l*) *Id.*, ss. 326 and 378.

well defined, the practice on the subject being in no small degree fluctuating and uncertain. (*m*) In particular, there seems to be a great want of uniformity in distinguishing between mixed presumptions and the other species of presumptions on which they border. This, however, I think, is scarcely surprising when we consider the anomalous character of this last branch of presumptions. For I cannot refrain from remarking that the propriety of the doctrine, which establishes a distinction between *mixed* and other natural presumptions, is at least questionable. Natural presumptions must perforce vary indefinitely in strength and significance, and there will always be a natural inclination on the part of the judge to advise the jury in obvious and familiar cases to draw the conclusion. But in all cases where the presumption is not binding as a matter of *law*, it would seem more consonant with reason to treat it as a mere presumption of fact, and to leave the question of its effect entirely to the jury, subject to the right of the judge to draw their attention to the manifest weight of the inference.

496. As for presumptions of fact, they are merely ordinary inferences founded on the law of nature, the discussion of which belongs to the head, either of inference, of evidentiary facts, or of circumstantial evidence. (*n*) Natural presumptions have been said to relate either to *things*, to *persons*, or to the *acts* and *thoughts* of intelligent agents. (*o*) This, however, is only expressing in somewhat different phraseology the principle that every fact, whether principal or evidentiary, whether it be a fact that is presumed, or a fact that gives rise to a presumption, is either physical, physiological, or psychological. (*p*) For

(*m*) *Vide* Best Ev., s. 323, and Taylor Ev., s. 97.
(*n*) *Vide* Taylor Ev., s. 169, and Ante i., ch. 9 and 16.
(*o*) *Vide* Best Ev., s. 316. (*p*) Ante, s. 39.

the term 'things' is only another name for material substances which are the seat of physical facts, the term 'persons' for the bodily frame of sentient beings, which are the seat of physiological facts, while the 'acts and thoughts of intelligent agents' are themselves facts, of which the former belong, partly to the physiological or physical, and partly to the mental, (*q*) and the latter to the purely psychological class.

497. More than one attempt has been made by our jurists to classify natural presumptions according to their weight, as *violent*, *probable*, or *light* presumptions, (*r*) or as *strong* or *slight* presumptions. (*s*) I cannot, however, but regard all such efforts as chimerical. Inferences vary in weight by such infinitesimally small degrees as to render any attempt to measure their probative force by a fixed scale palpably futile. A presumption of law, on the other hand, so far at least as it outweighs the inference that arises naturally from the facts, is more properly regarded, *pro tanto*, as a substitute for proof than as matter of evidence.

The doctrine of legal presumption, like that of estoppel, which it includes, is far too large and difficult a theme to be suitably discussed in these pages. The actual state of the law can only be learnt by a study of decided cases, or by a perusal of some of the practical treatises on the subject of presumptions.

498. Before closing the present chapter, however, I cannot refrain from observing that mistakes are frequently made both by jurists and practitioners as to the effect of statutes in creating presumptions. Because a statute tends to produce the same effect as some real or imaginary presumption, it is apt to be taken for granted that the statute must necessarily *create* the presumption in question. One or two

(*q*) *Vide* Benth. Ev., i. 46.
(*r*) *Vide* Best Ev., s. 317. (*s*) *Id.*, s. 319.

instances will best illustrate my meaning. The Statute of Limitations, 21 Jac. i., cap. 16, sec. 3, enacts in substance (*inter alia*), that no action shall be brought to recover any simple contract debt which is more than six years old. The effect of this provision in barring the action is, it will be perceived, very much the same as would be produced by a conclusive legal presumption that a debt of such long standing had already been paid; and accordingly the actual existence of such a presumption is often assumed as a matter of course. But there is, I think, no sufficient authority for such a position. There is, I imagine, no such presumption, except so far as it may have existed prior to and independently of the statute; (*t*) nor does it appear that the creditor would be debarred from availing himself of any remedy other than an action, which might present itself—such, for instance, as lien, (*u*) or perhaps Retainer. (*v*)

Take another case. The Act 38 and 39 Vict. cap. 94, sec. 3, makes it felony to have sexual intercourse with a girl under twelve years of age. This provision has much the same effect (where the statute applies) as if a child of that age were conclusively presumed by law to be incapable of giving her consent to an act of that kind; since without her consent, the act would (even in the absence of statutory interference) amount to rape, and therefore no felony at common law: in consequence of which the existence of such a presumption is very commonly taken for granted, not only in the case of actual sexual intercourse, but even in that of minor assaults of the same character. But, as in the preceding instance, there is, I imagine, no sufficient ground for such a view. No such presumption is created by

(*t*) *Vide* Taylor Ev., s. 67.

(*u*) *Vide* Spears *v.* Hartley, 3 Esp. 81, and Higgins *v.* Scott, 2 Barn and Ald., 413.

(*v*) Blackstone Com., iii. 18.

the statute. The age at which a female is presumed to be legally capable of giving her consent to such acts is determined solely by the common law. Nor, therefore, is it a proper mode of expression to say, in cases under the statute, that the child is *incapable of giving* her consent; the more correct way of putting the matter is to say that by virtue of the statute her consent is rendered *immaterial*. No doubt a statute may, and many statutes do, create presumptions; but they must do so in express terms; by making, *totidem verbis*, the existence or proof of one fact conclusive, or, *primâ facie*, evidence of another fact; or by declaring that one fact shall be conclusively presumed from the existence or proof of another, or by some such phraseology. Such a statute does not, I apprehend, either create or enlarge a presumption, merely because, so far as it operates, it tends to produce a similar result.

CHAPTER XX

OF RELEVANCY

499. THE facts requiring proof in any judicial proceeding may be distinguished either as *facts in issue* or as *facts relevant to the issue*, (*w*) which terms correspond respectively to the facts which we have hitherto usually described as principal and evidentiary facts. (*x*)

A fact in issue is one that forms in itself either the whole or a component part of the issue or question. A fact relevant to the issue, or relevant fact, is one which, though not in itself forming any constituent part of the actual subject of inquiry, is yet connected by a legitimate inference (or by a series of such inferences) with a fact in issue; in other words, a relevant fact is one that raises a fair presumption of some principal fact. (*y*) On the other hand, a fact may be said to be irrelevant to the issue when it is neither itself a fact in issue, nor is connected by a legitimate inference with any principal or evidentiary fact.

500. A fact in issue, though it may perhaps be correctly described as 'material,' cannot with strict propriety be called a relevant fact. The distinction, however, between facts in issue and facts relevant to the issue, though highly important, is by no means well maintained in our legal phraseology: the epithet 'relevant' (in common with 'material') being frequently used to denote principal facts as well as

(*w*) *Vide* Stephen Ev., art. 1.
(*x*) Ante i., chap. 8. (*y*) Ante, s. 256.

evidentiary ones. For instance, the question of the *intent*, with which a criminal act is perpetrated, is often spoken of in our books as a fact relevant (or material) to the complex question or fact of guilt, of which it forms a considerable part. Nor have I myself, I fear, in all cases succeeded in preserving the distinction. For it is the more difficult to adhere to the correct use of the word 'relevant,' as applied to facts, because not only fact, but *evidence* also, is sometimes, though somewhat improperly, spoken of as relevant or irrelevant to the case.

501. In this sense, evidence, or a 'piece of evidence,' may be said to be relevant or material to the issue when it tends to establish either a fact in issue or a fact relevant to the issue by legitimate means.

On the other hand, evidence may be said to be irrelevant to the case where it has no tendency to establish either a fact in issue or a relevant fact. But where evidence, or a piece of ostensible evidence, tends or purports to establish a really material fact by means not legitimate, there the evidence would be more appropriately described by the title of *illicit*. Such evidence would not, I imagine, even in our forensic diction be spoken of as irrelevant; because the only way in which it would be likely to arise would be, if it were proposed to prove a material fact by the testimony of an unduly sworn or incompetent witness; or if a witness attempted to depose to a material fact not within his own knowledge, but which he had inferred from other facts: in which event the objection would be made to the competency of the witness in the one case, and to the reception of the evidence in the other, not to the relevancy of any particular fact; while any other phase of transmitted evidence—such, for instance, as a written certificate—whereby it was attempted to establish a

material fact, would itself be properly regarded not as a means of proof, but as an irrelevant fact. (*z*) In short, what is called irrelevant evidence almost invariably presents itself in the shape of the proof of irrelevant facts by legitimate means.

502. I have said that evidence is relevant which tends to establish either a fact in issue or a relevant fact by a legitimate mode of proof. What it is that constitutes a legitimate mode of proof has already been explained, (*a*) but may be briefly repeated here. All legitimate modes of proof are comprised within the two expressions, *Real* or *Oral evidence*—that is to say, where the mode of proof is legitimate, the fact must be established either by manifestation to the senses of the jury, or by the oral testimony of a sworn witness, himself the percipient of the fact to which he deposes. If the fact thus proved be a fact in issue, there is then no further question of the relevancy of the evidence; but if the fact thus established claims only to be a relevant fact, then there remains the further question, 'What is a relevant fact?' or, in other words, 'What is a legitimate inference or natural presumption?'

503. Now, the meaning of a legitimate inference has been abundantly explained in a former chapter, (*b*) where it was defined to be any inference or probability that rests on some known law of nature, and is not merely founded on the supposed knowledge or experience of a rational agent evinced by his voluntary act. In other words, no mere *statement*, whether expressed by written or spoken words, or evinced by conduct, can be said to raise a legitimate inference of the fact thus stated or implied. The former is excluded as hearsay; the latter sometimes as hearsay also, but more frequently under the title of 'Res inter alios acta.' There are, however, as we have formerly seen, (*c*) certain exceptions to the

(*z*) Ante, s. 254. (*a*) Ante, s. 259. (*b*) Ante, s. 175. (*c*) Ante, s. 353.

rule against hearsay. Where, therefore, statements or declarations are receivable as falling within these exceptions, they cannot be regarded in any other light than as relevant facts; but it must not be forgotten that they are evidentiary facts of a very questionable and defective kind, and not relevant in the full sense of the term.

504. And setting aside the case of facts which bear upon the question as statements expressed by words or implied by conduct, I am unable to discover that any limit is placed to the reception of the proof of facts which raise even the *slightest* natural presumption of a fact in issue, or of another fact actually relevant to the issue. The mere insignificance of the probability that is engendered by an evidentiary fact can hardly be advanced as a valid ground for rejecting the proof of it; for however frail may be the assurance of the truth of the principal fact that we obtain from one such presumption, it is impossible to estimate beforehand the force of the assurance that may result from a combination of several. (*d*) Even two slight circumstances, if taken in conjunction, may by their coincidence create an assurance amounting to cogent moral conviction. (*e*) Any fact or circumstance, therefore, may in general be said to be relevant to the case if it raises the slightest legitimate presumption of a fact in issue, or of another relevant fact.

This, I think, is the general rule; for in all those cases which are occasionally cited to show that evidence of a fact will be rejected, where the probability which links it to the principal fact is too small and inconsiderable, it will, I believe, be found that the two facts are in reality not connected by any link of probability at all. (*f*)

The general rule, therefore, I apprehend to be that

(*d*) Best Ev., s. 297. (*e*) Ante, ss. 164 and 206.
(*f*) Best Ev., s. 255; Post, s. 524.

any fact which raises even the smallest shade of a legitimate presumption of the truth (or falsity) of a fact in issue is relevant.

505. But to this rule there are some arbitrary exceptions established by law.

In the first place, no evidence against the character of an accused person, and *a fortiori* no evidence tending to prove that he has committed any specific offence other than the one with which he stands charged, will be admitted, except it be to rebut proof of good character set up on his behalf. (*g*) Though it is to be observed that evidence of other criminal acts of a similar character to the one under investigation is frequently admitted to prove psychological facts, such as *intent* or guilty knowledge. (*h*)

In the second place, no evidence as to the character of a party to a *civil* action will be received, except in certain cases, where his character may be deemed to be itself in issue. (*i*) It is obvious, however, that in a purely natural view the character and previous conduct both of a party to a civil suit, and still more of the defendant in a criminal proceeding, are often highly relevant, as tending to raise a substantial presumption of the justice or injustice of his cause in the former case, or of his guilt or innocence in the latter. (*j*) But, notwithstanding this, such facts are in general, as I have just said, deemed in contemplation of law to be irrelevant.

506. The exclusion of the evidence of character does not, however, extend to the reputation of witnesses. The character of a witness is always deemed to be relevant, as bearing on the credibility of his testimony; (*k*) and though a witness is not actually compelled himself to answer questions that tend to criminate

(*g*) Best Ev., s. 261. (*h*) Best Ev., s. 255. (*i*) Best Ev., ss. 257-258.
(*j*) Best Ev., s. 256. (*k*) Best Ev., s. 263.

him, yet with this saving he is liable to have every action of his life, however foreign to the real merits of the case, pitilessly dragged to light. The danger and annoyance to which witnesses are thus subject seem all the more unjust when contrasted with the comparative immunity in this respect enjoyed by the actual parties to the suit, in reference to whom Mr. Best remarks (*l*) that 'the exposing every man who comes into our courts of justice to have every action of his life publicly scrutinised would keep most men out of them.' But if it be unreasonable that a party who comes voluntarily into court to serve his own interests should be exposed to such an ordeal, how much more unfair does it seem that a witness who has often no interest whatever in the case, and is dragged unwillingly before the tribunal, should be thus persecuted, especially when we consider how much more remotely the conduct or character of the witness is connected with the issue than that of the party. Such, however, is the law; and with the foregoing and a few more special exceptions, such as the confession of an accused person unduly or illegally obtained, (*m*) it may be stated generally that all facts which afford the slightest legitimate inference of a material fact are deemed to be relevant, and may be proved by competent evidence.

507. The result of our examination of the relevancy of facts may therefore be summed up as follows:—

(1) A fact may be irrelevant because it is totally unconnected, directly or indirectly, with any of the facts in issue.

(2) A fact may be irrelevant, because the inference suggested is not a legitimate one, *i.e.*, because the fact consists of mere statement expressed by language, or *Hearsay;* or of statement implied by conduct, or *Res inter alios acta.* And even where the fact proposed for

(*l*) Best Ev., s. 256. (*m*) Ante, s. 488.

proof is connected by a legitimate inference with a material fact, and, naturally speaking, raises a fair presumption of it, the fact may still, with certain exceptions, be deemed to be legally irrelevant, on the ground that it relates—

(1) To the character of a party to a *civil* suit.

(2) To the character of the defendant in a criminal proceeding.

(3) To some *other* offence committed by an accused person; or it may be deemed irrelevant.

(4) For some other more special reason.

With these exceptions, all facts which give rise to any presumption of a fact material to the issue are deemed by our law to be relevant. Mr. Best, however, lays down the further qualification that there must be '*an open and visible connection* between the principal and evidentiary facts.' (*n*) But this, I apprehend, means little more than that there must *be a connection*. It is true that the court (or judge) must *see* the connection; for since, when any question arises as to the relevancy of a fact, the judge must decide it; it is obvious that if he cannot be brought to perceive the link of probability that connects the two, the result must perforce be precisely the same as if there were no such connecting link. In this case the maxim, 'De non apparentibus et non existentibus eadom est ratio' (*o*) would seem to apply.

508. But besides the facts which raise a *legitimate* presumption of some other fact material to the issue, there are certain statements which, though they give rise, naturally speaking, to no such legitimate inference, are yet deemed by our law to be relevant to, or, in other words, are accepted as 'evidence' of, the facts stated in them. These are all comprised either under some of

(*n*) Best Ev., ss. 90 and 264.

(*o*) Best Ev., s. 38.

the recognised exceptions to the rule against *hearsay*, (*p*) or under the head of public documents or official written narratives. (*q*) Such facts, though they be in reality connected with the issue only as statements, are nevertheless, as just remarked, deemed by law to be relevant, and received in proof of the facts to which they relate. Wherever, therefore, they contain the narrative of any material fact, they become receivable, and must in a legal view be added to the list of facts relevant to the issue; though, as I have just stated, (*r*) they are facts of very imperfect and questionable relevancy.

(*p*) Ante, s. 353. (*q*) Ante ii., chap. 13. (*r*) Ante, s. 503.

CHAPTER XXI

THE 'ONUS PROBANDI'

509. THERE is another subject closely connected with judicial evidence which demands some notice. It is the question of the *onus probandi*, or burden of proof; the question, *i.e.*, which of the two contending parties is bound to prove his case under penalty of being defeated if he fails to do so.

At the first glance it would appear as if this onus or burden must always lie on the complainant or plaintiff in civil cases, and on the accuser or prosecutor in a criminal proceeding. And in criminal cases this is, I think, the invariable rule in the first instance, except where the accused rests his defence on a previous conviction, acquittal, or pardon for the same offence. In civil cases, too, it is the *general* rule; but here, on the other hand, it happens not infrequently that the defendant, instead of denying the case alleged against him by the plaintiff, formally admits it, wholly or in part, either by pleading in 'confession and avoidance,' or by a deliberate acknowledgment in open court; (*s*) and founds his defence on some fresh ground of fact, which he in his turn asserts. Moreover, the question does not arise only in the first instance. Both in civil and criminal cases, it is continually presenting itself in the subsequent stages of the trial; for the *onus probandi* is liable to be shifted at almost any juncture by a rebuttable presumption of law, or a strong presumption of

(*s*) *Vide* Taylor Ev., s. 350.

fact. (*t*) And thus it comes to pass that the burden of proof, which, it may be observed, carries with it the *right to begin*, often becomes a most debatable question.

510. The rule of the civil law for deciding the *onus probandi* was expressed by the maxim, 'Ei incumbit probatio, qui dicit; non qui negat'; (*u*) a rule which has been adopted, in theory at least, by our own tribunals; (*v*) in conformity with which, the burden of proof is said to lie on the party who states the affirmative, and not on the party who states the negative; but this, add the authorities, must be understood to mean the affirmative in substance, and not the affirmative in form. (*w*)

This is a very reasonable and necessary qualification, for it is obvious, as has been shown in a former chapter, (*x*) that the negative character of the fact expressed by a proposition or averment is by no means necessarily determined by the negative form of the proposition in which it is enuntiated. A proposition, logically and grammatically speaking affirmative, is frequently negative in substance, and *vice versâ*. And in many cases the party, by making a slight alteration in the language of his pleadings, may render the issue affirmative or negative at pleasure. (*y*) Thus, in alleging a breach of contract, the plaintiff may state either that the defendant 'did not perform his contract,' which is grammatically negative; or that he 'neglected or failed to perform his contract,' or that he 'broke the contract,' which are grammatically affirmative. The dictum in question must therefore be understood as casting the *onus probandi* upon the party who alleges the affirmative in substance, and not merely the affirmative in form.

(*t*) *Vide* Best Ev., s. 273.
(*u*) *Vide* Best. Ev., s. 269.
(*v*) *Vide* Powell Ev., 237.
(*w*) *Vide* Best Ev., s. 272.
(*x*) Ante, s. 89 and *seq.*
(*y*) *Vide* Taylor Ev., s. 337.

511. Now, if this were really the only rule by which our tribunals were guided in ascertaining on which side the burden of proof lies, if our courts could uniformly decide the question by requiring the party asserting the positive fact to establish it, and exonerating the party denying it from the proof of the negative, the question would present no further difficulty than what is involved in drawing the distinction between the positive and negative fact. This, however, is by no means universally true. On the contrary, we find that in actual practice our courts do by no means invariably absolve the party who avers a negative fact as part of his own case from the burden of proving it. Thus the onus of establishing the absence of consideration for a bill of exchange or promissory note is generally cast upon the party who sets it up as a defence to an action upon the instrument. (*z*) So, also, where a party impugns the legitimacy of a child born in wedlock, the onus of proving the non-access of the husband will lie upon him. (*a*) So, a landlord has been required to prove the fact that certain premises were not insured against fire by his tenant. (*b*) And many instances are to be found in our books where parties have been called on to prove want of notice, (*c*) want of consent or license, (*d*) and other negative facts of the same character. Indeed, in criminal matters the rules of the common law on this subject were found so inconvenient that the Legislature has, in many instances, interfered to relieve the prosecution from the burden of proving such negative facts. (*e*) This, however, only tends the more to establish the position, that the maxim, 'Ei incumbit probatio, qui dicit; non qui negat,' in whatever sense it be understood, cannot

(*z*) *Vide* Taylor Ev., s. 340.
(*a*) *Vide* Powell Ev., p. 243.
(*b*) Taylor Ev., s. 339.
(*c*) Taylor Ev., s. 339.
(*d*) Taylor Ev., s. 344.
(*e*) Taylor Ev., s. 345, etc.

be accepted as a safe guide for determining the *onus probandi.*

512. No doubt the positive or negative quality of the fact to be proved does exercise an important influence on the question, as to which of the two parties is to be called on to prove it; for it is undeniable that *proof* is intrinsically more simple, more certain, and more direct than *disproof.* But it is equally clear that the question cannot be decided solely by this standard; there being other considerations which must necessarily affect it; such as the definite or indefinite character of the negative itself; the question how far it is qualified by time, place, or circumstance; (*f*) by which side it is averred;—how far it is within the knowledge of that party;—the antecedent probabilities of the case;—and so forth.

The following test for determining on which side the *onus probandi* lies was propounded by Alderson B. in the case of Amos *v.* Hughes, (*g*) namely, that it lies on the party who would be unsuccessful if no evidence were given on either side, or upon the party who would fail if the particular allegation in question were struck out of the pleadings. (*h*)

It is, indeed, hardly possible to devise any better general formula for ascertaining the *onus probandi.* It must obviously be decided in the first instance by the state of the pleadings as tested by the above dictum. But in many cases the party, on whom the onus originally lies, is not compelled to carry his proof beyond a certain point; it is frequently sufficient for him to establish a *primâ facie* case; when the *onus probandi* will be shifted by a *presumption,*—whether a rebuttable presumption of law, or a strong presumption

(*f*) *Vide* Best Ev., s. 270.

(*g*) 1. Mood and R., 264, Best Ev., s. 268, and Powell Ev., 238.

(*h*) *Vide* Taylor Ev., s. 338.

of fact, (*i*) to the other party, who will then be required to rebut the presumption (either conclusively or *primâ facie*, as the case may be), at the risk of being defeated if he fails to do so.

513. In short, the rules that regulate the burden of proof form a portion of the law and doctrine of presumption; and though they depend in some measure on the negative or positive complexion of the facts alleged on either side; yet they are by no means uniformly dictated by that consideration, but, like the doctrines of presumption in general, are to a great extent arbitrary, uncertain, and we may perhaps add, inconsistent. The actual state of the law on the subject can, therefore, only be learnt by a study of decided cases.

(*i*) *Vide* Best Ev., s. 273.

CHAPTER XXII

THE RULE REQUIRING THE BEST EVIDENCE

514. It has been said by a most eminent judge in a most important case, that 'the judges and sages of the law have laid it down that there is but *one general rule of evidence, the best that the nature of the case will admit.*' (*j*) And Lord Chief Baron Gilbert, to whom principally we are indebted for reducing our law of evidence into a system, says: 'The first and most signal rule, in relation to evidence, is this, that a man must have the utmost evidence the nature of the fact is capable of.' (*k*) 'The true meaning of the rule of law that requires the greatest evidence that the nature of the thing is capable of is this: That no such evidence shall be brought, *ex naturâ rei*, supposes still a greater evidence behind, in the party's own possession and power.' (*l*) And in another old work of authority (*m*) it is said: 'It seems in regard to evidence to be an incontestable rule that the party, who is to prove any fact, must do it by the *highest* evidence the nature of the thing is capable of;' and similar language is to be found in most of our modern books.

515. Mr. Best, from whose work the foregoing statement of the rule requiring the best evidence is extracted, (*n*) proceeds in conformity with it to divide all evidence into (1) Original, and (2) Unoriginal or

(*j*) Lord Hardwicke Ch. in Omychund *v.* Barker. 1. Atk. 21, 49.
(*k*) Gilbert Ev., 4, 4th ed.
(*l*) Gilbert Ev., 16. (*m*) Bacon's Abridgm. Ev. 1, ed. 1,736.
(*n*) Best Ev., s. 87.

derivative. (*o*) But it is manifest that he experiences no small difficulty in the attempt to reconcile this rule or doctrine of theory with the other more specific rules of evidence, by which the practice is actually regulated. 'The important rule in question,' he says, (*p*) 'has been very often misunderstood; partly from the *ambiguous nature of the language* in which it is enuntiated, and partly from its being commonly accompanied by *an illustration which has been confounded with the rule itself*.' But in what respect, we may well ask, is the language of the rule ambiguous? 'All evidence shall be the best'—or 'the highest,'—'that the nature of the case'—'of the fact'—'of the thing'—'will admit'—'is capable of.' There does not in truth appear to be any ambiguity in this language in itself. The ambiguity, if any there be, must arise from the difficulty of *applying* the rule itself to the subject matter;—from some incongruity between the language of the rule and the practice of our tribunals. 'Sometimes,' continues Mr. Best, (*q*) (the rule) 'has been misunderstood, as implying that the law requires in every case the most convincing and credible evidence which could be produced under the circumstances.' This is most certainly the meaning, not only implied, but unequivocally expressed by the language of the rule. Then why, we may ask, is it *mis*understood in this sense? and why, as he adds afterwards, (*r*) 'do all the authorities agree that this is not its meaning?' This is the undoubted meaning conveyed by the language of the rule: and if it does not mean this, it has no meaning at all, or any meaning we choose to attach to it.

516. 'Evidence shall be the best that the nature of the case will admit.' This language would seem to pre-

(*o*) Best Ev., ss. 29, 89 and 472. (*p*) *Id.*, s. 87.
(*q*) Best Ev., s. 87. (*r*) Best Ev., s. 87.

suppose in every case a sort of preliminary inquiry as to what *is* the best evidence that the nature of the case will admit. That preliminary question being disposed of, and the best evidence being ascertained and selected, the rule then proceeds to insist on that alone being adduced to the exclusion of all other. Now in practice, nothing like this ever takes place, except in the comparatively limited instance of primary and secondary evidence; that is to say, whenever it appears that the *contents* of a written document, or the *due execution* of an instrument requiring attestation for its validity, are in question; in the first of which cases our laws insists on the production of the writing; in the second, of the attesting witness. And it is the former, and far more important of these two cases, that is uniformly cited, as Mr. Best remarks, (*s*) as an illustration of the rule. No wonder that 'this illustration has been confounded,' as he observes, (*t*) 'with the rule itself,' when in real truth, it is all but the sum total and full extent of the rule,—we might almost say the full extent of the rule; for the case of attesting witnesses is so limited and insignificant an exemplification of it, as scarcely to be worth reckoning.

517. And in all other instances, the rule is a dead letter. For, as we have formerly seen, (*u*) when the absence of an original document has been satisfactorily accounted for, the law draws no distinction between the different forms of secondary evidence, but will admit without distinction any legitimate proof of the contents that may be forthcoming, whether it consist of a copy, or of the oral testimony of a witness who states the contents of the original document from mere recollection; and this, though it is obvious that a properly proved copy affords far better and more trustworthy evidence of such

(*s*) Best Ev., s. 87. (*t*) *Ibid.*
(*u*) Ante, s. 339.

a fact than mere oral evidence. Nor, again, does our law recognise any distinction in admissibility between direct and circumstantial evidence, nor, except in the case of writings, between real and oral, though direct is essentially superior to indirect, and real to oral evidence.

518. The real truth is, that, except in the limited instance of primary as opposed to secondary evidence, the law has in general only one standard for the reception of evidence; not that it shall be the *best* that the nature of the case will admit, but in every case, whatever be its nature, that all facts relevant to the issue shall be proved either by real evidence; *i.e.*, by manifestation to the perceptive faculties of the tribunal itself, or, at the least, by oral evidence; *i.e.*, by the narrative of a personal observer of the fact to which he deposes, delivered upon oath in open court. In the two instances of the contents of a writing, and the execution of an attested instrument, and in these two only, are the requirements of the law modified or varied by the nature of the case. In these two alone do our courts reject evidence, which they would accept as legitimate in any other.

And further, whatever be the nature of the case;—however impracticable it may be to procure the sworn testimony of a personal observer, nothing inferior to this will, as a general rule, be admitted as evidence at all. Thus, as Mr. Best is fain to admit, (*v*) 'what A (a witness) has heard B (a stranger) say, is not only not admissible in the first instance, but the clearest proof of the death, or of the complete and incurable lunacy, of B would not render it admissible.' The result of all which is to show, that not only is it not true, that our law universally requires 'the best evidence that the nature of the case is capable of,' but that it will not even accept the best evidence, if that evidence falls short of a certain standard.

(*v*) Best Ev., s. 494.

519. Bentham's observations on this subject, though somewhat vituperative in style, are yet in substance very much to the purpose. 'Oh,' he exclaims ironically, (*w*) 'but we have a rule about the *best evidence;* viz., that in no case shall any evidence be received but the very best which the nature of the case admits of. Preciously instructive rule! *we receive no evidence but what we receive;* for anything more precise, or intelligible, or wise, or honest than this will not be found in it. No evidence do we ever receive, other than the *best* evidence. And what is the best evidence? Answer: It is on each occasion, that which we receive as such. They know not themselves what their own rules are. Strange indeed it would be if they did: for *that which has no existence*, how is it to be known to anybody?'

520. And yet though the rule is neither 'precise,' nor 'intelligible,' nor 'wise,' nor, in short, conformable to the practice, I cannot agree with Bentham in the suggestion that there is anything *dishonest* about it. There is something so attractive in the idea of uniformly requiring the best evidence, and rejecting all other; something so promising in the prospect of reducing the whole art of proof to a single rule of universal application, that it is hardly surprising if in the infancy of the study, when the principles of evidence were but dimly understood, this rule, being once solemnly enuntiated, was eagerly seized upon with the very best motives, as a solution of all difficulties, and a sovereign remedy for all perplexity. We are reminded of the antiquated theory formerly obtaining in the art of chemistry; namely, that all substances are reducible to some one or more of the four so-called elements of earth, air, fire, and water: a very simple and convenient theory doubtless, but unfortunately utterly untrue. And it is the same with the present rule. Nothing can be more

(*w*) Benth. Ev., iii. 646.

simple; we uniformly require in every case the *best* evidence. But unhappily it is totally impracticable. We find ourselves, for the most part, wholly incapable of ascertaining what evidence is the best on each occasion, nor can we, therefore, insist on its being adduced. We can only fix our standard. We can say: Either *show* us what we are to believe, or let us be informed on oath by one who *knows*. On each occasion we can accept what reaches this standard, and reject all evidence that falls short of it; but further than this we find it, as a general rule, impracticable to carry our scrutiny of the evidence that is presented to us.

521. The truth is, that the objections to different kinds of evidence rest on totally different grounds. The objection to the secondary evidence of the contents of a written document is founded on two considerations: first, the superiority of *real* evidence, or manifestation, over *oral* evidence or testimony; and secondly, the uniform physical aptitude of writings for production in a Court of Justice. The objection to hearsay or 'second-hand evidence,' on the other hand, is based on the superior trustworthiness of the narrative of a sworn witness, personally delivered, over that of any other form of narrative. And accordingly we find that all practical exponents of evidence, when they come to apply the rule requiring the best evidence to practice, and to treat the question in detail, are compelled to divide the subject into at least two branches; namely, first, Primary and Secondary evidence; and secondly, Original and Derivative or second-hand; (*x*) or, what is the same thing, Oral evidence and Hearsay. The first of these two heads discloses a very partial and limited fulfilment of the rule in question. The second is not a fulfilment of the rule at all, but the establishment of a fixed standard for every case.

(*x*) Best Ev., Bk. ii., chaps. iii. and iv., pp. 595 and 627.

522. I trust that I have now said enough to convince the reader that the rule requiring the best evidence that the case will admit, considered as a rule of universal application, is a mere chimera, existing in theory, and legal phraseology only, and possessed of no real meaning, except as applied to the case of Primary evidence. In all other directions it is unsound and impracticable. It would be far better, therefore, that so faulty a dictum should be discarded altogether. Its absence would have little or no effect to alter the actual practice, which is sufficiently defined and regulated by more tangible rules. Indeed, in my humble opinion, except by the absence of the confusion which it tends to produce, the rule would never be missed at all.

CHAPTER XXIII

'RES INTER ALIOS ACTA ALTERI NOCERE NON DEBET' (*y*)

523. THREE distinct principles are usually referred to the tenour of this maxim, and are very commonly confounded with each other in consequence.

The first of these is rather a branch of the substantive law relating to principal and agent or principal and accessory, than a rule of evidence. It is this: That no person is liable or responsible for the act of another, who is not his agent, or acting under his authority, at his instigation, or with his connivance. In conformity with this view, Mr. Best interprets the maxim thus: (*z*) 'No person is to be affected by the words or acts of others, unless he is connected with them either personally, or by those whom he represents, or by whom he is represented.'

It is on this principle that no evidence of acts of bribery or treating will be received on the trial of an election petition against a member of Parliament until it has been clearly established that the person, to whom they are imputed, is the agent of the member. And on the same ground, the act of an accused person is not allowed to weigh against another, unless it appear that they were both actuated by a common intent to commit the act in question. This, as previously remarked, is clearly a rule of substantive law, and not of evidence; though, like many other rules of substantive law, it may well come in question in ascertaining the *quid*

(*y*) Best Ev., s. 506. (*z*) *Ibid.*

probandum—that is, in determining what facts are, and what are not, relevant to the particular case. (*a*)

524. The second of these three principles, too, has scarcely a greater claim to rank as a rule of evidence proper than the first. It is in reality a branch of the rule confining evidence to the points in issue. It is the rule that 'excludes all evidence of *collateral facts*, which are incapable of affording any reasonable presumption as to the principal matters in dispute,' (*b*) *i.e.*, that excludes the evidence of all extrinsic or would-be evidentiary facts, from which no fair or legitimate inference can be drawn as to any fact which is really material. The class of spurious or professed evidentiary facts, which are generally referred to the language of this maxim, and rejected as *res inter alios actæ*, are the acts of one of the parties to a suit in dealing with strangers, on other occasions than the one in question. For, as Mr. Powell observes, (*c*) 'the fact that A contracted or dealt in a particular manner with B is no evidence (*i.e.*, affords no fair inference) that he meant to contract or deal in the same manner with C. Thus, in an action for goods sold and delivered, in which the defence is that the plaintiff sold them to the defendant on certain terms, the defendant cannot show that the plaintiff has sold the same quality of goods to other persons on the same terms; for the fact that a man has once or more acted in a particular way does not make it probable that he so acted on a given occasion.' 'So also,' he says, (*d*) 'in an action by a brewer against a publican, where the issue was as to the quality of beer supplied by the former to the latter, Lord Ellenborough refused to let the plaintiff call witnesses to show that he supplied them at the time in question with good beer. His Lord-

(*a*) *Ante*, s. 257. (*b*) *Vide* Taylor Ev., s. 298.
(*c*) *Vide* Powell Ev., 288. (*d*) Powell Ev., 289.

ship said: "This is *res inter alios actæ*. We cannot here inquire into the quality of different beer furnished to different persons. The plaintiff might deal well with one, and not with the others."' So the terms on which one tenant holds are 'no evidence' of the terms on which another tenant holds under the same landlord. (*e*) This kind of evidence is simply the proof of irrelevant facts.

525. But there is yet a third principle, which is frequently referred to the language of the maxim under consideration; though, properly speaking, it is but a branch of the rule against hearsay, and therefore in every sense a rule of evidence. It may be stated as follows: That the acts or conduct of a stranger to the suit, whereby he evinces his supposed knowledge of a material fact, are equally inadmissible in proof of that fact, as his language or statement would be, if not delivered in person and on oath; (*f*) or, to put it more strongly, that the language of conduct, when it emanates from a stranger (or even from a party, if it be not the party against whom the evidence is offered), is just as much hearsay as the language of words. (*g*) This last is a rule of evidence proper, as it is closely connected with the *modus probandi* itself. This species of spurious evidence is classed by Mr. Taylor in one place (*h*) as a kind of hearsay. He there styles such matter 'statement expressed in the language of conduct instead of the language of words,' and, as an instance of it, he cites the conduct or acts of the relatives of a person whose sanity is in question, in treating him as a lunatic or otherwise. These acts were objectionable as proof of his lunacy, because they were mere statements expressed in the language of conduct instead of the language of words—that these relatives know him to be insane—statements

(*e*) *Vide* Powell Ev., 290. (*f*) Ante, ss. 193 and 361.
(*g*) *Vide* Taylor Ev., s. 511. (*h*) Taylor Ev., ss. 510 and 511.

which, if received at all, should have been delivered openly on oath by the relatives themselves.

526. On the other hand, in another place, (*i*) we find precisely the same kind of evidence referred to the head of *res inter alios actæ*. One of the instances there adduced is the proof of bankruptcy at a particular time, afforded, in an action by the assignees of a bankrupt against one creditor, by the acts of other creditors in returning goods to the assignees. (*j*) 'The only way,' he there remarks, 'in which their conduct bore upon the case was by showing their conviction that they had received the goods under circumstances which did not entitle them to keep possession'; 'and,' he proceeds to explain, 'as their opinions expressed after the fiat could not have been received, evidence of their acts, adduced for the purpose of raising an inference respecting the previous intentions either of themselves or of the bankrupt, were equally inadmissible.' This explanation, however, hardly goes to the root of the matter. The acts of these other creditors were not inadmissible as *opinions* only, but equally so as expressing their *positive knowledge* of the fact that acts of bankruptcy had been previously committed. They were really, though expressed in the language of conduct and not of words, mere statements of that fact on the part of the creditors, and were inadmissible, because such statements, to render them receivable at all, should have been delivered openly upon oath by the creditors themselves. (*k*)

527. To this last form of *res inter alios actæ* belongs also that kind of evidence which falls within the scope of the maxim: *Res inter alios judicata alteri nocere non debet*. In a previous chapter, (*l*) we have discussed the question, how far a record affords, in a rational

(*i*) Taylor Ev., ss. 318 (299). (*j*) Ante, s. 361.
(*k*) *Vide* Ante, s. 363. (*l*) Ante, s. 397 and *seq.*

view, conclusive or satisfactory evidence of the act or judgment of the tribunal. But the maxim, *res inter alios judicata*, etc., has reference to the question, how far the act of the Court, when established, furnishes proof of the facts which it decides incidentally, or, in other words, of the facts upon which its decision must necessarily have proceeded. We have already seen that a Record is deemed in contemplation of law to furnish incontrovertible proof of the act of the tribunal. (*m*) And there are certain facts which are necessarily involved in this proof;—facts which constitute what Mr. Best designates the *substantive*, as distinguished from the *judicial* portion of the record; (*n*) and which are described by Mr. Taylor as the existence of the judgment with its date and legal consequences. (*o*)

528. But a Record, even though it be regarded as conclusive as to these, is by no means, therefore, necessarily conclusive as to any extraneous facts upon which the judgment must have proceeded, or which it necessarily implies, such, for instance, as the facts in issue. One or two examples will perhaps serve to illustrate the distinction. If a man was sued by another for money lent, and judgment were recovered against him; this judgment, when established, would necessarily be conclusive as to the existence of the judgment debt (since it is created by the act of the Court), of its amount, and of the defendant's liability to pay it, as well as of the date from which his liability commenced. But, naturally speaking, it would not be conclusive as to the previous existence of any ground or consideration for the judgment debt—not conclusive, *i.e.*, of the actual loan of the money by the plaintiff, that being an extrinsic fact, of which the judgment is, at best, an authoritative *statement* or assertion. So, if a man were sued for a debt

(*m*) Ante, s. 397. (*n*) *Vide* Best Ev., s. 590; Ante, s. 397.
(*o*) *Vide* Taylor Ev., s. 1,480.

contracted by his alleged wife, and judgment were recovered against him on the ground of an actual marriage, this would necessarily involve a liability on the part of the alleged husband to pay the debt; but would only imply the fact of his marriage. And so, if a man were convicted of felony, the proof of the conviction necessarily involves his liability to undergo the punishment awarded to him (since the act of the tribunal renders him so liable), and is conclusive too as to the time from which this liability to punishment dates; but it does not necessarily involve his guilt (since he may have been wrongfully convicted), and is not necessarily conclusive as to his having committed the offence in question, nor even as to the actual day on which he was tried for it. And therefore, though in conformity with the maxim, *Res judicata pro veritate accipitur*, (*p*) a judgment is deemed in contemplation of law to be binding and final, even as to such implied facts, against the *parties* to the proceeding in question; yet as against the world in general, it is mere *res inter alios judicata*, and not even *receivable* in evidence of the facts upon which the judgment has proceeded. (*q*)

529. The strictness and exclusionary nature of this rule has been somewhat impugned in modern times both by Bentham, (*r*) and other writers. For my own part, however, I cannot but regard the total exclusion of *res inter alios judicata* as a signal instance of the sagacity of our forefathers. For a judicial act, when viewed as evidence of the extrinsic facts which it implies, is a form of *statement*, not only unsubstantiated by the oath and personal presence of the person or persons who propound it, but it is a statement in great measure founded on hearsay and opinion, and not on the personal know-

(*p*) *Vide* Best Ev., ss. 44 and 588.
(*q*) Taylor Ev., ss. 1,480 and 1,495.
(*r*) *Vide* Benth Ev., iii. 431 and 432, and Best Ev., s. 590.

ledge of those from whom it emanates. For the jury are expressly prohibited by the tenour of the maxim, *Non refert quid notum sit judici, si notum non sit in formâ judicii,* (*s*) from deciding facts on their own personal knowledge acquired out of court, and the testimony of the witnesses, on which the verdict or judgment is to a great extent based, is, in relation to the second proceeding, mere hearsay. Besides which, *opinion* necessarily forms a large ingredient in all verdicts and judicial decisions, for it is the express province of the jury to draw *inferences* from the facts laid before them at the trial. On these grounds, therefore, I must express my complete concurrence in the justice of the observation once made by Mr. Best, (*t*) that *res inter alios judicata* 'is *res inter alios acta* in its most dangerous form, as being apparently attested and sustained by the authority of the administrators of the law.' To revert from *res inter alios judicata,* to the subject of *res inter alios acta* generally.

530. It appears that the language of this maxim is called upon to do duty as ground of objection to at least three kinds of defective evidence, or, more properly speaking, of irrelevant fact. Almost every act, which, while seeming to bear on the point in question, is on a more minute analysis found to be irrelevant, is referred to the category of *res inter alios actæ* for its condemnation. The natural and inevitable consequence of this course of procedure is that the several grounds of objection in each case become merged in a common confusion. Whereas it is highly desirable that the distinction between each should be carefully preserved, lest we be led to accept for valid proof that which is really no proof at all; or, on the other hand, to reject as defective that which is really unexceptionable evidence.

531. The case of the Kirkstall Brewery Co. *v.* the

(*s*) *Vide* Best Ev., s. 88. (*t*) Best Ev., p. 699, 2nd ed.

Furness Railway Co. (*u*) furnishes an instructive instance of this kind of error. It was an action for the loss of a packet of money entrusted by the Brewery Co. to the Railway Co., and the chief question at issue was, whether the parcel had, or had not, been stolen by a porter, one of the servants of the Railway Co. In proof of this fact, it was proposed on the part of the plaintiff to show that the station-master at the station where the parcel was lost had directed the apprehension of this porter on the charge of stealing it. The Court admitted evidence of this fact on the ground that the station-master had the implied authority of the Railway Co. to direct his apprehension; in other words, on the ground that the Railway Co. as principals were responsible for the act of the station-master as their agent.

But with due deference to the opinion of the learned judges by whom the case was decided, I do not see how this altered the case at all. The question in dispute was, not the apprehension of the porter, but his guilt; and the fact of his guilt was not a legitimate inference from the act of the station-master in directing him to be apprehended. (*v*) The inference of his guilt drawn from that act was founded on the *knowledge* of the station-master evinced by his voluntary action. To adopt Mr. Taylor's phraseology, (*w*) the only way in which the conduct of the station-master bore upon the question at all, was by expressing his *conviction* that the porter had stolen the parcel. It was a statement by him, that the porter was guilty, expressed in the language of conduct. Whereas the Court seem to have treated the question as if it arose in an action for false imprisonment or malicious prosecution brought by the porter against the Railway Co.; in which case their liability for the act of the station-master would have formed one of the principal questions in issue,

(*u*) 9 Law Rep. 2b. 468. (*v*) Ante, s. 175.
(*w*) *Vide* Taylor Ev., s. 299, and Ante, s. 526.

and would of course have depended upon the authority, express or implied, which he had received of them. But here the real point was, not whether they as principals were liable for his *acts* as their agent; but whether they were liable to be affected by his *statements* (in the language of conduct) considered in the light of *admissions*. If they were liable to be affected by his admissions, the evidence was properly received; if not, improperly.

CHAPTER XXIV

OF THE 'RES GESTÆ'

532. We have seen that almost any phrase of language, or portion of discourse, whatsoever is capable of assuming the aspect either of a principal or an evidentiary fact in relation to any question which may form the subject of inquiry for the time being. (*x*) Thus the phrase, 'John Smith is dead,' is a mere narrative or statement in relation to the question of John Smith's death; but if the subject of inquiry be whether the hearer or reader of the statement *had notice*, or *was aware* of John Smith's death, the language at once assumes the aspect of a substantive fact in relation to the question of notice. In short, the proof of the utterance of the language (assuming it to reach the mind of the party to be affected by it) is in such case proof of the fact of notice itself, and the truth or falsehood of the proposition contained in it does not come in question at all in estimating such proof.

533. Now in laying a case before a jury, or any other kind of tribunal, there are usually a number of minor facts to be death with, not strictly speaking relevant to the principal question or questions in issue, but more or less material, nevertheless, in filling up the history of the case, and making the tale a plausible, coherent, and intelligible one. Thus in a case of murder, or of larceny, a witness is not allowed to state at once, and without any introduction, the principal facts of the crime:—he is not permitted, for instance, to say simply and abruptly, at

(*x*) *Vide* Ante, s. 190, and *seq.*, and s. 282.

such a time and place, 'I saw the prisoner stab the deceased,' or 'I saw the accused snatch the prosecutor's watch out of his pocket, and run away with it,' but he is gradually led through a series of preliminary or introductory circumstances into the situation in which he had an opportunity of observing those facts which are really material to the issue.

Thus the examination of a witness in a case of this kind usually proceeds somewhat after the following fashion: 'On the evening of such a day I left my work at such an hour: I went into such a public-house: I found A, B, and C there: I sat there drinking with them for about an hour, when the deceased came in: The prisoner came in about half an hour afterwards; and so on.' These minor facts, together with the main facts of the case, principal and evidentiary, form collectively the *res gestæ* or history of the case. But it is to the minor facts before described, that the title of *res gestæ* is more particularly applied; and I think I shall not be far wrong in asserting, that it is these minor facts which occasion the most perplexing of those questions of evidence which are referred to this head.

534. For it frequently happens that the language or conversations of persons who are not parties to the suit, and whose statements are not receivable as admissions or confessions, form part of the *res gestæ* in the aspect of substantive facts. Now we have already noticed, that considerable difficulty often arises in discriminating whether a given phrase of language or portion of discourse is relevant to the inquiry as a substantive fact; or whether it bears upon it only as a statement or communication. (*y*) And if this difficulty occurs even in proving the main facts of the case, much greater is the perplexity that we encounter from the same cause, when

(*y*) Ante, s. 198.

we come to the proof of a multitude of minor details constituting the *res gestæ*.

A phrase of language or conversation which claims to be a substantive part of the *res gestæ*, like any other, may, as we have seen, (*z*) contain propositions or statements of extrinsic fact, or may not do so. Again, if it does contain any such statements, the extrinsic facts thus stated may, or may not, be relevant in any way to the subject of inquiry.

But so far as any extrinsic facts relevant to the case are stated or expressed by the language, so far is the reception of such language or conversation objectionable as tending to establish material facts by means of statement or 'hearsay evidence.' And the more important these material facts are, the more objectionable is the admittance of the language in which they are stated. But, on the other hand, so far as the language constitutes in itself a substantive fact relevant to any the most insignificant of the minor facts in the history of the case, so far its reception cannot, strictly speaking, be said to be either irrelevant to the inquiry, or improper as a mode of proving those facts, unimportant though they be. And the less insignificant the fact is, of which the language forms the substance, the more desirable does it become, that it should not be excluded.

535. Hence it frequently comes to pass, that in weighing the propriety of admitting or rejecting the evidence of a given piece of language or conversation, we are encountered by a balance of conflicting advantages and disadvantages;—of advantages, so far as the language forms in itself a substantive fact properly relevant to any of the *res gestæ*;—of disadvantages, so far as the same language contains the statement of any material fact. It is a dilemma from which there is no complete escape.

(*z*) Ante, s. 189.

The stereotyped phrase so familiar in the mouth of officers of justice, when giving evidence, 'from information I received,' is an instance of a device for evading such a difficulty. The 'information' which the witness received, *i.e.*, certain language addressed to him, forms a substantive fact, or part of the *res gestæ*, as serving to show the motive which prompted him, say in a case of larceny, to fix upon a particular person as the culprit,—to go to a particular place to apprehend him,—to search in a particular spot for the stolen property,—or, in short, to explain what led him to act in a particular manner. In this aspect the conversation or language forms part of the *res gestæ*, making the account, which the witness gives of his proceedings, coherent and intelligible, and so affecting the plausibility of his narrative, and consequently, in a greater or less degree, the credibility of every part of his story. On the other hand, such 'information received,' or communication, usually contains the statement of a fact, or of facts most momentous to the main inquiry,—of facts which frequently involve the whole question at issue; namely, the guilt of the accused. In this case the phrase in question serves to carry on to a certain extent the thread of the witness's narrative, while by suppressing the *details* of the 'information,' it effectually excludes the statement or 'hearsay evidence' of any material fact.

536. But it is not always that so satisfactory a compromise can be effected. In many cases we are driven to the alternative of excluding evidence of part of the *res gestæ* altogether, or of admitting 'hearsay evidence' of some material fact. I shall not attempt to dictate the course to be pursued under such circumstances. From a purely theoretical point of view, such evidence should always be received, since the facts which it tends duly to establish are not wholly irrelevant; but it may often become questionable how

far such a course is practically expedient. This must depend in each case on the relative importance of the language itself regarded as a fact, and of the extrinsic fact which it discloses. The problem is one which can hardly be solved by an appeal to any inflexible rule, and which must, therefore, be left in great measure to the discretion of the judge. (*a*) At the same time, I may perhaps venture to suggest that the following rule on the subject may possibly be found useful. Where a declaration involves the statement of a material fact, it should not be admitted, unless it is relevant *per se* (as a fact) to some of the facts in *issue*. It should not be admitted merely because it tends to preserve the connection or coherency of the story.

537. But in the absence of any fixed rule to appeal to, it becomes all the more desirable that the nature of the difficulty which frequently arises, when conversations form part of the *res gestæ*, should be fully understood. And this, I regret to say, it scarcely appears to be. For looking to some of the decided cases on the subject of the *res gestæ*, it would almost seem to be supposed that the more closely a *statement* is connected, whether in point of time or of matter, with some material fact, the greater claim it has to be admitted as part of the *res gestæ*. On no other ground, for instance, can the reception be justified of declarations which accompany an act, but have no effect to alter its character. (*b*) Whereas in a rational view, the close connection of a statement with the question at issue is rather a reason for its exclusion, than for its admission. It is not because a phrase of language, or declaration, is connected either closely or remotely with the subject of inquiry as a *statement*, that it can claim to be received as part of the *res gestæ*; but because it bears upon some part, trivial or vital, of the history of the case as a *fact*.

(*a*) *Vide* Taylor Ev., s. 520. (*b*) *Ante*, s. 359.

CHAPTER XXV

OPINION EVIDENCE

538. A WITNESS, as we have already seen, (*c*) is in general allowed to speak only as to facts within his own knowledge, *i.e.*, as to facts of which he has been himself the percipient; and moreover, he must speak as to *facts* only; hence it follows that the *opinions* of witnesses are not in general receivable in evidence. (*d*) But this rule is liable to be misunderstood from the equivocal character of the words, 'think,' 'believe,' and 'opinion.' The words, 'think,' and believe,' have at least two distinct meanings. In one sense they imply, not that the knowledge of the believer is not derived directly and exclusively from his own observation, but that it is not a complete and certain knowledge. When a witness says, 'I think,' or 'I believe that such and such a fact occurred,' or 'that the words used were so and so,' he frequently does not intend to intimate that the precise fact itself did not fall under his own personal observation; but that his recollection of what took place, or of the exact words that were used, is not sufficiently distinct, or that his perceptions at the time were not sufficiently keen to permit him now to feel sure that the fact really did occur precisely as he states it. He does not mean to imply that his knowledge of the fact is not derived solely from his own perceptive faculties, but that it is not quite a complete and certain knowledge. Now the

(*c*) Ante, s. 347.

(*d*) *Vide* Best Ev., s. 511, and Taylor Ev., s. 1,271.

rule in question is not intended to exclude this kind of partial knowledge on the part of a witness. As Mr. Taylor observes: (*e*) 'The law does not require him to speak with such expression of *certainty* as to exclude all doubt.' Any knowledge, complete or partial, is unobjectionable, so long as it is founded on observation alone.

539. But there is a second signification of the words 'think,' 'believe,' and 'opinion'; that, namely, of drawing a conclusion or inference from a fact, or a number of facts observed. And it is to opinions of this last kind that the rule does really apply. Witnesses are in general precluded from stating opinions of this last kind, for the simple reason that it is the function of the jury to draw any inferences that may arise from the facts that are proved, and not of the witnesses. The meaning of the rule, then, is this: that a witness must in general speak only as to facts which fall under his own observation, and not as to any ulterior facts, which are capable of being deduced or inferred from these.

540. But even as thus stated, the rule must be accepted with some qualification imposed by necessity. For the very nature of perception renders it impossible in many cases to distinguish between facts observed and inferences drawn from those facts. 'Whatever is known to us by consciousness,' says Mr. Mill, (*f*) 'is known to us beyond possibility of question. 'But,' he continues, 'we may fancy we see or feel what we in reality infer. A truth or supposed truth, which is really the result of a very rapid inference, may seem to be apprehended intuitively. It has long been agreed by philosophers of the most opposite schools that this mistake is actually made in so familiar an instance as that of our own eyesight. There is nothing which we

(*e*) *Vide* Taylor Ev., s. 1,272. (*f*) Mill Logic, i. 7; P. ed. 4.

appear to ourselves more directly conscious of than the distance of an object from us. Yet it has long been ascertained that what is perceived by the eye is at most nothing more than a variously coloured surface; that when we fancy we see distance, all we really see is certain variations of apparent size, and more or less faintness of colour; and that our estimate of the object's distance from us is the result of a comparison (made with so much rapidity that we are unconscious of making it) between the size and colour of the object as they appear at the time, and the size and colour of the same or of similar objects as they appeared when close at hand, or when their degree of remoteness was known to us by other evidence.

'The perception of distance by the eye, which seems so like intuition, is thus, in reality, an inference grounded on experience; an inference, too, which we learn to make; and which we make with more and more correctness as our experience increases: though in familiar cases it takes place so rapidly as to appear exactly on a par with those perceptions of sight which are really intuitive, our perceptions of colour.'

'In almost every act of our perceiving faculties,' he says in another place, (*g*) 'observation and inference are intimately blended. What we are said to observe is usually a compound result, of which one-tenth may be observation, and the remaining nine-tenths inference. I affirm, for example, that I hear a man's voice. This would pass in common language for a direct perception. All, however, which is really perception is that I hear a sound. That the sound is a voice, and that voice the voice of a man, are not perceptions, but inferences. I affirm, again, that I saw my brother at a certain hour this morning. If any proposition concerning a matter of fact would commonly be said to

(*g*) Mill Logic, ii. 202; P. ed., p. 420a.

be known by the direct testimony of the senses, this surely would be so. The truth, however, is far otherwise. I only saw a certain coloured surface, or rather I had the kind of visual sensations which are usually produced by a coloured surface, and from these as marks, known to be such by previous experience, I concluded that I saw my brother.' And further on, (*h*) he adds: 'If in the simplest observation, or in what passes for such, there is a large part of what is not observation, but something else; so in the simplest description of an observation there is, and always must be, much more asserted than is contained in the perception itself. We cannot describe a fact without implying more than the fact.'

541. Now in these and in all similar cases it would obviously be impossible for a witness to impart to the jury the sensations on which his inference is founded, with sufficient accuracy and minuteness to enable them to draw the inference with the same correctness and certainty as he himself does. In the case of his hearing a man's voice, for instance, it would be utterly impossible for him to describe the various modulations of sound which fell upon his ear, with sufficient accuracy to enable another person to conclude that these sensations were caused by the voice of a man, with the same truth and certainty as he himself is able to infer it; or in a case of identity, to depict the various features which he previously noticed in some individual, together with those which he recognises in the person who has been since, or is now, presented to his notice, and which from their resemblance enable him to state with confidence that the two persons are one and the same. It would not only be impossible in such cases for the witness to describe his sensations with the requisite minuteness, but those facts when described would have little or no meaning for any one else than the percipient himself.

(*h*) Mill Logic, ii. 206; P. ed., p. 422a.

542. Now the rule above mentioned is founded on the assumption that the jury are as well qualified to draw the inference as the witness himself is. But where this ceases to be the case, reason demands that the rule should be relaxed. '*Cessante ratione legis, cessat ipsa lex.*' (*i*) The rule in question must, therefore, *ex necessitate rei*, be accepted with this qualification: That where from the very nature of perception the percipient of a fact is better qualified to draw the required inference or conclusion from that fact than any one else can be, the rule must be relaxed, and he must be allowed to state the conclusion itself, instead of being restricted to a simple detail of the perceptions or sensations on which his inference is grounded.

543. The inferential fact of *identity*, whether of persons or of other objects, and also the inference as to the *apparent condition* or state of things or persons, have been generally *recognised* as *exceptions* to the rule which requires a witness to testify only as to his own perceptions; (*j*) but innumerable latent inferences of the same order usually pass for pure observation.

This circumstance may serve as a further explanation of such expressions as 'I think,' or 'I believe,' when tolerated in the mouth of a witness. Subject, however, to the foregoing qualification, an ordinary witness is not allowed to state conclusions; *i.e.*, he is not permitted to communicate to the jury inferences which any other person is as well qualified to draw as himself.

544. There is, however, a further and important exception to this rule, which rests on the maxim, *Cuilibet in suâ arte perito est credendum*; (*k*) an exception, which is openly recognised as such, and gives rise to that kind of testimony, which is technically distin-

(*i*) *Vide* Best Ev., s. 513.
(*j*) *Vide* Powell Ev., 82; Best Ev., s. 517, and Taylor Ev., s. 1,273.
(*k*) *Vide* Best Ev., s. 513.

guished as *Opinion evidence.* 'On questions of science, skill, trade, and the like,' says Mr. Best, (*l*) 'persons conversant with the subject matter—called by foreign jurists *experts*—an expression almost naturalised among ourselves — are permitted to give their opinions in evidence;' (*m*) *i.e.*, to state conclusions, whether drawn from facts which have fallen under their own observation, or from such as are proved at the trial by other evidence. (*n*) Thus medical practitioners are allowed to give their opinions as to the probable cause of disease or death, or the probable result of a wound or injury: artists to give their opinions as to the genuineness of a picture: shipbuilders to give their opinions as to the seaworthiness of a ship: and the like. (*o*) 'The opinion of witnesses possessing peculiar skill is admissible,' says Mr. J. W. Smith, (*p*) 'whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science or art as to require a course of previous habit or study in order to the attainment of a knowledge of it.'

545. This formal exception to the rule, requiring a witness to speak as to facts only, is founded on the same reason, as the former qualification of it; namely, that the jury are not in such a case so capable of drawing the conclusion or inference as the scientific witness is. They are not in fact, in such a case, possessed of that *general knowledge* (*q*) which is necessary to enable them to draw just conclusions from the particular facts of the case. (*r*) For which reason the scientific witness is

(*l*) *Ibid.* (*m*) *Vide* also Taylor Ev., s. 1,274.
(*n*) *Vide* Taylor Ev., s. 1,278. (*o*) *Vide* Best Ev., s. 513.
(*p*) Leading leases, 491, 5th ed.
(*q*) *Vide* Best Ev., s. 187, and Taylor Ev., s. 1,244.
(*r*) Ante, s. 270.

permitted either to supply the jury with that *knowledge itself*, in the shape of *general propositions*; or to state the *inferences* resulting from such general propositions combined with the particular facts of the case, whether falling under his own observation, or established at the trial by other evidence.

546. From this it may be gathered that scientific witnesses ought rather to be regarded as auxiliaries to the jury, than as witnesses, since they differ from other witnesses only in so far as they usurp the ordinary functions of the jury. And it is not, therefore, surprising to find, that under other juridical systems than our own this is actually the case. 'Persons of this description,' says Bentham, referring to experts, (*s*) 'though in English law confounded with witnesses, and not without advantage treated as such, are in fact a sort of assistants to the judge' (or rather in our case to the jury), 'and as such treated by the Roman law.' 'In France,' says Mr. Best also, (*t*) 'experts are officially delegated by the Court to inquire into facts and report upon them, and stand on a much higher footing than either ordinary or scientific witnesses among us.'

547. Hence it will appear, that those cases in which it has been ruled that a juror is precluded from using for himself, or imparting to his fellow-jurors, the scientific knowledge which he happens to possess, unless he be first sworn as a witness, (*u*) are open to grave exception. Such scientific knowledge is but a part of that general knowledge, (*v*) which it is the peculiar province of the jury to apply to the particular facts of the case, for the purpose of drawing conclusions from the two combined. General knowledge of a scientific kind, however, being limited to a particular class of persons, it frequently

(*s*) Benth. Ev., i. 37. (*t*) Best Ev., s. 515.
(*u*) *Vide* Best Ev., s. 187, and Taylor Ev., s. 1,244.
(*v*) Ante, s. 270.

happens that the jury are unfortunately destitute of it, and are consequently driven to an exceptional mode of supplying their deficiency. (*w*) But this can furnish no ground for debarring them from making use of that species of general knowledge, where they do happen to possess it, more than any other. The mere circumstance that a witness is permitted in certain emergencies to trench upon the proper function of the jury, can furnish no argument for precluding a juror from exercising his own function where he is competent to do so. To possesss, and to apply general knowledge, whether of a scientific or an ordinary kind, is the regular and proper office of the juror. To propound such knowledge, if of a scientific kind, or the result of such knowledge, upon oath, is the irregular and exceptional province of the scientific witness. The doctrine referred to would therefore go to establish this anomaly ; that because we are compelled by the exigencies of scientific general knowledge to allow the skilled witness to usurp, *pro tanto*, the function of the jury ; therefore the jury shall never (even where the exigency does not arise) be allowed to exercise their own peculiar function with reference to scientific or technical knowledge—a position at once untenable and absurd.

548. Wherever a witness, whether ordinary or scientific, is permitted to state his opinions, all the grounds on which his judgment is based may be inquired into on cross-examination. (*x*) Thus, though a witness in a case of identity is allowed to say simply, 'That is the same man,' yet he may afterwards be questioned as to any of the points of resemblance from which he draws the conclusion of identity. And in no case is a witness, whether scientific or otherwise, permitted to state a conclusion involving the truth or falsehood of the testimony of other witnesses, or allowed to give his

(*w*) Ante, s. 271. (*x*) *Vide* Best Ev., s. 517.

opinion on the very point which the jury are to determine, *i.e.*, on the general merits of the case. (*y*) For the maxim of our law on this subject is: *Dictum expertorum nunquam transit in rem judicatam.* (*z*)

549. Before finally quitting the subject of opinion evidence, we must not omit to notice a point to which we have already alluded in an earlier part of this work; (*a*) namely, that the general knowledge usually imparted (where wanting) by the scientific witness, is occasionally supplied to the jury in a totally different manner; namely, by adducing evidence of a series of individual facts, from which, when proved, the jury are called upon to construct by an inductive process the general proposition necessary to enable them to deduce the conclusion suggested. Of this we have instances in Palmer's case, (*b*) and in the case of Folkes *v.* Chadd, (*c*) to which allusion has already been made. (*d*) This mode of procedure, however, as previously remarked, (*e*) is rarely resorted to in judicial inquiries; and even when such is the case, the process is seldom, if ever, employed by itself, but is used to supplement and fortify scientific testimony adduced for the same purpose.

(*y*) *Vide* Taylor Ev., s. 1,278, and Best Ev., s. 513.
(*z*) Best Ev., s. 515. (*a*) Ante, s. 272.
(*b*) *Vide* Stephen Ev., art. 50. (*c*) 3 Douglas, 157.
(*d*) Ante, ss. 273 and 274. (*e*) Ante, ss. 272 and 274.

CHAPTER XXVI

CONCLUSION

550. With opinion evidence, our survey of proof in its judicial aspect is concluded. The foregoing inquiry must be accepted rather as furnishing a specimen of the manner in which the natural principles of evidence bear upon the positive law, than as a complete or exhaustive exposition of the subject. To apply the same kind of analysis to the whole range of the law of evidence in all its numerous ramifications, would demand, not one volume, but twenty, at the least. Four or five pages might be written in the same strain on the cases cited on each page of Mr. Taylor's voluminous work. Nevertheless, though it is impossible to offer in a work like the present anything more than an outline of the law of evidence, I have endeavoured as far as possible not to omit any of its leading features in which any degree of theoretical principle is involved. And with this the reader must be satisfied. But as I have been led to cast some considerable amount of reflection upon certain features of the existing law, the work would seem incomplete were I not to offer some suggestions as to the mode in which improvement might be effected and error avoided for the future.

The intelligent reader can hardly have failed to observe that the exception, which has been taken in these pages to the state of the positive law of evidence, has been levelled rather at the theoretical doctrines, than at the existing practice. I will, therefore, address

myself in the first instance to the reforms which I conceived to be desirable in the theory.

551. In the first place, then, the customary division of judicial evidence into Oral, and Written or Documentary; or into Real, Oral, and Documentary, is unsound. The instruments of evidence or vehicles of proof are but two; viz., Real and Oral; since it is through the medium of these two that all other matters are brought to the knowledge of the tribunal. (*f*) Under the first should be classed the proof, afforded by the production in court of the material objects which are the seat of relevant facts, including that afforded by the production of documents whose contents are in question. (*g*) Oral evidence should remain, as at present, the information imparted by the testimony of sworn witnesses. All other forms of 'transmitted evidence' should be relegated to the category of facts;—of facts in certain cases relevant, or deemed to be relevant to the issue; but, generally speaking, irrelevant as Hearsay. (*h*) As for Documentary evidence, in a certain sense it is simply a phase of Real. The expression 'Documentary evidence,' however, viewed as the name of a scientific division or species of evidence, is a most objectionable and misleading term; for this reason, that the value of the proof obtained by the production or manifestation of writings varies so greatly according to the relation in which the contents or terms of the document stand towards the actual subject of inquiry. The production of the document, it is true, establishes its own terms by the most cogent of proof; and so far as the contents are actually in question, the evidence is most transcendant. But, on the other hand, the contents may amount only to an admission or other matter evidentiary of the fact which the document is designed to establish, or even

(*f*) Ante, s. 261. (*g*) *Vide* Ante, s. 264.
(*h*) Ante, s. 254.

to a mere written statement of the same fact, in which case the proof afforded by the production of the writing may be of the very feeblest kind receivable. (*i*) The term 'Documentary evidence' may be a convenient expression for practical purposes, an expression with the use of which it may be impossible altogether to dispense; but it should always be remembered that it does not mark a scientific classification of evidence. We cannot say truly of Documentary, as we can of Real evidence, that it is intrinsically superior to Oral; because what is called Documentary or Written Evidence possesses no uniform average proving power; that being entirely contingent on the relation to the issue of the contents of the document. (*j*)

552. The other leading division of evidence;—that, namely, into Direct and Circumstantial,—is perfectly scientific, and stands in no need of modification or amendment. But inasmuch as there appears to be a very prevalent notion, that the methods of circumstantial evidence are of an inductive character, it may be as well that I should state once more that this view is a complete fallacy;—a fallacy which seems to have originated in the circumstance that the minor premiss of legal syllogisms so frequently consists in the assertion, not of a single fact, but of a combination or coincidence of several. (*k*) In a former page, (*l*) I have endeavoured to show that the process of drawing inferences in matters judicial—of proceeding from the evidentiary or relevant fact or facts to the principal one, is as purely deductive as any operation not conducted in strict logical form and order can possibly be: And that every inference drawn in the course of a legal inquiry is capable of being exhibited in a syllogism, or a series of syllogisms, the major premiss of which resides, as a rule, in the breast of the jury, or

(*i*) Ante, s. 265. (*j*) *Vide* Ante, s. 310.
(*k*) Ante, s. 151. (*l*) Ante, ss. 151 and 270.

other judge of fact; being a general proposition, which forms part of their stock of general information: While the place of the minor premiss is occupied by the evidentiary or relevant fact actually established by evidence, or by a group or combination of such evidentiary facts: the conclusion again, or, if a series of syllogisms be necessary, the *ultimate* conclusion, being a fact in issue or principal fact; in which latter case the conclusion of the first syllogism forms, of course, the minor premiss of the second, and the conclusion of the second the minor premiss of the third; and so on, until the fact in issue is reached. To which I may add, that the general proposition in the major premiss is in some instances supplied by opinion or scientific evidence, and occasionally, though rarely, by evidence of an inductive character. (*m*)

553. According to this view, therefore, the leading divisions of evidence are twofold: first as determined by the means or instrument of proof, Evidence is either *Real* or *Oral*. Secondly, as governed by the relation of the fact thus proved to the issue or question, Evidence is either *Direct* or *Circumstantial*.

In connection with the former division, there are also some minor points which demand notice. The use of the terms 'primary' and 'secondary evidence' should be restricted to the different modes of proving the *contents* of a writing, by its production or otherwise. (*n*) The proof of the *execution* or genuineness of a written instrument by means of the testimony of the subscribing or attesting witness is a totally different question, and stands on far lower grounds. There is no analogy whatever between primary evidence of the contents of a document, and the oral evidence of an attesting witness, and the two ought not to be confounded together under a common title.

(*m*) Ante, ss. 271, 272, 544, 545, and 549. (*n*) Ante, ii., chap. 8.

554. The operation of the rule against secondary evidence (or rather of that branch of the rule which relates to the contents of written documents) should be limited to shutting out secondary evidence of the *terms* of the writing, and (except perhaps in the case of a 'Record,' where the act of the tribunal is in question) the rule should never be construed to exclude legitimate proof of any extrinsic fact stated, recorded, reported or even admitted by the document.

555. The rule, which prohibits 'parol' or 'extrinsic evidence,' should be amended in its wording somewhat as suggested in chapter 16, (*o*) so as to show that it is aimed against the irrelevant *fact*, and not against the means of proof. Its operation should be confined to the interpretation of written *instruments*, properly so called; *i.e.*, of formal documents framed by individuals for the purpose of modifying their mutual rights; and it is very questionable, too, whether it ought not also to be strictly limited to the case of written instruments which are required by law. The rule ought also, I think, to be divided into two branches, so as to mark the distinction between verbal and other extrinsic matter of fact.

556. The rule, or dictum rather, which purports to exact the *Best evidence* in every case, should be, as far as possible, suppressed and obliterated. It is inconsistent with the actual practice; totally impracticable as a general principle; and calculated to produce misconception, inasmuch as the exaction of the 'best evidence, that the nature of the case will admit,' (*p*) is rather an *exception* than a rule.

557. The term 'Hearsay' is, as Mr. Best remarks, (*q*) very inadequate to express the meaning which it has obtained in our law; where it is used to denote all statement or narrative, whether verbal or written, which does

(*o*) Ante, ss. 448 and 450.

(*p*) *Vide* Ante, s. 514. (*q*) *Vide* Best Ev., s. 89.

not amount to an *admission or confession*, on the one hand, and is not delivered orally on oath as *Testimony*, on the other. The term 'Hearsay evidence' is still more objectionable, inasmuch as 'Hearsay' is not evidence at all but *fact*. (*r*) Some such phrase as 'bare statement,' or 'bare assertion,' would be much more appropriate to the occasion.

558. So much for theory. And next to pass to more practical questions. The case of Slatterie *v.* Pooley, which established the doctrine that evidence of a casual admission is receivable to prove the contents of a written document, should be overruled. This doctrine has a direct tendency to undermine and nullify one of the most scientific and valuable rules to be found in the whole positive law of evidence;—that, namely, which exacts the production of every document whose contents are in dispute. (*s*)

559. Wherever a written narrative, statement, or report is legally receivable in evidence, it should not be allowed to form an obstacle to the free cross-examination of a witness upon the matters to which it relates; (*t*) nor, I need scarcely add, should any such statement be construed to exclude any other legitimate evidence of those matters that may be forthcoming. (*u*)

560. The summary power of a tribunal to commit for contempt of court should be limited to cases where the whole of the facts constituting the offence fall under the immediate observation of the judge, and are thus established entirely by real evidence. (*v*)

561. A juror should not be debarred in his character as such from imparting to his fellow-jurors any general knowledge which he possesses, even though that general

(*r*) *Vide* Ante, s. 254. (*s*) Ante, s. 482.
(*t*) Ante, ii., chap. 11., s. 378 and *seq*. (*u*) *Vide* Ante, s. 422.
(*v*) Ante, s. 336.

knowledge should happen to be of a scientific or technical nature. Jurymen are, I apprehend, permitted freely to communicate to each other in private any other sort of general knowledge; and there appears no reason why any distinction should be drawn in that respect between scientific knowledge and general knowledge of the more ordinary kind. (*w*)

562. Expressions of the feelings, bodily or mental, if accepted at all as indications of the sensations or emotions of the person from whom they emanate, should at least be viewed with some suspicion. (*x*) Unless they are purely involuntary (a fact which it is generally almost impossible to ascertain), expressions of this kind are at best bare statements;—and statements, too, relating to matters, on which mankind are extremely prone to practise deception. (*y*)

563. More circumspection should be exercised practically in construing mere silence as acquiescence in the statement or assertion of another person. Mere silence should never be treated as a confession, except in cases where the absence of a reply is really significant of assent.

564. Another particular in which reform appears to me to be much needed is the phraseology employed in Acts of Parliament, written orders, rules of practice, and the like legislative or judicial documents, to describe the process of framing or calling into existence different kinds of writings. The phrases, 'reduced to writing,' 'put into writing,' 'taken down in writing,' 'evidenced by writing' or 'by deed,' with others, are employed without sufficient discrimination to denote the creation of written matter of whatever species. A contract, for instance, is said to be 'put into writing,' 'reduced to writing,' or 'evidenced' or 'manifested by writing.' A *deposition* to be 'put into writing,' 'reduced to writing,'

(*w*) Ante, s. 547. (*x*) Ante, s. 360. (*y*) *Ibid.*

or 'taken down in writing.' Now in reality, there is one broad and important distinction between the various phases of such written matter. Either the transaction itself, which the writing is designed to perpetuate, whether consisting of a conveyance, a will, a contract, or other written act, or of testimony delivered on paper, is originally performed by means of writing. Or the fact, consisting either of verbal matter, such as evidence orally delivered, or of some other kind of event, like a birth or a death, is reported, recorded, or narrated in writing. In the former case, the writing, or the act of writing, is the transaction itself; whereas in the latter, it is merely the narrative of an extrinsic fact. Thus an affidavit, or an answer in Chancery, is testimony given in writing; being itself the vehicle of proof, it is 'written evidence' in the most accurate sense; and the inspection or perusal of the writing shows the reader what evidence the deponent has given without possibility of error, assuming, *i.e.*, that the authorship is conclusively established. A deposition, on the other hand, such as is taken in a criminal case before Justices of the Peace, is merely oral evidence *reported* in writing. It is nothing more than a *statement* of the words which issue from the lips of the witness; and the reader of such a document (assuming it to be ever so genuine) derives his knowledge of the original words uttered by the speaker from the voluntary act of the writer or reporter, by whose veracity and accuracy his knowledge is therefore measured.

Let me not be misunderstood, however, as advocating the epistolary mode of extracting testimony (*z*) in preference to the oral. The main object of the rules and methods of judicial evidence is, not to ensure its preservation for use on future occasions, but to secure and guarantee its truth and fidelity at the time; and in

(*z*) *Vide* Bentham Ev., Book III., chap. ix., vol. ii., p. 158.

this respect, there can be no doubt whatever that the oral is far superior to the epistolary method; which latter admits of little or no cross-examination, and whose truth is not certified by the personal presence and demeanour of the witness.

At the same time, it is obvious that testimony originally delivered in a written form, in common with any other kind of written transaction, is a totally different thing from a *report* of oral evidence, as it is also from any other phase of written statement, record, or narrative. And, therefore, I think that the important distinction between written acts and written statements should be more clearly defined by the wording of the particular clause which prescribes the creation of the document in question.

To describe the narrative of an extrinsic fact, the expressions, 'shall be recorded,' or 'stated in writing,' or if it consist of verbal matter, 'shall be taken down,' or 'reported in writing,' would seem appropriate; but not, 'put into writing,' or 'reduced to writing,' which are prone to create misconception as to the real nature of the process employed in such a case.

On the other hand, in describing a written act or transaction, the phrases, 'shall be in writing,' 'shall be made in writing,' or perhaps, 'shall be put into writing,' or 'reduced to writing,' but not, 'shall be evidenced by writing,' would appear most suitable. To establish, or attempt to establish, a distinction between a transaction 'made in writing,' and 'evidenced' or 'manifested by writing,' (*a*) must inevitably produce endless confusion and difficulty. Where the oral method of extracting testimony is in use, there is only one way in which a transaction, not originally performed by writing, can be evidenced or manifested, or, in short, legitimately proved by means of writing; namely, where a verbal contract,

(*a*) *Vide* Taylor Ev., s. 929.

or other parol transaction of a similar kind, is subsequently acknowledged by a written admission. Now the position, that an agreement, for instance, made by word of mouth only is deemed good and sufficient in law as a mode of contracting, but is yet to be treated as practically nugatory and inoperative for want of evidence, unless it be subsequently admitted by writing, is most anomalous and absurd. It would surely be far more simple and rational, that wherever word of mouth is legally sufficient for the accomplishment of the transaction, it should be provable by any legitimate and appropriate means; and that where the law deems the use of writing to be necessary or desirable, that the writing should be exacted as a mode of performing the transaction itself, and as necessary to its validity.

565. Then again, not a little obscurity is occasioned by the mode in which questions as to the reception of evidence are usually enuntiated and debated in our Courts of Justice. Such and such a letter, document, or piece of language is said to be evidence, or no evidence against a particular party, or in a given case. But this, it seems to me, is leaping over steps, which should be considered seriatim. In every instance in which a doubtful or disputed 'piece of evidence' is tendered, the first question should be, not against whom, or in what case, is this evidence offered? but what fact are you seeking to establish thereby? This being ascertained, the second and most momentous question is, whether that fact is material; in other words, is it either a fact in issue, or a fact relevant to, or deemed relevant to the issue? Finally, if so; is the proposed evidence a legitimate mode of proving that fact?

566. All these, however, are more or less matters of detail, upon which the author expresses his views with considerable diffidence. It must be left to lawyers of more practical experience to judge how far the sugges-

tions here offered are actually feasible; but they will at least serve to point out the direction in which improvement is desirable.

To turn to more general topics.

The great danger which appears to me to menace the integrity of our system of judicial evidence in the present day, is the growing disposition to admit *hearsay* in various forms, especially when created under responsibility, and disguised in the shape of public documents, official registers, and legalised copies of original writings, (*b*) or clothed with the authority of *res judicata*. (*c*)

Each successive year adds to the number of officially framed narratives or reports, which become *ipso facto* receivable, by virtue of the doctrine that renders all writings, which the law requires to be drawn up or kept for the public benefit evidence, or rather evidentiary of the facts recorded in them—(*d*) a doctrine, which as at present interpreted, I cannot help regarding as the most dangerous in the whole law of evidence. The evil, however, does not consist so much in the mere reception of these official statements, as in their status when received. For being 'evidence' in a written shape, and therefore 'written evidence,' they become also *primary* evidence of the facts which they are admissible to prove; so much so, that in some cases, especially where they contain a report of verbal matter, such documents are even held to exclude all other evidence of those facts as secondary. (*e*)

Then also, there is an increasing desire to facilitate proof by admitting legalised copies of original writings, as well as in other ways. (*f*) Facility of proof, I need scarcely remark, is a most desirable object of legislation, but it should never be forgotten, that in the majority of cases this facility of proof must necessarily be accom-

(*b*) *Vide* Ante, ii., chap. 13. (*c*) *Vide* Ante, ss. 527-529.
(*d*) Ante, ii., chap. 13, and Taylor Ev., s. 1,429.
(*e*) Ante, s. 415, and Best Ev., s. 121. (*f*) *Vide* Ante, s. 421.

panied by a corresponding infirmity in the quality of the evidence obtained. There is, in truth, only one direction in which evidence can be safely and effectually facilitated —in other words, only one mode in which proof can be rendered easier without a commensurate lessening of its strength, namely, by enforcing the use of writing in all those numerous cases where the fact to be perpetuated, or rendered easy of proof, consists in the act of employing language. Thereby exacting the use of writing as a necessary condition to the legal validity of the act, we convert the language, and the more important part or constituent of the act, (*g*) into a permanent and continuing shape, and are enabled to provide real evidence of that component fact for future use. But facts of other kinds cannot be thus perpetuated in such a manner as to yield cogent evidence, nor can facility of proof be secured in any other direction without commensurate weakness in the evidence obtained. As regards *res judicata*, the effect of judicial statements as evidence has hitherto been restrained within reasonable bounds, being limited as a general rule to affecting the parties to the proceeding. This is a most salutary principle, for *res inter alios judicata*, as Mr. Best has remarked, (*h*) is *res inter alios acta* in its most dangerous form. A judgment, viewed as evidence against strangers to the suit in any ulterior proceeding, is not only itself a mere statement, but a statement founded in great measure on hearsay and opinion, and not on the individual knowledge of the person or persons by whom it is propounded. (*i*) I must therefore venture to differ entirely from those writers, Bentham among the number, (*j*) who would advocate any extension of the authority in this respect of *res judicata*.

(*g*) Ante, ss. 295 and 296.

(*h*) *Vide* Best Ev., p. 699, 2nd ed. (*i*) *Vide* Ante, s. 529.

(*j*) *Vide* Bentham Ev., iii. 431-432.

567. It may be that in Bentham's day our law of evidence was, if anything, too stringent and exclusionary. As to this, I offer no opinion. But if it was so, the defect has long since been remedied; and the danger now is that it may become too lax.

The English law of judicial evidence may, as Mr. Best observes, (*k*) fearlessly challenge comparison with that of any other nation in the world; and this position it owes, I feel persuaded, to nothing so much as to a rigid and inflexible observance of the rule that is embodied in the maxim, 'In judicio non creditur nisi juratis.' Consequently I cannot see this salutary principle gradually and stealthily invaded without raising my voice in expostulation. It may be, and no doubt is, expedient in certain cases to admit hearsay or unsworn statement; but it should be admitted only by way of concession or compromise, in the absence of better evidence, or to fortify it, where deemed insufficient. To place statements, whether written or verbal, even on a level with sworn testimony; to exact the oath and personal presence of the deponent, to subject him to cross-examination, to menace him with punishment if he swerves from the truth, in the one case; and to abandon all these precautions, in the other, is sufficiently inconsistent. But the climax of absurdity is reached when these unsworn written statements come to be placed, not merely on a par with, but even on a higher footing than legitimate oral evidence. That this result is actually reached in but few cases, I grant; but this consummation is due, not to the soundness of the theoretical doctrines of the law, but to the common-sense and sagacity which is continually occupied in trimming and revising the practice.

568. For in spite of the censure, which I have felt myself bound to cast upon certain of the abstract

(*k*) Best Ev., s. 120.

principles of our positive law of evidence, the practice at least is such as to command respect; and the whole system only requires a more correct apprehension of the theory to render it as perfect as any human institution of so complicated a character can expect to become. To this result if my labours have in the slightest degree contributed, I shall feel that they have not been expended in vain. And though I cannot but be conscious of the numerous imperfections, which tend to impair the value of the present work, I should never have ventured to give it to the public, had I not felt convinced that it contains not only truth, but truth, moreover, which has never hitherto been generally recognised.

APPENDIX—ARTICLE I (*l*)

THE clue to the distinction between an Event and a State is, I think, suggested by the phenomena of musical sounds, notes and passages, and, in particular, by such as are produced by a stringed instrument.

A prolonged note, which, while it lasts, resembles a State, in reality, as we know, consists of, or is produced by, a number of consecutive, equal, or similar vibrations of the same string, each of which vibrations resembles, or rather actually is, an *Event*.

Here all and each of the consecutive events which recur are apparently exactly similar.

And if, again, a series of two different notes, produced by two consecutive sets of unequal or dissimilar vibrations, succeed each other alternately, so as to produce a continuous shake, this effect, while it continues, still resembles a state of things, though still, as before, the effect is produced by, and consists of, a series of vibrations or events, which recur in regular periods.

Similarly we may have a passage of three, of four, or of more notes; but still, so long as the passage continues to recur, so as to produce a species of monotony, so long does the whole effect resemble a state; though still, as before, that effect is produced by the recurrence of a series of events.

What appears then in the case of sounds, if sufficiently prolonged, to be a state of things, is found, when analysed, to consist in reality of a series of minute events, which recur in periods of greater or lesser compass or duration.

And if this is the case with objects which manifest themselves to the sense of hearing, may not the same causes lie also at the root of what seem to be *states* of objects which are recognised by our other senses, as of sight or touch; although it so happens that in many of these cases we have no means of analysing the cause of our sensations, or of tracing them home to the events by which they are actually produced.

The luminosity of an object, for instance, is now said to be produced by vibrations, which vibrations must be the vibrations of particles of matter of some kind, and are neither more nor less than a series of events.

These considerations may well lead us to doubt whether that, which

(*l*) *Vide* Ante, Part I., chap. 7.

is usually called a state, does not in reality uniformly consist in the recurrence of an event or series of events of a precisely similar kind.

I say more or less similar, because the consecutive events, which go to constitute a state of things, are by no means of necessity *precisely* similar. Indeed, it may well be doubted if any two events, or facts of any kind that occur in nature, ever are or can be precisely alike. To our senses they frequently appear so, as in the instance of the successive vibrations of a musical string. But in the case of many so-called states, the consecutive facts which go to make up the state are very far from precisely similar even to our limited faculties of perception. A state of war, or of siege, for example, is made up of a series of events which have only a very distant or general resemblance to each other.

If, therefore, every event is only a series of events; (*m*) and every state likewise a series of events of a more or less similar kind; and if facts of either kind are transient or permanent in an infinitely varying degree, (*n*) the only tangible distinction between the two would seem to be that what is called a state is a fact that is continuing, or viewed as continuing, when we speak of it; while an event is a complete or terminated fact.

APPENDIX—ARTICLE II (*o*)

THERE is another question, which seems to turn in some degree on the distinction, or want of distinction between events and states; to depend, *i.e.*, on the question whether there be in reality such a thing as a state of perfect repose in nature;—namely, the question whether the attribute of a body, considered, of course, as a single instance, (*p*) be an actual property residing in the material object itself, and which causes our sensation, or whether it be nothing more than the sensation itself, which we receive from it. (*q*)

Let us take the case of an orange, one attribute of which is a yellow colour, from which we receive a sensation of yellow every time we look at it. The question is, is this yellow that we perceive a power or property belonging to the orange; or is it nothing else than our visual sensation of yellow? This seems in some degree to depend upon this further question; namely, whether the yellow that we perceive in this particular orange is always the same yellow, or a fresh instance. For example, suppose the orange to be lying on the table before me: I look

(*m*) *Vide* Ante, s. 116. (*n*) *Vide* Ante, s. 119.
(*o*) *Vide* Ante, Part I., chap. 2.
(*p*) *Vide* Ante, s. 43.
(*q*) *Vide* Ante, s. 41, and Mill Logic i., p. 41a, and i. 101, p. 48b.

at it and receive a sensation of yellow: I withdraw my eyes for a few seconds, and then look at it again, and receive a second sensation of yellow. Now it is obvious that my sensations are not the same sensation, although they may be precisely similar. They are two distinct sensations, not one. But is the yellow in the orange always the same yellow—a *state* of yellow? or is it on each occasion a fresh instance of yellow, some *event* or action that takes place between the object and my senses?

If it be the latter, there may be some slight ground for contending that the yellow—the so-called attribute—is nothing else than my sensation or sensations.

But if, on the other hand, it be on each occasion the same state of yellow in the orange, then the attribute must be something more than the sensation it creates, since the one attribute may be the cause of several successive and distinct sensations.

APPENDIX—ARTICLE III

I HAVE formerly remarked on one occasion (*r*) that the words of a speaker cannot be converted into written language by the act of another person in taking down his words on paper; that the writing must still remain, in relation to the vocal utterances, a mere narrative or statement on the part of the writer; and on another occasion, that this must always be the case with reports of verbal matter, unless some process can be discovered by which the words of a speaker can be made to fall of their own accord upon the paper independently of the will of any individual writer. (*s*)

Considerable progress towards this result has been accomplished in the last few years by that marvellous instrument, the phonograph. By its agency the words of a speaker (among other sounds) are made to fall, not on paper, but on a more yielding surface, from which they can be reproduced at any distance of time, and as often as required, not in the visible form of written characters, but in an audible form precisely counterfeiting the original vocal utterances, so precisely indeed that even the tones of the speaker's voice may be recognised.

Thus this instrument accomplishes the marvellous feat of arresting a fact of the most evanescent order, a passing sound, as it were, on the wing, (*t*) and of converting it into a permanent continuing fact or

(*r*) *Vide* s. 398. (*s*) *Vide* s. 308.

(*t*) *Vox emissa volat*—Broom's Max, p. 517, 2nd ed. *Vox audita perit*—*Vide* Best Ev., s. 223.

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state, capable of being manifested to the senses of an inquirer at any subsequent time when proof of it is required. The instrument, however, as at present constructed, seems scarcely suitable for use in a Court of Justice.

The first objection to its employment is, that the words are reproduced in an audible instead of a visible form, and that a fresh mechanical operation is necessary on each occasion in order to evoke them.

The second, that the material on which the words or sounds are impressed is neither sufficiently durable nor sufficiently portable to answer the requirements of judicial evidence. (*u*)

The third, that the apparatus is somewhat cumbersome.

The fourth, that it is costly.

And lastly, that it is necessary for the speaker to pronounce the words that are to be reproduced into or over the mouth of a tube.

These defects, as I have just remarked, render the phonograph unsuitable in its present form for furnishing evidence in a Court of Justice. At the same time, the instrument is still in its infancy, and it is impossible to predict how far a mechanical system of reporting, free from the control of the human will, may not be achieved ere long by means of some fresh adaptation of this wonderful contrivance. If an instrument can be invented capable of reproducing the vocal utterances of a speaker in permanent marks or characters, visible to the eye on some durable, compact and portable substance, similar to paper; if its action can be made infallible and free from the control of any operator, then its value in reporting for judicial purposes would be inestimable; because the proof that it would yield of testimony given, or words spoken, on a previous occasion would be no longer transmitted but real, inasmuch as it would be independent of the human will; and though the evidence would in a certain sense be indirect, the inference of its truth or accuracy would be so strong as to render it almost equivalent to direct. (*v*) A mechanical method of reporting of this kind, where the words of the speaker would fall of their own accord on the paper and leave lasting traces—where they wrote themselves down, as it were, as they issued from the speaker's lips, would give to oral evidence all the advantages peculiar to the epistolary method of extracting testimony (*w*) in addition to its own.

(*u*) *Vide* Ante, ss. 326 and 331.
(*v*) *Vide* Ante, ss. 207 and 276. (*w*) *Vide* Ante, s. 564.

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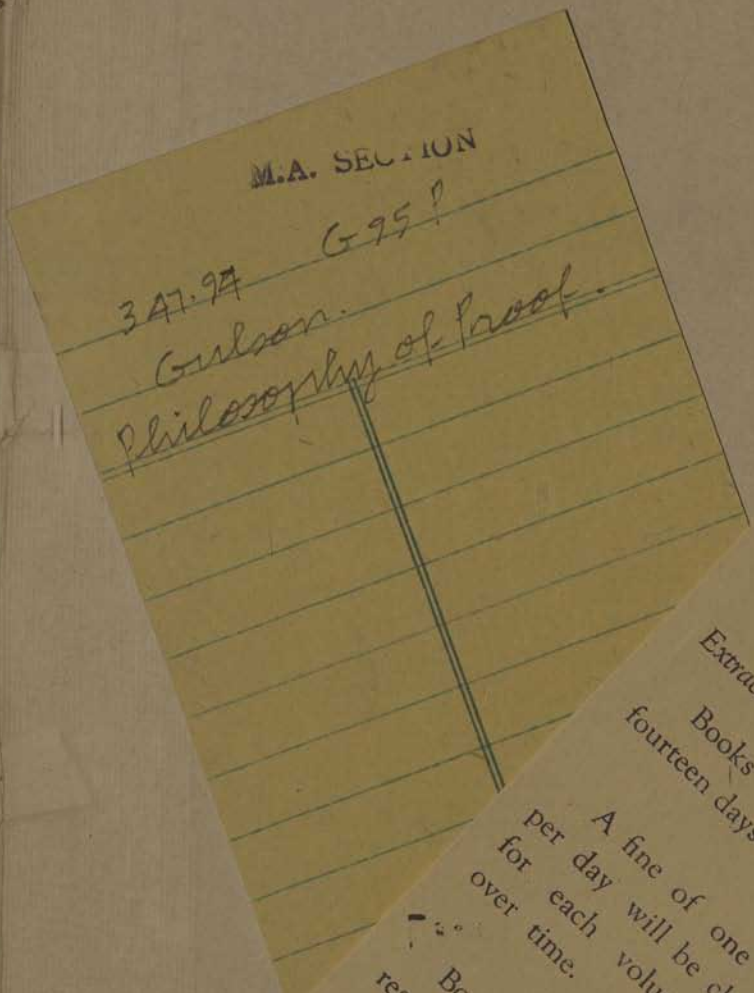

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