POCKET
CODE OF EVIDENCE

A

POCKET CODE

OF THE RULES OF

EVIDENCE

IN TRIALS AT LAW

BY

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TO

OLIVER WENDELL HOLMES

JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

IN GRATEFUL ACKNOWLEDGMENT

OF LOFTY IDEALS VOICED AND EXEMPLIFIED

FOR OUR PROFESSION

AND

OF MANY TOKENS OF KINDNESS SHOWN

TO THE AUTHOR

"The law has got to be stated over again. And I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago."

Justice *Oliver Wendell Holmes*,
Oration before the Harvard Law School Association,
at Cambridge, 1886.

PREFACE

The historian Judas Maccabaeus, in a preface of two thousand years ago, has supplied a concise and laudable canon for the task of an abridger. "All these things," he says,[1] "we shall essay to abridge in one volume, with the endeavor to make it attractive to read, convenient to learn, and profitable to use."

The object of the present volume is twofold: to provide the practitioner with a handy summary of the existing rules of Evidence; and at the same time to state them in a scientific form capable of serving as a code.

The practitioner needs a handy summary. He must impress all rules of procedure into his memory, by frequent re-perusal, so as to have the details familiar at call. He must also have at hand a concise manual for ready reference when memory fails. These needs the present book aims to meet.

Many of us were brought up to use Sir James Stephen's Digest in these ways. Its usefulness, however, with the lapse of time and with the expansion of law in the local sovereignties of this country, has been barred by limitation. Moreover, time has also naturally suggested some improved expedients. These expedients have here been tried. They are chiefly two: one of them aims to meet an inherent difficulty of the rules of evidence; the other is suited to the independence of our numerous jurisdictions.

The first expedient is a system of copious cross-references and distinctions. The marked feature of the law of Evidence is that, while the offered fact is single, the potentially applicable rules are multiple. Hence, at the moment when a given rule is applied, the offer is not necessarily disposed of; for other rules may possibly have application to different

[1] II, 2, 25.

aspects of the same offer, and with differing results. The practitioner therefore has to have all of these in mind at that moment. For this purpose the book of rules should at that place and moment supply him with references to other rules, different in essence, but related in some superficial feature to his possible purpose. No compiler can hope, even with such cross-references and distinctions, to meet the needs of every practitioner. But at least some effort can be made to supply the inherent need.

The second expedient is a textual provision for variances of rule in independent jurisdictions. The law is not usually unsettled in a particular State. But the law of another State may be opposed or variant. How can a single textual statement hope to represent correctly the opposed or variant rules of different jurisdictions? It must not pretend to. The effort in this text has been to recognize and to note these variations, so as to warn the user at such points to search elsewhere and more precisely for his own State's law. Textually this has been done by variant phrases and by footnotes: typographically it has been re-enforced by a system of brackets and otherwise. On page xii these typographical expedients are fully explained in a Key.

Of course, to attain further usefulness in this way, the book might provide on alternate blank pages the annotations of all decisions and statutes for each jurisdiction. Thus the practitioner could follow up instantly the textual statement and verify it in the authorities of his own jurisdiction. A series of such Local Editions, completely annotated, is planned for a future time, — at least, in the jurisdictions having voluminous authorities. The blank pages in the present General Edition will serve, it is hoped, for the personal annotations of the careful practitioner who desires to keep up with the course of judicial decision and to preserve his knowledge in accurate and ready form for use at

trials. — Be it said here that an accurate familiarity with the local rules of evidence is to-day lamentably lacking among practitioners who try cases (most notably in metropolitan courts). Few of them try cases often enough to become masters; hence much rough-and-ready bungling, unworthy of our profession and disastrous to any system of procedure. What is needed is a body of expert trial practitioners (like the British barristers), who shall be masters of the rules and shall thus ensure for the rules that perfect working by which alone they can serve the ends of justice.

In its aspect as a Code, the present summary is not offered as a proposal for legislation. Whether a legislative Code is ever desirable, and if it is, whether it is now feasible, in the special conditions of our law and our legal profession — these are large questions, which it would be useless here to enter upon. To Codification, as a general enterprise, many objections may be raised, — and a most deterrent one is that it tends to fossilize the law. There is no thought, in this Summary, of facing this grave question. The aim and hope may properly be (in John Stuart Mill's apt metaphor) "not to drive Reason from the helm, but merely to bind her by articles to steer in a particular way." After all, in its essence, a Code (as we now understand that term) is or ought to be a concise and practicable statement of a body of law in scientific form. The question is whether the law of Evidence can be so stated. The present summary is merely an attempt to answer that question.

The author would be unwilling to put his hand to such a summary unless with the liberty to exemplify therein what seem to him the principles of the science and of scientific statement. It does not here matter what those principles are; the book must speak for itself. But that liberty must include the privilege of formulating the law as it ought to be, alongside of the law as it is. No one could pleasurably

share in giving vogue to a statement of a rule which he believes to be unscientific or impolitic, without noting his dissent; and it is only a short step to formulating a proposal of the rule as it ought to be. Possibly some of these proposals will commend themselves. Possibly also some of them will seem to fall short of an ideal advance. For these latter, Law's inherent slowness of progress is the excuse. When Solon (according to Plutarch), after making over the laws with only "such alterations as might bring the people to acquiesce by persuasion," was asked "whether he had provided the best of laws for the Athenians?" he answered, "Yes, — the best they were capable of receiving." The philosophy of this ancient anecdote stands for us yet as both a consolation and a warning.

The chief textual features, then, in which this summary may plausibly be termed a Code, are that the Rules and Articles are so ordered topically as to form related parts of a complete whole; and that the phrasings are (as far as possible) so constructed grammatically as to represent in the same textual sentence or paragraph the terms of the variant rule, without obliging the reader to formulate its terms for himself and to substitute them in the text. Typographically, it may be added, every device has been used to exemplify the most advanced methods of codified statement, *e. g.*, by expanding and placing on separate lines every clause or phrase which designates an alternative limitation, or represents a doubtful or emphatic feature, or supplies an exception or a modification. The likelihood of a rapid increase of fruits, in the near future, from the labors of the National Conference on Uniform State Laws makes it worth while for our profession to consider carefully the possibilities of attaining clarity of statement and ease of citation by the help of typographical devices.

A closing word about "technicalities," which nowadays

are a subject of reformatory consideration. Evidence ought to have rules knowable before trial; and those rules ought to be fairly precise. That much may easily be conceded by all. But a rule need not be inherently a steel-clad formula. The evil nowadays is that nevertheless we treat it so, — a defect due in part to our traditional attitude towards statutes, and in part to our modern American attitude towards judges. A formulated rule tends unwholesomely to be the judge's tyrannous master, not his ministrant tool. What the system of Evidence needs is, not so much another set of rules, or fewer rules, as a judicial flexibility of rules. This great curative feature can be obtained, and by a few simple though powerful principles. An attempt to formulate them has been made herein, namely, in Rule 5 (Art. 3), Rule 18, and Rule 23. With those proposed principles dominating, in spirit as well as in letter, the curse of technicality, so far as it burdens our system of Evidence, would soon be removed.

But, after all, it is the spirit that gives life to the rules. All the rules in the world will not get us substantial justice if the Judges have not the correct living moral attitude towards substantial justice. We hear much lately about Pragmatism. What ever else it teaches, one truth it assures us plainly, that in the long run a man's concrete beliefs and actions are shaped and selected for him by the controlling power of his underlying disposition. What the law of Evidence, and of Procedure, nowadays most needs is that the men who are our judges shall firmly dispose themselves to get at the truth and the merits of the case before them. Until they become of this disposition and spirit, the mere body of rules, however scientific, however sensible, however apt for justice, will minister to them in vain.

J. H. W.

Northwestern University Law School,
Chicago, *September* 16, 1909.

[ ] The *single bracket* signifies that the rule or part of rule enclosed within it is the law in *one* or more jurisdictions, but *not in all*. A footnote in such cases makes further explanations.

The single bracket is freely used in the text for the purpose of warning the practitioner not to rely on the bracketed phrase without inquiry into the statutes and decisions of his own jurisdiction. The single bracket does not signify anything as to the commendability of the rule or clause so marked.

[[ ]] The *double bracket* signifies that the rule or part of rule enclosed within it is *not yet the law anywhere*, but *ought to be*.

{ } The *brace* signifies that the rule or part of rule enclosed within it *is* the law in every jurisdiction, but *ought not to be* law.

§ The *section number* at the left margin is intended exclusively as a convenient citation number for a particular passage. It has no relation to the intrinsic subdivision of subjects in the text. The Code is divided into Rules, Articles, Paragraphs, and Clauses — each of these being a subdivision of the larger. The Rules are grouped into Books, Parts, Titles, Sub-titles, Topics, and Sub-topics, and these groups represent the scientific relation of the Rules to each other.

W. § 496 etc. This citation, at the end of a Rule or Article, represents the number of that *corresponding section*, in the author's Treatise on the System of Evidence, where the authorities are collected for the subject dealt with in the Rule or Article.

The Section (§) numbers in Code and Treatise are not identical; but the sequence of subject is practically identical in Code and Treatise, except for three subjects (Confessions, Admissions by Conduct, and Hypothetical Questions), where a radical transposition has seemed to be a needed improvement.

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- B. Capacity, Skill, etc.
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- E. Emotion, Motive

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- II. Physical Capacity
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- V. Intent
- VI. Knowledge, Belief
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- Conduct exhibiting
- Circumstances causing
- Prior or subsequent condition
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  - D. Bias, Interest, etc.
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  evidenced by

  - Conduct exhibiting
  - Circumstances causing
  - [Repute ; see Hearsay Rule]
  - [Personal Opinion; see Opinion Rule]

  introduced through

  - Extrinsic Testimony
  - Cross-Examination
- *IV. Contradiction and Self-Contradiction*

  introduced by

  - Extrinsic Testimony
  - Cross-Examination

III. Testimonial Rehabilitation

IV. Parties' Admissions

POCKET
CODE OF EVIDENCE

CODE OF EVIDENCE

INTRODUCTORY RULES

RULE 1. *Scope of the Law of Evidence.* The law of Evi-
1 dence, as herein contained, includes the rules applicable when any knowable fact or group of facts is offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be given. — (W. § 1.)

RULE 2. *Divisions of the Subject.* The rules of Evidence
2 are comprised under five heads, herein represented by Introductory Rules and four Books, divided as follows:

Book I: What facts may be presented as Evidence (*Admissibility*).

Book II: By whom must or may Evidence be presented (*Burden of Proof; Presumptions*).

Book III: To whom must or may Evidence be presented (*Judge and Jury; Law and Fact*).

Book IV: Of what propositions in issue no Evidence need be presented (*Judicial Notice; Judicial Admissions*). — (W. § 3.)

RULE 3. *Facts Material and Provable under Rules of Sub-*
3 *stantive law and of Pleading.* The law of Evidence, as herein contained, therefore does not include the rules of substantive law or of pleading; these define the issues in litigation, and are assumed to have been already applied for determining the *facta probanda* (or propositions material to be proved).

These *facta probanda* are of the following four sorts: — (W. § 2.)

ART. 1. *Rules of Substantive law.* Propositions of fact
4 are provable by evidence when by the particular *substantive law* of the case they are material to the right or duty, claim or defence, involved therein.

Illustrations. (1) In a prosecution for battery the defendant offers to evidence the fact that the party beaten by him had insulted him shortly beforehand; this is admitted or excluded, not by any rule of evidence, but by the law of battery which determines whether the fact of the insult is a justification or a mitigation.

(2) In a prosecution for burglary, the prosecution offers to show that persons were living in the building at the time; this fact is admitted or excluded, not by a rule of evidence, but by the law defining the crime of burglary as a breaking and entering of a certain kind of house.

Distinctions: A rule of evidence and a rule of substantive law may here apply with different results to the same or to similar facts, according to the purpose with which the fact is offered.

(*a*) In an action for defamation by publishing a charge of crime, the plaintiff may offer his good character, by a rule of evidence, as evidential of his innocence of the crime, the defendant having pleaded the truth of the charge — (W. § 66); yet the plaintiff's bad reputation, by a rule of the law of damages, may or may not be used in mitigation of damages, if the defendant has pleaded both the general issue and the truth of the charge. — (W. §§ 70–73.)

(*b*) In a prosecution for murder, with a plea of self-defence, the deceased's reputed character for violence is not in issue under the substantive law; but it may be received, by a rule of evidence, to show the deceased's aggression or the defendant's belief. — (W. §§ 63, 246.)

(*c*) In an action based on the negligent manner of constructing a switch-frog, the custom of construction by other railroads may not in substantive law make the legal standard of care; but by a rule of evidence it may be received to show the mode of a careful construction. — (W. § 461.)

ART. 2. *Rules of Pleading.* Propositions of fact are prov-
5 able by evidence when by the *terms of the pleadings* and under the *rules of pleading* they are issuable in the case at bar.

Illustrations. In an action on a promissory note, the fact of payment may or may not be evidenced by the plaintiff's admissions, according as the payment is in issue or not, under a plea of general issue.

Distinctions: A rule of evidence and a rule of pleading may here apply with different results to the same or similar facts, according to the purpose with which the fact is offered:

(*a*) The defendant's offer to pay money in settlement may by a rule of evidence not be received to show an admission of liability; but by a rule of pleading his payment of money into court may restrict the issues in the case. — (W. § 1061.)

(*b*) In a trial on amended pleadings, the original unamended pleading does not control the issues in the trial; but by a rule of evidence it may be used as an extra-judicial admission. — (W. § 1067.)

ART. 3. *Rules dispensing from Evidence.* Propositions of
6 fact are provable by evidence when by any *rule of procedure*, including a rule of evidence, such facts are effective to dispense a party from evidencing a proposition which otherwise would require to be evidenced.

Illustrations. Where the execution of a deed is material, and the party needing it relies upon a stipulation or other judicial admission of its due execution, the stipulation may be proved. — (W. §§ 2588–2596.)

Cross-reference: This dispensation from evidencing propositions in issue is usually obtained by *judicial notice* (W. §§ 2565-2582) or by *judicial admissions* which appear on the record and therefore do not need to be evidenced.

ART. 4. *Rules of Evidence.* Propositions of fact are
7 provable by evidence when by any *rule of evidence* they are themselves admissible as evidentiary facts and thus in their turn become propositions to be proved.

Illustrations. In a prosecution for murder, the defendant's preparation or plan to commit the murder is admissible as evidence that he did commit it; this preparation or plan then is itself a fact to be proved, and the defendant's sharpening of a knife or utterance of a threat may be admissible as evidence thereof (W. §§ 238, 1725);
and so on in innumerable instances forming the bulk of the material in every trial.

ART. 5. *Material, admissible, relevant.* A fact provable
7*a* under any of the foregoing Articles 1–4 is said to be *material*,

i. e., legally capable of being proved. A fact receivable as evidence of such provable fact is said to be *admissible*. A *relevant* fact is one which would be admissible so far as concerns the rules of logic and probative value, i. e., the rules of Part I in Book I, but may not be actually admissible by reason of the restrictive rules in Parts II–IV of Book I.

Illustration. In an action against a carrier on a bill of lading, the signature of the shipper to the bill of lading and his prior reading of it may be material under Arts. 1–3, *supra*. If so, his letter admitting that he had read it, and his signature to the letter, may be relevant, under the rules of Part I, Book I, *post;* but they may not be admissible, by reason of some of the rules in Parts II, III, Book I, *post*.

RULE 4. *Kinds of Proceedings in which these Rules are applicable.*

8 ART. 1. The rules of Evidence, as herein contained, do not apply in the following kinds of proceedings, except as otherwise expressly provided:

Par. (*a*). In *ex parte* proceedings, as distinguished from responsory or adversary proceedings. — (W. § 4.)

Par. (*b*). In *interlocutory* proceedings, as distinguished from adjudicatory or final proceedings. — (W. § 4.)

Par. (*c*). In *appellate* proceedings, as distinguished from proceedings of trial of fact.

9 ART. 2. The rules of Evidence, as herein contained, do apply without variation in the following kinds of proceedings, except as otherwise expressly provided:

Par. (*a*). In proceedings in *chancery* and at *common law*. — (W. § 4.)

Cross-references. The principal rules in which such a difference is expressly provided are as follows: (1) Mode of taking testimony in writing (*post*, § 488); (2) mode and time of making objections (*post*, §§ 71–93); (3) mode of framing cross-interrogatories (*post*, §§ 914, 922); (4) number of witnesses required (*post*, § 1500); (5) discovery before trial (*post*, § 1325); (6) reformation of instruments for mutual mistake (*post*, § 1895).

10 *Par.* (*b*). In trials *criminal* and *civil*. — (W. § 4.)

Cross-references. The principal rules in which such a difference is expressly provided are as follows: (1) Corroboration of accomplices and of other kinds of witnesses in certain criminal issues (*post*, §§ 1517–1520); (2) moral character of the accused in a criminal case (*post*, §§ 130–137); (3) rules concerning *corpus delicti*, bigamy, etc. (*post*, §§ 1535–1537); (4) confessions of an accused (*post*, § 700); (5) measure of persuasion for the jury in a criminal case (*post*, § 2022); (6) presumptions and burden of proof for the respective parties in a criminal case (*post*, §§ 2064–2066).

Illustrations. (1) Doe is alleged to have defrauded Roe by means of representations that a policy of life insurance could be obtained by paying money and taking shares of stock. To evidence the fraudulent knowledge and intent of Doe, his representations of a similar sort, made to other persons, are admissible, either in a criminal prosecution for fraud or in a civil action for damages by reason of the deceit. — (W. § 321.)

(2) In a trial involving the death of Doe at the hands of Roe, the testimony of a deceased witness J. S., given at a former trial of the same case under cross-examination, is admissible, whether the case be a civil action for damages due for the death or a criminal prosecution for manslaughter; the requirement of cross-examination being no different, and the constitutional provision having only the effect of making the rule unalterable by the Legislature for criminal cases.[1] — (W. § 1398.)

(3) Doe publishes a statement that Roe has forged a check. In a criminal prosecution of Roe for forgery, the charge must be believed by the jury beyond a reasonable doubt; but in a civil action for slander by Roe against Doe, with a plea of truth, the jury may believe by a preponderance of evidence. — (W. § 2498.)

(4) The goods of Doe were shipped by the common carrier Roe, but never delivered. A statute made a common carrier liable for goods feloniously taken by his servants. In an action for the value of the goods, the carrier's failure to offer the testimony of the servants would be a circumstance of inference against him (under § 658, *post*); but in a prosecution of the servants for feloniously taking the goods, their failure to testify would not be a circumstance of inference against them (under § 1746, *post*). — Vaughton *v.* R. Co., 12 Cox Cr. 580 (1874).

Distinctions. By the rules of evidence a fact may be admissible evidentially in either a criminal or a civil case; yet the legal effect of the *factum probandum* may by the

[1] A few Courts refuse this view.

substantive law be different in a criminal charge and a civil claim:

(*a*) The defendant, being treasurer of the Navy, and charged with misapplication of public moneys received, a certificate for money received by the defendant's subordinate officer is admissible in any case to show that officer's receipt of the money; but the officer's receipt of the money does not of itself charge the defendant with criminal responsibility. — (Lord Melville's Trial, 29 How. St. Tr. 746 (1806).)

11 RULE 5. *Evidence before Trial; Jury's Deliberations; Judge's Instructions on Evidence.* The rules herein contained do not include rules of procedure concerning the taking or use of evidence before a trial or after a trial (extra-judicial), but include only the rules affecting the use of evidence at a trial (infra-judicial), except as otherwise expressly provided.

In particular,

12 *Par.* (*a*). Rules of procedure for the officers authorized to *take depositions* or acknowledgments, and for the mode of taking them, are not here included, except so far as a rule of evidence at the trial is thereby involved.

Illustrations. (1) Whether a party may before trial have process to take a deposition before a notary public, or to take a deposition of a convict in prison, is a rule of procedure not here included; but whether he may use such a deposition on the trial is a rule of evidence here included (*post*, § 928).

(2) Whether a party may have process to obtain discovery from a party-opponent before trial is equally a rule of procedure before trial, but it is here included because of its relation to the rule of evidence excluding witnesses and documents not discovered on demand before trial (*post*, § 1325).

13 *Par.* (*b*). Rules of procedure for *summoning witnesses*, tendering fees, exempting from process, etc., are not here included, except so far as the privilege of the witness, as a rule of evidence at the trial, is dependent on them.

14 ART. 1. No specific rule of evidence controls or applies to the *jury's use of evidence* after it has been admitted by the judge under the rules of admissibility, except as follows:— (W. §§ 29, 2550, 2551.)

Par. (*a*). The rule as to the *measure of persuasion*, i. e. whether by preponderance of evidence or beyond reasonable doubt (*post*, § 2022);

Par. (*b*). The rules of law as to *presumptions* affecting a party's duty to produce evidence (*post*, § 2034);

[*Par.* (*c*). The rule of *falsus in uno* (*post*, § 573);] [1]

Par. (*d*). The rules of *quantity*, requiring more than one witness, or corroboration, or the like, in specific issues (*post*, §§ 1502, 1516).

[*Par.* (*e*). The rules for *confessions* (*post*, § 700) and for *dying declarations* (*post*, § 951), which may be applied anew by the jury to reject such evidence from their consideration, even after the judge has admitted it, if the rules so require.] [2]

Par. (*f*). The rule of *multiple admissibility* (*post*, § 44).

Cross-references. The respective functions of *judge and jury* in general are dealt with in §§ 2100–2115, *post*.

ART. 2. *The judge shall give the jury no instructions of law as to the weight or credit to be given by them in considering* any piece of evidence or class of evidence which has *been by him admitted* as evidence to be considered by them; except as follows: [3]

Par. (*a*). The judge may instruct the jury as to the application of the various rules mentioned in Art. 3, *supra*.

Par. (*b*). The judge may instruct the jury to disregard (1) any evidence which after being admitted has later been struck out by him (under § 95, *post*) as having been incorrectly admitted in the first instance; or

[1] This is an unsound rule, obtaining in many courts.

[2] This paragraph represents the anomalous and unsound rule prevailing in some courts.

[3] (NOTE: This rule has always been, in theory and practice, a corner-stone of jury trial. In recent times, practice in this country has more and more violated it. It is here to be said that this rule and Art. 3, with Rule 18, § 49, *post* (trial Court's discretion) and Rule 23, § 102, *post* (new trials for error) can alone serve to rescue our law of trials in the future from becoming a putrid and unmanageable mass of decisions).

(2) any matter which, though not admitted by him as evidence, has somehow come or may come to the notice of the jury and cannot properly be considered by them as evidence.

Illustration. (1) The jury may be instructed to disregard the testimony of a witness whose disqualification is not discovered until cross-examination and whose testimony has then been struck out.

(2) The jury may be instructed to disregard the remarks of counsel improperly asserting facts not in evidence, or to avoid reading parts of an account-book which have been sealed up as irrelevant.

Par. (*c*). The judge may instruct the jury that they may consider as in evidence any specific fact, or class of facts, which is legally admissible as evidence but has naturally come to their notice without a formal offer by a party in the usual manner, as by interrogation or otherwise.

Illustrations. The usual examples of this kind of evidence are: the demeanor of a witness (*post*, § 534); the party's failure to produce evidence in his power (*post*, § 658); the self-contradictions of a witness contained in his own testimony (*post*, § 578);

Par. (*d*). The judge may instruct the jury to consider as proved any fact which is the subject of judicial notice (*post*, § 2120) or of a judicial admission (*post*, § 2140) under the respective rules of those topics.

16 [[ART. 3. The judge *may express to the jury*, after the close of evidence and argument, *his personal opinion* as to the credibility or weight of the evidence or any part thereof.]][1] — (W. § 2559.)

[1] (NOTE: This is not the law today in any jurisdiction, except in New Jersey and in the Federal Courts. But it ought to be. Perhaps a reaction will some day come, to redeem us from the great error which we committed two generations ago in thus abandoning one of the best traditions of jury-trial at common law. It is because of this abandonment of a sound rule, representing a natural part of the judge's function, that in recent times the same irrepressible function has tended to satisfy itself by the violation of the rule of Art. 4, as noted above).

RULE 6. *Conflict of Laws; Rule of the Forum.* The rule of
17 the forum of trial is to furnish the rules of evidence — (W. § 5); with the following exceptions and distinctions:

ART. 1. Where by the rule of the forum an official statement in writing is receivable testimonially if made under an official duty, (*post*, § 1090), it is sufficient if the law of the place of the official's act recognizes such a duty, even though the law of the forum does not. — (W. §§ 5, n. 9, 1633, 1644, 1675, 1677.)

ART. 2. Where a document is to be authenticated, the
18 kind of evidence admissible or sufficient for the purpose is determined by the rule of the forum; except so far as the principle of Art. 1 permits resort to the rule of some other place for admitting an official certificate of authenticity. — (W. §§ 2163–2169.)

ART. 3. Where for a trial to be held in one jurisdiction
19 a deposition is to be taken in another jurisdiction, the rules of the former jurisdiction determine the admissibility of the deposition on trial; but the rules of the latter jurisdiction determine the mode of compelling the deponent and of taking the testimony before the officer in so far as the use of compulsory process is concerned or so far as State policy has prescribed any rules limiting such proceedings within its territory. — (W. §§ 5, n. 8.)

ART. 4. Where a rule of substantive law or of judicial
20 jurisdiction is involved, and not a rule of evidence, the general principles for conflict of laws on those subjects apply. — (W. § 5.)

Illustrations. (1) A will appears to be attested by three attesting witnesses. If by the rule of the forum two only are required to be called, that rule applies, whether by the rule of the testator's domicile or of the place of the property the rule requires the calling of three or one or more. But so far as the validity of the will depends on the number of witnesses attesting it, the different rule of the domicile or of the place of property may require to be applied.

(2) An official marriage register in France is desired to be proved in New York by a copy made by a notary; a French

rule admitting a notary's copy of a marriage register will not *per se* suffice to admit it in New York; but if in New York a copy of an official register is admissible when made by the officer having custody of it, and the French notary is shown to have the custody, then the copy is admissible. Whether the purporting notarial seal shall be presumed genuine will be determined by the rule of New York.

(3) On a trial in Illinois the deposition is desired of a citizen of Illinois who is in Massachusetts. Whether the person may be compelled to appear before the officer appointed to take the deposition depends on the law in Massachusetts; but whether the deposition may be received as that of a non-resident depends on the law in Illinois.

(4) A bill of lading is given in Illinois for shipment of goods to Massachusetts, and is signed by the consignor. Litigation arises in Massachusetts. If by the general principles of conflict of laws the rule of the place of making the contract is to govern, then the rule of Illinois determines whether the consignor may in spite of his signature dispute his knowledge of the bill's contents (parol evidence rule), and whether any part of the contract resting in parol is binding (statute of frauds); both of these rules belonging to the substantive law, though usually spoken of as rules of evidence.

RULE 7. *Conflict of Laws; Federal and State rules.* In
21 the respective jurisdictions of State, Federal, and Territorial Courts in the United States, each is governed in its own trials, independently of the others, by its own rules of evidence, on the principle of Rule 6, except so far as the Federal Constitution compels or the respective State statutes permit a variation. — (W. § 6.)

Such variations are as follows:

ART. 1. *State Courts.* The Court of a State applies the
22 State rule of evidence, under the general principle of Rule 6;

Par. (*a*) even where a Federal statute has made a rule of evidence for documents not bearing a *revenue-stamp;* — (W. § 6, n. 11, and § 2184.)

Par. (*b*) but *except* that for the *authentication of official documents* it recognizes as an alternative method the rule of the Federal statute; — (W. § 1680, n. 3, and § 1681, n. 12.)

Par. (*c*) and *except* that it is bound by any rule of the *Federal Constitution* that dominates over State law.[1] — (W. § 7, n. 10.)

ART. 2. *Federal Courts.* In the Federal Courts, the rules
23 of evidence of the State in which the trial is held are adopted as the Federal rules, unless by Federal constitution, treaty, or statute, an inconsistent rule is expressly enacted; with the following exceptions and distinctions:

(*Reason and Policy:* Inasmuch as a Federal Court usually sits within a particular State, and as the counsel are also practitioners in the courts of that State and are therefore accustomed to its settled rules of procedure, the above general rule is a simple, flexible, and wholesome one for procedure in general).

Par. (*a*). In *equity proceedings*, the foregoing general
24 rule applies. — (W. § 6.)

Par. (*b*). In *admiralty proceedings*, the foregoing gen-
25 eral rule applies. — (W. § 6.)

Par. (*c*). In *common law criminal trials*, the foregoing
26 general rule does not apply, but instead is applied the State common law rule which was in force at the time of the entrance of the State into the Union.[2] — (W. § 6.)

Par. (*d*). In *common law civil trials*, the foregoing gen-
27 eral rule applies.

Par. (*e*). The State rule, when it is to be followed, may
28 be a *statutory* rule; except under par. (*c*) *supra*.

Par. (*f*). The State rule, when it is to be followed,
29 may be *any rule* of evidence, and not merely a rule for the qualifications of witnesses. — (W. § 6.)

Par. (*g*). The State rule as to *depositions*, when it is
30 to be followed, is only the rule as to the mode of taking, and not the rule as to the mode of using. — (W. § 6.)

RULE 8. *Constitutional Rules; Legislative Alteration.* Ex-
31 cept where a Constitution by embodying expressly a specific

[1] This presumably might serve to also cover the rule of Par. (*b*), *supra*, under the full-faith-and-credit clause; but that rule can be rested on the ground of comity.

[2] This is an unreasonable modification.

rule of evidence has made it unalterable by the Legislature, the Legislature has the power to alter any rule of evidence; subject to the following distinctions and exceptions: — (W. § 7, n. 7.)

32 ART. 1. A prohibition against *ex post facto* laws does not apply to a law altering a rule of evidence. — (W. § 7, n. 9.)

33 ART. 2. A constitutional rule of *property* or other substantive law cannot be altered by a statute which in form purports to make only some rule of conclusive evidence under Rule 133 (*post*, § 906). — (W. §§ 1353, 1354.)

34 ART. 3. A statute which usurps the judicial function in purporting to make a rule of conclusive evidence or presumption so as to prevent the judicial investigation and ascertainment of the facts material to a right or liability is invalid under Rule 133 (*post*, § 906). — (W. §§ 1353, 1354.)

BOOK I: ADMISSIBILITY

(WHAT FACTS MAY BE PRESENTED AS EVIDENCE)

INTRODUCTION:

GENERAL THEORY AND PROCEDURE OF ADMISSIBILITY

Topic I: General Theory

RULE 10. *First Axiom of Admissibility.* None but facts
35 having rational probative value are admissible. — (W. § 9.)

Illustration. In a trial for homicide, the fact is offered that the accused was requested, with others, to touch the corpse of the murdered man, to see if blood flowed, but that he refused to do so; this is admissible, not because the flowing or retention of the blood at the guilty man's touch would be rationally evidential of his guilt, but because a particular person's refusal to touch may be evidence of his consciousness of guilt, under Rule 118 (*post*, § 650).

RULE 11. *Second Axiom of Admissibility.* Any fact having
36 a rational probative value is admissible, unless some specific rule herein forbids. — (W. § 10.)

Illustrations. (1) On an issue involving an act of forgery, the disposition of the person's character as to acts of honesty or dishonesty, is of some rational probative value towards showing that he did or did not do the act; it is therefore admissible, unless some specific rule of prohibition is applicable, such as the rule against the prosecution's use of the accused's character, or the rule against a civil party's use of his character.

(2) On an issue whether a person was on board a vessel lost at sea, the fact of his prior intention to sail on that vessel is of probative value, and is admissible; but to evidence that

intention, the hearsay rule forbids the admission of his declarations, unless an exception to the hearsay rule is applicable.

RULE 12. *Classification of the Rules of Admissibility.* The
37 rules of Admissibility are divided into three groups: — (W. § 12.)

The first group of rules define the conditions of probative value which suffice to entitle a fact to be regarded as evidential; these are rules of Relevancy (including the relevancy of Circumstantial, Testimonial, and Autoptic Evidence), and are contained in Rules 24–123 (*post*, §§ 105–734).

The second group of rules lay down auxiliary tests and safeguards, appropriate to special classes of evidence, and designed to overcome special weaknesses or risks shown by experience to exist; these are rules of Auxiliary Probative Policy, and are included in Rules 125–193 (*post*, §§ 745–1643).

The third group of rules allow certain extrinsic policies, important to the community in general, to override temporarily the purpose of ascertaining the truth, and therefore to exclude facts for reasons independent of their probative value; these are rules of Extrinsic Policy, and are included in Rules 194–212 (*post*, §§ 1650–1870).

RULE 13. *Admissibility, distinguished from Weight or Proof; Function of Judge and Jury.* When an offered fact satisfies
38 all the rules of these three groups, being forbidden by none, it is said to be Admissible; that is, the jury may consider it as part of the evidential material which is to persuade them to the conclusion represented in their verdict. — (W. §§ 12, 28.)

ART. 1. The judge alone determines the Admissibility of
39 an offered fact, pursuant to Rule 229 (*post*, § 2100).

ART. 2. The jury alone determines the persuasive effect,
40 or Weight, of a fact admissible for their consideration, subject to the provisions of Rule 5, Arts. 3, 4, 5 (*ante*, § 14).

RULE 14. *Admissibility, distinguished from Relevancy.* A
41 fact offered as relevant for a specific purpose must satisfy all

the rules applicable to it for that purpose in any of the groups of rules mentioned in Rule 12 (*ante*, § 37); so that its admissibility signifies that it is not only relevant, under the first group of rules, but is also not forbidden by any rule under the remaining two groups. — (W. § 29.)

RULE 15. *Multiple Admissibility.* When a fact is offered
42 for one purpose, and is admissible in so far as it satisfies all rules applicable to it when offered for that purpose, its failure to satisfy some other rule which would be applicable to it if offered for another purpose does not exclude it. — (W. § 13.)

Illustrations. (1) On an issue of the sanity of J. S., a letter from M. to J. S., concerning a business transaction, and J. S.'s conduct in ordering a sale of an estate in answer to the letter, is admissible as conduct of J. S. relevant to show his mental capacity, (*post*, § 252); but the inadmissibility of the letter (*post*, § 910), as a hearsay statement of M. upon the mental capacity of J. S., does not prevent the former use of the letter in connection with the conduct of J. S. — (W. §§ 228, 1786.)

(2) On an issue of murder of M. by J. S., with a plea of self-defence, the prior threat of M. to kill J. S. is not admissible (*post*, § 279) to show J. S.'s reasonable apprehensions of assault, unless communicated to J. S.; but its inadmissibility for this purpose does not prevent its admissibility (*post*, § 182) as evidence of M.'s design to kill J. S. and therefore of his probable aggression, provided it satisfies the other rules applicable to the latter purpose. — (W. §§ 110, 247.)

(3) A purporting deed not shown by some appropriate evidence to be genuine is not admissible (*post*, § 1595) as an instrument of grant conveying title from the purporting grantor; but the same document, if acted on by an occupant of the land under claim of prescriptive title, is admissible (*post*, § 1245) as a verbal act of his, indicating the extent of land occupied by him; and its inadmissibility for the former purpose does not prevent its admissibility for the latter purpose. — (W. § 2132.)

(4) The extra-judicial admissions of a wife may not be admissible against her husband, because the rule prohibiting her testimony against him may apply equally to her judicial admissions (*post*, § 1713); but if her statements were made publicly in his presence without dissent, his silence may make them his own admissions, and as such they would be admissible against him (*post*, § 668); yet, if they were made privately to him, the further rule against the use of confidential marital communications (*post*, § 1812), being equally appli-

cable to them in either of the above aspects, would exclude them for either purpose. — (W. § 2338.)

43 *Par.* (*a*). The possibility that the jury might improperly apply to an inadmissible purpose a fact admissible for another purpose does not exclude it.

44 *Par.* (*b*). The party against whom a fact is admitted under this Rule may ask the judge to *instruct the jury* as to the limited purpose for which the fact is admissible; and the party's failure to ask for such an instruction is a waiver of objection to the inadmissibility of that fact. — (W. § 13.)

45 RULE 16. *Conditional Admissibility.* If an offered fact would by any rule be admissible only after or together with other facts, it may be admitted provisionally when offered, subject to the later introduction of the other facts under Rule 163 (*post*, § 1360). — (W. § 14.)

46 RULE 17. *Curative Admissibility.* Where an inadmissible fact has been offered by one party and received, and the opponent afterwards, for the purpose of negativing or explaining or otherwise counteracting it, offers a fact similarly inadmissible, the following rules apply: — (W. § 15.)

47 ART. 1. If the opponent *did not duly object* to the fact originally offered, the second fact

a. [is admissible if it serves to remove an unfair effect upon the jury which might otherwise ensue from the original fact.][1]

b. [is admissible.][1]

c. [is inadmissible.][1]

Illustrations. (1) In an action for loss of support of the plaintiff's husband, due to intoxication caused by the defendant, the plaintiff has offered the inadmissible fact of prior acts of intoxication caused by the defendant; to rebut any unfair prejudice from this fact, the defendant may introduce testimony in denial of it.

[1] Clause *a* is the sound rule, obtaining in a few jurisdictions. Cl. *b* is the rule in England and a majority of U. S. jurisdictions. Cl. *c* is the rule in a few jurisdictions. Rulings of Cl. *b* are often really examples of the rule of Cl. *a*.

(2) In an action on a contract to purchase goods, the defendant having refused to perform on the ground of the goods being not equal to sample, the plaintiff introduces the inadmissible fact that the defendant has purchased his goods from other persons at a cheaper price; to remove the prejudicial impression of this fact, the defendant may explain the circumstances of these purchases.

48 [ART. 2. If the opponent *did duly object* to the fact originally offered, the second fact is admissible on the same conditions as in Art. 1 *supra*.] [1]

Distinctions. (1) Whether a party who has originally objected is deemed to *waive by subsequently introducing similar evidence* (*post*, § 91);

(2) Whether facts admissible to *impeach a witness' character* may be rebutted or explained by *denying* them (Rule 111, *post*, § 608) or by *consistent statements* (Rule 113, *post*, § 612);

(3) Whether a *collateral* fact may be disproved (Rule 107, *post*, § 568);

(4) Whether the party may *re-examine* to facts which he might have put in on the direct examination (Rule 164, *post*, § 1378).

49 [[RULE 18. *Discretion of the Trial Court. In all rulings upon the admissibility of evidence, the trial Court's determination is final and absolute;* subject to the following distinctions and exceptions:]] — (W. § 16.)

(NOTE: This is the second great commandment of enlightened trial procedure, which forms, with the rule as to instructions on the weight of evidence (Rule 5, *ante*, §§ 15, 16) and the rule against new trials for erroneous rulings on admissibility (Rule 23, *post*, § 102), a chief hope of future progress towards attaining truth by trials. The following articles, as they stand, do not represent accurately the law in any one jurisdiction; but our trial procedure will remain a solemn game until they do represent the law everywhere.)

50 ART. 1. The trial judge is bound to *obey the rules* of evidence, and therefore *does not have discretion*, in the sense of determining the admissibility of facts by his personal views or changeable beliefs as to what is just.[2]

[1] No authority on this point has been found; but the case is stronger for the opponent than that of § 47, because he cannot be charged with a waiver, and yet his dilemma, when the fact's admissibility is doubtful, is just as meritorious.

[2] See Note 1 on the next page.

ART. 2. The trial judge's determination is *not final, i. e.,*
51 it is subject to the usual methods of appeal, in so far as his statement of the *tenor of a rule of law* is objected to as an erroneous statement of the rule.[1]

[ART. 3. The trial judge's determination is *final,*

52 *Par.* (*a*) in the *application of a rule* of evidence to a particular offer of evidence;[2] and

Par. (*b*) in the *finding of any facts preliminary* to or otherwise involved in the application of a rule to the offer.][2]

Illustrations. (1) To prove the contents and execution of a deed, a certified copy of the record is offered, without evidence of the loss of the original. The trial judge rules it to be admissible. This ruling is not final, under Art. 2, so far as involves the judge's statement of the rule of law to be that no loss need be shown before using a certified copy of the record. The ruling is final, under Art. 3, Par. (*a*), so far as the question arises whether the exceptional rule for recorded deeds is the applicable one instead of the ordinary rule for documents in general. The judge's ruling is final, under Art. 3, Par. (*b*), so far as the question of fact arises whether the original deed is sufficiently shown to be lost.

(2) On a prosecution for murder, the defendant offers to show prior threats by the deceased against the defendant. The trial judge rules this to be inadmissible. This ruling is not final, under Art. 2, so far as involves the judge's statement of the rule of law to be that communicated threats are inadmissible unless an overt act was done by the deceased, or that uncommunicated threats are not admissible at all. The ruling is final, under Art. 3, Par. (*a*), so far as the question arises which of these rules is applicable to the offer as made. The ruling is final, under Art. 3, Par. (*b*), so far as the question of fact arises whether the threats were communicated, or whether there was an overt act.

(3) A witness is objected to as not qualified to testify to the nature of certain stains said to be bloodstains. The rule of evidence that every witness must have sufficient experience on the subject of his testimony would be undisputed; but the question might arise whether by rule of evidence special experience is needed for recognizing a bloodstain; this ought

[1] These two articles are intended to emphasize the important distinction between "discretion" as meaning a right to decide on personal grounds without any fixed rules, and "discretion" as meaning the finality of the decision. These articles are the law everywhere, and ought to be.

[2] This is the law in only a few jurisdictions and on a few subjects, e. g. the qualifications of an expert witness.

to be regarded as a question of the application of the general rule to the specific offer (under Art. 3, Par. *a*) rather than of the tenor of an abstract rule of law (under Art. 2); yet most jurisdictions do have concrete rules of law for the different kinds of expert facts, and therefore the ruling would not be final. But the judge's finding that this witness was by trade a butcher would be final under Art. 3, Par. (*b*), and the judge's ruling that a butcher is a person qualified to know about blood would plainly be a ruling upon the application of the law to a specific offer, final under Art. 3, Par. (*a*).

(4) A child-witness eight years old is objected to as not competent to take the oath. Whether there is a rule exempting children from the oath, or a rule declaring children of eight years incompetent, is an appealable ruling of law. But whether the rule applies to admit the particular child offered as a witness, and whether, in applying the rule, the child is of a certain age, are final rulings under Art. 3, Par (*a*) and Par (*b*).

[[ART. 4. An appeal may be taken from rulings under
53 Art. 3, provided the appellant shows *prima facie* that the alleged error would entitle him to a new trial under Rule 23, (*post*, § 102), and also files such an affidavit of merits, subject to a penalty, as is otherwise usual to deter from frivolous or dilatory proceedings.[1]]]

(NOTE: In order to simplify the working of the rules of Arts. 2 and 3, the trial judge should follow the form of ruling used in other countries, *i. e.*, by stating the rule of law, as understood by him, separately from the application of it to the offer and the preliminary facts; thus (in Illustration *a*, above): "The rule is that an original deed must be shown lost, but there is an exception for a certified copy of a recorded deed. This exception applies here, so that the original's loss need not be shown; for the copy offered is a certified copy of the record." This enables the Supreme Court to separate at once the final from the appealable part of the ruling. If there were a Code, the trial judge would rule: "Under Code § 781, I rule that this is a certified copy and is therefore admissible without showing the loss of the original.")

Cross-references. For specific rules of evidence in which the principle of the trial judge's finality of decision is regularly applied, in some jurisdictions, see Rule 73, *post*, § 344, (specific instances of conduct, etc.), Rule 83, *post*, § 377, (witness' qualifications), Rule 107, *post*, § 567, (witness' impeachment), Rule 126, *post*, § 759, (loss of document), Rule 163, *post*, § 1352, (order of evidence).

[1] This ought to prevent frivolous exceptions, and yet gives ample safeguards. It takes the place of the usual fruitless phrase about "abuse of discretion." But it is not now law.

Topic II:

Procedure in Questions of Admissibility

RULE 19. *The Offer of Evidence.* All evidential facts, in
55 order to be admissible, must be offered to the tribunal by one of the parties; *except*

Par. (*a*) where the matter naturally comes to the atten-
56 tion of the tribunal in the ordinary course of the trial, under Rule 5 (*ante*, § 15, par. (*c*)); and

Par. (*b*) where the judge of his own motion orders the
57 production of the evidence, under Rule 224 (*post*, § 1990); and

Par. (*c*) where the judge or the jury may take judicial
58 notice of the matter, under Rule 230 (*post*, § 2120).

Art. 1. *Time of the Offer.* The time of the offer *at the trial*
59 is determined by the rules governing the Order of Presenting Evidence (Rule 163, *post*, § 1352); but testimony taken by deposition *before trial* must also fulfil the rules of the Code of Procedure as to filing before trial, and the like.

Art. 2. *Form of the Offer.* The offer may be made in
60 any form that suffices to make plain to the judge that the counsel desires and is ready to bring the evidence to the attention of the jury; with the following exceptions and distinctions: — (W. § 17.)

Par. (*a*). The offer need not be *in writing;* although by certain other rules the evidence itself may need to be in writing;

Par. (*b*). The offer may be made by *calling a proposed*
62 *witness* to the stand and by *asking him a question* as to the proposed evidential fact; except where the evidential fact is required to be proved in some other mode, as by the

exhibition of a corporal thing, the reading of a deposition, etc.

Cross-references. For the rules as to the *mode of interrogation*, the reading of a *deposition*, etc., see Rules 92-95, *post*, §§ 461–497.)

Par. (*c*). The offer of a party's own case must be, not
63 merely a tentative proposal, nor a promise of expected evidence, but in substance a presentation of *evidence actually ready*.

Cross-reference. For an offer of evidence *conditionally admissible*, see Rule 163 (*post*, § 1360).

Par. (*d*). The offer on a cross-examination must not be
64 a question intended merely to convey to the jury a *groundless insinuation*.

Cross-reference. This kind of offer is also partly covered by Rule 156 (*post*, § 1271).

ART. 3. *Tenor of the Offer.* The sufficiency of an offer to
65 satisfy the rules of evidence depends exclusively upon its specific contents regarded as a whole; with the following consequences: — (W. § 17.)

Par. (*a*). If the fact offered is admissible only *for a*
66 *certain purpose*, or only *in connection* with another fact, the offer is not sufficient unless it specifies the purpose or the other fact.

Cross-references. This involves *conditional admissibility* (Rule 163, *post*, § 1360). For the rule that an *expected but excluded answer* must also be specified, see Rule 22 (*post*, § 100).

Par. (*b*). If *two or more facts* are included in the offer, of
67 which one or more is admissible and another is not, the offer is not sufficient.

Par. (*c*). If the fact is offered for *two or more purposes*,
68 for one of which it is inadmissible, the offer is not sufficient.

Par. (*d*). If the fact is offered for a specified *inadmis-*
69 *sible purpose*, the offer is not sufficient, even though there existed an admissible purpose not specified.

Par. (*e*). If the fact is offered for a specified *admissible*
70 *purpose*, the offer is sufficient, even though there existed an inadmissible purpose not specified.

Cross-reference. This results from the principle of Multiple Admissibility, under Rule 15, (*ante*, §§ 42–44).

71 RULE 20. *The Objection to Evidence.* For the purposes of subsequent appeal or other correction of errors, no erroneous admission of evidence can be availed of unless the party against whom it was offered has duly made objection. — (W. § 18.)

72 ART. 1. *Time of the Objection.* An objection must be made as soon as the ground of it is known, or could reasonably have been known, to the objector, unless some special reason makes its postponement desirable for him and not unfair to the offeror; with the following further rules of detail:

73 *Par.* (*a*). For evidence first taken *at the trial*, the objection to a *person* on the ground of his personal disqualification as a witness must be made when the person is first called to the stand, subject further to Rules 75–79 (*post*, §§ 362–366).

Cross-reference. These further rules, concerning *voir dire*, etc., are best placed with the rules for Qualifications of a Witness.

74 *Par.* (*b*). For evidence first taken *at the trial*, the objection to a *fact* or group of facts must be taken at the moment after the offeror has uttered his question or otherwise made his offer of the fact; *except* that where the ground of the objection is found only in some feature of a *witness' answer* which could not have been relied upon until the answer was made, the objection may and must be made immediately after the answer.

75 *Par.* (*c*). For the purpose of being enabled to make due objection, the opponent is entitled to see any *writing* before it is offered in evidence, subject to Rules 89, 161 (*post*, §§ 440, 1345).

76 *Par.* (*d*). The objection must be *positive*, not hypothetical; but the right to object may be expressly *reserved* till a later time, if the opponent cannot at the usual time practicably know the possible grounds for objection; as, where a lengthy deposition is offered or a series of complicated facts.

Cross-reference. Compare the rule for a ***judge's reservation*** of his ruling (Rule 21, *post*, § 94).

77 *Par.* (*e*). The objection must be *repeated* for each separate offer of evidence, even though the fact offered and the ground of objection be the same;

provided (1) that where the offeror in renewing his offer seeks *merely to evade* the objector's vigilance, or where the offeror expressly or impliedly *consents*, an objection to the same fact or witness or to the same class of facts or witnesses need not be renewed; and

provided (2) that where a fact has been admitted *conditionally* only, and the condition is not fulfilled later, a renewal of the objection is necessary under Rule 163 (*post*, § 1360).

78 *Par.* (*f*). For evidence taken by *deposition before trial*, [the objection must be made before trial and at the time of the taking;

provided (1) it was then feasible to be taken, and

provided (2) the ground of the objection was such that it might have been obviated by the offeror before the time of offering at the trial.] [1]

Illustrations. Ordinarily, all objections to the *procedure* of taking, the manner of interrogatories, the form of the answer, and the like, will be proper at the time of taking. Ordinarily, all objections to the *materiality* or *relevancy* of facts offered need not be made till the trial; although sometimes a fact whose irrelevancy could be removed by a further question to the same deponent would fall in the former class. Objections to the qualification of a witness may fall in either class; as also objections to the auxiliary rules, such as the rule for producing original documents, the opinion rule, and others.

79 *Par.* (*g*). For evidence taken by *deposition before trial*, objections which ought to be made before trial need not be made until after the deposition is returned and filed, so far as the ground of the objection is found in the documentary form of the officer's return; and then by a motion to suppress or amend it.

[1] This is the broad rule as sometimes generalized. But more usually its statement is found (not so satisfactorily) in the shape of specific rules on the details noted in the Illustrations.

Par. (*h*). For evidence taken by *deposition before trial*,
80 an objection made before trial must be renewed at the time of the offer of the deposition on the trial, except so far as a prior motion to suppress or amend has disposed of it.

Par. (*i*). A failure to make objection at one trial does
81 not amount to a waiver of objection for a *subsequent trial*, except so far as a failure to object before the former trial would have had that effect.

ART. 2. *Form of the Objection.* An objection need not be
82 made in any particular *form of words*, provided the objector makes it plain to the judge that he desires to have the evidence not admitted for the consideration of the jury.

An objection made to a witness' answer after it is uttered is termed a *motion to strike out.*

An objection made to a deposition before trial is termed a *motion to suppress.*

ART. 3. *Tenor of the Objection.* An objection may be,
83 according to its tenor, either general or specific. A *general* objection is one which merely asserts the offered evidence to be inadmissible. A *specific* objection is one which additionally specifies the principle or rule by reason of which the offered evidence is said to be inadmissible. — (W. § 18.)

Par. (*a*). A *general* objection, *if overruled* by the trial
84 judge, is not sufficient for any consideration on appeal; *except* that it will be sufficient if on the face of the evidence, considered in its relation to the whole case, there appears no purpose whatever for which the offered evidence could have been on any conditions properly admitted.[1]

Par. (*b*). An objection stating that the offered evidence
85 is "*incompetent*" or "irrelevant" or "immaterial" is deemed a general objection.

Par. (*c*). A *general* objection, *if sustained* by the trial
86 judge, suffices for consideration on appeal:

except (1) that it will not be sufficient if on the face of the evidence, considered in its relation to the whole of the case, there appears no ground of objection which could have been on any conditions valid; and

[1] The phrasing differs somewhat in different courts.

[*except* (2) that it will not be sufficient if the offering party has asked for and the objector has then failed to specify a ground of objection].[1]

Par. (*d*). A *specific* objection, *if overruled* by the trial
87 judge, is not sufficient for the consideration on appeal of any ground of error *other than the one* specified;

except that it will be sufficient if on the face of the evidence, considered in its relation to the whole case, there appears no purpose whatever for which the offered evidence could have been on any conditions properly admitted.

Par. (*e*). A *specific* objection, if *sustained* by the trial
88 judge, is sufficient for the consideration on appeal of any ground of error, other than the one specified, which could not by possibility have been obviated by the offeror during trial if it had been specifically stated. — (W. § 18.)

Par. (*f*). An objection is to be construed as an *indivisible*
89 *whole;* so that where an objection is made to a question or answer involving *two or more facts*, or to the *entire testimony* of a witness, or to any other composite offer a part of which is liable to a specific objection though another part is not, it is insufficient, whether overruled or sustained, for consideration on appeal, unless it expressly specifies the part to which the ground of objection is directed. — (W. § 18.)

ART. 4. *Waiver of the Objection.* An objection may be
90 waived expressly or impliedly.

Par. (*a*). The objector waives an objection when he
91 himself subsequently introduces evidence which is directed to prove or disprove the same matter and is liable to the same objection;[2] — (W. § 18.)

except where the subsequent evidence is in fairness needed to *rebut or explain* evidence introduced upon an *overruled* objection.

Illustration. Deed of A signed by mark; the plaintiff offers a deposition of M, living in the jurisdiction, to the identity of A's mark. The defendant objects to the sufficiency of evidence of execution, and also to the deposition of M who

[1] The second exception is an implied corollary.

[2] This rule is difficult to phrase with precision; the risk is of stating it too broadly.

is living and able to attend court; both objections are erroneously overruled. The defendant afterwards offers the deposition of N, living in the jurisdiction, denying that A was illiterate, etc.; this is a waiver of the first objection, but not of the second.

Distinctions. (*a*) Compare the rule for Curative Admissibility (Rule 17, *ante*, §§ 46–48). There the question is whether the subsequent evidence is of right now admissible, while here the question is whether its admission now prevents the party from complaining of the original error.

(*b*) Distinguish the rule that an error of *exclusion* by sustaining an objection is cured by the *opponent's* subsequent *introduction of the same evidence;* here it is not that a waiver exists, but that the error becomes immaterial (Rule 23, *post*, § 102).

92 *Par.* (*b*). The objector may by other conduct, depending on the circumstances of the case, be deemed to have waived an objection.

93 ART. 5. *Burden of Proof.* The burden of proving to the judge the existence of the facts which form the grounds of an objection, but are not apparent on the face of the offer, is ordinarily not on the objector; because by Rule 19 (*ante*, § 65), the sufficiency of an offer is to be determined from its tenor as made.

Exceptions to this rule are stated in connection with the various kinds of evidence to which they apply.

Cross-references. Compare the rules for disqualification by interest, infancy and insanity (Rules 80, 81, 84, *post*, §§ 367, 370, 388), for confessions (Rule 122, *post*, § 700).

94 RULE 21. *The Ruling of the Judge.* An objector is *entitled* to an *immediate* and *final* ruling before the close of the offeror's case, declaring the offered evidence inadmissible or admissible either absolutely or conditionally, in so far as otherwise he would be unfairly disadvantaged by his inability to know whether evidence in rebuttal or explanation would be needed. — (W. § 19.)

95 ART. 1. An objector is not entitled to an immediate and final ruling directly on objection made, and therefore cannot complain of a subsequent *revocation* of a ruling of admission by striking out the admitted evidence, merely in so far as

concerns the effect of the admitted evidence upon the jurors' minds.

ART. 2. In case of a revocation of ruling under Art. 1,
96 the objector is entitled upon request to an instruction to the jury to disregard the evidence struck out.

RULE 22. *The Exception to the Ruling.* A ruling cannot be
97 considered for purposes of appeal unless the party dissatisfied therewith has so indicated at the time to the judge and the other party in some suitable manner. This notice of dissent is termed an Exception. — (W. § 20.)

ART. 1. *Time of the Exception.* The exception must be
98 taken immediately upon the ruling; unless the Rules of Court prescribe otherwise.

ART. 2. *Form of the Exception.* The exception must be
99 in writing, signed by the counsel and the judge; except so far as the Rules of Court prescribe otherwise.

ART. 3. *Tenor of the Exception.* The exception must show
100 the evidence offered, the objection and its grounds, the ruling, and the notice of exception, and all other matters necessary for determining the correctness of the ruling and the materiality of the error if any, such as the expected answer to the question, where a question was excluded, or the answer made, where a question was allowed. — (W. § 20.)

ART. 4. *Further Requirements.* The exception must further
101 satisfy all other rules of procedure applicable to exceptions in general, such as its confirmation by motion for new trial, or the like.

Distinctions. Distinguish the rules for a motion to take the case from the jury for *insufficiency of the evidence as a whole* (Rule 226, *post*, § 2009).

RULE 23. *New Trial for Erroneous Ruling.* [*An er-*
102 *roneous ruling by the trial judge, in admitting or excluding evidence, shall not be a ground for ordering a new trial or otherwise reversing a judgment, if the jury's verdict, without the erroneously admitted evidence, or with the erroneously excluded*

evidence, ought nevertheless to have been to the same effect as actually rendered.] [1] — (W. § 21.)

(NOTE: This is the third great commandment of enlightened trial procedure; it forms, with the rule as to instructions on the weight of evidence (*ante*, §§ 15, 16), and the rule for the finality of the trial Court's determinations (*ante*, § 49), the foundation of future progress. It is probably not yet the law, as actually enforced, in any jurisdiction.)

[ART. 1. In applying the foregoing rule, the party com-
103 plaining of error shall have the burden of convincing that the verdict ought to be set aside.]

[1] This is the orthodox phrasing in the earlier English cases. Other judicial phrasings are: "If the verdict is clearly supported by evidence properly admitted, it shall not be set aside for the erroneous admission or rejection, etc." "If the evidence admitted or rejected could not have changed the result, the verdict will not be set aside"; "If the verdict is manifestly for the right party, the verdict will not be set aside for the erroneous admission or rejection of evidence." "If the erroneous admission or rejection of evidence ought not to have affected the verdict." The following phrasing is from the Indian Evidence Act, § 167, drawn by Sir J. Stephen: "The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

PART I: RELEVANCY

INTRODUCTORY PROVISIONS: GENERAL PRINCIPLES OF RELEVANCY

RULE 24. *Kinds of Evidence.* All evidential sources, *i. e.*
§ 105 materials for persuading the tribunal of some *factum probandum*, as defined in Rule 3 (*ante*, §§ 3–7), are divided into three classes, namely, Testimonial, Circumstantial, and Autoptical. — (W. § 24.)

ART. 1. *Testimonial Evidence.* An evidential fact is said
§ 106 to be Testimonial when it is the assertion of a human being offered as evidence of the truth of the matter asserted.

Par. (*a*). Such an assertion is termed Testimonial Evi-
§ 107 dence whether the matter asserted is a fact directly forming a *part of the issue* under the pleadings, or is merely a *subsidiary fact* relevant as evidence of some other fact under Rule 3, Art. 4 (*ante*, § 7).

Illustration. In an issue of homicide, the defendant alleging an alibi, part of his evidence is that his house was on fire at the time, ten miles away, and that he was burned in trying to extinguish it; the physician's assertion that he saw and treated the defendant's burns is testimonial evidence, no less than the eye-witness' assertion that the deceased was killed with a knife.

Par. (*b*). Such an assertion is termed Testimonial Evi-
§ 108 dence, whether it is uttered *on the witness stand* in the jury's hearing, or is uttered *out of court* before trial. In either case it is governed by the general principles for Qualification, Impeachment, and Rehabilitation of Witnesses (Rules 80–122, *post*, §§ 367–734). In the latter case, it is governed additionally by the Hearsay rule (Rule 134, *post*, § 910); but the first-named general principles then

suffer special modifications, provided for in the sections dealing with the Hearsay rule.

Illustration. In an action for non-payment of a debt, a broker testifies for the defendant that the defendant placed money in his hands for the payment of the debt. If, instead of the broker making this statement on the stand, he has made it as an entry in an account-book, it would be equally testimonial evidence, if offered and received, but it would first have to satisfy one of the exceptions to the Hearsay rule.

ART. 2. *Circumstantial Evidence.* An evidential fact is
109 said to be Circumstantial when it

(1) is any fact other than a human assertion offered to evidence the truth of the matter asserted, and

(2) is offered in evidence of any other matter to be proved. — (W. § 25.)

Par. (*a*). Such a fact is termed Circumstantial, whether
110 it is offered as evidence of a *factum probandum* forming a *part of the issue*, or is offered as evidence of a *subsidiary* alleged *factum probandum* which is itself only relevant as evidence to some other *factum probandum* under Rule 3, Art. 4 (*ante*, § 7).

Illustration. In a prosecution for homicide, the fact is offered (1) that the defendant came out of the room in which the deceased was then immediately found dead alone; from this we infer directly (2) the defendant's act of killing. Or, the fact is offered (1) that the defendant's gun was found discharged, near the body, shortly after the killing, whence we infer (2) that it was discharged by him, and (3) that it was the discharge of his gun which killed the deceased. In both instances, the fact is circumstantial, however directly or indirectly the evidential fact is related to the *factum probandum* in issue.

Par. (*b*). Such a fact is termed Circumstantial, whether
111 it is itself, as a *factum probandum* under Rule 3, Art. 4 (*ante*, § 7), evidenced by testimonial evidence or by autoptical evidence or by other circumstantial evidence.

Illustration. In a prosecution for robbery, the fact that the defendant ran away and escaped from the house by jumping through and breaking a closed window is offered as evidence of his guilt; this is circumstantial evidence, whether it be itself evidenced by the statement of an eye-witness, or by the fact of finding in the defendant's coat a piece of glass

matching the window (proved again by a witness), or by the jury's inspection of the window and the glass found in the defendant's coat.

ART. 3. *Autoptical (Real) Evidence.*[1] A fact is said to be
112 evidenced Autoptically when it is offered for direct perception by the senses of the tribunal without depending on any conscious inference from some other testimonial or circumstantial fact. — (W. § 24.)

Par. (*a*). A fact evidenced autoptically, *i. e.* by the
113 tribunal's own perception, may be either a matter forming part of the issue under the pleadings, or only a fact *circumstantially evidential to some other* relevant fact, or some form of testimonial evidence.

Illustration. (1) In an issue of bastardy, the alleged father having red hair, the fact that the child has red hair, if evidenced autoptically, is itself only evidential circumstantially of the further fact of the defendant's paternity; and its circumstantial relevancy for that purpose may be questioned, irrespective of the propriety of ascertaining the fact of the child's red hair autoptically.
(2) In an action for failure to deliver goods under a contract of sale, a document offered for the inspection of the jury to learn its tenor may be the very contract in issue, or a letter of the defendant offered as an admission, or a book of entries by a deceased clerk offered as a hearsay statement, or a deposition of an absent witness.

Par. (*b*). A fact evidenced autoptically is to be regarded
114 as *a part of the evidence*, in the sense that it is a proper mode of producing persuasion in the tribunal, subject to the rules specially applicable thereto (Rule 123, *post*, § 730). But it is not to be regarded as evidence, for the purpose of applying rules applicable only to testimonial and circumstantial evidence; since in the latter classes the tribunal is asked to make an inference from the evidential fact to some other fact, while in the former the tribunal is asked to perceive immediately by the senses without inference.

ART. 4. *Relative Weight of Circumstantial and Testimonial*
115 *Evidence.* There is no fixed rule determining the relative weight

[1] The old term "Real Evidence" is too misleading to be preserved.

of the two kinds of evidence in a given controversy. — (W. § 26.)

(*Reason and Policy.* In considering whether the facts in issue have been sufficiently proved, it is apparent that the quantity of testimonial evidence and of circumstantial evidence varies greatly in different controversies according to the nature of the particular issue; and that no case is without some testimonial evidence and no case is without some circumstantial evidence. Moreover, in most instances the facts of circumstantial evidence are themselves evidenced by testimonial evidence; so that the precise effect of each is hard to disentangle. Furthermore, the greater or less weight of testimonial evidence depends upon considerations which affect the trustworthiness of a single class of evidence, namely, the assertions of human beings, while the weight of circumstantial evidence depends upon the trustworthiness of inferences from experience with a great variety of facts, so that there is no known standard of measurement which they possess in common. Again, the two kinds of evidence are seldom brought into such direct contrast that they can be feasibly compared and measured, *i. e.* so that a single *factum probandum* can be found to be affirmed purely by testimonial evidence but negatived purely by circumstantial evidence.)

116 *Par.* (*a*). There is no inherent defect in either kind, as such, which should prevent it from producing persuasion, and there is no inherent superior value in either kind, as such, over the other.

[The prohibition of Rule 5, Art. 4 (*ante*, § 15), against instructing the jury as matter of law upon the weight of evidence, does not prevent the judge from explaining to the jury, in such equivalent language as he may deem fit, the foregoing considerations, so as to remove any erroneous views which they may entertain as to the relative weight of the two kinds of evidence.] [1]

117 ART. 5. *Logical Principles applicable.* [2] The logical process by which any offered fact is receivable is inductive, in the form, Fact A is some evidence from which Fact X may be inferred. The potential defect in this process is that one or more other inferences or explanations

[1] This paragraph is not law, as above phrased; but some such instruction is conceded to be proper.

[2] This Article is of no direct service, except as a basis to which to refer later rules.

may be the true one, instead of the one alleged. But there can be no inflexible test of admissibility, in practical logic for judicial trials; since in different classes of facts the law must consider partly the differing views of human experience as to such facts, partly the relative practical availability of stronger facts, and partly the hardship of certain inferences if unfounded. The general underlying principle is, for both circumstantial and testimonial evidence: A fact is admissible as evidence of a *factum probandum*, if the inference desired to be drawn from it to the *factum probandum* is in human experience fairly capable of belief as possible or probable, having regard in a given case to the greater or less number of other and different inferences to which the fact is also naturally open. — (W. §§30–33.)

Illustrations. A, a gardener employed at an insane asylum is charged with larceny of valuables; the following facts are offered: that he ran away from the asylum on the discovery of the theft, that he was poor, that he possessed no cash before the larceny but a large sum afterwards, that an insane patient asserts that A took the valuables. Here there is for each fact one or more possible inferences other than A's guilt; but in the second and fourth instances the other and competing inferences may be relatively so strong that the fact will not be admitted as evidence of the guilt of A.

Par. (*a*). For an *opponent* the logical process is the same as that of a proponent, with the following modifications:

(1) He may advance a *new* evidential fact;

(2) He may *deny* the proponent's evidential fact; or,

(3) He may *explain away* the proponent's evidential fact by offering the facts which make the other inferences from it to be more probable.

The last process is termed *Explanation*, and makes admissible the facts thus serving. — (W. §§ 34, 35.)

Illustration. To charge A with murder, the prosecution shows a specific threat, an old quarrel, and blood-traces on clothes. The accused (1) advances the new facts of an alibi and a character for peaceableness; (2) denies the specific threat; (3) explains away the old quarrel by showing a reconciliation, and explains away the blood-traces by showing the recent killing of a chicken.

TITLE I: CIRCUMSTANTIAL EVIDENCE

INTRODUCTORY PROVISIONS: GENERAL PRINCIPLES

RULE 25. *Degree of Probative Value required.* When a fact
118 is offered as circumstantial evidence of a *factum probandum*, there is no general rule for determining the logical sufficiency of the inference for admissibility, except the general logical principle applicable to all evidence, as declared in Rule 24, Art. 5 (*ante*, § 117).[1] — (W. § 38.)

A fact logically sufficient to be admitted is termed ***relevant***.

Distinguish the term *material*, which signifies a *factum probandum* under Rule 3, Art. 5 (*ante*, § 7).

ART. 1. *Specific Rules Prevail.* The relevancy of a specific
119 fact offered as circumstantial evidence is determined by ensuing specific rules applicable to particular classes of evidence. [[When no specific rule is expressly applicable, the general principle is applied by the trial Court under Rule 18 (*ante*, § 52).]]

ART. 2. *Collateral or Remote Evidence.* The terms "collateral" and "remote," as applied to circumstantial evidence,
120 have no other meaning than to signify the kind of evidence that does not satisfy the present Rule 25 (*ante*, § 118) or any other specific rule of Relevancy herein contained. — (W. § 39.)

Distinctions. Distinguish the use of the terms as applied to specific instances of the *operation of a machine*, the danger of a highway, etc., under Rule 73 (*post*, § 344), to *other crimes* offered to evidence intent, etc., under Rule 65 (*post*, § 297), to the *contradiction* of witnesses under Rules 107 and 108 (*post*, §§ 567, 574), to *oral agreements* accompanying a writing, under Rule 217 (*post*, § 1920).

[1] This general canon is practically of little or no service. It must be inserted, however, to avoid the loose phrasings often found.

ART. 3. *Conditional Relevancy.* A fact which does not
121 appear to be relevant when offered may be admitted conditionally, on the terms laid down in Rule 163, (*post*, § 1360). — (W. § 40.)

ART. 4. *Circumstantial Evidence proved by the Same Kind.*
122 A fact relevant circumstantially as evidence of another admissible fact is admissible even though the other fact is itself desired to be used as circumstantial evidence of a third fact; and so on, without regard to the number of inferences desired to be added.[1] — (W. § 41.)

Illustration. On a trial for homicide, the defendant's gun is found discharged; this fact is relevant to evidence the fact that it was he who discharged it, which is relevant to evidence the further fact that his discharge of it shot the deceased; here the feature that the offered fact requires two inferences before it leads to a fact in issue, and that both inferences are circumstantial, does not exclude the evidence. Whether that evidence alone would suffice to take the case to the jury is a different question, under Rule 226 (*post*, § 1997); but practically such a question would never be presented.

RULE 26. *Multifariousness or Confusion of Issues; Undue*
123 *Prejudice; and Unfair Surprise.* A fact circumstantially relevant in itself may nevertheless be excluded because of the effect upon it of one of the Auxiliary Rules of Probative Policy (Rule 125, *post*, § 745), particularly of those rules which exclude facts capable of causing excessive confusion of issues (Rule 165, *post*, § 1383) or undue prejudice (Rule 166, *post*, § 1390) or unfair surprise to the opponent (Rule 161, *post*, § 1325). But so far as specific kinds of relevant circumstantial evidence are affected and excluded by such other principles, the resulting composite rules are declared in this part of the Code in connection with the rules for specific kinds of circumstantial evidence. — (W. § 42.)

Illustrations. (1) The moral character of a defendant accused of homicide may be of logical probative value and therefore relevant to show that he did or did not commit the act of homicide; yet the principle of preventing undue prejudice may sometimes exclude such character when offered by the prosecution.

[1] This represents every day's practice, though it is theoretically denied in some Courts.

(2) To evidence a witness' capacity for truth-telling, his specific acts of fraud or perjury on other occasions may be of probative value and therefore relevant; yet the principle of preventing unfair surprise may forbid the use of such acts as evidence of his character, unless in such a manner as to avoid the danger of unfair surprise.

(3) To evidence the dangerous condition of a highway or of a machine, repeated particular instances of its injurious effects in use or operation under similar circumstances may be relevant; yet the principle of preventing excessive confusion of issues may exclude such facts in a given case.

RULE 27. *Classification of Circumstantial Evidence.* Cir-
124 cumstantial Evidence may be classified, in view of the nature of the inference as shown by experience, first, according to the kind of *factum probandum*, *i. e.* the proposition of fact which is to be evidenced by it; and, next, according to the *a priori* or *a posteriori* process of the inference. The following classes thus are formed:

Fact to be evidenced:

I. A Human Act; or

II. A Human Quality or Condition; or

III. A Quality, Condition or Event of Inanimate Nature.

Process of Inference:

A. Prospectant (*e. g.* character before an act);

B. Concomitant (*e. g.* alibi at the time of an act);

C. Retrospectant (*e. g.* traces left by the act).

SUB-TITLE I:

EVIDENCE OF THE DOING OF A HUMAN ACT

TOPIC I: PROSPECTANT EVIDENCE

RULE 28. *Classification of Prospectant Evidence.* Evi-
125 dentiary facts raising a prospectant inference of the probable subsequent doing or not-doing of a human act may be classified under the following groups, so far as specific rules of evidence have been laid down under the general principle of Rule 25 (*ante*, § 118):

A. Character, Disposition;
B. Physical Capacity, Strength, Skill;
C. Habit, Custom;
D. Emotion, Motive;
E. Design, Plan, Intention.

SUB-TOPIC A:

CHARACTER OR DISPOSITION, AS EVIDENCE OF A HUMAN ACT

1. *Preliminary Discriminations*

RULE 29. *Character, distinguished from Reputation and from*
127 *Conduct.* The rules which declare whether character is admissible to evidence a human act as a *factum probandum* assume that actual disposition is the evidentiary fact, and hence are separate and independent of the following rules:

Par. (*a*). A rule which declares whether a *reputation* is
128 admissible, under the Hearsay rule, to evidence the actual character when it becomes in its turn a *factum probandum*. — (W. § 52.)

Cross-reference. This is Rule 147 (*post*, §1050).

Illustration. The honest character of a defendant in a trial for robbery is always relevant and admissible in his behalf;

but his reputation may not be admissible to evidence that character unless the reputation was formed at the place of residence of the defendant.

Par. (*b*). A rule which declares whether *particular instances*
129 *of conduct* are admissible to evidence the actual character as a *factum probandum.* — (W. § 53.)

Cross-reference. These are Rules 43–49 (*post*, §§ 218–239).

Illustration. In a prosecution for robbery, the defendant having offered his alleged good character as to honesty, the prosecution may introduce his alleged bad character as to honesty; the actual character is relevant and admissible, but neither party may evidence it, as a *factum probandum*, by particular instances of conduct.

Par. (*c*). A rule which declares whether a *reputation* of
130 character is admissible to evidence the *belief*, *motive*, or other *mental condition of another person* as a *factum probandum.* — (W. § 69.)

Cross-reference. This is Rule 62, *post* (§ 277).
Illustration. In an action for malicious prosecution, the plaintiff's bad repute as a thief may be offered, not as evidence of the guilt of the plaintiff in the original prosecution, but as evidence of the now defendant's honest belief as justifying him in prosecuting.

2. *Character as evidentiary of an Act*

RULE 30. *Defendant's Character in a Criminal Case.* The
131 moral character of a defendant in a criminal case is relevant to evidence that he did or did not do the act charged; and is admissible, with the following exceptions and qualifications: — (W. § 55.)

ART. 1. *Kind of Character.* The kind of character relevant
132 is the specific moral trait which in human nature is related to the act charged; — (W. § 59.)

Illustrations. On a charge of rape, the character offered must be the disposition as to chastity; but on a charge of larceny, the character offered must be the disposition as to honesty.

[*Par.* (*a*). *Except* that a defendant may offer his general
133 goodness of character, subject to Art. 4 (*post*, § 137).]

134 *Par.* (*b*). And *except* that, when the defendant becomes a witness, his character as a witness may be used, according to the provisions of Rule 97, Art. 2 (*post*, § 502).

135 ART. 2. *Time and Place of Character.* The character that is relevant is the character existing at the time of the act charged; but to evidence this character as a *factum probandum*, the character at a prior or subsequent time, and while in a different place, is relevant, provided the time is not so remote as to make it probable that it has changed.

Distinction. To evidence such character at a different *place*, the reputation offered must be in the community at that place; and to evidence such character at a subsequent *time*, the reputation offered may be improperly affected by rumors of the act charged: hence the rules for reputation (Rule 147, Art. 4, *post*, § 1071) may prevent the use of reputation and thus indirectly exclude the character.

136 ART. 3. *Defendant's Use of his Character.* The defendant may introduce his character in any criminal case, irrespective of the kind of offence charged, and irrespective of the strength of the evidence offered against him, and irrespective of whether the doing of the act charged is actually in dispute. — (W. § 56.)

Distinction. Whether the *jury should be told* that good character, when admitted, should be given weight necessarily, or should of itself suffice to create a reasonable doubt, is sometimes discussed. To lay down a rule for the jury on these subjects is to violate the fundamental principle of Rule 5, Art. 4 (*ante*, § 15).

137 ART. 4. *Prosecution's Use of Defendant's Character.* On the principle of preventing Undue Prejudice (Rule 166, *post*, § 1390), the prosecution may not introduce the defendant's character against him, except for the purpose of rebuttal when his character has been already offered in his own behalf. — (W. §§ 57, 58.)

(*Reason and Policy.* This rule rests on the likelihood that the jurors are apt to be influenced by a defendant's bad character to find him guilty irrespective of an actual belief in that guilt. — The determination to avoid violating this rule leads Courts to a strict interpretation of rules admitting other kinds of evidence under this Topic.)

Distinctions. (1) Distinguish the right of the prosecution to use the defendant's character *as a witness*, under Art. 1, Par. (*b*), *supra*.

(2) Distinguish the question whether, from the defendant's *failure to introduce* his own character, the prosecution may draw the inference that the character is bad, under Rule 118, Art. 6 (*post*, § 658).

RULE 31. *Character of Complainant in Rape, etc.* In any
138 prosecution or action involving in the issue an unchaste act by a man against a woman, where the willingness of the woman is material, the woman's character as to chastity is admissible to show whether or not she consented to the man's act. — (W. § 62.)

Illustration. In a prosecution for *rape*, or for *enticement* to prostitution, or in an action or prosecution for *indecent assault*, the woman's character as to chastity is admissible; but not in a prosecution for *rape under the age of consent* (statutory rape).

Distinction. (1) Whether the character may itself be evidenced by *particular acts of* unchastity, with either the defendant or other men, involves the further rule about particular acts (Rule 47, *post*, § 229).

(2) Whether the woman *as a witness* may be impeached by her character for unchastity, involves the rule for impeachment of witnesses (Rule 98, Art. 1, *post*, § 519).

(3) Whether in *bastardy* the woman's character makes other paternity probable, involves Rule 39, Art. 3 (*post*, § 191.)

(4) Whether in *rape*, the woman's willingness may be evidenced by particular acts involves Rule 67 (*post*, § 329).

ART. 1. *Woman's Good Character.* The woman's good
139 character as to chastity is here [not] admissible even though it is not yet disputed by the man.[1] — (W. § 62, n. 1.)

ART. 2. *Prostitution.* Habits as a prostitute are equivalent
140 to unchaste character. — (W. § 62, n. 2.)

Distinction. Here it is necessary to distinguish between habitual prostitution and particular acts (Rule 47, *post*, § 229).

RULE 32. *Character of Deceased in Homicide.* When on a
141 trial involving homicide or other violence an issue of self-

[1] The few rulings accept the bracketed word, but are unsound.

defence arises, and it thus becomes a material question whether the deceased or other injured person was the aggressor, his character as to violence or the opposite is admissible as evidence of his probable conduct. — (W. § 63.)

ART. 1. *Civil Cases.* This rule is [not] applicable in civil
142 cases.[1] — (W. § 64).

ART. 2. *Rebuttal.* This rule is applicable in favor of
143 the prosecution [provided the defence has first introduced such evidence].[2] — (W. § 63.)

ART. 3. *Overt Act.* Where the defence introduces such evi-
144 dence, it must be accompanied or preceded by some overt act or other fact evidencing the deceased's aggression at the time; the sufficiency of which is for the trial Court to determine under Rule 18, Art. 3 (*ante*, § 52).[3] — (W. § 63.)

ART. 4. *Communication.* It is not necessary that the
145 character as offered should have been known to the deceased.[4]

Distinctions. (1) Distinguish the rule for using the deceased's character to show the defendant's *state of mind as to belief* (Rule 62, *post*, § 278), by which the character must be known to the defendant.

(2) Distinguish the rule for using the deceased's *specific acts* of violence, or *threats*, to show the defendant's state of mind as to *apprehension of violence* (Rule 62, *post*, §§ 279, 280) or to show the *deceased's character* (Rule 45, *post*, § 226).

Cross-reference. For the deceased's *threats* as evidence of his probable conduct, see Rule 37, *post*, § 182.

RULE 33. *Character of Parties in Civil Causes.* In civil
146 causes, on an issue whether a certain act was done or not, the person's character is not admissible as evidence of his probable doing or not doing of the act; subject to the following exceptions and qualifications: — (W. § 64.)

(*Reason.* This general rule rests chiefly upon the reasons that the doing of an act material to a civil cause of action has

[1] Some Courts insert the "not," but incorrectly.

[2] Most Courts insert the proviso, but this is unwise.

[3] This rule is the same as for communicated character, under Rule 62 (*post*, § 278).

[4] This distinguishes the present Rule from Rule 62 (*post*, § 278).

rarely any moral quality (*e. g.*, the making of a contract, or the breach of it), nor is the moral intent of it material; so that the person's moral character is not relevant. Moreover, the other circumstances involved are usually so varied and much more important that the parties' character would usually be of slight value, and would merely serve to confuse the real issues. — The inclination to avoid violating the present rule leads also to a strict interpretation of other rules admitting evidence under this Topic.)

147 [ART. 1. *Sundry Cases involving Moral Traits.* Wherever the moral quality of an act is marked, and the act is of great importance in the issue, the person's character, relevant to the act, is admissible as evidence of his probable conduct;][1] [and the application of Rule 32, Art. 1 (*ante*, § 142) to civil cases falls under this head.] — (W. §§ 64, 68.)

Illustrations. In an action involving the wilful burning of property insured, or the forgery of a will, or adultery as ground for divorce, or actual fraud by a debtor, the person's character should be admissible. But in an action of assumpsit for money had and received or for goods not delivered according to sample, or of trespass for cutting trees, or of trover for goods taken by constructive fraud on creditors, the person's character should not be admissible.

148 ART. 2. *Negligent Acts.* Where the issue involves a negligent act, whether by the plaintiff or by the defendant or by a third person (such as an employee), the person's character as to negligence or the opposite is [not] admissible as evidence of his probable conduct; [provided there were no eye-witnesses of the conduct].[2] — (W. § 65.)

Distinctions. Distinguish the questions (1) whether a *habit* of doing an act in a certain way is admissible (Rule 36, *post*, § 170);

(2) whether, if negligent character is for any purpose provable, the person's *particular acts* of negligence are admissible for the purpose (Rule 46, *post*, § 228);

(3) whether an *employee's negligent reputation* or *negligent acts* are admissible to show his *employer's knowledge* of the employee's incompetence (*post*, Rule 62, §§ 281, 282) or as

[1] This broad rule, though it formerly was, is not now the law in most jurisdictions; but there is an increasing tendency to recognize it.

[2] The negative of the above rule is the law in most jurisdictions; and even where the affirmative form is accepted, the eye-witness proviso is usually found.

a part of the issue in a fellow-servant case (Rule 34, *post*, § 161).

(4) whether *intoxication* or *intemperance* is admissible (Rule 35, *post*, § 168).

Illustrations. (1) In an action for injury to the plaintiff while driving around a freight-car of the defendant obstructing the crossing of a highway, an issue of fact being whether the highway was at the time so obstructed, the defendant's negligent practice in so obstructing it is admissible, either under the present rule, or under Rule 36 (*post*, § 170); but separate instances of such obstruction would be inadmissible under Rule 46 (*post*, § 228).

(2) In an action for injury to the plaintiff's horse by a collision with the defendant's wagon in the highway, the careful or careless character of the defendant, the wagon-driver, may be admissible to show his probable conduct, under the above rule; yet particular prior acts of his may be inadmissible to evidence that character, under Rule 46 (*post*, § 228).

(3) In an action for injury done by a railroad train, thrown from the track by a misplaced switch, the switchman's negligent or careful character is admissible under the present rule; and if the plaintiff is an employee and the fellow-servant rule applies, the switchman's character is in any event admissible under Rule 34 (*post*, § 161), as being a part of the issue, and particular instances of his negligent conduct may be admissible under Rule 62 (*post*, § 282), to show the employer's knowledge.

149 [ART. 3. *Plaintiff Defamed.* In an action for defamation by an utterance charging the plaintiff with a criminal act, on a plea of truth the plaintiff's character is admissible as if he were a defendant in a criminal case, on the conditions specified in Rule 30 (*ante*, §§ 130–137).][1] — (W. § 66.)

Distinctions. Distinguish (1) the rule as to using the plaintiff's character when *in issue in mitigation of damages* (Rule 34, *post*, § 154);

(2) the rule as to using *specific acts of misconduct* by the plaintiff *in mitigation of damages*, or as a part of the issue on a *plea of truth* where the utterance charges a specific act (Rule 49, *post* §§ 236, 239).

Illustration. In an action for slander charging the plaintiff with having received a piano knowing it to be stolen, and a plea of truth, the plaintiff may introduce his character for honesty, and until then the defendant may not introduce the plaintiff's character. But on an issue of mitigation of damages, the defendant may introduce the plaintiff's

[1] Only a few jurisdictions have definitely accepted this rule.

character, under Rule 34 (*post*, § 154). Moreover, if the charge were that the plaintiff habitually received stolen goods knowingly, on a plea of truth the defendant could introduce specific instances, as a part of the issue, under Rule 49 (*post*, § 236).

150 ART. 4. *Defendant in Malpractice.* In an action involving the unskilful doing of an act by a physician or other person engaging to act skilfully, the person's character as to skill or the opposite is admissible as evidence of his probable conduct, [subject to the conditions applicable to a defendant's character in a criminal case, under Rule 30 (*ante*, §§ 130–137).][1] — (W. § 67.)

Distinctions. Distinguish (1) the rule allowing the use of such character for skill when it is in issue under the pleadings (Rule 34, *post*, § 163); since this is usually the case, the above rule seldom has an opportunity for independent application; (2) the rule as to *particular acts* of unskilfulness (Rule 46, *post*, § 228, Rule 50, § 242).

151 [ART. 5. *Third Persons.* The foregoing rules of Articles 1 to 4 are equally applicable where the act to be evidenced is that of a third person not a party to the action.][2] — (W. § 68.)

Illustrations. This rule might admit the character of a third person in the following cases: In *divorce for adultery*, the character of the co-respondent for chastity; in *bastardy*, the character of another putative father for chastity; in *probate* of a will, the character of the alleged forger for honesty.

152 ART. 6. *Animals.* In an action involving the conduct of an animal, the animal's character as to the appropriate trait is admissible as evidence of its probable conduct. — (W. § 68.)

Distinctions. Distinguish (1) the use of the animal's character when *in issue* as to the owner's *scienter* (Rule 62, § 283). (2) the use of *particular acts* of the animal to evidence its character (Rule 48, *post*, § 230), or to evidence the owner's knowledge (Rule 62, *post*, § 283).

3. *Character as an Issue in the Case*

153 RULE 34. *Character in Issue, as Mitigating Damages, as a Substantive Excuse, or Otherwise.* Wherever by any rule of

[1] There is here little authority; the clause as to the rule in criminal cases seems prudent.

[2] No Court states the rule so broadly. But many Courts have recognized various instances of it.

substantive law, including the law of damages, and subject to the rules of pleading, the character, whether actual or reputed, of any person, whether a party to the action or not, is material, it may be proved, as a fact in issue, though it cannot be used as evidence of any other fact except so far as is allowed by the foregoing Rules 30–33 (§§ 130–152).[1]

Distinctions. Distinguish the questions (1) whether *reputation* is admissible to evidence such character, when actual character is to be evidenced (Rule 147, Art. 4, *post*, § 1071); (2) whether *particular acts* of misconduct are admissible to evidence such character (Rule 49, *post*, §§ 232–239). (3) whether the *reputed character* is admissible as evidence of *knowledge*, *reasonable belief*, or the like, by the defendant (Rule 62, *post*, §§ 278–288).

ART. 1. *Mitigation of Damages.* In the following classes of
154 actions, the rules of substantive law and of damages and of pleading may regard the reputed character of a person as material in mitigation of damages:

Par. (*a*). In an action for *defamation*, the reputed
155 character of the plaintiff.[2] — (W. §§ 70–74.)

Par. (*b*). In an action for *breach of marriage-promise*, or
156 for *malicious prosecution*, or for *indecent assault*, the plaintiff's reputed character; and in an action for *seduction* of a daughter or a spouse, the plaintiff's actual character. — (W. § 75.)

Par. (*c*). In an action for *seduction* of a daughter or a
157 spouse, the reputed or the actual character of the daughter or spouse; and in an action for *death*, the actual character of the deceased so far as involving his earning capacity. — (W. § 75).

Distinction. The *crime* of seduction, and woman's *statutory action*, must here be distinguished (*infra*, § 160).

Par. (*d*). But in all of the foregoing classes of cases the
158 rules of pleading may exclude the good character of the

[1] A Code of Evidence should not attempt to include the rules of this sort, but merely to distinguish them from its own rules; accordingly, no statement of the tenor of the precise rule is here offered for any of these classes of cases.

[2] Here much turns on the rules of pleading; there is also a question as to the kind of character in issue, and as to rumors being equivalent to reputation.

person, offered in his behalf, until the defendant disputes it. — (W. § 76.)

ART. 2. *Excuse.* In the following classes of actions, the
159 rules of substantive law may regard the character, actual or reputed, of some person, as coming in issue to fix or to remove the defendant's liability:

Par. (*a*). In *breach of marriage-promise*, or of *employment-*
160 *promise*, the plaintiff's actual character, as exonerating the defendant. — (W. § 77.)

Par. (*b*). In tort against an *employer*, the employee's
161 character for competence, as fixing the defendant's liability to a *fellow-servant*. — (W. § 80.)

Distinctions. Distinguish here the use of the employee's (1) *reputed* character, or (2) *particular acts*, to show the employer's knowledge (Rule 61, *post*, §§ 281, 282).

ART. 3. *Sundry Issues of Character; Bawdy-house, Gambling-*
162 *house, Criminal Seduction.* In the following issues, the substantive law may regard the actual or reputed character of a person or place as being a part of the issue:

Par. (*a*). In a prosecution for keeping a *bawdy-house*, the
163 actual or reputed character of the house or of the persons frequenting it. — (W. § 78.)

Distinctions. Distinguish here (1) the use of *reputation* as evidence of actual character (Rule 47, Art. 4, *post*, §1071); (2) the use of *particular acts* as evidence of actual character (Rule 49, *post*, § 233).

Par. (*b*). In a prosecution for keeping a *gambling-house*,
164 the actual or reputed character of the house or of the persons frequenting it. — (W. § 78.)

Distinction. Distinguish here the use of *reputation* as evidence of the actual character (Rule 47, Art. 4, *post*, §1071).

Par. (*c*). In a prosecution for *seduction*, or a civil action
165 (under statute) by the woman for seduction, the actual or reputed character of the woman.[1] — (W. § 79.)

[1] The terms of the statutes vary as to making reputed or actual character the issue.

Distinctions. Distinguish (1) the use of *reputation* as evidence of actual character (Rule 147, Art 4, *post*, § 1071);

(2) the use of *particular acts* of unchastity as evidence of actual character (Rule 49, *post*, § 234);

(3) the use of *particular acts* of unchastity to *impeach the woman* as a *witness* (Rule 105, *post*, § 549), or to evidence her *willingness* (Rule 67, *post*, § 329.)

SUB-TOPIC B:

PHYSICAL CAPACITY, SKILL, OR MEANS, AS EVIDENCE OF A HUMAN ACT

RULE 35. *Physical Capacity, Skill, or Means.* Whenever the
167 doing or not doing of a human act by a person is material to be proved, his possession or lack of suitable corporal or mental capacity, or technical skill, or mechanical means or tools, is relevant and admissible. — (W. § 83.)

ART. 1. *Strength, Skill, Intoxication, Tools, etc.* The general
168 principle applies to sundry varieties of human strength, intoxication, skill, possession of means, and the like. — (W. §§ 84–88.)

Illustrations. (1) A holographic will is offered, and its genuineness is disputed; the alleged testator's illiteracy is admissible as evidence that he did not write it.

(2) In a prosecution for homicide, the defendant's condition of physical incapacity by intoxication, at the time of the killing, is admissible as evidence that he did not do it.

(3) On a charge of forgery of government money, the fact that the defendant was in possession of peculiar dies and chemicals, suited to the making of such money, is admissible; but not his character as an habitual forger.

Distinctions. (1) Distinguish the *character* rule, which will often exclude the use of such evidence in criminal cases (Rule 30, *ante*, § 137) or in civil cases (Rule 33, *ante*, § 148), if the evidence emphasizes rather the moral character of the person than his physical or technical capacity.

(2) Distinguish the rule against *particular acts* evidencing character (Rules 43–48, *post*, §§ 218–230), which in the same way may exclude such evidence.

(3) Distinguish the rules for using *habit* or *custom* (Rule 36, *post*, § 170) and for *design* or *plan* (Rule 37, *post*, 137) which however may equally serve to admit such evidence in some aspects.

(4) Distinguish the rule for using *traces* as evidence of *identity* (Rule 41, *post*, § 196), which may equally serve to admit such evidence in some aspects, especially the fact of r ools, etc., *after* the doing of the act in question.

ART. 2. *Possession or Lack of Money, as evidencing a Loan,*
169 *Payment, or the like.* Where the delivery of money or goods as payment or loan or deposit, by a certain person, is material to be proved, the person's possession or lack of such money or goods, at a reasonable time beforehand, may be relevant; but is usually not sufficiently probative to be admissible, except when offered negatively, *i. e.* his incapacity offered to negative his doing of the act. — (W. § 89.)

Illustrations. (1) In a bill to enforce a resulting trust in lands purchased with money advanced by R in the name of a clerk, R's furnishing of the money being disputed, the clerk's lack of money adequate for the sums paid is admissible.

(2) In an action on a note, and a plea of payment, the maker's possession of money before the time alleged would be relevant, but so slightly probative as hardly to be admissible, unless to rebut the fact of non-possession offered as evidence that he could not have paid.

Distinction. Distinguish the use of such facts as evidence of *motive* (Rule 67, Art. 3, *post*, § 326) *e. g.*, where the alleged debtor's lack of means is offered to show that the alleged lender would probably not have given him credit; or as evidence of *identity by traces* (Rule 41, *post*, § 197), *e. g.* where the defendant's possession of money *after* but not before a larceny is offered to show how he probably obtained it.

SUB-TOPIC C:

HABIT OR CUSTOM, AS EVIDENCE OF A HUMAN ACT

RULE 36. *Habit or Custom.* Wherever a human act or the
170 manner of doing or not doing an act is material to be proved, the person's habit, or the custom of a class of persons including him, is relevant, providing it involves a fair regularity or frequency of conduct as to the act or class of acts in question. — (W. §§ 92, 93.)

Distinctions. (1) Distinguish the *character*-rule, which is sometimes (though too strictly) made to exclude such evidence, in criminal cases (Rule 30, *ante*, § 137) and in civil cases (Rule 33, *ante*, § 148), if the moral character is emphasized.

(2) Distinguish the rule against *particular acts* evidencing character (Rule 46, *post*, § 228) or habit (Rule 66, *post*, § 316), which may sometimes exclude such evidence if offered so as to emphasize the separate acts rather than the general habit.

(3) Distinguish the rule for *aiding memory* by a record of past recollection verified by habit (Rule 89, Art. 2, *post*, § 433).[1] — (W. § 98.)

Illustrations. (1) Action against a collector for moneys received but not handed over; the business habit of the parties to deliver and receive at a stated time weekly the sums collected is admissible.

(2) Action on a contract made by telegrams; the originals being called for, and their destruction thus being a material fact, the habit of the telegraph company to destroy all telegrams on file at the end of six months is admissible.

(3) Action for death caused by a railroad train at a crossing; the deceased's habit of slacking the speed of his horse when approaching the crossing is admissible; unless this be treated as character-evidence governed by Rule 33 (*ante*, § 148).

(4) In a prosecution for forgery, the defendant's habitual attempts to imitate the signatures of other persons are not admissible under the present rule, partly because a regularity of habit can hardly be found in such an offer, and partly because the offer may be interpreted as involving the defendant's moral disposition to forge; yet if restricted as an offer of the defendant's technical skill and capacity to imitate (Rule 35, *ante*, § 168), it is admissible, especially as it is thus essentially only a rebuttal of the presumable incapacity of the ordinary person to imitate signatures successfully.

ART. 1. *Sundry Applications.* The foregoing rule applies
171 to admit a habit or custom of the following sorts:

Par. (*a*). A habit or custom as to *making contracts* or *authorizing an agent's acts*, as evidence of the doing of a specific act of the sort. — (W. § 94.)

Distinction. Here the usual sort of evidence offered is not a general or uniform habit, but particular instances of similar transactions, which then fall under Rule 66 (*post*, § 316).

Par. (*b*). A custom of the Government *post-office* de-
172 partment, or of a public *telegraph* servant, as evidence that a letter or telegram properly addressed, prepaid, and deposited, was delivered to the addressee. — (W. § 95.)

Distinction. (1) Here, since the custom is judicially noticed to exist (Rule 230, *post*, § 2135), no formal offer of proof of it is needed.

[1] In such cases the person sometimes speaks to his habit, without using a memorandum (chiefly *notaries* and *attesting-witnesses*); the present rule may then be invoked.

(2) Whether letter or message thus received is *presumed genuine* involves a Rule 191 (*post*, §§ 1625, 1626).

(3) Whether the *postmark* is evidence of the time and place of mailing involves Rule 41 (*post*, § 199).

Par. (*c*). A habit of *temperance* in or *abstinence* from
173 *intoxicating liquor;* but not an intemperate use of intoxicating liquor, unless it is of marked regularity or continuance. — (W. § 96.)

Distinctions. (1) Distinguish the use of *particular instances* of intoxication, as evidence of the habit (Rule 66, *post*, § 316), or as evidence of an employer's knowledge (Rule 62, *post*, § 282).

(*b*) Distinguish the use of intemperance as a fact in issue constituting an *employee's incompetency*, under the fellow-servant rule.

Par. (*d*). A habit of doing or not doing a *negligent* or a
174 *careful* act. — (W. § 97.)

Distinction. Here, if the evidence is offered merely as a habit, the negligent or careful quality of the act being otherwise established, it avoids the risk of violating the rule against using moral character (Rules 30, 33, *ante*, §§ 137, 148), which however is applied nevertheless by some Courts.

Par. (*e*). A habit of *writing* or *spelling* in a certain man-
175 ner, as evidence of the authorship of a document.

Cross-reference. The mode of evidencing such a habit by *specimens* (Rule 177, *post*, § 1488), or by *expert opinion* (Rule 177, *post*, § 1480) or by *lay opinion* (Rule 177, *post*, § 1466) is what usually gives rise to question in the use of this principle, which is itself undoubted.

Par. (*f*). A custom of *officials* to perform their duty,
176 as evidence that it was performed in a given instance.

Cross-reference. This is unquestioned, and has even given rise to a rule of presumption (Rule 228, *post*, § 2088).

Sub-Topic D:

Design or Plan, as Evidence of a Human Act

RULE 37. *Design, Plan, Intention.* Wherever a human
177 act or the manner of doing an act is material or relevant to be proved, the person's design or plan or intention as to that act, or as to a class of acts including it, is admissible, provided the time intervening was not so long as to make its abandonment probable. — (W. §§ 102–104.)

Distinctions. (*a*) As evidence of this design or plan, the person's *declarations* may be offered; these must therefore satisfy either the rule for a *party's admissions* (Rule 115, *post*, § 630) or the hearsay exception for *declarations of a mental state* (Rule 153, *post*, § 1200); those rules are here assumed to be satisfied.

(*b*) As evidence of this design or plan, the person's *conduct* may be offered, under Rule 59 (*post*, § 266), and especially his *other similar criminal acts* under Rule 65 (*post*, §§ 297–314) or *contractual acts* under Rule 66 (*post*, § 316); such rules are here assumed to be satisfied.

(*c*) Distinguish the *intent accompanying an act* (Rule 60, *post*, § 271) from the plan or intention as evidence of the doing of an act.

Illustrations. In a prosecution for fraudulently evading payment of fare on a railroad train, a question being whether the defendant was on the train at the time, his plan to ride upon that train is relevant; and to evidence the plan, his declarations of intention are relevant both as a party's admissions and under the hearsay exception; but on the question whether his failure to pay was fraudulent, former acts of evasion of payment when riding may not be admissible, under Rule 65 (*post*, §301) as evidence of either plan or intent.

ART. 1. *Threats of a Defendant.* Under the foregoing
178 principle, the threats of a defendant are admissible as evidence of his doing the act charged; with the following qualifications and distinctions: — (W. §§ 105–110.)

Par. (*a*). The threat need not specify the precise act in question, provided it applies to such a *class of acts.*

Distinction. Even where the threat is not definite enough, as such, under the present rule, it would often be admissible as an expression of hostility, under Rule 67, Art. 6 (*post*, § 329).

Par. (*b*). If the threat is *conditional* or contingent in
179 form, the prosecution must show whether the condition or contingency was fulfilled.

Par. (*c*). A *lapse of time* between the utterance of the
180 threat and the doing of the act charged does not of itself make the threat inadmissible.

Par. (*d*). The defendant may introduce any facts which
181 tend to *explain away* the significance of the threat.

Distinction. The threats of a *co-defendant* or *co-indictee* are excluded by the hearsay rule, as against this defendant,

unless they are receivable as admissions of a co-conspirator (Rule 121, Art. 2, *post*, § 687).

ART. 2. *Threats of the Deceased in Homicide.* Wherever
182 homicide or other assault is involved and the fact of self-defence is in issue, and a question thus arises whether the deceased or other injured person was the aggressor, his threats against the defendant are relevant, subject to the following qualifications and distinctions (in addition to those of Art. 1 as applied to this class of threats):[1] — (W. §§ 110, 111.)

Par. (*a*). They are not admissible, if there is clear evidence that the defendant was the aggressor;

Par. (*b*). They are not admissible unless there is other appreciable evidence of the *deceased* or *injured person's aggression*, or unless there were no eye-witnesses of the affray;

Par. (*c*). They are admissible even though *not known* at the time to the defendant;

Par. (*d*). They are admissible in a *civil* as well as in a criminal case.

Par. (*e*). The trial Court's ruling is *final*, under Rule 18 (*ante* § 52,) on the facts required in par. (*a*) and par. (*b*).

Par. (*f*). The prosecution may in *rebuttal* introduce the deceased or injured person's peaceable intention.

Distinction. The use of *communicated threats*, to evidence the defendant's reasonable apprehensions, under Rule 62 (*post*, § 279) imposes a condition not required by Par. (*c*) *supra*.

ART. 3. *Deceased's Intention of Suicide.* On an issue of
183 homicide, the question being whether the deceased killed himself, the deceased's intention of suicide is admissible; subject to the qualification of Rule 40 (*post*, § 194.)

Cross-reference. The present rule offers here no obstacle; but the rule of § 194, *post*, is sometimes thought to impose conditions. The hearsay exception for declarations of a mental condition is also involved (Rule 153, Art. 2, *post*, § 1207.)

[1] The details of the rule vary somewhat in the different jurisdictions.

ART. 4. *Testamentary and Contractual Plans.* Wherever
184 the question is whether a will, or a will of specific contents, was executed or revoked or altered, or whether a gift or contract or transfer was made; the person's prior expressions of plan or design as to the matter in question are admissible. — (W. § 112.)

Illustration. In probate proceedings, the alleged will being lost, and its execution being otherwise evidenced, the contents of the will may be evidenced by the decedent's instructions to his attorney as to the tenor of his will.

Distinctions. (1) For *wills*, the usual controversy is over *post-testamentary* utterances, which involve other principles (Rule 153, Art. 4, *post*, § 1218).

(2) For *contracts*, the design or plan is usually desired to be evidenced by *specific instances* of other similar contracts, thus raising a different question Rule 66 (*post*, § 316).

SUB-TOPIC E:

EMOTION OR MOTIVE, AS EVIDENCE OF A HUMAN ACT

RULE 38. *Motive in general.* Whenever the doing or not
185 doing of a human act is material or relevant to be proved, the person's emotional condition as impelling him towards or against that act or class of acts is relevant. — (W. §§ 117, 119.)

ART. 1. *Evidence to prove Motive.* The person's emotional
186 condition, or Motive, may be evidenced

(*a*) by external circumstances adapted to stimulate it,

(*b*) or by his conduct or words expressing it,

(*c*) or by its prior or subsequent existence.

All rules of Evidence as to Motive concern this process of evidencing it, and are therefore stated under that head (Rule 67, *post*, §§ 322–331).

ART. 2. *Evidence of Motive not essential.* In no case is it
187 essential that a person's motive for an act shall be ascertained or evidenced; but the apparent absence of the specific appropriate motive may be treated as evidence to negative the doing of the act. — (W. § 118.)

Topic II: Concomitant Evidence of a Human Act (Opportunity, Alibi, Third Person's Guilt, Etc.)

Sub-Topic A: Opportunity

188 RULE 39. *Opportunity in general; Other Person's Equal Opportunity.* Whenever the doing of a human act by a particular person is material or relevant to be proved, the person's opportunity to do it is relevant.

The term 'opportunity' includes all facts of time, place, and personal conduct which make it corporally possible for a given person to have been present and doing the act, and also all facts which make it less possible corporally for some other person to have been present and doing it. — (W. § 131.)

Illustration. On a charge of placing an obstruction on a railroad track, the prosecution may show that the defendant was seen within a mile of the place one hour beforehand, and that no other persons were seen near the place for two hours before or after.

189 Art. 1. *Exclusive Opportunity not necessary.* It is not necessary under this Rule to show that the party charged as the doer of the act had exclusive opportunity to do it. — (W. § 131.)

190 Art. 2. *Equal Opportunity for Others.* The party charged as the doer of the act may introduce all facts indicating that one or more other persons had also the opportunity of doing it. — (W. § 132.)

Illustrations. In an action on a note, the party charged as maker, denying the execution, may show that there is another person of the same name who was doing business with the payee; or in a prosecution for arson, the clerk charged, who was in the building on the night of the fire, may show that two other clerks were in the building at the same time.

Distinction. Here the party charged is merely *explaining away* his apparent exclusive opportunity; but under Rule 40 (*post*, § 194) he may also attempt to establish affirmatively that another person was the doer.

191 Art. 3. *Same: Other Person's Intercourse with Complainant in Bastardy, Seduction, etc.* Wherever the paternity of a child is material or relevant to be proved, the party denying a specific paternity may show that about the probable time

the mother had intercourse or improper liberties with another man. — (W. § 133.)

This rule is therefore applicable in the following proceedings:

Par. (*a*). (1) In a proceeding for *filiation* or charge of *bastardy*;

(2) in an action for a parent's *loss of services* by a daughter's pregnancy;

Par. (*b*). But not in a charge of *rape*, *incest*, or *adultery;* [except that in such cases, where pregnancy or birth of a child is admitted in evidence under Rule 41 (*post*, § 207), the party charged may rebut its effect by the present kind of evidence].[1]

Distinctions. Distinguish the use of other acts of intercourse (1) to show the woman's *willingness to consent* (Rule 47, *post*, § 229 and Rule 67, § 329);
(2) to *impeach* the *woman's testimonial credit* (Rule 105, Art. 2, *post*, § 552).

Par. (*c*). And not in an issue of *inheritance*, where the mother is a married woman at the time of birth and the child is alleged to be not that of the husband; except on the conditions permitted by the *presumption of legitimacy* (Rule 228, *post*, § 2080).

Sub-Topic B: Essential Impossibility

192 RULE 40. *Impossibility of Acts, in general.* Wherever the doing of a human act by a particular person is in issue, the person may show any contemporaneous fact which makes it corporally impossible that he could have been the doer. — (W. § 135.)

Such facts are of two chief sorts:

(1) that the person charged was at the time absent;
(2) that another person did the act.

192a ART. 1. *Alibi of Defendant.* A person charged to have done any act may show any fact making it probable that he was not present at the time and place of the act; and such facts

[1] This last proviso is not conceded by some Courts; but it seems practically fair.

are admissible even though they do not suffice to make his presence totally impossible. — (W. § 136.)

193 ART. 2. *Non-Access of Husband.* In an issue of inheritance, the party desiring to prove illegitimacy may show that the husband did not physically have access to the wife at the probable time; subject to the conditions of the *presumption of legitimacy* (Rule 228, *post*, § 2080).

194 ART. 3. *Third Person as Doer of the Act Charged.* A person charged with any act may show in rebuttal that it was committed by a third person, and for this purpose any facts making it probable that the third person did it are admissible, including the threat and the motive of a third person; provided that the total of such facts is determined by the trial Court to be sufficient to go to the jury under the general Rule 226, (*post*, § 2002).[1] — (W. §§ 139–142.)

Illustration. On a charge of murder, the defendant and the deceased had been seen together just before the deceased's death; the defendant may show that the deceased was supposed to have eloped with H's wife and that H had threatened to kill the deceased.

Distinctions. Such evidence must satisfy any other applicable rules, such as the hearsay rule, which might exclude a third person's confessions (Rule 139, Art. 2, *post*, § 968).

195 ART. 4. *Suicide.* On an issue of violent harm, including issues of death or injury on insurance policies, the self-infliction of the harm may be shown, and therefore any facts making it probable that the harm was self-inflicted; subject to the proviso of Art. 3, *supra.*[2] — (W. §§ 143, 144.)

Distinctions. Here also the other applicable rules must be satisfied, *e. g.* the hearsay exceptions as to declarations of intention, etc. (*post*, Rule 153, § 1207, *ante*, Rule 37, § 183).

TOPIC III: TRACES OF A HUMAN ACT, AS RETROSPECTANT EVIDENCE OF ITS COMMISSION

196 RULE 41. *Traces, in general.* Whenever the doing of a human act by a particular person is material or relevant to be proved,

[1] This proviso is in most Courts applied too strictly.
[2] Here also the proviso is often too strictly applied.

any fact about that person which is such a trace as might reasonably have been left by the doing of the act is admissible; and the absence of such a trace is also admissible to evidence that that person is not the doer of the act. To explain away the presence of such a trace, the person may introduce any facts which make probable some other cause for the existence of the trace. — (W. § 148.)

Such traces may be grouped under three heads: Mechanical, Organic, and Mental.

Sub-Topic A: Mechanical Traces

197 Art. 1. *Miscellaneous Instances.* The presence or absence of clothing, marks, tools, or other substance, upon a person or premises, is a trace admissible under this Rule. — (W. § 149.)

Illustration. On a charge of burglary, the window having been raised by a knife, and a fragment of the blade being left in the window, the presence in the defendant's pocket of the knife fitting the broken blade is admissible. Here the defendant may explain away the fact by showing that he did not possess the knife until two days after the burglary, when he found it in the street.

Distinction. Distinguish the inference as to *identity* (Rule 68, *post*, § 333); *e. g.* the fact that the defendant's gun is found recently discharged is evidence of the present sort; but the fact that the bullet of the defendant's gun is identical or not with the kind of bullet found in the deceased's body involves the inference of identity.

198 Art. 2. *Brands, Timber-Marks, etc.* The presence on an animal, on timber, or on other chattels, of a brand or other mark which a particular person has the custom or the exclusive right to use is admissible to show that that person placed it there, [and that he is the owner of the chattel].[1] — (W. § 150.)

Distinguish the use of the *official register* to show a person's exclusive right to a mark (Rule 148A, *post*, § 1100), and the *presumed genuineness* of the mark (Rule 188, Art. 2, *post*, § 1593).

199 Art. 3. *Postmark.* The official postmark on an envelope is admissible as evidence that the envelope was passed through

[1] This bracketed clause is sometimes not deemed to be law, except by express statute; but it is sound.

the government mails at the time and place indicated. — (W. § 151.)

Cross-reference. For practical purposes, this rule usually requires the aid of two more, namely, that a purporting postmark is *presumed genuine* (Rule 191, *post*, § 1624) and that the official mark is admissible as an official statement without calling the officer (Rule 148 C, Art. 5, *post*, § 1151).

ART. 4. *Possession of Chattels taken in a Crime.* Wherever
200 a chattel has been taken, in the doing of a wrongful act, the fact of its subsequent possession is admissible to show that the possessor was the taker, and therefore was the doer of the whole act.

Par. (*a*). This application of the Rule includes the crimes of larceny, burglary, forgery, robbery, murder, and game-destruction, among others. — (W. §§ 152, 153.)

Distinctions. (*a*) Distinguish the *presumption of law* based on this evidence (Rule 228, *post*, § 2066).

(*b*) Distinguish the possession of goods, *e. g.* liquor, as evidence of an *intention to commit a crime*, *e. g.* to sell the liquor (Rule 59, *post*, § 267).

ART. 5. *Possession of Money.* The possession of money is
201 admissible under this Rule as evidence of the doing of a wrongful act involving the taking of money, provided either (1) that there is some mark of identity of the specific money, or (2) that the possessor lacked such a quantity of money before the time of the act. — (W. §§ 154, 155.)

Distinctions. Distinguish the use of lack of money as evidence of *motive to take* (Rule 67, Art. 3, *post*, § 326) or of *incapacity to pay* (Rule 35, *ante*, § 169).

ART. 6. *Possession of Instrument of Debt.* The possession
202 of an instrument of debt by an obligor after maturity is admissible as evidence of the obligee's voluntary restoration of it amounting to an acknowledgment of discharge of the obligation. — (W. §§ 156, 2518.)

Distinctions. (*a*) Distinguish the *presumption of law* based on this fact (Rule 228, *post* § 2068).

(*b*) Distinguish the possession of a *receipt*, which is an admission by the obligee under Rule 115 (*post*, § 630).

ART. 7. *Possession or Existence of a Document, as evidence of*
203 *Execution, Delivery, or Seisin.* The possession of a document, or its existence in a certain form or place, is admissible for the following purposes:

Par. (*a*). The existence of a document purporting to be *signed* or *sealed* by a particular person is evidence of his *execution* of it, subject to the special rules for the sufficiency of evidence of authentication of documents (Rules 189–193, *post*, §§ 1595–1643).

Par. (*b*). The existence of a document in an official *record-office*, or in the *grantee's custody*, is evidence of its *delivery*, subject to the presumption of law applicable thereto (Rule 228, *post*, §§ 2070–71).

Par. (*c*). The existence of a *document of ownership*, such as a deed of grant or of lease, is evidence of *possession of the property*, by the maker of the document, at the time of making it, on an issue of adverse possession in a prior generation. — (W. § 157, par. 4.)

Distinctions. (1) Distinguish the *presumption of genuineness* of such *ancient documents* (Rule 190, *post*, § 1608).

(2) Distinguish the use of deeds as *verbal acts* accompanying an act of possession otherwise proved, to indicate its scope (Rule 155, Art. 2, *post*, § 1245).

ART. 8. *Possession of Property, as evidence of Ownership.*
204 The fact of possession of property is evidence of the possessor's ownership of it; subject to the presumptions of law applicable thereto (Rule 228, *post*, § 2067).

ART. 9. *Negative Traces: Death, Payment, Lost Will, etc.*
205 The absence of such traces as would ordinarily exist if an act had been done or not done is admissible in the following cases, subject to the rules of presumption applicable thereto (Rule 228, *post*, §§ 2068, 2077, 2085).

Par. (*a*) *Lack of news* from an *absent person*, as evidence of his *death;*

Par. (*b*). *Lapse of time* without litigation over a *debt*, as evidence of its *payment;*

Par. (*c*). *Failure to find* a *will*, as evidence of its *revocation;*

Par. (*d*). *Failure* by a *vendee* to take *possession*, as evidence of *fraudulent collusion* with the *debtor-vendor*.

Sub-Topic B: Organic Traces

Art. 10. *Miscellaneous Instances.* The presence or absence
206 of any thing having a physiological or other organic relation to a human act causing it is an admissible trace. — (W. § 168.)

Illustration. On an issue of adultery by a husband, the fact of a venereal disease is admissible as evidence of his intercourse with other women.

Art. 11. *Birth during Marriage, to evidence Paternity.*
207 The birth of a child during marriage is evidence of the husband's paternity. — (W. § 164.)

Par. (*a*). The effect of this evidence upon the burden of proof is determined by the presumption of legitimacy (Rule 228, *post*, § 2080).

Par. (*b*). For the purpose of explaining away such evidence, the fact of the mother's intercourse with another man is admissible, under Rule 39 (*ante*, § 191), subject to the presumption of legitimacy (Rule 228, *post*, § 2080).

Art. 12. *Birth to Unmarried Mother, to evidence Paternity.*
208 In any issue involving intercourse with an unmarried woman, whether bastardy, seduction, rape, incest, or the like, the birth of a child, or her pregnancy, is evidence that intercourse was had with her by some one, [but not that it was had by a particular person.] [1] — (W. § 168.)

Par. (*a*). For the purpose of explaining away such evidence, when offered as a part of the evidence against a particular alleged father, the fact of the woman's intercourse with another man is admissible, under Rule 39 (*ante*, § 191).

[1] This rule is not recognized by all Courts, but the above form recognizes in part each side of the controversy.

ART. 13. *Resemblance of Child, to evidence Paternity.* On
209 an issue involving parentage, the corporal features of the child, if sufficiently developed, are evidence. — (W. § 166.)

Distinguish (*a*) the question whether the child can be *shown* in court (Rule 123, *post*, § 730);
(*b*) whether a witness' *opinion* of resemblance may be given (Rule 175, *post*, § 1461).

ART. 14. *Corporal Traits, to evidence Race, etc.* On an
210 issue involving a person's descent from a particular race or nationality, the corporal features of the person are evidence. — (W. § 167.)

SUB-TOPIC C: MENTAL TRACES

ART. 15. *Miscellaneous Instances.* The presence or absence
211 of any thing having a mental or psychological relation as the effect of a human act causing it is a trace admissible under Rule 41.[1] — (W. §§ 172–176.)

(1) But so far as this mental trace is a *consciousness* or *belief* existing in the person himself who has done or not done the act, and is therefore to be itself evidenced by his conduct or utterances, it is subject to the limitations of Rule 63 (*post*, § 290), governing the admissibility of evidence of a mental condition, and of Rule 118 (*post*, § 64) governing a party's implied admissions.

Illustrations. (1) On a charge of murder, the defendant's *consciousness of guilt* is evidential as a trace; but his conduct and utterances are the only mode of evidencing that consciousness, and the rules applicable are those for conduct to evidence consciousness (Rule 63, *post*, § 290) and for parties' implied admissions (Rule 118, *post*, § 641).

(2) On an issue of *identity*, the person's recollection or non-recollection of the important events in the life of the person in issue is an evidential trace; but his utterances and conduct are the sole evidence available, and the rules applicable thereto must govern (Rule 63, Art. 3, *post*, § 293).

[1] In so far as this broad principle would admit the results of psychological *experiments* based on the association of sensations, it is presumably not yet law.

ART. 16. *Conduct of Animals, to evidence a Human Act.*

212 The conduct of an animal, such as experience has shown to be a usual effect of human acts, is admissible as a trace. — (W. § 177.)

In particular,

Par. (*a*). Where the issue involves a particular person's *ownership* or *possession* of the animal, its behavior regarding that person or his property is evidence.

Par. (*b*). Where the issue involves a particular person's *presence* at a particular place, the behavior of a dog, capable of detecting and accurately following human scent, when laid on the trail, is evidence.

SUB-TITLE II:
EVIDENCE OF A HUMAN QUALITY OR CONDITION

TOPIC I:
EVIDENCE TO PROVE MORAL CHARACTER OR DISPOSITION

RULE 42. *Modes of evidencing Character.* Moral character
215 or disposition is capable of being evidenced circumstantially in three ways:

(*a*) By *prior* or *subsequent* moral character of the person in question. Either of these is admissible, but their use is affected by the rules for Reputation as evidence of character, and is therefore dealt with under that topic (Rule 147, Art. 4, *post*, § 1071).

(*b*) By moral *character of an ancestor* as tending to be transmitted. This is not admissible, the conclusions of biological science not having yet pointed out any definite and constant tendencies or tests.

Distinguish the admissibility of *ancestral insanity* (Rule 56, *post*, § 263) and *longevity* (Rule 52, *post*, § 248).

(*c*) By *conduct* of the person in question, exhibiting a specific trait of moral character. The ensuing rules apply to this kind of circumstantial evidence. — (W. §§ 190, 191.)

ART. 1. *Rules not applicable to Witnesses.* The following
216 rules apply in evidencing the moral character of *any person* whose character is material or relevant to be proved under Rules 30–34 (*ante*, §§ 130–165); but do not apply to the character of a *witness*.

ART. 2. *Rules of Relevancy and of Auxiliary Policy com-*
217 *bined.* The following rules represent the combined result of the general principles of Relevancy (Rule 25, *ante*, § 118), ar[illegible] ry Policy (Rule 26, *ante*, § 123), in particular [illegible] of Undue Prejudice (Rule 166, *post*, § 1390),

Unfair Surprise (Rule 161, Art. 1, *post*, § 1326), and Excessive Confusion of Issues (Rule 165, *post*, § 1383).

Sub-Topic A:

Conduct to Evidence Character of an Accused

RULE 43. *Particular Instances of Misconduct not admissible.*
218 Even where the bad moral character of a defendant in a criminal case is provable as evidence for the prosecution under Rule 30 (*ante*, § 137), particular instances of misconduct, even though they would be relevant to show the trait of character involved, are inadmissible, for that purpose, by virtue of the principle of preventing Undue Prejudice, (Rule 166, *post*, § 1390), as well as of the principles of preventing Unfair Surprise (Rule 161, Art. 1, *post*, § 1326), and Excessive Confusion of Issues (Rule 165, *post*, § 1383). — (W. §§ 193, 194.)

(*Reason and Policy.* The chief reason for this Rule is the great risk of undue prejudice, *i. e.* that the jury, instead of determining the accused's guilt or innocence of the present charge solely on the evidence of the deed itself, will bring in a verdict of guilty because the accused has at any rate done other bad deeds and therefore will not suffer unjustly by the verdict. In addition to the impropriety of such a reason for a verdict, there is the risk of injustice, due to the circumstance that the other supposed deeds have been in this trial only casually investigated, without fair notice of those issues and opportunity to dispute the correctness of the other charges, *i. e.* the rules against unfair surprise and excessive confusion of issues are involved.

The present Rule is regarded as so important that it dominates the other Rules under this Sub-Title, *i. e.* the tendency to enforce this Rule whenever there is any risk of its violation induces Courts to interpret the other Rules narrowly, so as to exclude evidence which would otherwise be plainly admissible under them; thus to some extent infringing the principle of Multiple Admissibility (Rule 15, *ante*, § 42).)

Art. 1. *One Criminal Act, not evidential of Another, except*
219 *through an Inference of Motive, Plan, etc.* The doing of another criminal act, not a part of the issue, is therefore not admissible as evidence of the doing of the criminal act charged, except when offered for the specific purpose of evidencing Design, Plan, Motive, Identity, Intent, or other

relevant fact (Rules 50–65, *post*, §§ 240–314) distinct from Moral Character. — (W. § 192.)

ART. 2. *Criminal Quality of Act does not exclude.* If conduct
220 is thus admissible for some other allowable purpose, by virtue of the principle of Multiple Admissibility (Rule 15, *ante*, § 42) its criminal quality and its indication of moral character do not exclude it. — (W. §§ 215, 216.)

Illustrations. (1) In a trial for arson of a barn, the defendant's attempt on two former occasions to burn houses in other parts of the town is not admissible, unless for the purpose of evidencing Intent or Motive.

(2) On a charge of murder by poison, the defendant's murders of other members of the same family by poison, if admissible to show Motive or Intent, are not excluded because they are criminal acts and might cause undue prejudice.

ART. 3. *Other Criminal Acts, as Inseparable in Proof.*
221 Wherever the doing of a criminal act charged appears to have been accompanied by the doing of one or more other criminal acts, so that it is not practicable to separate them in the course of producing evidence, the other acts may be proved, by virtue of the principle of Multiple Admissibility (Rule 15, *ante*, § 42), but not for the purpose of using them evidentially against the defendant's moral character. — (W. § 218.)

Illustrations. (1) On a charge of stealing bank-notes from a letter, the fact that another stolen letter contained other bank-notes, which were taken out and substituted for the ones in question, may be proved as an inseparable part of the act.

(2) On a charge of larceny of a horse, the taking of two other horses as a part of the same act may be proved.

Cross-references. Compare the use of other criminal acts to evidence (1) *Identity* (Rule 68, *post*, § 334); (2) *Stolen possession* (Rule 41, *ante*, § 200).

ART. 4. *Other Conditions of Crime, to increase Sentence.*
222 Wherever a prior conviction of crime may by law be considered for the purpose of affecting the sentence in the case at bar, the prior conviction may be shown, [but not until

after verdict returned upon the question of guilt].[1] — (W. § 196).

ART. 5. *Other Criminal Acts to Impeach Defendant as*
223 *Witness.* When the defendant takes the stand as a witness, his testimonial character may be evidenced in any manner allowable against a witness under Rules 97, 98, and 105 (*post*, §§ 501, 518, 549) and subject to the limitations of privilege and its waiver (Rule 203, *post*, §1749).

Distinction. Distinguish the rule for *cross-examining* a witness of the defendant's good reputation as to *rumors of misconduct* negativing such reputation (Rule 105, Art. 3, *post*, § 557).

RULE 44. *Particular Instances of Good Conduct not admis-*
224 *sible.* Where the good moral character of a defendant in a criminal case is provable for the defence under Rule 30 (*ante*, § 136), particular instances of good conduct, even though they would be relevant to show the trait of character involved, are inadmissible for that purpose, by virtue of the principle of preventing Unfair Surprise (Rule 161, Art. 1, *post*, § 1326).[2] — (W. § 195.)

SUB-TOPIC B:

CONDUCT TO EVIDENCE CHARACTER OF OTHER PERSONS EVIDENTIALLY USED

RULE 45. *Particular Acts to evidence Character of Deceased*
225 *in Homicide.* Where, in a trial involving homicide or other violence, and on an issue of self-defence, the deceased's character for violence or turbulence or the opposite is admissible, under Rule 32 (*ante*, §§ 141–145), particular instances of his conduct exhibiting this trait are [not] admissible to evidence such character.[3] — (W. § 198.)

ART. 1. This rule is applicable in *civil* as well as in criminal
226 cases.

[1] This is the rule of the English and Canadian Statutes and a majority of the statutes in the United States; but a minority improperly omit the concluding proviso.

[2] This rule, however, is perhaps anomalous.

[3] Of the few Courts here on record, a majority accept the negative form.

[[ART. 2. This rule is applicable in favor of the *prosecution*
227 as well as of the defence.[1]]]

Distinctions. (1) Distinguish the rule for using the deceased's particular acts of violence to show the *defendant's state of mind* as to apprehension of violence (Rule 62, *post*, § 280).

(2) Distinguish the rule for using the deceased's prior acts of violence to show *ill-feeling between the parties* (Rule 67, Art. 6, *post*, § 329).

RULE 46. *Particular Acts to evidence Character of Party*
228 *or Party's Agent in a Civil Case.* In a civil case, even where the moral character of a party or his agent or a third person is admissible as evidence of the person's probable doing or not doing of an act, under Rule 33 (*ante*, §§ 146–150), particular instances of conduct, even though they would be relevant to show the trait of character involved, are inadmissible for this purpose, by virtue of the principles for preventing Undue Prejudice (Rule 166, *post*, § 1390), Unfair Surprise (Rule 161, Art. 1, *post*, § 1326), and Excessive Confusion of Issues (Rule 165, *post*, § 1383).[2] — (W. § 199.)

(*Reason and Policy.* The chief reason for this rule is in substance the same as that for Rule 43 in criminal cases, — here applicable to civil cases where the issues involve conduct capable of exciting sentiments of reprehension. Nevertheless, the extent of the risk in civil cases is much less than in criminal cases, and is often none at all).

Distinctions. (1) Distinguish the rule for admitting such conduct to evidence negligent *character in issue* (Rule 49, *post*, § 238), or *physical capacity* or *skill* (Rule 50, *post*, § 240).

(2) Distinguish the rule for admitting such conduct to evidence an *employer's knowledge* of an employee's *incompetent character in issue* (Rule 62, *post*, § 282).

(3) Distinguish the rule for admitting a *habit* or course of conduct (not involving moral character) to evidence the doing or not doing of an act (Rule 36, *ante*, § 170).

(4) Distinguish the rule for admitting particular instances of the *operation of a machine* (Rule 73, Art. 3, *post*, § 350) or

[1] There is no authority yet for this; but it is fair and rational.

[2] This rule, generally accepted, seems fair enough. Its only shortcoming is the quibbling distinctions to which it necessarily gives rise.

of the *condition of a highway* (Rule 73, Art. 4, *post*, § 352) to show its defects.

Illustrations. (1) In an action against an employer for injury to a train-fireman by derailment, the negligent act charged being the switchman's wrong setting of signals, prior instances of the switchman's wrong setting of signals would be inadmissible under the present rule, though they might be admissible to evidence the switchman's incompetence as a fellow-servant or the defendant's knowledge thereof.

(2) In an action on a note, with a defence that the note was a forgery of the employer's name by an employee, his practice of signing the employer's name on shop-notices might be admissible as evidence of the employee's technical ability to imitate the signature or of his practice to do so.

(3) In an action for injuries caused by the explosion of dust accumulated near a pulley-shaft in a factory, prior instances of such explosions might be admissible as evidence of the tendency of such an accumulation, though not of the negligent character of the employees in charge.

[[ART. 1. The Court may admit such instances, on notice given before trial, under Rule 161, Art. 1 (*post*, § 1326), where in the circumstances the policy of avoiding Undue Prejudice (Rule 166, *post*, § 1390) or Excessive Confusion of Issues (Rule 165, *post*, § 1383) is of no importance.]][1]

229 RULE 47. *Particular Acts to evidence Character of Complainant in Rape, etc.* Wherever the bad moral character for chastity of the woman complainant, on an issue of rape or other unchaste act by a man against a woman in which the latter's consent is material, is admissible under Rule 31 (*ante*, § 138), particular acts exhibiting the woman's unchaste disposition, and thereby her probable consent, are [not] admissible to evidence her character.[2] — (W. § 200.)

Distinctions. (1) Distinguish the rule for *impeaching the woman's credit* as a witness on cross-examination (Rule 105, Art. 2, *post*, § 552).

(2) Distinguish the rule for using such acts to evidence *non-paternity* on an issue of bastardy (Rule 39, *ante*, § 191).

(3) Distinguish the rule for using other acts of *intercourse with the defendant himself* as evidence of the woman's motive to consent (Rule 67, Art. 6, *post*, § 329).

[1] This is not law, but gives a desirable flexibility to the rule.
[2] The jurisdictions are divided *pro* and *contra* this rule.

[ART. 1. The woman's habitual *prostitution* is to be regarded, for the purpose of the present rule, as involving general character, and not particular acts.][1] — (W. § 200.)

RULE 48. *Conduct to evidence Disposition of an Animal.*
230 Wherever the disposition of an animal is admissible evidentially under Rule 33, Art. 6 (*ante*, § 152), or is provable as a part of the issue, particular instances, relevant to show the trait involved, are admissible. — (W. § 201.)

Distinctions. (1) Distinguish the admissibility of an animal's conduct to show the *owner's notice* of its propensity (Rule 62, *post*, § 283).

(2) Distinguish the admissibility of an animal's conduct to show *ownership* by its recognition, etc. (Rule 41, Art. 15, *ante*, § 212).

SUB-TOPIC C: CONDUCT TO EVIDENCE CHARACTER IN ISSUE

RULE 49. *General Principle.* Wherever a person's moral
231 character is a part of the issues in the case under the pleadings, the principles for preventing Undue Prejudice (Rule 166, *post*, § 1390), or Unfair Surprise (Rule 161, Art. 1, *post*, § 1326), or Excessive Confusion of Issues (Rule 165, *post*, § 1383) are [not] consistent with using particular instances of conduct.

Such instances exhibiting the trait in question are therefore [not] admissible, [[subject to the trial Court's determination in limiting their number, under Rule 165 (*post*, § 1385), and in ordering a notice of particulars to be filed before trial under Rule 161, Art. 1 (*post*, § 1326)]];

with the following further details and qualifications.[2] — (W. § 202.)

ART. 1. *Common Offenders.* Particular acts are admissible
232 under the present rule on a charge of being a common cheat,

[1] This article is needed only in a jurisdiction taking the negative of the main Rule.

[2] The affirmative form of the rule is the orthodox one, though denied in some Courts. The clause in double brackets is not a part of the orthodox rule; but it serves to obviate the only objections to that rule, viz. to avoid Unfair Surprise and Excessive Confusion of Issues.

common liquor-seller, common gambler, common drunkard, or the like.[1] — (W. § 203.)

Cross-reference. Such acts would also be admissible under Rule 66 (*post*, 316), for evidencing a habit.

ART. 2. *House of Ill-fame.* On an issue involving the keeping
233 of premises for prostitution, particular instances are admissible

(*a*) of prostitution on the premises, to evidence their use;

(*b*) of prostitution by the inmates, to evidence their occupation.[2] — (W. § 204.)

ART. 3. *Seduction.* Wherever by law the seduction of a
234 woman is a crime against the State or a civil cause of action by her, and her prior actual (not reputed) chaste character is expressly or impliedly essential to the crime or cause of action, particular prior acts of unchastity by her, including lewd conduct not involving intercourse, are admissible for the defence.[3] — (W. § 205.)

ART. 4. *Excuse for Breach of Marriage-Promise.* Where
235 the unchaste character of the promisee is by law an excuse for breach of promise of marriage, the unchaste character may be evidenced by particular acts of intercourse with another person or of other lewd behavior. — (W. § 206.)

ART. 5. *Justification of Defamation of Character.* In an
236 action for defamation by an utterance involving a bad general character or trait thereof or habit of conduct, and the truth of the utterance is pleaded in defence, particular instances exhibiting the trait or habit are [not] admissible for the defence.[4] — (W. § 207.)

ART. 6. *Incompetence of Physician.* In an issue involving
237 the competence of a physician or other person requiring

[1] All Courts concede this.

[2] Practically all Courts concede this.

[3] The words of the State statute are here determining.

[4] Some Courts admit; some exclude; some require the particular acts to be pleaded or furnished in a bill of particulars. The last is the sensible rule, and is here provided for by the clause in brackets in § 231, *ante*.

professional skill, particular instances exhibiting such skill or the opposite are [not] admissible.[1] — (W. §§ 67, 87, 221.)

Cross-reference. Compare the rule for admitting the *general character* of such a person for skill (Rule 33, *ante*, § 150), and for evidencing *skill* by particular instances (Rule 50, *post*, § 242).

238 ART. 7. *Incompetence of Employee.* In an issue involving the competence of an employee, particular instances of conduct exhibiting such competence or the opposite are admissible. — (W. § 208.)

Distinctions. (1) Distinguish the use of such conduct as evidence of negligent character *not in issue* but relevant to the issue (Rule 46, *ante*, § 228), or as evidence of the *employer's knowledge* of the employee's competence (Rule 62, *post*, § 282).

(2) Distinguish the use of *acts of intoxication*, as evidence of intemperate habits (Rule 66, *post*, § 316).

Illustrations. See § 228, *ante*.

239 ART. 8. *Mitigation of Damages.* In any action where the moral character of the plaintiff or a third person may by the law of damages and by Rule 34 (*ante*, § 154), be considered by the tribunal in fixing the amount of damages to be recovered, and such moral character involves the actual character and not merely the reputation thereof (as distinguished in Rule 29, *ante*, § 126), particular instances of conduct exhibiting the trait of character in question are admissible for the defence; that is to say,

Par. (*a*). In an action for *defamation*, the plaintiff's conduct is not admissible. — (W. § 209.)

Distinguish the use of such conduct to evidence character on a *plea of truth* (Rule 49, Art. 5, *ante*, § 236).

Par. (*b*). In an action for *malicious prosecution*, the plaintiff's conduct is not admissible. — (W. § 209.)

Distinguish the use of such conduct to evidence the defendant's *probable cause* for prosecution (Rule 62, *post*, § 288).

Par. (*c*). In an action by a parent for *seduction* of a daughter,

[1] Few Courts have ruled.

(1) such conduct of the *parent* is admissible. — (W. § 210); and

(2) such conduct of the *daughter* is admissible. — (W. § 211.)

Distinguish the use of such conduct to evidence the woman's character in the *statutory wrong or crime* of seduction (Rule 49, Art. 3, *ante*, § 234).

Par. (*d*). In an action for *criminal conversation* or for *alienation of affections*, such conduct of either the plaintiff or the other spouse is admissible. — (W. § 211.)

Par. (*e*). In an action for *indecent assault* or for *breach of promise of marriage*, such conduct of the plaintiff is admissible. — (W. §§ 212, 213.)

Topic II:

Evidence to prove Corporal Condition or Capacity

240 RULE 50. *Particular Instances of Conduct.* Wherever the corporal condition or capacity of a person is in issue, or under Rule 35 (*ante*, § 367) is evidentially relevant to a fact in issue, particular instances of the person's conduct or bodily action are admissible for that purpose, even though they might be inadmissible under Rule 43 (*ante*, § 218) to evidence moral character. — (W. § 219.)

241 Art. 1. *Strength, Illness, etc.* Corporal strength, illness, ability, or the like, may be thus evidenced. — (W. § 220.)

242 Art. 2. *Skill or Mechanical Means.* Manual skill or ability or the like may be thus evidenced, by instances, or by the possession of tools or apparatus giving such ability. — (W. § 221.)

Cross-references. (1) A *physician's skill* may be thus evidenced by instances; but the rule for evidencing Character is generally held to apply (Rule 49, *ante*, § 237).

(2) *Possession of tools* may be also evidence of *design* (Rule 59, *post*, § 267).

(3) *Voice-quality* may be thus evidenced by utterances; but other rules here become applicable according to circumstances, viz. sufficiency for *identification* (Rule 86, Art. 4,

post, § 404), the *opinion* rule, for the witness identifying (Rule 175, *post*, § 1464), the *oath* rule, for voice-utterances used as testimony (Rule 157, *post*, § 1285).

(4) *Capacity of vision* may be thus evidenced by instances, but usually the purpose of this is to evidence the nature of the *object seen* (Rule 73, Art. 5, *post*, § 354), not the capacity of the particular person seeing.

ART. 3. *Pecuniary Capacity.* A person's pecuniary
243 capacity to pay or to lend money, being in issue or being relevant under Rule 35 (*ante*, § 169), may be evidenced by his conduct in borrowing money or in not paying money due. — (W. § 224.)

Distinguish the *possession* or *lack* of money as evidencing a *motive* for committing a crime, seeking a loan, or the like (Rule 67, Art. 3, *post*, § 326).

RULE 51. *Physical Appearance.* Wherever a person's
244 corporal qualities are in issue or relevant, the external corporal appearance of the person is admissible, in so far as such appearances are in ordinary life acted upon as evidence. — (W. §§ 221–223.)

ART. 1. *Age.* A person's *age* may be thus evidenced. —
245 (W. § 222).

Distinguish (1) appearance as evidence of *belief* by a person observing (Rule 62, *post*, § 285);

(2) the *jury's inspection* of appearance (Rule 123, *post*, § 730).

ART. 2. *Health, Strength, etc.* A person's *health* or *strength*
246 may be thus evidenced. — (W. §§ 221, 223.)

Distinguish (1) the effect of the *Opinion* rule (Rule 175, *post*, § 1461) on the method of evidencing appearance in any of these cases.

(2) the *qualification* of a *lay witness* to testify to appearances of disease (Rule 83, Art. 4, *post*, § 382).

RULE 52. *Predisposing Circumstances.* The existence of
247 a corporal quality or condition may be evidenced by circumstances likely to produce it.

ART. 1. *Heredity.* The presence of the quality or con-
248 dition in members of the person's family from whom it might be inherited is thus admissible, provided there is other evidence of its existence in the person in question. — (W. § 223.)

Cross-reference. For hereditary *insanity*, see Rule 56, *post*, § 263.

ART. 2. *Occupation.* The special nature of a person's
249 occupation or mode of livelihood is thus admissible. — (W. § 223.)

RULE 53. *Prior or Subsequent Condition.* A person's con-
250 dition or quality of any sort may be evidenced by its prior or subsequent existence or absence, at a time not so remote as to take away all fair probability of its continuance under the circumstances of the case. — (W. § 225.)

Cross-references. For other instances of the application of this rule, arising in the use of *photographs*, see Rule 93, Art. 2, *post*, § 480.

TOPIC III:

EVIDENCE TO PROVE MENTAL CAPACITY

RULE 54. *General Principle.* Wherever a person's mental
251 capacity is in issue or relevant, it may be evidenced either by the person's conduct, utterances, or appearances exhibiting it, or by pre-existing external circumstances tending to produce it, or by its prior or subsequent existence in him;

subject to the following limitations. — (W. § 227.)

RULE 55. *Conduct, Utterances, and Appearances.* Any act,
252 utterance, or appearance of a person is admissible, for consideration as evidence to the jury;

subject to the usual general rules, namely: — (W. § 228.)

Par. (*a*) that the judge may exclude facts which tend to confuse the issues without adding valuable evidence (Rule 165, *post*, § 1383);

Par. (*b*) that the judge may declare a given quantity of evidence insufficient to go to the jury (Rule 227, *post*, § 2002);

Par. (c) that no presumption of insanity or sanity be made from any specific fact except as authorized by the rules of presumption (Rule 228, *post*, §§ 2041, 2045).

ART. 1. *Suicide.* The fact of *suicide* is thus admis-
253 sible.

ART. 2. *Testamentary Plans.* Other *testamentary* acts,
254 plans, and conversations are thus admissible. — (W. § 229.)

ART. 3. *Disinheritance.* The *disinheritance* of near relatives
255 is thus admissible. — (W. § 229.)

ART. 4. *Delusion.* A *delusion* of fact is thus admissible. —
256 (W. § 228.)

Distinguish the use of *communicated facts*, whether true or false, as predisposing to insanity (Rule 56, *post*, § 261).

ART. 5. *Third Persons' Communications.* The person's
257 *treatment* of third persons' communications is thus admissible. — (W. § 228.)

Illustration. On receipt of a letter demanding rent, the person replies, disputing the reckoning, or claiming that an angel has promised to pay it; this reply, with the letter, is admissible.

Cross-reference. The hearsay rule (Rule 155, *post*, § 1258) does not prevent.

ART. 6. *Explanations.* On the general principle of Ex-
258 planation (Rule 24, Art. 5, *ante*, § 117), any fact explaining away the apparent significance of such conduct, utterance, or appearance, is admissible. — (W. § 228.)

ART. 7. *Undue Influence.* A testator's incapacity to resist
259 the control of a third person alleged to have used undue influence in procuring the execution of the will may be evidenced by any of the present modes. — (W. § 230.)

ART. 8. *Hearsay Rule.* Utterances of the person asserting
260 any fact are not to be used as testimonial evidence of that fact under the present Rule, except so far as this use is permitted by the exceptions to the hearsay rule (Rule 153, Art. 4, *post*, § 1218).

RULE 56. *Predisposing Circumstances.* Any circumstance
261 tending to produce the form of mental incapacity in question

is admissible, provided other evidence of such incapacity is in the case. — (W. § 231.)

ART. 1. *Miscellaneous Occurrences.* Circumstances likely
262 to cause mental shock or disturbance are thus admissible, if they have been communicated to the person; but their supposed effect may be explained away as in Rule 55, Art. 6 (*ante*, § 258). — (W. § 231.)

Illustration. In a trial for homicide, defence insanity, caused by the deceased's reported rape of the defendant's daughter, the report of the rape to him is admissible for the defence; the fact that the defendant had consented to the deceased's unlawful attempts is admissible for the prosecution.

Distinguish the question whether the witness to such reports can be discredited by disproving the facts reported (Rule 107, *post*, § 567); and the question of the hearsay rule (Rule 155, *post*, § 1258).

ART. 2. *Heredity.* The presence of insanity in members of
263 the person's family from whom it might be inherited is admissible, provided there is other evidence under Rule 55 (*ante*, § 252) or Rule 57 (*post*, § 264) of its existence in the person in question. — (W. § 232.)

RULE 57. *Prior and Subsequent Condition.* A person's
264 prior or subsequent condition as to sanity or insanity is admissible to evidence his condition at the time in issue; the range of time depending on the circumstances of the particular case as to the kind of the alleged incapacity, its probable persistence, and the person's habits and health. — (W. § 233.)

Distinctions. Distinguish the application of other rules where the present rule is incidentally involved, particularly (1) the rule for using an *inquisition* of lunacy (Rule 148B, Art. 4, *post*, § 1140).

(2) the rule for using utterances admissible under the Hearsay exception (Rule 153, Art. 4, *post*, § 1218).

RULE 58. *Intoxication.* Intoxication, as a condition of
265 temporary mental derangement, may be evidenced

Par. (*a*) by the person's *conduct;*

Par. (*b*) by his prior *drinking* of intoxicative liquor;

Par. (*c*) by his *prior* or *subsequent* condition of intoxication. — (W. § 235.)

Distinguish (1) the admissibility of a *habit* of drinking as evidence of being drunk at a particular time (Rule 36, *ante* § 171);

(2) the admissibility of an intoxicated condition as evidence of incapacity to do a *specific act* (Rule 35, *ante*, § 168).

Topic IV:

Evidence to prove Design or Plan

266 RULE 59. *General Principle.* Whenever a person's design or plan to do an act is in issue, or is relevant under Rule 37 (*ante*, § 137), it may be evidenced circumstantially

(*a*) by his conduct or utterances indicating the design or plan,

(*b*) or, by the prior or subsequent existence of the design or plan. — (W. § 237.)

Distinctions. (1) Distinguish the testimonial use of his *assertions* to evidence the design or plan under the hearsay exception (Rule 153, Art. 2, *post*, § 1207);

(2) the use of his conduct to evidence *motive* or *emotion* (Rule 67, *post*, § 322);

(3) the use of his conduct to evidence *intent accompanying an act* (Rules 60, 65, *post*, §§ 271, 297);

(4) the use of his conduct to evidence *knowledge* or *belief* (Rules 63, 65, *post*, §§ 271, 290).

267 Art. 1. *Miscellaneous Instances.* Any act or utterance which, under the circumstances and according to practical experience, naturally interpreted, would indicate a probable design or plan to do an act or class of acts, is admissible; in particular, acts or utterances involving

Par. (*a*) preparation of *materials*,

Par. (*b*) possession of *tools*, *documents*, or *weapons*,

Par. (*c*) journeys or experiments,

Par. (*d*) inquiries, prophecies, or allusions. — (W. § 238.)

268 Art. 2. *Explanatory Circumstances.* On the general principle of Rule 24, Art. 5 (*ante*, § 117), circumstances which tend to explain away the significance of such acts or utterances are admissible. — (W. § 239.)

ART. 3. *Similar Offences.* The doing of one or more acts,
269 similar to the act in issue, whether or not having a criminal nature, may be admitted for the present purpose, subject to the limitations prescribed in Rule 65 (*post*, § 297.)

ART. 4. *Prior or Subsequent Design.* A person's prior or
270 subsequent design is admissible to evidence his design or plan at a particular time in issue; the range of time depending on the circumstances of each case. — (W. § 241.)

TOPIC V: EVIDENCE TO PROVE INTENT

RULE 60. *General Principle.* Intent is a person's state of
271 mind, at the time of doing an act, with reference to his volition of the act and its external consequences. The intent may thus be evidenced circumstantially

(*a*) by his conduct or utterances,

(*b*) or, by his prior or subsequent state of mind. — (W. § 242.)

ART. 1. *Motive, Knowledge, Design, distinguished.* Intent
272 signifies a state of mind distinct from Motive, Knowledge, or Design; although for the purposes of criminal or other law two or more of these states of mind may be material and may for practical purposes be known together as Intent.

Illustration. A pulls the trigger of a pistol and the discharge wounds M. Here, A's Intent is his state of mind as to volition to pull the trigger and wound M; but (1) his Knowledge whether the pistol was loaded is a separable element, which may be separately evidenced; (2) his Motive for doing it, *e. g.* self-defence or revenge, is a separable element which may be separately evidenced; (3) his Design beforehand to do it is a separable element, which may be separately evidenced. Moreover, even though he had such knowledge and motive and design it may still be the fact that the actual pulling of the trigger and discharge of the pistol at the time of the act was accidental or inadvertent and therefore without volition, *i. e.* Intent on his part to do so.

ART. 2. *Sundry Evidence.* The Intent at the time of the
273 act may thus be evidenced by any one of these other states of mind, prior or subsequent, or by the conduct and utterances

of the person at the time of the act; and any evidence receivable for such other purposes may be also applied to evidence the Intent.

274 ART. 3. *Similar offences.* The doing of one or more acts similar to the act in issue, whether or not having a criminal nature, may be admitted for the present purpose, subject to the limitations prescribed in Rule 65 (*post*, §§ 297–314).

275 ART. 4. *Hearsay Rule.* Where the person's utterances asserting an intent are offered in evidence, they must satisfy the hearsay rule or one of its exceptions, as set forth in Rules 153, 155 (*post*, §§ 1200, 1240) or the rule for a party's admissions (Rule 115, *post*, § 630).

Illustrations. This applies not only in criminal cases, but also in issues of agency, wills, and the like.

TOPIC VI:

EVIDENCE TO PROVE KNOWLEDGE, BELIEF, OR CONSCIOUSNESS

276 RULE 61. *General Principle.* A person's knowledge, belief, or consciousness of a matter may be evidenced circumstantially

(*a*) by external circumstances likely to produce such a state of mind;

(*b*) by his conduct or utterances indicating it;

(*c*) or, by the prior or subsequent existence of such a state of mind.

Distinguish the use of the person's utterances *asserting* the existence of such a state of mind; this testimonial use of such assertions must satisfy the Hearsay rule or one of its exceptions (Rules 153, 155, *post*, §§ 1200, 1240).

SUB-TOPIC A:

EXTERNAL CIRCUMSTANCES AS EVIDENCE OF KNOWLEDGE, BELIEF, OR CONSCIOUSNESS

277 RULE 62. *General Principle.* Any external circumstance, the occurrence of which is likely to have produced in a person a knowledge, belief, or consciousness of a relevant matter, is admissible, subject to any specific qualifications in the ensuing rules.

Such circumstances may be classified, in their nature of operation, as follows:

(*a*) *Direct exposure* of the matter to the person's sense of sight, hearing, or the like;

(*b*) *Express communication* of the matter, by the utterance of another person;

(*c*) *Reputation* of the matter in the community;

(*d*) *Intrinsic nature* of the matter, as likely to operate in one or more of the foregoing modes. — (W. §§ 245, 261.)

The following specific rules are not classified in the foregoing modes of operation, but according to the kind of facts of which the knowledge, belief, or consciousness is to be shown.

Cross-reference. In Arts. 1–11, below, the hearsay rule is no obstacle (Rule 155, *post*, § 1258).

278 ART. 1. *Defendant in Homicide; Deceased's Reputed Character.* When in a case of homicide or other violence self-defence is in issue, and some other evidence of the injured person's aggression has been introduced, the character of the injured person for violence, or for other aggressive trait likely to cause apprehension and a belief in the necessity for self-defence, is admissible for the party alleging self-defence; — (W. § 246.)

Provided,

Par. (*a*) that the character must be *known* to the latter party, or so *reputed* as probably to have come to his knowledge;

Par. (*b*) that the character of a *third person* associated in the affray may on the same terms be admissible;

Par. (*c*) that the person's reputed character for *peaceableness* or the like is admissible for the party denying self-defence [in rebuttal] [1].

Distinguish the admissibility of the injured person's violent character as evidence of *his probable aggression* (Rule 32, *ante*, § 141), and not, as here, of the state of mind of the party alleging self-defence.

[1] The qualifying words in brackets are the law in most jurisdictions, but ought not to be.

ART. 2. *Defendant in Homicide; Deceased's Threats.* A
279 threat of violence, made by the injured person against a party alleging self-defence, is admissible on the same terms as in Art. 1 above; [except that other evidence of aggression need not be first introduced[1]].— (W. § 247.)

Distinguish the use of *uncommunicated threats* as evidence of the injured person's *probable aggression* (Rule 37, *ante*, § 182), and not, as here, of the state of mind of the party alleging self-defence.

ART. 3. *Defendant in Homicide; Deceased's Violent Acts.*
280 An act of violence, done by the other person prior to the affray in issue, is [not] admissible for a party alleging self-defence, on the same terms as in Art. 1 above, provided it was of a nature to indicate an aggressive disposition.[2] — (W. § 248.)

Distinguish (1) the use of violent acts as evidence of the person's *actual character* under Rule 45 (*ante*, § 226).

(2) the use of acts of *hostility to the present defendant*, indicating a *motive* of aggression under Rule 67, Art. 6 (*post*, § 329).

ART. 4. *Employer of an Incompetent Employee; Reputed*
281 *Character of the Employee.* Wherever by the substantive law an employer's knowledge of the incompetent character of an employee is material, the reputation of the employee as to the trait of character in question, in his place of domicile [or employment] is admissible to evidence the employer's knowledge.[3] — (W. § 249.)

Distinctions. (1) The reputation may also be admissible to evidence the employee's *actual character*, under the hearsay exception (Rule 147, Art. 4, *post*, § 1071).

(2) The reputation, in a few States, may constitute *per se* negligence of the employer, irrespective of its evidencing his probable knowledge.

(3) The employee's *actual* character may not be admissible so far as it is offered to evidence the doing of the act (Rule 33, Art. 2, *ante*, § 148).

[1] The qualifying phrase in brackets is not the law in some jurisdictions, but perhaps ought to be.

[2] The negative rule obtains in some jurisdictions; most Courts have not passed upon it.

[3] The words in brackets are in many jurisdictions not law, but ought to be.

282 ART. 5. *Employer of an Incompetent Employee; Acts of the Employee.* On the issue named in Art. 4 above, a specific act or acts of the employee, indicating incompetence in the trait in question, is [not] admissible to evidence the employer's knowledge, if done under circumstances likely to bring it to his notice; [[provided the principles of Excessive Confusion of Issues (Rule 165, *post*, § 1383), or of Unfair Surprise (Rule 161, Art. 1, *post*, § 1326) do not, in the case in hand, make it improper.]] [1] — (W. § 250.)

Distinguish the use of such acts of the employee

(1) to evidence his *actual incompetence* (Rule 49, *ante*, § 238),

(2) to evidence his negligent *character* offered evidentially to show a probable negligent act at the time in question (Rule 46, *ante*, § 228).

Illustration. See § 228 (1), *ante*.

283 ART. 6. *Owner of a Vicious Animal.* To evidence the owner's or possessor's knowledge of the vicious quality of an animal,

Par. (*a*) the *reputation* of the animal is admissible;

Par. (*b*) *particular acts* of the animal are admissible. — (W. § 251.)

284 ART. 7. *Owner of Defective Premises or Chattel.* To evidence the owner's or possessor's knowledge of the defective quality of premises or a chattel,

Par. (*a*). The *repute* in the community is admissible;

Par. (*b*). A similar *personal injury*, or other harmful result, occurring at a prior time at the same premises or chattel, is admissible;

Par. (*c*). The known condition of a *related part* of the same premises or chattel is admissible. — (W. § 252.)

Distinguish the use of prior similar injuries to evidence the *actual* defective quality of the premises or chattel (Rule 73, Art. 4, *post*, § 354).

[1] A few jurisdictions take the negative. The double-bracketed proviso, which allows a suitable flexibility to the rule, is not expressly recognized in present practice.

ART. 8. *Person dealing with an Insolvent, Intemperate, or*
285 *Lunatic.* To evidence a person's knowledge or belief as to the insolvency, insanity, intemperance, or the reverse, of another person making a sale or purchase, the latter's reputation is admissible. — (W. §§ 253, 256, 257.)

Distinguish the use of the reputation, by exception to the hearsay rule, to evidence *actual* insolvency, intemperance, insanity, or the reverse (Rule 47, Art. 5, *post*, §§ 1084).

ART. 9. *Sundry Persons dealing with Property.* The
286 reputation of premises or a chattel is admissible to evidence knowledge or belief, on the part of a person possessing or owning it, as to its being *adversely possessed*, *stolen*, kept for *gambling* or *prostitution*, or the like. — (W. § 254.)

Distinguish the use of reputation to show the *actual* mode of user in question (Rule 47, Art. 5, *post*, § 1084).

ART. 10. *Person dealing with a Partnership.* To evidence
287 a person's knowledge of the dissolution of a partnership, the *publication* of notice in a suitable newspaper, or the *reputation* of dissolution, is admissible. — (W. § 255.)

Distinguish the question whether a particular mode of notice *suffices per se* in substantive law.

ART. 11. *Person Prosecuting or Arresting without Probable*
288 *Cause.* In an issue involving the justifiableness of a prosecution or arrest, the prosecuting or arresting party's belief or probable cause may be evidenced by the other person's *reputed character*, or by his reputed prior *particular acts* of misconduct, or by *express communications* received from third persons. — (W. § 258.)

ART. 12. *Possessor of a Document.* The possession of a
289 document is evidence of the possessor's knowledge of its contents. — (W. § 260.)

Distinguish (1) the possession of the document as an *admission* of the *correctness* of its contents (Rule 119, Art. 4, *post*, § 671), particularly where the books of a partnership or corporation are concerned;

(2) the presence of a document *on a person's premises* as evidence that he was at a prior time in possession of it (Rule 41, *ante*, § 203);

(3) the utterance or possession of other *counterfeit* documents as evidence of knowledge or intent (Rule 65, Art. 4, *post*, § 301).

(4) the substantive effect of *keeping* a document as a *waiver* of the right to dissent or rescind.

Sub-Topic B:

Conduct or Utterances, as Evidence of Knowledge, Belief, or Consciousness

RULE 63. *General Principle.* Wherever a person's knowl-
290 edge, belief, or consciousness of a matter is in issue or relevant, his conduct or utterance indicating circumstantially the existence of such knowledge, etc., is admissible. — (W. §§ 265, 266.)

Art. 1. *Belief per se Material.* If the person's belief or
291 knowledge is in itself a part of the issue or is relevant otherwise than by Rule 41 (*ante*, § 211), it is no ground for exclusion of the conduct or utterances that the fact said to be believed or known is also material, and that therefore the conduct or utterance might also be credited by the jury as an implied assertion of that fact; the judge's instruction against such misuse of them being a sufficient precaution, under the principle of Multiple Admissibility (Rule 15, *ante*, § 42).

Illustrations. (1) Murder of a pregnant paramour; the defendant maintained that death was by suicide. The deceased's utterances indicating a knowledge of pregnancy are receivable, because this knowledge was material to her motive; though her statement is not receivable as testimony to the fact of pregnancy.

(2) Death of an insured; issue as to the fact of his disease and the falsity of his representations of good health at the time of insuring; the deceased's utterances indicating a knowledge of his disease are receivable for that purpose, even though not admissible to prove the fact of disease, either as a party's admissions or as a hearsay exception.

Art. 2. *Belief otherwise Relevant.* If the person's knowl-
292 edge or belief is relevant only as evidential of the truth of the fact believed, on the principle of Rule 41 (*ante*, § 211), and thus there is likelihood that his conduct or utterance

would receive credit with the jury solely as an implied assertion of that fact, then it is not admissible — (W. § 267.)

Unless,

Par. (*a*) some specific *exception to the hearsay rule* is applicable; or

Par. (*b*) the person is one whose statements would be receivable as the *admissions of a party* or *privy;* or

Par. (*c*) the case falls within one of the classes mentioned in Art. 3, below.

Illustrations. (1) A will is offered to be proved by oral testimony of those who saw it, the loss of the original being alleged; the heirs dispute the existence of any will; the testator's belief, as to having made a will or not, would be theoretically evidential under Rule 41 (*ante*, § 211), yet his utterances or conduct evidencing such a belief would be excluded by the present rule; unless Par. (*c*) applies.

(2) On a charge of murder, the defence alleges that the guilty party is M, and offers the flight of M as part of the evidence; this would be inadmissible except under Par. (*c*).

(3) On a charge of making counterfeit money, the defendant's conduct and utterances showing a knowledge of the place where the counterfeit money was kept are receivable; because he is a person whose statements would be receivable as a party's admissions.

(4) On an issue of seaworthiness of a vessel, the captain's conduct in embarking in it is not admissible to evidence his belief and thus thereby to evidence the fact of seaworthiness.

ART. 3. *Exceptions.* The conduct and utterances of a
293 person *not a party or privy* are receivable, under Par. (*c*) of Art. 2 above, in the following cases:

Par. (*a*) conduct and utterances evidencing the *consciousness of guilt* of a third person, subject to the limitations of Rule 40, Art. 3 (*ante*, § 194), and of Rule 118, Arts. 3, 4 (*post*, § 650).

Par. (*b*) conduct and utterances evidencing the belief of a man and woman as to their *marriage*, the marriage being material, subject to the limitations of Rule 181, (*post*, § 1537). — (W. § 268.)

Distinguish the use of *reputation* as a Hearsay exception (Rule 147, Art. 3, *post*, § 1066).

Par. (*c*) conduct and utterances of parents evidencing their belief in the *legitimacy* of a child. — (W. § 269.)

Distinguish the use of hearsay statements of *family history* (Rule 140, *post*, § 980).

Par. (*d*) conduct and utterances evidencing a person's belief in facts of his past life, where his *identity* is material. — (W. § 270.)

[*Par.* (*e*) conduct and utterances of a *testator* evidencing his belief as to the existence or contents of a will alleged to be lost or to be altered after execution; subject to the limitations of Rule 153, Art. 4 (*post*, § 1218) as to the hearsay use of such utterances.] [1] — (W. § 271.)

Par. (*f*) conduct and utterances of *parties to a contract* or other transaction evidencing their belief as to the terms of an oral transaction or a lost written one, whenever under the circumstances the risk of an improper hearsay use seems not worth considering. — (W. § 272.)

Illustration. In an action on a policy of accident insurance conditioned on the continuance of M's employment by R, the conduct of M and R is evidence of their belief and therefore of the fact that the employment had terminated.

Cross-reference. The rule as to parol evidence may here be involved (Rule 217, *post*, § 1926).

[ART. 4. *Consciousness of Innocence.* The conduct and utterances of an accused person, indicating circumstantially a consciousness of his innocence of the crime charged, are admissible in his favor.] [2] — (W. § 293.)

Illustration. The usual example is the accused's refusal to escape when it is in his power.

Cross-references. (1) For the use of statements explaining *possession of stolen goods*, see Rule 114, Art. 4 (*post*, § 628).

(2) For the use of other *sundry statements* of an accused, see Rule 155, Art. 2 (*post*, § 1245).

[1] This rule is in many States not law.
[2] The great majority of Courts repudiate this rule.

Sub-Topic C:

Prior or Subsequent Knowledge, Etc.

RULE 64. *General Principle.* A knowledge or belief at
295 a particular time may be evidenced by the existence of a knowledge or belief at a prior or subsequent time, within limits depending upon the circumstances of each case.

Topic VII:

Similar Offences, or Other Acts, as Evidence of Knowledge, Design, or Intent

RULE 65. *General Principle.* A prior or subsequent act of
297 a party, similar to the one charged as the source of criminal or civil liability, though it may be inadmissible to evidence the party's character by reason of Rule 43, Art. 1 (*ante*, § 219), is nevertheless admissible by reason of Rule 43, Art. 2 (*ante*, § 220), in so far as it is relevant to evidence the party's knowledge, intent, or design, if such is in issue or relevant, subject to the following provisions: — (W. §§ 300, 305.)

Cross-references. See also the rules for *inseparable crimes* (Rule 43, Art. 3, *ante*, § 221), *identity*, (Rule 68 *post*, § 334), *motive* (Rule 67, *post*, § 322).

Art. 1. *Knowledge.* A prior similar act is admissible to
298 evidence Knowledge, when the prior act would probably have led to some knowledge or warning (under Rule 62, *ante*, § 277), and the similarity of the transaction would make such knowledge or warning applicable to the case in hand. — (W. § 301.)

Illustrations. (1) On charge of uttering a counterfeit ten-dollar bank-note knowing it to be counterfeit, the accused's attempt to utter a counterfeit silver dollar one month before, and its refusal by the offeree, would be a warning as to its counterfeit nature, but not of the counterfeit nature of so dissimilar a kind of currency as a ten-dollar bill, unless the two things were originally received by the accused from the same person so that the suspicion aroused for the one would attach also to the other.

(2) On a charge of receiving a bicycle knowing it to be stolen, the accused's prior receipt of a stolen watch would not be evidential of knowledge as to the bicycle, unless both had been offered

to him by the same vendor and either the reclaiming of the former by the owner had given warning of the vendor's guilt or the repeated offer of articles unlikely to be honestly acquired by the same person would naturally arouse suspicion.

ART. 2. *Intent.* A prior or subsequent act is admissible
299 to evidence the Intent accompanying the act charged, when the other act is so similar as to the person, thing, and other circumstances that the repeated doing of it is not likely to occur without the intent in question; subject to the following distinctions:

Par. (*a*). A single other act may be admissible, if the similarity is sufficiently close.

Par. (*b*). The range of time between the acts depends upon the circumstances of each case.

Par. (*c*). The other acts need not be connected with the party as their author, provided some evidence has been introduced connecting him with the act charged. — — (W. §§ 302, 303.)

Illustrations. (1) On a charge of larceny by making false entries in books of account kept by the defendant employee, the making of other incorrect entries in the same set of books, within a few months before and after, is admissible to negative the probability of honest mistake in figuring; if only one or two such other errors are offered, they should be limited to substantially the same transaction and period; the range of time and subject may broaden with the number of errors offered.

(2) On a charge of knowingly uttering a counterfeit ten-dollar bank-note, the utterance of other counterfeit money three times within the preceding month is admissible to evidence intent, even though it might be inadmissible under Art. 1 above to evidence knowledge, because the repetition of the instances within a short period diminishes the possibility of innocent intent.

(3) On a charge of arson of the barn of the defendant's employer, the defendant's explanation being that a horse accidentally kicked over a lamp, the breaking out of three fires in the same barn within two months preceding is admissible to negative the accidental origin of this one.

ART. 3. *Design or Plan.* Where the defendant's design
300 or plan to do the act charged is desired to be evidenced as relevant under Rule 37 (*ante*, § 177), a prior or subsequent

act is admissible to evidence the design or plan, provided the acts have such common features in their preparation, commission or other attendant circumstances as to indicate a plan to produce a result of which the act charged is a part.

Par. (*a*). The minimum number of such other acts, and the range of time, depend upon the circumstances of the case. — (W. § 304.)

Illustrations. (1) On a charge of murder of M by poisoning, the defendant's poisoning of A and B, shortly before, is admissible to show a plan, where A and B were the preferred beneficiaries of M's insurance and the defendant was the next to them in succession. But if the act of administering poison were conceded, and the question was as to its inadvertence, the fact of the prior deaths of A and B in a similar manner would be admissible to show intent under Art. 2 above, without requiring circumstances of common features indicating a common plan.

ART. 4. *Application of the Rule to Sundry Crimes, Torts*
301 *and Frauds.* The foregoing rules of Arts. 1, 2, and 3 may be applied in issues involving crimes, torts and frauds, according as any one of the foregoing purposes is material; and under the principle of Multiple Admissibility (Rule 15, *ante*, § 42) the evidential facts, when offered for either of the three purposes, are admissible if the appropriate rule for that purpose is satisfied.

This article is thus applicable to

Par. (*a*) an issue of *forgery* or *counterfeiting.* — (W.
302 §§ 309–318.)

Par. (*b*) an issue of *false pretences* or *representations.* —
303 (W. §§ 320, 321.)

Par. (*c*) an issue of *knowing possession* or *receipt of stolen*
304 *goods.* — (W. §§ 324–327.)

305 *Par.* (*d*) an issue of *embezzlement.* — (W. §§ 329–331.)

306 *Par.* (*e*) an issue of *fraudulent transfer*. — (W. §§ 333–336.)

307 *Par.* (*f*) issues involving *bribery*, *perjury*, and *sundry frauds*. — (W. §§ 338–344.)

Cross-reference. The rule that on *cross-examination to impeach a witness* (Rule 101, Art. 1, *post*, § 583) a wide range is permissible, is often meant to cover such transactions as would be admissible under the present principle.

308 *Par.* (*g*) an issue of *larceny* or *kidnapping*. — (W. §§ 346–349.)

309 *Par.* (*h*) an issue of *robbery*, *burglary*, or *extortion*. — (W. §§ 351, 352.)

310 *Par.* (*i*) an issue of *arson*. — (W. § 354.)

311 *Par.* (*j*) an issue of *rape*, *abortion*, and the like. — (W. §§ 357–359.)

Cross-references. (1) For the use of *other voluntary intercourse* between the *same persons*, as evidence of *motive*, see Rule 67 (*post*, § 330).

(2) For the use of other intercourse *by the woman*, as indicating the guilt of a *third person*, in bastardy and rape, see Rule 39 (*ante*, § 191).

(3) For the use of other intercourse *by the woman*, to *impeach her credit* as a witness, see Rule 102, Art. 2 (*post*, § 552).

312 *Par.* (*k*) an issue of *homicide*, *assault*, or the like. — (W. §§ 363–365.)

313 *Par.* (*l*) issues involving offences against the *liquor* laws — (W. § 367.)

314 *Par.* (*m*) issues involving *miscellaneous* misconduct. — (W. § 367.)

315 ART. 5. *Application of the Rule to Contracts and other Civil Cases.* The foregoing articles are applicable to civil cases

Topic VIII:

Similar Acts, as Evidence of a Habit, System, Usage, Custom, or Status

RULE 66. *Habit or System; General Principle.* Wherever a
316 habit or system or plan or course of conduct of a person or class of persons is material, or is relevant under Rule 36 (*ante*, § 170) to evidence the probable doing or not doing of a particular act, it may be evidenced by specific instances of similar conduct, provided the other acts have such common features with the case in hand as to indicate a plan, habit, or course of conduct which includes it. — (W. §§ 375, 376.)

Distinguish (1) the rule against using a *party's character* (Rules 33, 46, *ante*, §§ 146, 228), because if the particular conduct is chiefly relevant for that purpose, and not for the present, it would be inadmissible.

(2) the rule admitting a *habit*, as evidence of doing an act, when proved generally or abstractly (Rule 36, *ante*, § 170); in the present rule, the question is whether the habit or plan itself can be evidenced by specific acts.

Illustration. Issue as to a debt contracted after notice of dissolution of partnership; to evidence the disputed terms of the notice sent to the plaintiff, the terms of the notice as prepared and sent to other creditors are admissible.

Art. 1. *Contracts.* Wherever the fact or the terms of a
317 contract are material, the making of another such contract by the promisor is admissible in the following cases:[1] — (W. § 377.)

Par. (*a*) where it consists in having treated a third person as *agent* for a similar transaction; and this rule applies equally to a criminal case;

Par. (*b*) in sundry contracts, where it is a contract with the *same promisee* under substantially similar circumstances;

[1] The rulings adopting the rule of Par. (*c*) are perhaps in the minority.

[*Par.* (*c*) in sundry contracts, where it is a contract with a *different promisee* under substantially similar circumstances].

Illustrations. (1) In an action on a bill of exchange accepted by J for the defendant, the payment of several other bills by the defendant similarly accepted is admissible.

(2) In an action for plumbing work done on a house, the defendant being mortgagee, and the issue being whether he or the builder had hired the plaintiff, the fact that in building the same house the defendant had made many of the work-contracts is admissible; otherwise, probably, if the evidence related to a separate house.

Cross-reference. For the use of *business-patronage* by other customers to evidence an article's quality, see Rule 73, Art. 5 (*post*, § 354).

ART. 2. *Prescriptive Possession.* To show possession of a
318 tract of land, acts of possession of a part of it, so connected as to indicate a course of conduct as to the whole of it, are admissible. — (W. § 378.)

ART. 3. *Trade Custom or Usage.* Where the custom or
319 usage of a trade or other class of persons to do an act is material, or is relevant under Rule 36 (*ante*, § 170), instances of such customary acts by other persons of the class are admissible, provided they are sufficiently numerous and the circumstances are substantially similar. — (W. § 379.)

Illustration. In an action for damages by an actor for wrongful discharge because of his refusal to play on Sunday, the custom impliedly forming a part of his contract may be evidenced by the custom of other similar theatre-companies; but if the customary amount of cash-receipts at a Sunday performance were in issue, the customary Sunday receipts of other companies, even in the same place, might not be admissible.

Cross-reference. (1) Compare the use of *business-patronage* by other customers as evidence of an article's quality (Rule 73, Art. 5, *post*, § 354).

(2) Compare the use of the custom of other persons as to *precautions* taken at a *machine*, *railroad-crossing*, or the like, as evidence of *its dangerous or safe nature* (Rule 73, Art. 5, *post*, § 354).

Distinctions. (1) Distinguish the rule as to evidencing a custom by *opinion* testimony (Rule 173, *post*, § 1450), or by a single instance (Rule 179, *post*, § 1514).

(2) Distinguish the parol-evidence rule as to an *oral* custom forming part of a written contract (Rule 217, *post*, § 1937).

ART. 4. *Prior or Subsequent Habit, Custom, or Status.*
320 The prior or subsequent existence or nature of a custom, habit, or personal relation or status is admissible to evidence its existence or nature at a particular time; the range of time depending on the circumstances of each case. — (W. § 382.)

Illustrations. This rule may be applied to the *mode of conducting a business*, the *possession or ownership of land or chattels*, a condition of *solvency* or of *indebtedness* or of *coverture* or of *residence*, the *incumbency of office*, etc.

ART. 5. *Habit of Handwriting or Spelling.* The habit or
321 style or type of a person's handwriting or spelling may be evidenced by particular instances exhibiting it; subject to the limitations of Rule 177 (*post*, § 1475). — (W. § 383.)

TOPIC IX:

EVIDENCE TO PROVE EMOTION (MOTIVE, FEELING, PASSION)

RULE 67. *General Principle.* Whenever a person's motive
322 is material, or is relevant under Rule 38 (*ante*, § 185) to evidence the doing or not doing of an act, the motive may be evidenced

(*A*) by *external circumstances* adapted to stimulate it;

(*B*) or by his *conduct* or *words* expressing it;

(*C*) or by its prior or subsequent existence. — (W. §§ 385–387.)

Par. (*a*). *Definition.* Motive signifies the emotional
323 condition of the person impelling him towards or against that class of acts. The circumstances adapted to stimulate this emotion are only evidential of the actual motive.

Illustration. A is charged with murder. The fact that he was a man of wealth is evidence that the motive of a desire to obtain money by the murder did not exist; and the fact that the deceased had seduced A's sister is evidence that the motive of revenge or hate did exist.

ART. 1. *A: Circumstances Tending to Excite an Emotion.*
324 *General Principle.* Any circumstance which by possibility could in human experience tend with others to excite the emotion in question is relevant; provided as follows: — (W. § 389.)

Par. (*a*) that there must also be some possibility of the party's knowledge of the exciting circumstance.

Par. (*b*) that the communication of the exciting circumstance to the party as true is admissible, even though the circumstance had not in truth occurred. — (W. § 390, n. 6.)

Distinction. Where under Par. (*a*), the defendant's belief in *e. g.* the seduction of his wife by the deceased is offered by the defendant in mitigation, his belief and passion are evidenced by the communication, and the contradiction of the fact of seduction itself would be immaterial in rebuttal; but otherwise for the purpose of discrediting the witness reporting the seduction to him (Rule 107, *post*, § 568).

ART. 2. *Criminality does not exclude.* On the same prin-
325 ciple as in Rule 43, Art. 2 (*ante*, § 220), a circumstance otherwise relevant is not inadmissible because of its criminal quality nor of any other feature capable of violating the principle against Undue Prejudice (Rule 166, *post*, § 1390); but the trial judge may take such aspects into consideration; and the circumstances of each case control, being incapable of reduction to rule. — (W. §§ 390, 391.)

Illustrations. For *killing*, the emotion may be sexual jealousy, excited by a husband's opposition to a liaison; or may be a desire to prevent discovery of a former crime or to evade pursuit for it, this desire being evoked against the deceased by one of numerous possible circumstances; or may be a sympathy with a third person having the desire to kill. But when such relevant circumstances are slight in their connection and strong in likelihood of undue prejudice, there is ground for excluding them.

ART. 3. *Motive in Civil Cases; Pecuniary Motive.*[1] In
326 civil cases where the doing of an act is in dispute, the appropriate motive is always admissible, and the circumstances

[1] The further examples of pecuniary motive, cited in W. § 392, need no place in a code.

that tend to excite it under the circumstance of such cases. — (W. § 392.)

Illustrations. (1) A's lack of money is admissible to show that B was probably unwilling to lend or sell to him.

(2) Where the price or the identity of an article sold is in issue, its market value is admissible to show that the party was probably unwilling to agree to pay more.

Distinguish the inference as to *capacity* to lend, from lack of money (Rule 35, *ante*, § 169), and as to *larceny* of money, from the subsequent possession of it (Rule 41, *ante*, § 201).

327 ART. 4. *B: Conduct Exhibiting an Emotion. General Principle.* Any conduct which by possibility could in human experience indicate the operation of the emotion in question is admissible; subject to the rule of Art. 2, *supra* (§ 325). — (W. § 394.)

328 ART. 5. *C: Prior and Subsequent Emotion. General Principle.* The existence of a specific emotion at a prior or a subsequent time is admissible to evidence its existence at the time of the act in question; the range of time depending on the circumstances of each case. — (W. § 395.)

329 ART. 6. *Hostility; Sexual Passion.* The foregoing principle applies without further qualification

Par. (*a*) to emotions of *hostility* or the reverse, towards a particular person, as evidencing an act of *corporal violence*. — (W. §§ 396, 397.)

Distinctions. Distinguish (1) former *threats* of a *defendant* as evidence of a Design to injure (Rule 59, *ante*, § 267) or acts of violence as evidence of Intent (Rule 65, *ante*, § 312);

(2) former *threats* of a *deceased* as evidence of a Design to injure (Rule 37, *ante*, § 178) or of a Belief in probable aggression (Rule 37, *ante*, 182);

(3) former *litigation* as evidencing a Motive for injury (Rule 67, *ante*, § 325).

330 *Par.* (*b*) to sexual emotions towards a particular person, as evidencing a *rape*, *seduction*,[1] etc. — (W. §§ 398–402.)

Distinctions. Distinguish the following other rules:

[1] Some Courts here exclude subsequent acts. Some Courts have no consistent rule.

(1) In *seduction, bastardy, breach of marriage-promise;* the woman's acts of unchastity with *other persons,* as affecting the damages (Rule 49, *ante,* § 239) or as evidencing another man's *paternity* (Rule 39, *ante,* § 191), or as impeaching her *testimonial credit* (Rule 105, Art. 2, *post,* § 552).

(*b*) In *rape;* the woman's acts of unchastity with other persons, as evidencing her *disposition to consent* (Rule 47, *ante,* § 229); the man's former attempt on the *same woman,* as also evidencing intent (Rule 65, *ante,* § 311), and his former assault on *another woman* as evidencing his design (Rule 65, *ante,* § 311).

331 ART. 7. *Malice, in Defamation.* Where in an action for defamation the defendant's malice is in issue as affecting privilege or damages, other utterances of the defendant exhibiting ill-will [are admissible,

whether defamatory *per se* or not,

and whether prior or subsequent to the time of action begun,

and whether on the same or a different subject,

and whether already recovered for or not,

and whether barred by limitation or not;][1] (—W. §§ 403–406.)

[[*Par.* (*a*) provided that on the circumstances of each case the trial judge may exclude any utterances which are likely, by reason of any of the above circumstances, to violate the principles of preventing Unfair Surprise (Rule 161, *post,* § 1325), or Excessive Confusion of Issues (Rule 165, *post,* § 1383), or Undue Prejudice in an improper award of damages (Rule 166, *post,* § 1390).]]

TOPIC X:

EVIDENCE TO PROVE IDENTITY

333 RULE 68. *Definition.* Identity is the quality or condition of actual sameness between two persons or things separately observed at separate times or places. It is evidenced by comparing common marks, existing in the supposed separate persons, with reference to the probability of the two persons

[1] The rule differs in different Courts; most concur in repudiating these various qualifications; the proviso gives sufficient concession to them where needed.

being in reality one only. Where a certain mark is commonly found in many persons, its presence in two is only slightly indicative of their identity. Hence, the relevancy of one or more facts offered as identity-evidence depends on the degree of necessariness of their association with a single object only. — (W. §§ 410–412.)

334 ART. 1. *General Principle.* A fact or group of facts offered as evidence of identity of two supposed persons is relevant wherever the mark does not in experience apply to so many persons that the chances of the two supposed persons being one are too small to be appreciable. — (W. §§ 412–414.)

Distinctions. In practice, no question of relevancy ought to be raised; for the only important question can be as to the *sufficiency* of all the evidence to go to the jury (Rule 227, *post*, § 2002) or as to the *presumption* of identity arising from certain single facts, such as a name (Rules 228, *post*, § 2082).

Illustration. The correspondence of boot-size in the murderer and the defendant would always be admissible as relevant; but might not be sufficient evidence of identity if there were none else.

Cross-reference. For *traces* as evidence (foot-prints, blood-marks, etc.), see Rule 41 (*ante*, § 197). For identity of *chattels*, see Rule 70 (*post*, § 338).

335 ART. 2. *Criminality of Act immaterial.* The criminality of an act of the defendant otherwise relevant does not exclude it; in accord with the general principle of Rule 43, Art. 2 (*ante*, § 220). — (W. § 414.)

336 ART. 3. *Hearsay.* Under Rule 155, Art. 3 (*post*, § 1255), the fact that a person's utterances, relevant to identify circumstantially, might be excluded by the hearsay rule if offered testimonially, does not make them inadmissible. — (W. § 413, n. 9 and § 416.)

Illustration. A conversation about a murder, alluding to it in the past tense, might be admissible to fix a date.

SUB-TITLE III:

EVIDENCE TO PROVE FACTS OF EXTERNAL INANIMATE NATURE

RULE 69. *Definition and Classification.* When a fact of
337 inanimate external nature (*i. e.*, not a human act, nor a human quality or condition or relation) is material or relevant, the principles of relevancy affecting the modes of evidencing it are classified into four groups:

I. Identity (*e. g.* whether a machine sent was the same as the one received).

II. Occurrence of an Event (*e. g.* whether a tree fell).

III. Existence or Persistence in Time (*e. g.* whether a highway-defect existed at the time in issue).

IV. Tendency, Capacity, Quality, Cause, or Effect, (*e. g.* whether a hole in a sidewalk was dangerous). — (W. §§ 430–432.)

Topic I: Identity

RULE 70. *General Principle.* Identity of a thing, place, etc.
338 may be evidenced upon the same principles as identity of a person (Rule 68, *ante*, §§ 333–336). — (W. § 415.)

Topic II: Occurrence of an Event

RULE 71. *General Principle.* There is no specific rule for
339 circumstantially evidencing the occurrence of an event. — (W. §§ 435, 436.)

(*Reason.* The circumstantial evidence for the occurrence of an event either is so varied and so free from difficulties that no specific rule is necessary or possible; or it involves one or another of the ensuing inferences (cause, tendency, etc.) and the rules applicable thereto. Moreover, testimonial (and opinion) evidence is commonest for evidencing the occurrence of an event.)

Topic III: Existence or Persistence in Time

RULE 72. *General Principle.* The existence at a particular
340 time of an object, or of a condition or quality of it, may be evidenced by its prior, subsequent, or concomitant existence in whole or in part; subject to the ensuing details and qualifications: — (W. § 437.)

Art. 1. *Existence, from Prior or Subsequent Existence.*
341 The prior or subsequent existence of an object, or of a condition or quality thereof, is admissible, unless too remote from the time in issue, in view of the nature of the thing and the circumstances of the case, and calculated to cause Excessive Confusion of Issues, Unfair Surprise, or Undue Prejudice (Rules 161, 165, 166, *post*, §§ 1325, 1383, 1390).

Illustrations. The existence of a broken plank in a sidewalk on Jan. 31 is admissible to evidence its existence there on Jan. 7, unless the circumstances indicate other strongly probable explanations. But there can seldom be ground for exclusion, on this ground of mere irrelevancy, in cases of highways, machines, etc.; it is only where the possible undue prejudice, etc., overrides the slight relevancy that exclusion is justifiable.

Distinctions. (1) The *subsequent repaired* condition of a place may be offered to evidence an admission of negligence (Rule 118, Art. 2, *post*, § 647).

(2) The *prior dangerous* condition of a place may be offered to evidence the owner's knowledge of it (Rule 62, Art. 7, *ante*, § 284).

(3) A *photograph*, otherwise admissible (Rule 93, Art. 2, *post*, § 480), may be excluded under the present rule.

Art. 2. *A Whole, evidenced by its Parts.* The existence
342 or quality or condition of an object or place may be evidenced by its concurrent existence or quality or condition in a part thereof so related that similarity is probable; and this includes the evidencing of a lot or mass by sample. — (W. §§ 438–440.)

Illustrations. The condition of a building-stone, alleged to be rotten, may be evidenced by the condition of another, where the influences or the origin was substantially similar.

Topic IV:

Tendency, Capacity, Quality, Cause, or Effect

RULE 73. *General Principle.* To evidence the tendency,
344 capacity, quality, or condition of a place or object, or its relation as cause or effect to something else, other specific occurrences indicating such a tendency, cause, etc., are relevant, provided the circumstances of the other instances and of the case in hand are substantially similar in all respects that might supposedly affect the matter in question. — (W. § 442.)

Illustrations. (1) To prove that the plaintiff's illness was due to the gas that escaped into his house from a leak in the defendant's gas-main, the similar illness at the same time of the other inmates of the same house would be relevant; but the similar illness of persons living in other houses on the same street might not be relevant, because the circumstances of occupation, drainage, personal health, etc., affecting the cause of illness, might be substantially different in the other houses.

(2) To show that a certain boiler was not dangerously likely to explode at a certain pressure of steam, other instances of non-explosion of boilers at the same pressure would be relevant, provided the other boilers were substantially similar in type, age, and other circumstances affecting strength.

Art. 1. *Details of the Rule.* In employing this Rule, the
345 following considerations, as respects logical relevancy and the form of inference, apply:

Par. (*a*). The other evidential instances may be obtained by observation of data that occurred independently, or by artificial *experiments* prepared by the observer.—(W. § 445.)

Illustration. The instances of other boiler-pressures, in Illustration (2) § 344, might be obtained by experiment with boilers selected and prepared for the purpose, or by observation of what had occurred in the ordinary factory work at other times and places before the occurrence in issue.

Distinguish the exclusion of experiments on other grounds; particularly, of

(1) the inconvenience of making them in the court-room (Rule 123, *post*, § 730).

(2) the privilege against self-crimination, where an experiment on the defendant himself is desired (Rule 203, *post*, § 1737).

346 *Par.* (*b*). No minimum *number of instances* can be fixed; the number affects only the weight of the evidence. — (W. §§ 446, 447.)

347 *Par.* (*c*). The tendency, cause, etc., may be evidenced by comparison of *contrary* sets of instances. — (W. § 442, n. 1.)

Illustration. To show that an embankment was the cause of silting-up of a harbor, instances may be admitted of other harbors on the same coast where no embankment existed and no silting-up occurred.

348 *Par.* (*d*). To *rebut* the probative effect of instances admitted under this rule, the opponent may introduce

1. other instances in which the contrary effect was found;

2. or other instances in which the same effect was found, with a different cause;

3. or other circumstances showing a different cause for the same instances. — (W. § 449.)

Illustrations. (1) In an action for injuries by vibration to buildings at the east end of a bridge, evidenced by instances of several buildings at that end, the opponent may show instances of buildings remaining uninjured at the west end, where the vibrations were stronger (Method 1); and may show that the presence of a railway track at the east end explained those instances (Method 3).

(2) In a prosecution for the death of M caused by poisoned meat, the defendant may show that other persons eat of the same dinner without being ill (Method 1), and that on the next day M was similarly ill after a dinner not containing meat (Method 2).

349 [ART. 2. *Limitations of Policy.* Wherever, in the circumstances of the trial in hand, the evidencing of such other instances would violate the principles of preventing Unfair Surprise, Undue Prejudice, or Excessive Confusion of Issues (Rules 161, 165, 166, *post*, §§ 1325, 1383, 1390), they may be excluded in the trial Court's discretion, under Rule 18 (*ante*, §52)]; [[and the trial Court may require, under Rule 161, Art. 1

(*post*, § 1326), to avoid surprise, that the offering party shall have given notice of particulars to the opponent before trial]].[1] — (W. §§ 443, 444.)

Illustrations. In Illustrations (1) and (2), *supra*, § 344, the judge might exclude the instances, otherwise relevant, if on the circumstances it appeared that the trial would be unduly complicated by the number of witnesses involved, their impeachment, etc., in view of the slight utility of the evidence compared with the other available evidence in the case; or if it appeared that the details of the other illnesses would excite undue prejudice against the defendant; or he might admit a limited number of instances, on motion made before trial specifying the expected evidence and the witnesses thereto.

ART. 3. *Applications of the Rule to Material Effects as*
350 *Evidence.* The foregoing rules are applicable to

Par. (*a*) the tendency, capacity, quality, etc., of a *factory, stream, railroad, sewer, machine, gas, tool, weapon, vehicle*, or other substance, as evidenced by other instances of the *effects* produced by it on *inanimate* matter. — (W. § 451.)

Illustrations. See Illust. (2), § 344, and Illust. (1), § 348, above.

Par. (*b*) the cause of a *fire by a steam-engine*, or the
351 defective construction or condition of the engine causing it, as evidenced by their instances of its operation so as to emit burning coals;

(1) [[*provided* that for evidencing a defective construction or condition, and not merely a capacity to cause fire, greater probative force in the instances may be required.]]

(2) [And *provided* that instances from other engines may be used wherever their construction or condition is similar;

[1] The clause in double brackets is not yet law anywhere, except in England and Canada, but ought to be. The other part, as it stands, is law in a few jurisdictions only, especially Mass. and N. H., where the trial judge's discretion (*ante*, § 49) controls. Of the remaining jurisdictions, the majority ignore this Article, by always admitting a specific class of evidence if relevant under Art. 1; the minority enforce this Article, by always excluding a specific class of evidence on this ground.

and such similarity is presumed for engines of the same owner or lessor.] [1] — (W. §§ 452–456.)

ART. 4. *Applications of the Rule to Corporal Effects as*
352 *Evidence.* The foregoing rules are applicable to

Par. (*a*) the tendency, capacity, quality, etc., of a *weapon, gas, drug,* food, liquor, or other substance, as evidenced by other instances of the effects produced on a *human* or *animal* body. — (W. § 457.)

Illustrations. See Illust. (1), § 344, and Illust. (2), § 348, above.

[*Par.* (*b*) the tendency or nature, harmful or the reverse,
353 of a *machine, highway, building, track,* or other place, by the occurrence or non-occurrence of such *harm to other persons* on other occasions.] [2] — (W. § 458.)

Illustration. To show that a stairway was dangerous by reason of a loose board, two other instances on the same day of persons being tripped by it and falling, would be relevant; and in rebuttal the fact that a thousand persons a day for a month had passed over it without falling would also be relevant, provided it could be evidenced without too many witnesses.

Distinctions. Distinguish (1) the use of other injuries to show *notice of the defect* to the owner (Rule 62, *ante,* § 284);

(2) the *presumption of negligence* from the occurrence of harm (Rule 228, *post,* § 2062);

(3) the inference of an *admission of negligence* by making subsequent repairs (Rule 118, Art. 2, *post,* § 647).

ART. 5. *Applications of the Rule to Mental Effects as*
354 *Evidence.* The foregoing rules are applicable to

[1] The first proviso is not enforced by any Court, but might well be. The second proviso is not law in several jurisdictions when the engine which (if any) must have caused the fire is identified; but this is unsound. The presumption of similarity is not found in some Courts.

[2] Most Courts apply the rule thus. Some reject it, on the principle of Art. 2 (*supra,* § 349). Some require, in applying the general principle of this Rule 73 (*supra,* § 344), express testimony to sameness of condition, where the other instances were at a time much before or after. Some exclude instances of the non-occurrence of harm, thus ignoring the principle of Art. 1, Par. *d, supra,* § 348 (Method 1).

TITLE II:

TESTIMONIAL EVIDENCE

360 RULE 74. *Classification of Testimonial Evidence.* Testimonial evidence, as defined in Rule 24, Art. 1 (*ante*, § 106), gives rise to different classes of rules, divided according to the processes of inference involved, as follows:

I. Rules for admitting the testimonial assertion to be introduced in the first instance, *i. e. Witness-Qualifications;*

II. Rules for admitting facts that diminish the credibility of a testimonial assertion already admitted, *i. e. Witness-Impeachment;*

III. Rules for restoring the credibility of a testimonial assertion already impeached, *i. e. Witness-Rehabilitation.* — (W. §§ 475–477.)

361 ART. 1. *Classification of Testimonial Qualifications.* The rules for Witness-Qualifications are further divided, according to the elements of a testimonial assertion, as follows:

I. Rules excluding a witness who lacks the *capacity* to give any testimony at all; of which there are three sorts,

(A) Organic Capacity (mental derangement, mental immaturity, moral depravity);

(B) Experiential Capacity;

(C) Emotional Capacity (pecuniary interest, domestic relationship).

II. Rules excluding a witness who as to specific testimony lacks one of its necessary testimonial elements, *i. e.*

Observation,

Recollection,

Narration (or Communication). — (W. § 478.)

SUB-TITLE I:

TESTIMONIAL QUALIFICATIONS

INTRODUCTORY RULES

RULE 75. *Time of Qualifications.* The time of giving testi-
362 mony is the time when the qualifications must exist; for a deposition, this is the time of taking it. — (W. § 483.)

RULE 76. *Burden of Proof of Qualifications.* The burden
363 of proving lack of organic or emotional capacity by virtue of some rule herein named is on the opponent; in all other respects, the offering party must prove the witness' qualifications; subject to the exceptions hereafter specifically named. — (W. § 484.)

RULE 77. *Mode of Proof of Qualifications.* The witness'
364 lack of qualifications may be made to appear in one or more of four ways:

Par. (*a*) from his *behavior* before beginning testimony;

Par. (*b*) from a *preliminary questioning*, by either party or the judge, before beginning of his testimony;

Par. (*c*) from *other witnesses*, before beginning of his testimony;

Par. (*d*) from his answers *after testimony* begun;

All of these are subject to specific exceptions hereafter named. — (W. § 485.)

RULE 78. *Time of Objecting to Qualifications.* The time
365 of objecting to a witness' qualifications is

Par. (*a*) for testimony *at trial*, before testimony begun, or so soon after as the ground of objection becomes known;

Par. (*b*) for *deposition before trial*, at the time of taking it, so far as the ground of objection was then known and might have been obviated before trial,

as provided by Rule 20, Art. 1 (*ante*, §§ 78–80).

RULE 79. *Who determines Qualifications.* The judge
366 determines the qualifications of a witness, on the principle of Rule 229 (*post*, § 2101).

Topic I: Organic Capacity

Sub-Topic A: Mental Derangement (Insanity, Imbecility, Disease, Intoxication)

RULE 80. *General Principle.* No person is disqualified as a
367 witness by reason of insanity, imbecility, disease, intoxication, or any other form of mental derangement, except insofar as his condition precludes substantially all trustworthiness in his powers of observation, recollection, or narration, on the specific matter to be testified.[1] — (W. §§ 492–495, 498, 500.)

Cross-reference. For *confessions* while intoxicated, see Rule 122, Art. 5 (*post*, § 715).

Art. 1. *Trial Court determines.* A witness' disqualifica-
368 tion on this ground depends on the circumstances of the particular case and witness. — (W. § 496.)

Cross-reference. For *judicial discretion* in general, see Rule 18 (*ante*, § 49).

Art. 2. *Capacity presumed.* The opponent has the
369 burden of proving the witness to lack capacity, by one of the methods named in Rule 77 (*ante*, § 364); and a judgment of committal to an asylum for insane raises a presumption of incapacity. — (W. § 497.)

Sub-Topic B: Mental Immaturity (Infancy)

RULE 81. *General Principle.* No person is disqualified
370 as a witness by reason of mental immaturity, or at any par-

[1] Modern decisions all accept this principle, though few state it so broadly. The Code States and a few others have statutes of peculiar phrasing.

ticular age, except insofar as he lacks substantially all trustworthiness in his powers of observation, recollection, or narration, on the specific matter to be testified.[1] — (W. §§ 505, 506, 509.)

ART. 1. *Trial Court determines.* A witness' disqualification on this ground depends on the circumstances of the particular case and witness. — (W. § 507.) 371

Cross-reference. For *judicial discretion* in general, see Rule 18 (*ante*, § 49).

Distinguish the *capacity to take an oath* (theological belief), which may result otherwise and is affected by special statutes (Rule 157, *post*, § 1285).

ART. 2. *Capacity presumed.* The opponent has the burden of proving the witness to lack capacity, by one of the methods named in Rule 77 (*ante*, § 364); [but a person under the age of fourteen is presumed to lack capacity.][2] — (W. § 508.) 372

Cross-reference. For the *methods of ascertaining* incapacity, see further under the Oath (Rule 157, Art. 3, *post*, § 1292).

SUB-TOPIC C: MORAL DEPRAVITY

RULE 82. *General Principle.* A person is not disqualified by reason of moral depravity, or of any particular trait thereof, or of any fact supposed to evince such a trait. — (W. § 515.) 373

ART. 1. *Alienage, Race, Color, Sex, Religion.* A person is not disqualified by reason of birthplace, race, color, sex, or theological or religious profession or belief.[3] — (W. §§ 516–518.) 374

Cross-reference. For *theological capacity* to take the *oath* see Rule 157, Art. 2 (*post*, § 1287).

[1] This principle is universally accepted, though seldom stated in so broad a rule. The Code States and a few others have statutes, with special phrasings.

[2] This presumption is generally so stated; but it is unsound to prescribe any.

[3] In a very few jurisdictions, Indians, Chinese, or Negroes are disqualified, under statutes.

ART. 2. *Conviction of Crime.* A person is [not] disqualified
375 by reason of conviction of
(*a*) Perjury; or,
(*b*) Any other crime.[1] — (W. §§ 519–524.)

ART. 3. *Self-confessed Mendacity.* No person is disqualified
376 by reason of testifying
Par. (*a*) in acknowledgment of crime or other turpitude. — (W. §§ 525, 526, 531.)

[*Par.* (*b*) in contradiction or retractation of a prior statement by him, oral or written, private or official, sworn or unsworn.][2] — (W. §§ 527–530.)

Distinguish (*a*) an *estoppel* in substantive law;
(*b*) a contradiction of an official certificate by *other witnesses* (Rule 133, Art. 5, *post*, § 905).

[1] Many States, in their statutes, retain disqualification by conviction for perjury; a few include other specified crimes. There should of course be no such exclusion.

[2] A few Courts still forbid a certifying officer to contradict his certificate; but this is unsound.

Topic II: Experiential Capacity

RULE 83. *General Principle.* Every witness must be fitted
378 by experience to comprehend and acquire knowledge on the subject proposed to be testified. Since this experience is relative to the subject of testimony, a person may be qualified as to one subject and not as to another. — (W. §§ 554–556.)

Art. 1. *General and Special Experience; Qualifications*
379 *presumed.* Subjects of testimony are divided into two classes: Those on which a sufficient experience is possessed by the normal adult person in the community (General Experience); and those on which a sufficient experience is possessed only by those who have followed some special occupation, trade, art, science, or other distinct form of activity (Special Experience; Experts). For testimony to the second class of facts, a person lacking special experience is disqualified. — (W. §§ 556, 559.)

Distinguish the Opinion rule (Rule 168, *post*, § 1410) excluding superfluous testimony, *i. e.* where the jury can have all the data laid before them and do not need the witness' inferences; that rule often excludes testimony from witnesses of only general experience, *i. e.* qualified under the present principle; but it also might admit testimony excluded by the present principle.

Illustration. If the question is whether a fence was blown down or cut down, an ordinary person who has seen it might be qualified to form an opinion as to the cause, but the opinion rule might confine him to stating the appearances he observed. But if the length of the fence is in issue, the opinion rule would allow him to state this, while the present principle might require him to be an expert (surveyor), in so far as the precise length in number of rods was desired.

Art. 2. *Qualifications presumed.* General experience is
380 presumed to exist in every person offered as a witness. Special experience must be shown by the party offering the witness. — (W. § 560.)

Illustration. To read English needs some skill acquired by experience, but that experience, being common to all members of the community, is presumed; if a specific witness is offered to testify to words seen on a placard, but he is in fact a Russian unable to read English, he is disqualified; yet the opponent is the one to prove the disqualification. But if the placard were in German, thus being a fact needing special experience, the witness' special experience must be shown by the offering party.

381 ART. 3. *Who is qualified as Expert.* The qualifications of a particular witness as to special experience (Expert) depend on the circumstances of each witness in the case in hand.[1] — (W. § 561.)

Cross-references. For *knowledge*, as distinguished from experience, see Rule 86 (*post*, § 400).

For *stating the grounds* of an expert opinion, see Rule 83, Art. 2 (*post*, § 380), and Rule 106 (*post*, § 558).

For *hypothetical questions*, see Rule 168 (*post*, § 1416).

For *impeaching* an expert's character, see Rule 100 (*post*, § 529).

For *limiting the number* of experts, see Rule 167 (*post*, § 1401).

For summoning experts *by the Court*, see Rule 224 (*post*, § 1991).

382 ART. 4. *Rules for Specific Subjects (Law, Medicine, etc.).* In applying the general rules of Arts. 2 and 3, the following specific rules control:[2]

383 *Par.* (*a*) For *foreign law*, the witness need not be by profession a lawyer or judge. — (W. §§ 564, 565.)

Cross-reference. See also the rule as to *knowledge* of the specific law (Rule 86, *post*, § 400), and the opinion rule (Rule 173, *post*, 1446).

384 *Par.* (*b*) For *medical* topics (health, sanity, poison, blood, etc.)

(1) General experience qualifies to testify to apparent conditions.

(2) Where special medical experience is needed, a general

[1] The general rule for *trial Court's discretion* (Rule 18, *ante*, § 49) leads to the same result. But few Courts to-day leave the determination to the trial Court.

[2] None of these are needed.

practitioner in good standing suffices for all subjects included in ordinary medical training. — (W. §§ 568, 569.)

Cross-references. See also the rule as to medical *knowledge* Rule 87, Art. 1, *post*, § 416) and the *opinion* rule as applied to sanity (Rule 169, *post*, § 1430) and to health (Rule 175, *post*, § 1462).

385 *Par.* (*c*) For *handwriting*, any person able to read and write is qualified. — (W. § 570.)

Cross-reference. See also the rule as to *knowledge* of the specific hand (Rule 87, Art. 3, *post*, § 418), and the opinion rule (Rule 177, *post*, § 1475).

386 *Par.* (*d*) For *value*, general experience qualifies.

Cross-reference. See the rule as to *knowledge*, which is more detailed (Rule 87, Art. 4, *post*, § 422).

387 *Par.* (*e*). For *speed*, general experience qualifies. — (W. § 571.)

Cross-reference. See also the *opinion* rule (Rule 175, *post*, § 1464).

Topic III: Emotional Capacity

Sub-Topic A: Pecuniary Interest

388 RULE 84. *General Principle.* No person is disqualified by reason of his pecuniary relation to a party or his pecuniary interest depending on the event of the trial, except as herein stated.

389 Art. 1. *Criminal Cases.* No person in a criminal case is disqualified by reason of being a party, or of having any other interest depending on the event of the trial or on the action of prosecuting officers.[1] — (W. §§ 488, 579, 580.)

Cross-reference. For the *privilege* not to testify, see Rule 203 (*post*, § 1730).

390 Art. 2. *Civil Cases.* No person in a civil case is disqualified by reason of being a party or of having any other interest depending on the subject or the event of the trial. — (W. §§ 488, 577.)

391 [*Par.* (*a*) *Except* that the *interested survivor* of a transaction with a decedent or other person since disqualified is not qualified to testify against the latter's estate as to that transaction, unless on consent or implied waiver by the latter's representative.][2] — (W. §§ 488, 578.)

Art. 3. *Testifying to Intent.* No person is disqualified

[1] In Georgia, a defendant is still partly disqualified. In several States there are remnants of the old rules disqualifying a co-defendant or co-indictee, and here the statutes have been variously construed.

[2] This exception obtains in all but four States, but is variously phrased in statutes. Some disqualify for the whole suit, others for the transaction only; some disqualify all interested persons, other the parties only; etc. The whole exception is unsound and does harm.

§ 392 to testify to his own intent or other mental state material in the case.[1] — (W. §§ 581, 1966.)

Cross-reference. See the rules as to excluding testimony to *another person's* intent (Rules 86, 174, *post*, §§ 405, 1457).

Distinguish the substantive law of libel, contract, etc., which may make the party's intent immaterial.

ART. 4. *Mode of Proving Disqualification.* The general 393 rules as to the mode of proving disqualification (Rules 75–79, *ante*, §§ 362–366) here apply.[2] — (W. §§ 583–587.)

SUB-TOPIC B: DOMESTIC RELATIONSHIP

RULE 85. *General Principle.* A person is not disqualified 395 by reason of domestic relationship to a party to the cause, unless herein expressly so declared. — (W. § 600.)

ART. 1. *Husband and Wife.* A husband or wife is [not] 396 qualified to testify on behalf of the other when the other is a party or otherwise interested, in a criminal case [or in a civil case].[3] — (W. §§ 488, 605–620.)

Cross-references. For the *privilege* not to testify or be testified against, see Rule 202 (*post*, § 1710).
For *confidential communications* see Rule 206 (*post*, § 1812).

ART. 2. *Survivor's Spouse.* The husband or wife of a 397 survivor disqualified under Rule 84, Art. 2, par. (*a*) (*ante*, § 391) is also disqualified. — (W. § 608.)

ART. 3. *Parent and Child* (*Legitimacy*). A married father or mother may not testify to the fact of non-access [during marriage] in any proceeding where that fact is provable to

[1] Except in Alabama and possibly elsewhere.
[2] This is now of consequence only for the exception under Art. 2, par. (*a*); but the local modern practice does not always follow the common law rules.
[3] The unbracketed part is the law in almost all States. For civil cases, many States retain a disqualification, variously phrased by statute. These are anachronisms.

show the illegitimacy of a child born of the mother after marriage.[1] — (W. §§ 2063, 2064.)

Cross-references. (1) For the original rule, merely requiring *corroboration* for the mother, see Rule 180, Art. 3 (*post*, § 1521).

(2) For the presumption of *legitimacy*, permitting the non-access to be proved, see Rule 228 (*post*, § 2080).

[1] This rule is law in almost every State; in England the bracketed clause appears to be recognized. The rule is due to an historical blunder, and is senseless in policy.

Topic IV: Testimonial Knowledge

RULE 86. *General Principle.* The first element in testimony
400 is means of knowledge of the matter to be testified. Means of knowledge implies a physical opportunity to use the senses in observing. — (W. §§ 650, 656.)

Art. 1. *Knowledge not presumed.* The party offering the
401 witness must show him qualified as to means of knowledge. — (W. § 654.)

Art. 2. *Means of knowledge specified.* The witness may
402 state the facts supplying the means of his knowledge, even though such facts would not otherwise be admissible. — (W. § 655.)

Cross-references. The rule of *multiple admissibility* (Rule 15, *ante*, § 42) permits this, and the *hearsay rule* does not forbid it (Rule 155, *post*, § 1240); but the rule for preventing *undue prejudice* might always be invoked (Rule 166, *post*, § 1390).

Illustration. A witness is asked how he is able to identify the defendant as the person present at an affray, and replies, "Because he was the man who stole my wagon," or "Because my foreman said it was the man, etc."; here the undue-prejudice rule is the only one that could exclude.

Distinguish the opponent's right to *cross-examine* to the means of knowledge (Rule 106, Art. 2, *post*, § 561).

Art. 3. *Knowledge need not be Positive.* A witness is
403 qualified though his means of knowledge results only in a belief or impression, not a positive conviction.[1] — (W. § 658.)

Cross-reference. See also the *opinion* rule (Rule 174, *post*, § 1457), and the rule for *recollection* (Rule 88, *post*, § 427), which in some aspects apply to a testimonial "impression."

Art. 4. *Data must be Rational.* A witness is not qualified
404 whose means of knowledge appears to be only data not ration-

[1] The rulings here are often ambiguous, owing to the opinion rule.

ally capable of forming means of knowledge. — (W. §§ 659–663.)

Illustrations. A witness may testify to a person's *identity* from having only heard his *voice;* or to another person's *state of mind,* from having observed his conduct; and a biological expert may testify to the number of oval microbes on the point of a needle, or a medical expert to the probable duration of a heart-lesion; but in the third class of cases some Courts may (over-rashly) exclude testimony in the narrow idea that the matter is not humanly knowable, and in the fourth class may exclude it because in substantive law no recovery can be had for merely contingent injuries.

ART. 5. *Personal Observation required.* A witness is not
405 qualified whose means of knowledge was not substantially the personal observation of his own senses. — (W. § 657.)

In particular, a witness whose means of knowledge was hearsay assertions of others is not qualified;

except as follows:

Par. (*a*) a *public officer's* testimony to the records or
406 acts of his subordinates or predecessors. — (W. § 665.)

Par. (*b*) a person using standard *scientific instruments*
407 and formulas prepared by another person. — (W. § 665.)

Par. (*c*) an *expert* using the reported *data of fellow-*
408 *scientists;* — (W. § 665.)

in particular, a *legal expert* who has studied printed sources of *foreign law* [1] — (W. § 690.) and

a *medical expert* who has studied printed *medical data.* — (W. § 687.)

[*Par.* (*d*) a *medical expert* who has taken into considera-
409 tion the statements of the patient or his attendants.] — (W. § 688.) [2]

Cross-reference. For the admissibility of the *patient's own words,* under the hearsay exception, see Rule 153, Art. 1 (*post,* § 1201).

Par. (*e*) a person who testifies to the *contents of a docu-*
410 *ment* read to him by another person, as provided in Rule 128, Art. 3 (*post,* § 823).

[1] This is perhaps more liberal than all Courts would rule.

[2] Some Courts refuse to go this far, making various limitations; but common sense calls for the above rule.

411 *Par.* (*f*) a person who testifies to his *own age*. — (W. § 667.)

Cross-reference. For the rule permitting this as a statement of *family hearsay*, see Rule 140 (*post*, § 980).

412 [*Par.* (*g*) a person who, having listened on the *telephone*, testifies

(1) to the *identity* of the speaker though not recognizing the voice,

(2) or to the *tenor* of the utterances though transmitted by a third person.][1] — (W. §§ 669, 2155.)

Cross-reference. For the authentication of a telephone message, see further Rule 188 (*post*, § 1594).

413 ART. 6. *Negative Knowledge.* A witness is qualified to testify in denial who was so placed that he probably would have observed the fact if it had occurred. — (W. § 664.)

Illustration. A person waiting at a railroad crossing may testify that the whistle was not blown, because he would have heard it if it had been.

414 ART. 7. *Hypothetical Forms of Knowledge.* Where an expert has not personally observed the data on which his inference is based, they may be supplied to him by hypothetical statement, their proof being made by other evidence; according to the rules for hypothetical questions (Rule 168, Art. 3, *post*, § 1416).

The same may be done for a witness to value, who has knowledge of the class of values involved, but has not observed the object to be valued. — (W. § 653.)

415 RULE 87. *Knowledge on Specific Subjects.* A witness' qualification as to means of knowledge on a specific subject depends upon the circumstances of each witness and case; subject to the following specific rules:

416 ART. 1. *Sanity.* A witness to sanity or the reverse is qualified who has had sufficient observation of the person to form a belief as to his mental condition. — (W. § 689.)[2]

[1] Most Courts do not yet go so far, at least on the latter point, where some limitation to conversations with agents is usually made; but the above simple rule is strict enough.

[2] The phrasings vary in different Courts, but all are mere forms of words. In the Code States a statute sometimes defines.

Distinguish the *opinion* rule as applied to such testimony (Rule 169, *post*, § 1430).

417 ART. 2. *Reputation.* A witness to reputation must have resided in the place of the reputation. — (W. §§ 691, 692.)

418 ART. 3. *Handwriting.* The means of knowledge of a witness who testifies that a specific piece of handwriting is or is not that of a specific person must be either

(A) the having seen that person make that writing or the having heard him (if a party opponent) admit the making of it; or.

(B) the having means of knowledge of that person's *style of handwriting*, so as to compare the style with the specific piece in issue.

The latter method may include three varieties, in each of which the necessary elements are (1) the style of handwriting, and (2) the identity of the writer. These three varieties are

(*a*) by seeing that person make other writings;

(*b*) by seeing writings purporting to be that person's and otherwise known to be his;

(*c*) by seeing writings purporting to be that person's but not otherwise known to be his. — (W. § 693.)

419 *Par.* (*a*). A witness who qualifies by having seen the person make a writing need not have seen it done

(1) often,[1]

(2) nor recently,

(3) nor in any specific quantity;

(4) and the writing may be one made by a party after controversy begun.[2] — (W. §§ 694–697.)

420 *Par.* (*b*). A witness who qualifies by having seen writings purporting to be that other person's has sufficient means of knowledge of the writer's *identity*

(1) if the person has *expressly admitted* making the writing; — (W. § 700.) or

(2) if the person has by conduct (*e. g.* by paying a note) *impliedly admitted* making it; — (W. § 701.) or

[1] As the rulings go, once is enough.

[2] This is sometimes denied; but the simple rule above does no harm.

(3) if a *correspondence* has been exchanged, circumstantially indicating genuineness; [1] — (W. § 702.) or

(4) if the witness is a *clerk* or *custodian of records* and the writings purport to be those of an employer or other person whose writings are naturally there found.[2] — (W. §§ 703 704.) or

(5) if the witness, testifying to *bank-notes* or other paper currency, has found them to pass current without dispute.[3] — (W. § 705.)

420 *Par.* (*c*). Where the witness qualifies by seeing writing not known to him to be the purporting maker's, he must be an expert in handwriting, by virtue of the Opinion rule, and the authenticity of the specimen-writings must be evidenced by other testimony, subject to the provisions of Rule 177 (*post*, § 1475).

421 *Par.* (*d*). When a witness is qualified by knowledge of the type of handwriting, and is desired to identify the handwriting of a specific document, the document must be *produced* before him in court; unless he has already seen it, or unless it is produced by photographic copy under Rule 93, Art. 2 (*post*, § 484), or unless other special circumstances are deemed sufficient. — (W. § 1185, notes 6–9.)

Distinction. Whether a Court will order a document to be taken from the files and sent to a deposing witness out of court is a different question.

422 ART. 4. *Value.* A witness to value need not have had a special training or occupation; [4] but he must be

(1) familiar with the standard of value for the class of objects in question, and

(2) acquainted with the specific object to be valued — (W. §§ 712, 720.)

subject to the following distinctions and qualifications:

[1] Some Courts require more than this; the phrasing differs.
[2] Phrasings differ. Some Courts are less liberal; some limit the rule to ancient records.
[3] Phrasings differ.
[4] This is broader than most Courts put it.

Par. (*a*). For *realty*-value, the witness need

423 (1) not be a dealer in land;

(2) nor have had dealings;

(3) nor have heard of specific sales. — (W. §§ 714, 720.)

Par. (*b*). For *services*-value, the witness

424 (1) need not have followed the occupation of the party rendering services; [1] and

(2) may be the party himself. — (W. § 715.)

Par. (*c*). For *personalty*-value, the witness

425 (1) need not be a dealer; and

(2) may be the owner himself; — (W. § 716.)

(3) if there is a market value, he must have had the means of knowing it, by acquaintance with the transactions.[2] — (W. §§ 717–719.)

Cross-references. For *other sales* as evidence of value, see Rule 73 (*ante*, § 354).

For the *opinion* rule applied to value-testimony, see Rule 170 (*post*, § 1435).

For *market reports* of value as hearsay admitted by exception, see Rule 150, Art. 2 (*post*, § 1182).

[1] This is more liberal than most Courts.

[2] The rulings as to the last clause differ in phrasing.

Topic V: Testimonial Recollection

RULE 88. *General Principle.* The second element in testi-
427 mony is recollection; and this recollection should adequately represent the impressions originally received by his observation. — (W. § 725.)

But there are no specific rules of law disqualifying for lack of recollection; in particular,

Par. (*a*). No specific degree or quality of vividness or
428 certainty of recollection is required; and any "impression," "belief," or the like, may be admissible in the circumstances of the case.[1] — (W. §§ 726–729.)

Distinguish (1) an "impression" which signifies that the witness lacked any *personal observation* (Rule 86, *ante*, § 405).
(2) an "impression," "understanding," etc., which may be excluded by the *opinion* rule (Rule 174, *post*, § 1457).[1]

Illustrations. A witness to a railroad collision testifies to his "impression" that the whistle was blown when the train was still 200 yards away; this is admissible, so far as it signifies merely that, though he saw and heard it, he was not positive as to the distance observed (*ante*, § 403), or is not now clear in memory (§ 428); but is inadmissible if it signifies that he speaks only from what bystanders said (*ante*, § 405), or if the opinion rule is (erroneously) applied (*post*, § 1458).

Art. 1. *Specifying the Grounds of Recollection.* The witness
429 may on direct examination state the circumstances that form the special grounds of his recollection, subject to the provisions of Rule 86 (*ante*, § 402); and on cross-examination he may be required to do the same, subject to the provisions of Rules 101 and 106 (*post*, §§ 532, 558). — (W. § 730.)

Art. 2. *Past and Present Recollection.* A witness' recol-
430 lection may be past or present.

[1] The rulings are sometimes inconsistent in appearance, because of the above distinctions.

(1) A past recollection must have been recorded, subject to the provisions of Rule 89.

(2) A present recollection may be revived, refreshed, or stimulated, subject to the provisions of Rule 90.[1]

RULE 89. *Past Recollection Recorded.* A past recollection
431 recorded may be used, subject to precautions for securing the adequacy of the recollection and the accuracy and identity of the memorandum; as follows: — (W. §§ 734–736.)

Cross-references. For a *stenographer's notes* of testimony, compare also the rules as to *calling the stenographer* under the hearsay exception (Rule 148B, Art. 3, *post*, § 1134), as to accounting for the *witness' absence* (Rule 136, Art. 2, *post*, § 930), and as to *sameness of issues* and parties (Rule 135, Art. 2, *post*, § 919).

For a *notary's certificate*, compare the rule for admitting it as a hearsay exception (Rule 148 C, Art. 1, *post*, § 1146).

For an *attesting-witness* verifying his signature, compare the rule admitting it when he is deceased, etc. (Rule 141, *post*, § 1000). — (W. § 737.)

ART. 1. *Recollection fresh when recorded.* The memorandum
432 must have been made when the matter was fairly fresh in recollection; but the time depends on the circumstances of each case. — (W. § 745.)

ART. 2. *Accuracy of Record.* The witness must be able to
433 say that he believed the memorandum correct at that time; either (1) by now remembering that belief,

or (2) by now relying upon a habit of correctness, on the handwriting, or on other indicia.[2] — (W. §§ 746, 757.)

Illustrations. The second mode is usually the case for *notaries*, *attesting-witnesses*, *stenographers*, *book-keepers*, etc.

Par. (*a*). The witness must be qualified by *personal*
434 *observation* of the matter recorded, as required by Rule 86 (*ante*, § 405). — (W. § 747, n. 8.)

[1] There are a few Courts which still do not fully recognize the distinction.

[2] In Massachusetts, the record must probably have been one of a set of regular entries.

435 *Par.* (*b*). But the witness need not *himself have written* the memorandum, provided he saw it and knew its correctness at a time when his recollection was fairly fresh. — (W. § 748.)

436 ART. 3. *Original and Copy.* The original memorandum is required, if procurable, according to the rules for producing original writings (Rule 126, *post*, § 747); otherwise a copy may be used. — (W. § 749.)

437 *Par.* (*a*). This copy may be by a *different person*, provided the maker of the original also testifies. — (W. § 750.)

438 ART. 4. *Joint Testimony of Observer and Recorder.* Where one person observed the events and orally stated them to another person, and the other person duly recorded the statement, the record is admissible on their joint testimony to their respective parts.[1] — (W. § 751.)

Illustration. A wagon-driver loads iron rods, calling out the pieces at each trip to the shipping-clerk, who notes the items of the load as they are called out, but does not see the goods taken and loaded; the memorandum may be used upon the joint testimony of the driver and the clerk; because each thus furnishes one element, and both together complete all that would have been required for one person alone. If one alone testifies, the rule of Par. (*a*) applies.

439 *Par.* (*a*). Where either the observer or the recorder is not in court, and only the other testifies, the memorandum is admissible only if it satisfies the hearsay exception for regular entries (Rule 142, *post*, § 1002).

440 ART. 5. *Opponent's Inspection.* The memorandum must be shown to the opponent, on request, before or after use by the witness, for inspection, and for cross-examination; pursuant to Rule 161, Art. 8 (*post*, § 1345). — (W. § 753.)

441 ART. 6. *Record forms Part of Testimony.* A record duly made and used forms part of the witness' present testimony,

[1] Note that here the memorandum need not have been a regular entry, though it commonly is, and though some Courts assume that it must be.

and may therefore be shown or handed to the jury by the party offering it.[1] — (W. § 754.)

ART. 7. *Present Recollection not preferred.* A past recorded
442 recollection may be used, even though the witness has some present recollection.[2] — (W. § 738.)

[[ART. 8. *Past Unrecorded Recollection.* A past recollection
443 not recorded may be testified, if the subject is so simple that error is unlikely.[3] — (W. § 744.)]]

Illustration. An alleged robber is freshly arrested, and at the police-station the robbed man, on seeing the person arrested, declares him to be the robber. At the time of the trial, the robbed man is unable to recall the features and identify the accused; nevertheless he, or one who heard him at the police-station, may testify to the identification as then made.

Cross-reference. This could also come in under Rule 113 (*post*, § 619).

RULE 90. *Present Recollection Refreshed.* For the purpose of
444 refreshing and improving a dormant recollection, a witness may use any artificial aid which under the circumstances is appropriate and does not seem improperly suggestive.[4] — (W. § 758.)

Cross-reference. Where the assistance is to be made by *questions* from counsel, or the like, the rules for *leading questions*, and other *forms of suggestion*, apply (Rules 91 and 92, *post*, §§ 454, 461).

Par. (*a*). In particular, *any writing* may be used;
445 subject to the following provisions: [5] — (W. § 758.)

Cross-reference. For improper suggestion by *writings of counsel*, *depositions*, etc., see Rules 91 and 94 (*post*, §§ 454, 488).

[1] Some Courts make verbal distinctions, *e. g.*, that it is not "independent" evidence; but almost all acknowledge the rule of practice.

[2] This is denied in the New York, Federal, and a few other Courts.

[3] This is not law, except probably for the case given in illustration.

[4] The trial Court here determines (Rule 18, *ante*, § 49).

[5] On most of the following details, there are Courts which hold the contrary, by confusion of the subject with that of Rule 89.

ART. 1. *Writing not Made by Witness.* The writing is
446 [not] required to be one made by the witness himself.[1] — (W. § 759.)

ART. 2. *Not an Original.* The writing is [not] required to
447 be an original.[1] — (W. § 760.)

ART. 3. *Not Made at the Time.* The writing is [not] re-
448 quired to have been made freshly after the time of the event.[1] — (W. § 761.)

Illustration. A *deposition* or report of *former testimony* may be thus used.

Distinguish (1) the rule against *impeaching one's own witness* (Rule 97, Art. 4, *post*, § 504), and

(2) the rule against using *self-contradictions* as independent evidence (Rule 108, Art. 5, *post*, § 589), as applied to depositions and former testimony.

ART. 4. *Opponent's Inspection.* The writing must be
449 shown to the opponent, on request, as provided in Rule 89, Art. 5 (*ante*, § 440).[2] — (W. § 762.)

ART. 5. *Writing not a Part of Testimony.* The writing does
450 not become a part of the witness' testimony, and therefore the party offering the witness is not entitled to read or show it as evidence to the jury;[2] though he is compellable to show it to the jury, on request of them or of the opponent, pursuant to the principle of Art. 4, above. — (W. § 763.)

ART. 6. *Refreshing on Cross-examination.* The cross-
451 examining party may require a witness to refresh his memory by a writing, subject to other applicable rules. — (W. § 764.)

Cross-references. See the references under Art. 3, above, and the rule for *showing a document* on cross-examination (Rule 161, Art. 8, *post*, § 1345).

[1] There are rulings erroneously omitting the " not."
[2] A few Courts deny or doubt this, without grounds.

Topic VI: Testimonial Narration (Communication)

RULE 91. *General Principle.* The third element in testimony
454 is Narration (or, Communication). It should correctly reproduce and intelligibly express the witness' actual and sincere recollection.

The rules for that purpose are

either (1) rules arising from general risks affecting all forms of testimonial utterance (Art. 1, below);

or (2) rules arising from a specific form of testimonial utterance (Rules 92–95, below). — (W. § 766.)

Art. 1. *General Rules to prevent Improper Suggestion in*
455 *Sundry Ways.* Testimony subjected to any method of suggestion or instruction, involving substantial danger that the testimony will fail to represent the witness' sincere and actual recollection, may be excluded;[1] — (W. § 786.)

in particular, where the witness

Par. (*a*) Uses writings under pretence of *refreshing*
456 *recollection* (as provided in Rule 90, *ante*, §§ 444–451).

Par. (*b*) *Remains in court* during the testimony of
457 other witnesses (as further governed by Rule 162, Art. 2, *post*, § 1316); or

during an argument of counsel as to the admissibility of the witness' testimony. — (W. § 786.)

Par. (*c*) Is *recalled* for a pretended correction (as
458 further governed by Rule 164, Art. 6, *post*, § 1380).

Par. (*d*) Has *conferred* with counsel, before the giving
459 of testimony, for the purpose of shaping his testimony as desired. — (W. § 788.)

[1] The rule for trial Court's discretion here applies (Rule 18, *ante*, § 49).

ART. 2. *Specific Rules affecting the Form of Testimony.* The
460 rules arising from a specific form of testimony are classified according as the witness' statement varies from the simple and usual form in being

(A) not an uninterrupted narrative, but given by answers to interrogations of counsel (Rule 92); or

(B) not expressed in words, but in gestures or other symbols (Rule 93); or

(C) not uttered orally, but in writing (Rule 94); or

(D) not intelligible directly by the tribunal, but requiring assistance to interpret (Rule 95). — (W. § 766.)

SUB-TOPIC A: TESTIMONIAL INTERROGATION

RULE 92. *General Principle.* A witness' testimony may be
461 given by making answers to questions of counsel; subject to the following provisions: — (W. § 768.)

Distinctions. The following rules are independent of the present ones:

(1) For the *order of topics* and the order of *direct and cross-examination* (Rules 162–164, *post*, §§ 1350–1380).

(2) For the *right* of opportunity *of cross-examination*, and the exceptions (Rule 135, *post*, § 913).

(3) For the *kind of facts* admissible to impeach, on cross-examination or otherwise (Rules 101–106, *post*, §§ 532–565).

(4) For *impeaching one's own witness* on cross-examination (Rule 97, Art. 4, *post*, § 504).

ART. 1. *Leading Questions.* A leading question is one which
462 suggests the specific tenor of the answer desired from a witness presumably favorable to the party questioning, and is forbidden,

unless the circumstances of the case render it not improperly suggestive or make it nevertheless necessary;[1] — (W. §§ 769, 770.)

subject to the following provisions:

Par. (*a*). A question which in form
463 (1) assumes a controverted fact, or

[1] Thus the trial Court's discretion controls (Rule 18, *ante*, § 49).

(2) permits the simple answer 'yes' or 'no,'
is usually improper;
and a question which
(3) states alternatives requiring a verb in the answer
is usually not improper.[1] — (W. §§ 771, 772.)

Illustrations. (1) "What was A doing, when B stabbed him?" this is leading as to the second clause only.

(2) "Did B stab A without saying anything to warn him?"

(3) "State whether A did or did not stab B."

Par. (*b*). On *cross-examination*, a leading question is
464 usually not improper.[2] — (W. § 773.)

Distinguish (1) the ensnaring or *misleading* question on cross-examination (Art. 2, *post*, § 467);

(2) the rule against asking for *one's own case* on cross-examination (Rule 164, Art. 4, *post*, § 1376).

Par. (*c*). On *direct examination*, a leading question is
465 usually not improper

(1) where the witness is *hostile*, biased, or otherwise unlikely to accept suggestions; — (W. § 774.) or

(2) where the matter asked about is *preliminary* and undisputed. — (W. § 775.)

Par. (*d*). A leading question is usually allowable, by
466 *necessity*, where the witness

(1) has *exhausted* his *recollection*; — (W. § 777.) or,

(2) *cannot comprehend*, by reason of infancy, illness, illiteracy, alienage, or otherwise, the subject of testimony sought from him; — (W. § 778.) or,

(3) is asked as to the *precise words* of another person's utterance. — (W. § 779.)

Cross-reference. For a *dying declarant*, see Rule 138 (*post*, § 951).

ART. 2. *Misleading Questions on Cross-examination.* A
467 question to an opponent's witness, assuming as true a matter which he has not yet testified to, or otherwise implying into

[1] On form (3) the rulings are divergent.
[2] Some Courts deny this, but unsoundly.

his testimony unfavorable matters not yet admitted by him, is not allowable. — (W. § 780.)

Illustrations. To a witness who denies that he made an assault: "What did he say to you before you used your knife?" To a witness who testifies to the words of an alleged slanderous statement: "Are you always so particular in listening to the truth about your friends?"

Distinguish the following rules:

(1) Allowing a cross-examiner to *withhold the ultimate purpose* of his question (Rule 163, Art. 2, *post*, § 1360).

(2) Forbidding a cross-examiner to *assert in argument* a matter not evidenced (Rule 156, Art. 3, *post*, § 1271).

Cross-references. The present principle is applied also in forbidding a cross-examiner to *insinuate misconduct* on cross-examination to character (Rule 105, Art. 2, *post*, § 552).

468 ART. 3. *Intimidating Questions on Cross-examination.* A question which in manner or substance is calculated improperly to intimidate or disconcert a witness, and thus groundlessly to make testimony appear less trustworthy than it is, is not allowable.[1] — (W. § 781.)

469 ART. 4. *Repetition of Questions.* The repetition of a question is allowable or not, according to its purpose and the circumstances of the case.[2] — (W. § 782.)

Par. (*a*). Repeating an unanswered question upon a matter already ruled to be *inadmissible* is not allowable.

470 *Par.* (*b*). Repeating a question *once answered* in the same direct or the same cross-examination, or questioning on the same matter in other form, is not allowable.

Cross-reference. For the rule against putting in *on rebuttal* matters belonging to the case in chief, see Rule 164, Art. 4 (*post*, § 1376).

471 *Par.* (*c*). Repeating on *cross-examination* the questions already put on direct examination, or questioning on precisely the same details, is usually allowable.

472 *Par.* (*d*). Repeating on cross-examination the same question already properly asked on cross-examination

[1] All Courts concede this. Many trial judges ignore it.

[2] The trial Court's discretion thus determines (Rule 18, *ante*, § 49).

but *answered unfavorably* or not answered, for the purpose of inducing the witness to change his answer, is usually not allowable.[1]

ART. 5. *Length of Examination; Number of Examiners.*
473 (1) The examination of a witness by more than one counsel on the same side during a single stage of testimony is usually not allowable.

(2) The length of time of examination of a witness may if necessary be fixed beforehand. — (W. § 783.)

ART. 6. *Questions by the judge.* The trial judge may put
474 questions,[2] pursuant to Rule 224 (*post*, § 1990);

(2) and a leading question is allowable. — (W. § 784.)

ART. 7. *Narration without Questions; Non-Responsive*
475 *Answers.* The witness may testify on any specified subject without waiting for questions as to details, unless in a particular instance he appears likely to insert irrelevant matters.

Par. (*a*). In a *deposition* taken in writing by commission *out of court*, where counsel for the parties do not attend to examine, the testimony must be given on specific interrogatories. — (W. § 785.)

Par. (*b*). A *response* stating matters *not asked about* in a question is not objectionable if relevant. — (W. § 785.)

Cross-reference. For a *non-responsive* answer as objectionable in a deposition because of lack of notice for cross-examination, see Rule 135, Art. 3 (*post*, § 922).

SUB-TOPIC B: NON-VERBAL[3] TESTIMONY

RULE 93. *General Principle.* A witness may communicate
478 his testimony in a form or symbol other than words, wherever

[1] In all these cases, the trial judge may exceptionally rule otherwise, under Rule 18 (*ante*, § 49).

[2] Here some Supreme Courts place restrictions; but such restrictions are harmful to justice.

[3] "Verbal" means "in words made of letters," and is not to be confounded with "oral," meaning "spoken with lips."

in the circumstances it is appropriate;[1]
in particular, in the following modes:

ART. 1. *Dramatic Communication.* Testimony may be
479 given or supplemented by gesture, dumb-show, or other dramatic mode. — (W. § 789.)

Cross-reference. Compare the rule as to *exhibiting in court* the witness' injured limbs, etc. (Rule 123, *post*, § 730) and the rule as to *indecent evidence* (Rule 195, *post*, § 1652).

ART. 2. *Pictorial Communication.* Testimony may be
480 given or supplemented by a model, map, diagram, photograph, or other pictorial or graphic mode; — (W. §§ 790–792.) subject to the following provisions:

Par. (*a*). The map, photograph, etc., must be *verified*,
481 *i. e.*, must be made a part of the testimony of some witness qualified by personal observation (pursuant to Rule 86, Art. 5, *ante*, § 405) of the object represented. — (W. §§ 793, 794, nn. 1–4.)

Par. (*b*). The map, photograph, etc., need *not* be veri-
482 fied by the *maker* of it; and it need not be by a public officer. — (W. § 794, nn. 5, 6.)

Par. (*c*). Personal observation by the senses is not
483 necessary when the photograph, etc., is made with some *standard scientific instrument* (lens, vacuum-ray, etc.) capable of disclosing data not perceivable by the unaided senses and used by a competent operator. — (W. § 795.)

Par. (*d*). The *original object* need not be produced
484 or accounted for, except by virtue of Rule 126 (*post*, § 755) requiring the production of writings; [but where the original of a *writing* is produced under that Rule, a photograph may also be used, in so far as it may in the circumstances be useful.][2] — (W. §§ 796, 797.)

Distinctions. Distinguish (1) the rule for using *specimens* of handwriting for comparison (Rule 177, Art. 5, *post*, § 1488).

[1] The rule for trial Court's discretion would here apply (Rule 18, *ante*, § 49).

[2] Here the rule for trial Court's discretion should apply (Rule 18, *ante*, § 52). The rulings are not harmonious.

(2) the rule excluding *irrelevant* objects shown by photograph (Rules 72, 73, *ante*, §§ 341, 350–354, Rule 73, Art. 2, *post*, § 349).

(3) the rule as to *showing* objects likely to *excite* prejudice (Rule 123, *post*, § 730).

(4) the rule for admitting *official maps* and *surveys* as a hearsay exception (Rule 148B, Art. 2, *post*, § 1133).

(5) the rules of substantive law as to *maps* or *surveys* forming part of a deed by reference.

Sub-Topic C: Written Testimony

488 RULE 94. *Oral Testimony Required.* All testimonial evidence is communicated to the tribunal by oral utterance of the witness; subject to the following details and exceptions: — (W. § 799.)

489 Art. 1. *Exceptions.* Wherever the testimonial statement is in writing, made or signed by the witness or adopted by him as his statement, it is regarded as written testimony; and is allowable in the following cases:

Par. (*a*). *Records of past recollection*, as admitted under Rule 89 (*ante*, §§ 431–443), and *maps*, diagrams, etc., as admitted under Rule 93 (*ante*, § 480). — (W. § 800.)

Par. (*b*). *Copies*, verified by a witness, of an original document not produced, as admitted under Rule 128, Art. 2 (*post*, § 822). — (W. § 801.)

Par. (*c*). *Hearsay* writings, as admitted under some exception to the hearsay rule (Rules 137–152, *post*, §§ 950–1198).

Par. (*d*). An *absent witness'* testimony, admitted on affidavit or stipulation, to *prevent postponement*, under Rule 231 (*post*, § 2140).

Par. (*e*). *Depositions*, being some third person's transcription of testimony orally delivered extra-judicially before an officer and then signed by the witness; as prescribed in Art. 2, below.

490 Art. 2. *Rules for Depositions.* Whenever the hearsay rule admits a witness' testimony that has been delivered

before trial out of court before a judge or other officer (Rules 135, 136, *post*, §§ 913–945), subject to the procedure prescribed therefor by chancery rule or by code or statute,[1] the mode of such delivery shall be as follows: the counsel to state the questions, if oral, or the officer to read them, if written; the witness to answer them orally; the answers to be written down by the officer or some person appointed by him; [2] and furthermore: — (W. § 802.)

491 *Par.* (*a*) the person writing the answers is *not to be* an *agent* or *kinsman* of either of the parties. — (W. § 803.)

492 *Par.* (*b*) the writing is to be as nearly as feasible a *literal transcription* of the answers. — (W. § 804.)

493 *Par.* (*c*) the answers are to be spontaneously given, without *improper suggestion*, either by reference to prepared writings or otherwise as forbidden for oral testimony in court (Rules 89, 90, *ante*, §§ 431–451, Rule 92, *ante*, §§ 461–475). — (W. § 787.)

494 *Par.* (*d*) the written answers are to be *read over* to or by the witness and *signed* by him. — (W. § 805.)

495 *Par.* (*e*). The foregoing rules do not apply to a stenographic or other *written report of testimony orally delivered* at a *trial* before a jury or a committing magistrate. — (W. § 805.)

Distinctions. The question whether the written testimony can be *disputed* and shown to be an incorrect report of the oral utterance (Rule 133, Art. 2, *post*, § 902) turns on this distinction between a deposition and a *report of oral testimony;* where Art. 2, par. *a–d*, above, is fulfilled, the writing *is* the testimony, and is indisputable as to tenor.

Cross-references. Compare the rules as to evidencing testimony by *any one who heard* it (Rule 131, *post*, § 890), or by a hearsay *official report* (Rule 148B, Art. 3, *post*, § 1134), or by using a deposition as a *party's admission* (Rule 119, Art. 5, *post*, § 672).

[1] Here signifying the rules of procedure before trial, which are not covered by the present Code (Rule 5, *ante*, § 11).

[2] The local statutes of course prescribe the procedure in detail; here merely the general principle is noted, as properly belonging in this Code.

SUB-TOPIC D: INTERPRETED TESTIMONY

RULE 95. *General Principle.* Whenever in the circum-
496 stances of the case a witness' natural mode of communication is not adequate to make himself directly intelligible to the tribunal, an interpreter or translator may be used; [1]

in particular, when the witness is

(*a*) a *deaf-mute;*

(*b*) an *alien;*

(*c*) unable to speak *aloud.* — (W. § 811).

ART. 1. *Interpreters and Translators.* Whenever an in-
497 terpreter or translator is used,

(*a*) he must be *qualified* in experience, under Rule 83 (*ante*, § 379); — (W. § 811.)

(*b*) he must take an *oath* as witness to the words interpreted, under Rule 157 (*post*, § 1285);

(*c*) his translation must be in *writing* and annexed, if the testimony is a deposition.

Cross-reference. For the application of the hearsay rule, requiring an interpreter to be called or accounted for, in evidencing *testimony at a former trial*, see Rule 156, Art. 4 (*post*, § 1280).

[1] Here the rule of trial Court's discretion applies (Rule 18, *ante*, 49).

SUB-TITLE II: TESTIMONIAL IMPEACHMENT

TOPIC I: GENERAL RULES

RULE 96. *General Principle of Impeachment.* The process
500 of introducing evidence tending to diminish the trustworthiness of a person whose testimonial statement has been already admitted as evidence is termed Impeachment. — (W. § 875.)

The rules affecting the various modes of impeachment involve the following general distinctions, among others:

Par. (*a*). Some general or *abstract trait* of the witness, such as bias or moral character, may be offered as evidence; but this abstract trait may in turn have to be evidenced by *specific instances* of conduct. — (W. § 876.)

Par. (*b*). A fact of the preceding sort may be circumstantially *relevant;* but it may nevertheless be excluded by some principle of *policy* preventing excessive confusion of issues, undue prejudice, or unfair surprise (Rules 161, 165–6, *post,* §§ 1325, 1383, 1390). — (W. § 877.)

Par. (*c*). For the purpose of enforcing the foregoing policy, a rule may forbid the evidencing of a fact by *other witnesses,* while allowing it by *cross-examination* of the impeached witness himself. — (W. § 878.)

Par. (*d*). Some impeaching facts may have a *definite* relevancy, such as perjury evidencing a disposition to lie; while others may have an ambiguous, alternative, or *indefinite* relevancy, such as an inconsistent statement on the same point. — (W. § 879.)

RULE 97. *Persons Impeachable.* Any witness may be impeached, subject to the following details and exceptions:

ART. 1. *Hearsay Witness.* An extra-judicial testimonial
501 statement, admitted under an exception to the hearsay rule or

otherwise, may be impeached in the appropriate manner as provided under the respective exceptions;
that is to say,

(*a*) a *dying declarant* (Rule 138, *post*, § 951).

(*b*) an *attesting will-witness* (Rule 141, *post*, § 1000).

(*c*) a *declarant* of facts against interest, of facts of family history, etc. (Rules 139, 140, *post*, §§ 966, 980).

(*d*) an *absent witness'* alleged testimony admitted to avoid a continuance (Rule 231, *post*, § 2140). — (W. §§ 884–888.)

ART. 2. *Defendant as Witness.* A defendant in a criminal
502 case who testifies may be impeached like any other witness, and not otherwise; — (W. § 890.)
that is to say,

Par. (*a*) his *character* for testimonial traits may be used under Rule 98 (*post*, § 519), but his character as accused under Rule 30 only (*ante*, §§ 130–137);

Par. (*b*) his *conduct* as evidencing testimonial character may be used under Rule 105 (*post*, §§ 549), but not as evidencing an accused's character except under Rule 43 (*ante*, §§ 218–223);

Par. (*c*) his *privilege* not to answer is governed by Rule 203 (*post*, § 1730).

ART. 3. *Impeachment of Impeaching Witness.* A witness
503 to impeaching facts may himself be impeached; but in the circumstances the further process may be forbidden, on the principle of preventing excessive confusion of issues (Rule 165, *post*, § 1383).[1] — (W. § 894.)

ART. 4. *Impeaching One's Own Witness.* A party may not
504 introduce evidence impeaching a witness called by himself, [[in so far as under the circumstances the party appears to

[1] Rulings differ; this limitation would probably be accepted.

have committed a fraud upon the Court or to desire chiefly to punish or coerce the witness]]; [1] — (W. §§ 896–899.)

subject to the following provisions:

Par. (*a*). He may not show bad testimonial *character.*
505 — (W. § 900.)

Par. (*b*). He may not show *bias, interest,* or *corruption.*
506 — (W. § 901.)

Par. (*c*). He may [not] show a prior *self-contradictory*
507 *statement;* [except [by a cross-examination] where the witness' prior statements have led the party to expect contrary testimony,] [and for the sole purpose of stimulating the witness to recollect and to revise his testimony].[2] — (W. §§ 902–905.)

Cross-reference. Compare the general rules for impeachment by self-contradiction (Rule 108, *post,* § 574).

Par. (*d*). He may show all facts relevant to his case,
508 even though the witness is thereby *contradicted* by other witnesses, [and may discredit the witness thereby on other matters].[3] — (W. § 908.)

ART. 5. *Who is One's Own Witness.* The foregoing rule
509 forbids the impeachment as follows:

Par. (*a*). It is forbidden to the party first calling a witness, after any relevant answer has been made to a question, pursuant to Rule 164 (*post,* § 1376). — (W. § 910.)

[*Par.* (*b*). It is forbidden to the party first calling a wit-
510 ness on matters testified to when afterwards called by the opponent;

[1] The last clause is not law anywhere, but it is the only justifiable scope of this rule. The ensuing §§ 505–515 would therefore be dispensed with, under that clause.

[2] There are several forms of rule, varying between unconditional admission and exclusion. The form with the clauses in brackets has perhaps most adherents; but it is less desirable. Statutes exist in some States.

[3] Not all Courts concede the clause in brackets.

except where the opponent has used a deposition taken but not used by the first party.][1] — (W. § 913.)

511 *Par.* (*c*). It is [not] forbidden to the opponent who afterwards calls a witness already called by the first party; *except* where a deposition, used by the opponent, was taken but not used by the first party.[2] — (W. §§ 911, 912.)

Cross-references. Compare the rule that *either party* may use a deposition taken and not used by the other (Rule 135, *post*, § 919); the rule as to putting in one's *own case on cross-examination* (Rule 164, *post*, § 1376); and the rule as to compulsory putting in of the *whole of a deposition* (Rule 184, *post*, § 1561).

512 [*Par.* (*d*). It is forbidden to a party who on *cross-examination* has obtained facts pertaining to his *own case* in chief — (W. § 914); and this includes a prohibition of leading questions.][3] — (W. § 415.)

Cross-reference. For the only just rule as to leading questions, see Rule 92 (*ante*, § 462).

513 *Par.* (*e*). It is [not] forbidden to a party who calls the *opposing party*.[4] — (W. § 916.)

514 *Par.* (*f*). It is not forbidden to a party

(1) whose *co-party* in a *criminal* case testifies for himself or for the prosecution,

(2) or whose *co-party* in a *civil* case testifies for himself or for the opponent. — (W. § 916.)

515 *Par.* (*g*). It is not forbidden to a party calling a witness specifically required by law to be called by him, under Rules 130, 131, (*post*, §§ 841, 890), in particular an attesting will-witness. — (W. §§ 917, 918.)

[1] The rulings are not agreed.
[2] The rulings are not agreed.
[3] This senseless rule obtains in some jurisdictions.
[4] Many Courts hold *contra*. Statutes often regulate it.

Topic II:

Character, Mental Defectiveness, Bias, etc., as General Traits in Impeachment

RULE 98. *Moral Character.* The defective moral character
518 of a witness, in so far as it involves a diminution of his truthfulness, is relevant in impeachment. — (W. §§ 920–922.)

Cross-reference. For *reputation* as a mode of evidencing to such character, see Rule 147 (*post*, § 1071).

For instances of *conduct*, as evidencing such character, see Rule 105 (*post*, § 549).

Art. 1. *Kind of Character.* The specific trait of veracity is
519 admissible; [and also the general character] [[in so far as in the circumstances a knowledge of it may seem useful]]. [1] — (W. § 923.)

Cross-reference. For the *form* of the question ("Would you believe him on oath," etc.), see Rule 176 (*post*, § 1471).

Distinguish the use of an *accused's* character as witness and as party (Rule 97, Art. 2, *ante*, § 502). — (W. § 925.)

Par. (*a*). No other specific trait than *veracity* is
520 admissible.[2] — (W. § 924.)

Art. 2. *Time of Character.* The time of the character may
521 be any time not unreasonably remote; [3]

except so far as a reputation at a time after controversy begun may be excluded as a mode of evidence by Rule 147 (*post*, § 1071). — (W. §§ 927, 928.)

[1] A large minority of Courts admit general character; for that form of rule, the last clause, though not law, seems wise; the trial Court should have discretion.

[2] A few Courts admit other traits; but this is unsound.

[3] A few Courts exclude prior character; some others exclude it unless no other is available.

ART. 3. *Place of Character.* The place of the character
522 may be any place;
except so far as a reputation elsewhere than in the place of residence may be excluded as a mode of evidence by Rule 147 (*post*, § 1071). — (W. § 929.)

RULE 99. *Insanity, Intoxication, and Sundry Mental Defects.*
523 The defective mental capacity or condition of a witness,
at a time when
and in such degree as
it involves a diminution of his trustworthiness in respect to any one of the three testimonial elements, Observation, Recollection, or Communication (Rule 80, *ante*, § 367), is relevant in impeachment; — (W. § 931.)
subject to the following provisions:

ART. 1. *Insanity.* Any form of insanity is admissible.[1] —
524 (W. § 932.)

ART. 2. *Intoxication* is admissible [and, in the circumstances
525 of the case, a habit of intemperance in liquor].[2] — (W. § 933.)

ART. 3. *Disease, etc.* Any disease, drug-habit, or the like,
526 is admissible.[3] — (W. § 934.)

[[ART. 4. *Degrees of Mental Accuracy.* A marked variation
527 from the normal mental accuracy in observing or remembering is admissible, where a particular issue depends specially upon testimonial precision in such matters; and for this purpose a witness' powers may be tested by psychological experts with any standard method recognized as trustworthy.]][4]

[1] Possibly not all Courts would go so far.
[2] The bracketed clause would not be law in most States.
[3] The rulings here are scanty, and less liberal.
[4] This is not yet the law anywhere; but should be provided for, in case applied psychology develops any such trustworthy method. No doubt, even now, simple and telling experiments would to-day be permitted, to show the general fallibility of observation and memory; as noted under Rule 106, below.

ART. 5. *Theological Belief; Race.* Theological belief, or
528 race, or alienage, is not admissible. — (W. §§ 935, 936.)

RULE 100. *Inexpertness, Bias, Interest.* The following
529 qualities are admissible in impeachment:

Par. (*a*). A deficiency in *expertness*, so far as the topic is one of which special expertness is required. — (W. § 940.)

Cross-reference. Compare the rule as to one expert's *opinion* of another's qualifications (Rule 176, Art. 2, *post*, § 1470), and as to evidencing inexpertness by *particular instances of error* (Rule 106, *post*, §§ 558-564).

Par. (*b*). A *partisan feeling* against or in favor of one of the parties or issues in the cause. — (W. § 940.)

Cross-reference. Compare the *opinion* rule as applied to bias (Rule 174, *post*, § 1458).

Modes of evidencing this bias are dealt with in Rule 102 (*post*, § 535).

Par. (*c*). A *mercenary inclination* to distort the testimony to favor one party or the other.

This inclination is of two sorts, according, as it is

(1) inferred to exist from the witness' *conduct* before trial, in accepting profit or a pledge thereof, for his testimony (*Corruption*), — dealt with in Rule 103 (*post*, § 540);

(2) or, inferred to exist from the *circumstance* that the witness will receive profit or loss according to the decision of the cause (*Interest*), — dealt with in Rule 104 (*post*, § 546).

Topic III:

Evidencing General Qualities by Conduct and Circumstances

RULE 101. *Extrinsic Testimony and Cross-Examination.*
532 The evidencing of any of the foregoing general qualities by specific instances of conduct or by specific circumstances may be made

(*a*) either by calling other witnesses,

(*b*) or by cross-examination of the witness himself;

unless some express limitation is herein made. — (W. § 943.)

Art. 1. *Scope of Cross-Examination.* A liberal scope
533 may be allowed by the trial judge wherever the discrediting conduct or circumstances are sought to be evidenced by cross-examination.[1] — (W. § 944.)

Cross-reference. Compare the rule for *not disclosing* the relevancy of a question on cross-examination (Rule 163, *post*, § 1360).

Art. 2. *Demeanor on the Stand.* The demeanor of the
534 witness while testifying may furnish evidence as to his testimonial qualities. — (W. § 946.)

Cross-reference. Compare the rule for demeanor of the *accused* (Rule 650, *post*, § 118).

535 RULE 102. *Bias.* A witness' bias may be evidenced

(*a*) by *circumstances* likely to produce it;

or, (*b*) by *conduct* exhibiting it. — (W. § 948.)

[1] This rule ought therefore to leave everything to the trial Court's discretion, pursuant to Rule 18 (*ante*, § 48).

ART. 1. *Circumstances indicating Bias.* Circumstances
536 bringing the witness into a status to one of the parties, as family-member or relative, employee, opponent in other litigation, or otherwise, so as to make likely in human experience a feeling of special sympathy or hostility, are admissible.[1] — (W. § 949.)

Cross-reference. The *procuring* of an indictment may also be admissible as conduct showing hostility (Art. 2, *infra*); the *pendency* of an indictment may also be evidence of interest (Rule 104, *post*, § 547).

ART. 2. *Conduct and Utterance.* Any conduct or utterance
537 indicating a special sympathy or hostility is admissible.[1] — (W. § 950.)

Par. (*a*). The *details of a quarrel*, as evidencing the
538 depth or the insignificance of the feeling, whether on cross-examination or on re-direct examination, may be excluded, if the principle of preventing excessive confusion of issues or undue prejudice (Rules 165, 166, *post*, §§ 1383, 1390) so requires.[2] — (W. §§ 951, 952.)

Par. (*b*). The rules for *prior inquiry* whether the witness
539 made a statement attributed to him (Rule 108, *post*, § 579) here [do not] apply.[3] — (W. § 953.)

RULE 103. *Corruption.* A corrupt inclination to make the
540 testimony favor one party or the other may be evidenced by conduct, as follows:

ART. 1. *Willingness to lie.* A witness'
541 expression of a willingness to lie in general,
or to lie in the cause in hand,
or a confession of having lied in the cause in hand,
is admissible. — (W. §§ 957–959.)

[1] The rule of trial Court's discretion ought here to control (Rule 18, *ante*, § 49).

[2] The rule of trial Court's discretion should here apply (Rule 18, *ante*, § 49).

[3] Courts differ on this point. The better doctrine would be the affirmative, if the rule were not applied as technically as it to-day is.

ART. 2. *Subornation.* A witness' act
542 of giving pecuniary profit to another person,
or of receiving it himself,
for falsely giving or for suppressing evidence, is admissible. — (W. §§ 960, 961.)

Cross-reference. Compare the rule for a *party* (Rule 654, *post*, § 118).

Par. (*a*). A witness' receipt of pecuniary profit, past
543 or promised, for his testimony, whether as fees, expenses, or otherwise, is admissible; though in the circumstances the inference may be of Interest only (Rule 104, *infra*) and not of Corruption. — (W. § 961.)

ART. 3. *Sundry Corruption.* The habitual making or
544 aiding of false claims of the kind in issue is [not] admissible.[1] — (W. § 963.)

ART. 4. *Prior Inquiry.* The rules for prior inquiry whether
545 the witness made a statement attributed to him (Rule 108, *post*, § 579) here [do not] apply. — (W. § 964.)

RULE 104. *Interest.* An inclination to distort the testimony
546 to favor one party or the other may be evidenced by an expected pecuniary profit or loss depending on the event of the cause;
in particular, by the circumstance

Par. (*a*) that the witness, as a *party* or otherwise, will be pecuniarily and directly affected by the decision of the cause, whether civil or criminal.[2] — (W. §§ 966, 968.)

Par. (*b*) that the witness is an *accomplice* or co-indictee.
547 — (W. § 967.)

Par. (*c*) that the witness, as surety, police-officer,
548 injured person, or otherwise, may be *indirectly* affected

[1] Some Courts erroneously insert the "not."
[2] Here there is a question whether the judge may in a criminal case specifically mention the accused's interest in his charge to the jury. For civil cases there are numerous statutes.

in repute, in testimonial credit, or in pecuniary profit, by the decision of the cause. — (W. § 969.)

RULE 105. *Moral Character.* The testimonial moral char-
549 acter of a witness, as relevant under Rule 98 (*ante*, §§ 518–522), may be evidenced by specific instances of misconduct, subject to the following limitations based on the principles of preventing excessive confusion of issues, undue prejudice and unfair surprise (Rules 161, 165–6, *post*, §§ 1325, 1383, 1390):

ART. 1. *Extrinsic Testimony.* The misconduct may not be
550 evidenced by the testimony of other witnesses. — (W. §§ 979 987.)

Par. (*a*). Except that a *conviction for crime* may be so
551 evidenced (W. §§ 980, 987), if relevant under Art. 2, par. (*c*), *infra.*

Cross-reference. For the rule requiring the *copy of the record* of judgment, see Rule 128 (*post*, § 826).

ART. 2. *Cross-examination.* On cross-examination of the
552 witness himself, his misconduct may be evidenced (W. §§ 981, 987);

provided that

[*Par.* (*a*) the misconduct must be *relevant* to the specific
553 trait (Rule 98, *ante*, § 519) of lack of veracity; unless in so far as a knowledge of other traits of his character may in the circumstances be useful in estimating his trustworthiness.][1] — (W. §§ 982, 987.)

[*Par.* (*b*) in all cases the *trial Court* may limit the scope
554 of the facts cross-examined, in order to protect the witness from exposures which seem to be sought maliciously or to be unprofitable for showing the witness' untrustworthiness.][2] — (W. §§ 983, 987.)

[1] Few Courts lay down such a rule; most ignore any relevancy to the veracity-trait.

[2] Almost all Courts rule thus. A few follow the English rule of setting no limit. A few adopt the opposite extreme of forbidding all cross-examination to misconduct.

Distinguish (1) the *privilege* of the witness, even where the fact is properly asked for on cross-examination, not to make answer involving *crime* (Rule 202, *post*, § 1730) or *disgrace* (Rule 201, *post*, § 1701); — (W. § 984.)

(2) the prohibition of questions *insinuating* misconduct, but not *bona fide* expecting an affirmative answer (Rule 92, *ante*, § 467, and Rule 156, *post*, § 1271).

555 *Par.* (*c*) where a *conviction of crime* is used, the crime must be one involving [dishonesty.][1] — (W. §§ 980, 987.)

556 *Par.* (*d*) an *arrest*, or complaint, [being only an accusation, and therefore hearsay,] is [not] admissible.[2] — (W. §§ 982, 987.)

Illustrations. On a prosecution for keeping a gambling-house, a police officer is witness for the prosecution; his cross-examination asks (1) whether he has ever been divorced for adultery, (2) whether he has ever himself kept a gambling-house, (3) whether he has ever made a false charge against the defendant and withdrawn it for money; (4) a conviction for assault is then introduced by copy of the record. Of these, (1) may well be excluded under Par. (*b*); (2) might be excluded under Par. (*a*) or Par. (*b*), but probably would not be; (3) would always be admitted; (4) would depend entirely on the local statute, but on principle should be excluded under Par. (*a*).

557 ART. 3. *Rumors of Misconduct, to test a Reputation-Witness.* The rule of Art. 1, *supra*, does not forbid questioning a witness to good reputation of an accused or of another witness as to having heard rumors of the misconduct of the person to whose good repute he testifies; [[provided the counsel in good faith believes that there were such rumors.]][3] — (W. § 988.)

558 RULE 106. *Skill, Observation, Memory, etc.* The quality or degree of a witness' special Experience (Rule 83, *ante*, § 379), and his capacity or means of Observation (Rule 86, *ante*,

[1] No Court uses precisely this rule. Statutes obtain almost everywhere; by some, any crime suffices; by others, only a felony; by others, any crime that would have disqualified at common law.

[2] Courts differ on this point.

[3] Almost all Courts accept this rule; but the bracketed clause should be enforced to prevent abuse.

§ 400), of Recollection (Rule 88, *ante*, § 427), and Communication (Rule 91, *ante*, § 454) may be evidenced by specific instances exhibiting the witness' deficiencies, subject to the following provisions:

ART. 1. *Extrinsic Testimony.* Testimony of other witnesses to specific facts occurring out of court is not allowed (W. §§ 991–996);

except as follows:

559 [*Par.* (*a*) To circumstances affecting the witness' *actual means* of observation or of recollection;] [1]

Illustration. Testimony that at the time and place of an accident the moon was not shining, or the view was obstructed by an embankment.

Distinguish the rule as to *contradiction* on a collateral point, which ought not to be here applied (Rule 107, *post*, § 570).

560 [*Par.* (*b*) To specific instances of defective *capacity* as to experience, observation, or memory, if the issue makes such capacity specially important,

provided no excessive confusion of issues or unfair surprise is involved] [2]

[[or provided the extrinsic testimony is that of a psychological expert under Rule 99, Art. 4 (*ante*, § 527]]. — (W. § 991.)

Illustrations. (1) An expert to handwriting identifies a certain signature as forged. The opponent may show that the same witness, when shown several other notes before trial, identified them erroneously.

(2) A wagon-driver testifies to having seen a red light at a place of street-repairs. The neighbouring druggist may testify that the driver has formerly mistaken a green light in the store-window for a red light.

ART. 2. *Cross-examination, and Tests in Court.* Specific circumstances and instances may be evidenced,

561 *Par.* (*a*). On cross-examination, by questions as to *circumstances* affecting the witness' *means of experience*, of *observation*, and of *memory*.[3] — (W. §§ 994, 995.)

[1] Most Courts would allow this.

[2] Few Courts would allow this. The clause in double brackets is a provision for the law of the future.

[3] This is universally allowed.

Illustrations. Asking whether a medical man ever attended a similar case before; whether the moon was shining on the night of an affray; why the witness remembers the exact date; etc., etc.

562 [*Par.* (*b*) On cross-examination, by questions as to *specific prior instances, out of court, exhibiting defective capacity* as to experience, observation, memory, or narration.][1] — (W. §§ 991–996.)

Illustrations. Asking whether a medical man did not once cause death by erroneous diagnosis; whether a bookkeeper did not once make a mistake of $50,000 in his balance; etc.

563 *Par.* (*c*) On cross-examination, by questions to elicit *specific present instances* of such *defective capacity.*[2] — (W. §§ 991–996.)

Illustrations. (1) *Expertness.* Asking a medical witness to define certain terms in his science; asking an illiterate witness, who has testified to a precise time, to tell the time now by the clock.

(2) *Observation.* Asking a witness to colors to pick out red or brown in the room.

(3) *Memory.* Asking a witness to give other details relating to an occurrence which he claims to remember well, or details of other occurrences not related.

564 [*Par.* (*d*) On cross-examination, with the aid of counsel or other persons, by simple *artificial tests, performed in court,* exhibiting specific present instances of such capacity.][3] — (W. §§ 991–996.)

Illustrations. (1) Testing a witness to the identity of patents, by bringing another machine and having another expert question him as to its construction.

(2) Testing a stenographic witness to a conversation by having him write a short report and then translate it.

565 [[*Par.* (*e*) Without cross-examination, but in court, by tests made upon the witness by a *psychological* expert, where the issue is one in which precision of observation or memory is important]].[4]

[1] This would be allowed by some Courts.
[2] This is universally allowed.
[3] This is sometimes allowed.
[4] This provides for the law of the future, pursuant to Rule 99, Art. 4 (*ante,* § 527).

ART. 3. *Collateral Contradiction.* So far as any evidence
566 may be allowable under Arts. 1 or 2 above, it is not forbidden by the rule (Rule 107, *post*, § 567) against contradiction on a collateral matter.[1]

TOPIC IV: CONTRADICTION AND SELF-CONTRADICTION

RULE 107. *Contradiction (Specific Error).* The degree or
567 quality of a witness' trustworthiness may be evidenced indefinitely (Rule 96, par. (*d*), *ante*, § 500) *i. e.* without relevancy to any particular testimonial trait or element, such as moral veracity, memory, etc., by errors of assertion made by him in specific facts;

provided that on collateral facts the error cannot be evidenced by calling other witnesses in contradiction, in pursuance to the principle (Rules 161, 165, *post*, §§ 1325, 1383) preventing excessive confusion of issues and unfair surprise; — (W. §§ 1000–1002);

subject to the following details:

ART. 1. *Collateral Facts defined.* A fact is not collateral
568 which could have been independently evidenced for some other purpose than that of proving the error by contradiction; — (W. § 1003);

this includes

Par. (*a*). A fact otherwise *admissible under the issues* in
569 the case. — (W. § 1004.)

Par. (*b*). A fact otherwise admissible to *impeach* the
570 witness under Rules 96–106 (*ante*, §§ 500–565).[2] (W. § 1005.)

Illustrations. Whether the witness had a prior lawsuit with the plaintiff; whether the moon was shining at the time of the affray; whether an expert witness is a graduate of a medical school.

[1] This is needed, to guard against the occasional misuse of Rule 107.

[2] Some Courts are here too strict. The whole matter is governed by the rule of discretion (Rule 18, *ante*, § 49).

ART. 2. *Direct and Cross-examination.*

571 *Par.* (*a*). A collateral fact asserted on *direct examination* is not thereby exempted from the rule. — (W. § 1007.)

572 *Par.* (*b*). The rule does not prevent *questioning* as to collateral facts on *cross-examination* to discover specific errors, but only forbids the proof of the error by calling other witnesses.[1] — (W. § 1006.)

573 [ART. 2. *Falsus in uno.* If the witness consciously falsifies upon a material fact, the jury may reject his entire testimony, except so far as they may believe it because of corroboration by other evidence]; [[but they are in no case obliged to believe it]]. [2] — (W. §§ 1008–1015.)

574 RULE 108. *Self-Contradiction.* The degree or quality of a witness' trustworthiness may also be evidenced indefinitely (Rule 96, par. (*d*), *ante*, § 500) by the inconsistency of assertions made by him on specific facts;

provided that on collateral facts the inconsistency cannot be evidenced by calling other witnesses to testify to his self-contradictory assertion, pursuant to the principle (Rules 161, 165, *post*, §§ 1325, 1383) of preventing excessive confusion of issues and unfair surprise; (W. §§ 1017–1019.)

subject to the following details:

575 ART. 1. *Collateral Facts defined.* A fact is not collateral which could have been independently evidenced for some other purpose than that of proving the self-contradiction; —(W. §§ 1018, 1020.)

this includes

576 *Par.* (*a*). A fact otherwise admissible under the issues in the case. — (W. § 1021.)

[1] Some Courts do not accept this, nominally at least.

[2] This rule is generally laid down, though in varying phrases; but it is wholly unsound, for several reasons. The proposed clause in double brackets guards against its worst defect.

577 *Par.* (*b*). A fact otherwise admissible to impeach the witness under Rules 96–106 (*ante*, §§ 500–565). — (W. § 1022.) [1]

Illustrations. See Rule 107 (*ante*, § 568).

578 ART. 2. *Cross-examination.*

Par. (*a*). The rule does not prevent *questioning* as to collateral facts *on cross-examination* to elicit self-contradictions, but only forbids the proof by calling other witnesses. [1] — (W. § 1023.)

Par. (*b*). The rule prevents proof of an assertion which is inconsistent only with the witness' answer to the preliminary question required by Art. 3 *infra* on cross-examination. — (W. § 1038.)

579 ART. 3. *Preliminary Warning.* Before calling other witnesses to evidence the self-contradictory statement, the cross-examining counsel must, on the principle of preventing unfair surprise (Rule 161, *post*, § 1326), ask the witness whether he made the supposed inconsistent statement; — (W. §§ 1025–1028)

Cross-reference. Compare the application of this rule to *bias-utterances* (Rule 102, Art. 2, *ante*, § 539) and to *parties' admissions* (Rule 116, *post*, § 633).

subject to the following details:

580 *Par.* (*a*). The question may be asked on cross-examination; but if not then asked, the witness may be *recalled for re-cross-examination* to put the question. — (W. § 1036.)

581 *Par.* (*b*). The question must be *specific* enough, as to the time, place, and other circumstances of the supposed inconsistent statement, so that the witness may be enabled to identify it if made. [2] — (W. § 1029.)

[1] A few Courts state the contrary.

[2] Most Courts enforce the rule in this form, but too technically. It is plainly covered by the rule for trial Court's discretion (Rule 18, *ante*, § 49).

Par. (*c*). The question may be dispensed with [[where
582 the absence or decease of the witness, or other circumstances, make it impracticable;[1] in particular,]]
where the testimony containing the statement to be self-contradicted is in the form of

[(1) a *deposition*.][2] — (W. § 1031.)

[(2) testimony at a *former trial*.][3] — (W. § 1032.)

[(3) *hearsay utterances* of a dying declarant, attesting witness, or the like.][3] — (W. § 1033.)

[(4) testimony of an *absent person admitted* under Rule 231 (*post*, § 2140), to avoid a postponement, provided its truth has not been conceded.][4] — (W. § 1034).

Par. (*d*). The question is equally required where the
583 supposed *self-contradictory statement* is contained in a *deposition* or other sworn statement. — (W. § 1035.)

Par. (*e*). Where the supposed self-contradictory
584 statement was made *in writing*, the method of putting it is governed by Rule 127 (*post*, § 812).

Par. (*f*). The self-contradictory statement is ad-
585 missible even though the witness

(1) fails to deny making it,[5] — (W. § 1037, nn. 1, 2.)
[or, (2) admits making it.][6] — (W. § 1037, n. 3.)

ART. 4. *Self-Contradiction defined.* A statement admissible
586 as a self-contradictory assertion may be in any form of utterance or conduct expressly or impliedly exhibiting a belief inconsistent with the assertion in the present testimony;[7] — (W. § 1040)
in particular:

[1] No Court lays down this broad rule.
[2] The authorities are divided; most are *contra*.
[3] Most Courts agree on this.
[4] Most Courts are *contra*.
[5] All Courts now agree to this.
[6] Many Courts deny this.
[7] Some Courts would not phrase it so broadly.

Cross-reference. For *conduct*, compare *admissions by conduct* (Rule 118, *post*, § 641).

587 *Par.* (*a*) It may [not] be an *opinion*.[1] — (W. § 1041.)

Illustration. An eye-witness who testifies to facts exonerating the defendant may be impeached by an opinion expressed that the defendant was guilty.

588 *Par.* (*b*) It may be a *silence* when a positive assertion would have been natural. — (W. § 1042.)

Illustration. A witness testifying to the presence of an accomplice at a murder may be impeached by his failure, when testifying at the committal, to mention anything about an accomplice.

ART. 5. *Self-Contradictory Statement not Testimony.* The statement offered as inconsistent is admissible only for the purpose of discrediting the witness' testimony as given on the stand; therefore,

589 *Par.* (*a*) It is not *of itself testimony*.[2] — (W. § 1018, n. 2.)

590 *Par.* (*b*) It may be excluded, where a prior positive assertion, offered to contradict the witness' negative assertion or *failure to recollect* on the stand, is in danger of being misused by the jury.[3] — (W. § 1043.)

ART. 6. *Explaining the Inconsistency.* The witness is 591 allowed and entitled on re-examination to explain away the inconsistency of the statement; (W. § 1044.)

and for this purpose

[*Par.* (*a*) he may make the explanation on *cross-examination* at the time of being questioned under Art. 3 above];[4]

Par. (*b*) he may testify to such other parts of the statement as explain its significance, subject to Rule 185 (*post*, § 1576). — (W. § 1045.)

[1] Most Courts have the unsound notion that the opinion rule applies some limit here.
[2] This is a truism, usually forming a quibble in instructions.
[3] This rule is usually too strictly enforced.
[4] This is probably not the law; but the cross-examiner should not be allowed to choke off the explanation.

SUB-TITLE III:

TESTIMONIAL REHABILITATION (SUPPORTING OR RESTORING A WITNESS' CREDIT)

RULE 109. *General Principle.* When evidence to diminish
595 a witness' personal credit in any of the foregoing ways has been received, evidence relevant to restore the witness' credit, by denying the discrediting fact or by explaining away its significance, may be introduced; subject to the following detailed rules. — (W. §§ 1100, 1101.)

Distinguish the general process of *rebutting* the opponents' evidential facts relevant to the case; there the rules as to *order of evidence* are involved (Rules 163–4, *post*, §§ 1352, 1377).

TOPIC I:

REHABILITATION AFTER IMPEACHMENT

RULE 110. *Introducing Good Moral Character.* A witness'
596 good moral character for veracity [or for morality in general] [1] may be introduced after his moral character has been impeached; but not before; — (W. § 1104)
that is to say, after evidence

Par. (*a*) of his *abstract moral character for veracity* [or
597 character in general]; [1] — (W. § 1105.)

[*Par.* (*b*) of *particular instances of* misconduct, admitted
598 on cross-examination or evidenced by conviction of crime, under Rule 101 (*ante*, §§ 532–534);] [2] — (W. § 1106.)

Par. (*c*) of *corruption*, under Rule 103 (*ante*, §§ 540–
599 545); — (W. § 1107.)

[1] The bracketed clause applies in Courts permitting impeachment by general bad character under Rule 98, Art. 1, (*ante*, § 519).

[2] Courts differ on this point; but the above rule seems the fairer.

600 *Par.* (*d*) but *not* of *bias* or of *interest*, under Rule 102, 104 (*ante*, §§ 535, 546); — (W. § 1107.)

601 [*Par.* (*e*) *nor* of *self-contradiction*, under Rule 108 (*ante*, §§ 574–586);][1]

602 *Par.* (*f*) *nor* of error evidenced by *contradiction*, under Rule 107 (*ante*, §§ 567–572).[2]

603 RULE 111. *Other Methods involving Moral Character.* The witness' good moral character may also be rehabilitated in the following ways:

ART. 1. *Discrediting the Impeaching Witness.* The impeaching witness who has testified to bad moral character may be discredited,

604 *Par.* (*a*) by evidence of his *own bad moral character*, under Rules 97, 98 (*ante*, §§ 503, 519);

605 *Par.* (*b*) by requiring him to specify the *particular rumors or statements* that formed the basis of the bad repute as testified by him. — (W. § 1111.)

Distinguish the cross-examination of a *supporting* witness as to *rumors of misconduct* (Rule 105, *ante*, § 557).

ART. 2. *Denying or Explaining Bad Repute.* The supposed bad reputation may be rebutted, — (W. § 1112.)

606 *Par.* (*a*) by other testimony *denying it;*

607 *Par.* (*b*) by cross-examining the witness to the grounds of his assertion, under Rule 105 (*ante*, § 557).

ART. 3. *Denying or Explaining Particular Misconduct.* After impeachment by evidence of particular acts of misconduct, either admitted on cross-examination or evidenced by record of conviction,

[1] The Courts are divided on this point.
[2] A few Courts are *contra*.

608 *Par.* (*a*) the misconduct may not be denied; except by showing a pardon or reversal for a conviction; — (W. § 1116.)

609 *Par.* (*b*) but it may be explained away

(1) by calling witnesses to good moral character, under Rule 110 (*supra*, § 598);

(2) by the circumstances of extenuation, stated on re-examination; [1] — (W. § 1117.)

[(3) by any other explanation called for in fairness to the witness].[2] — (W. § 1117.)

611 RULE 112. *After Impeachment by Bias, Interest, etc.* After impeachment by evidence of bias, interest, self-contradiction, or otherwise, the witness may be rehabilitated (W. § 1119)

(1) by denying the evidential facts;

(2) by explaining them away, as provided in Rules 102, 104, 108 (*ante*, §§ 535, 546, 574);

or, (3) by any other mode appropriate in the circumstances; [3]

but, (4) not by introducing good moral character, pursuant to Rule 110 (*ante*, § 596).

Topic II:

Rehabilitation by Prior Consistent Statements

612 RULE 113. *Witnesses in General.* A witness' prior statement, consistent with that now made by him on the stand, is not admissible before impeachment. — (W. §§ 1122–1124.)

Art. 1. *Statements admissible after Impeachment.* Such statements are admissible when relevant to rebut some impeaching evidence already introduced;

that is to say, they are

[1] Some Courts may hesitate here.

[2] This broad rule is not so stated by Courts, but seems simple and adequate.

[3] This general clause is needed to provide for new modes not yet passed upon.

613 *Par.* (*a*) [not] admissible to rebut deficient ***moral character***;[1] — (W. § 1125.)

614 *Par.* (*b*) [not] admissible to rebut ***particular misconduct*** admitted on cross-examination or evidenced by conviction of crime.[2] — (W. § 1131.)

615 *Par.* (*c*) [not] admissible to rebut ***prior self-contradictions***,[3] [unless the utterance of the alleged self-contradiction is denied and the consistent statements tend to support the denial][4]; — (W. § 1126.)

616 *Par.* (*d*) [not] admissible to rebut a ***contradiction by other witnesses***.[5] — (W. § 1127.)

617 *Par.* (*e*) admissible to rebut evidence of ***bias***, ***interest***, or ***corruption***, if made before the time of the supposed discrediting influence;[6] — (W. § 1128.)

618 *Par.* (*f*) admissible to rebut circumstances indicating ***recent contrivance*** of testimony, if made before the time of the supposed contrivance; — (W. § 1129.)

Illustration. The defendant, if guilty, must have been at a place on the 14th, and could have been there once only; he testifies that he was there on the 7th; to corroborate this, his statement on the 9th, alluding to being there on the 7th, is admissible.

619 *Par.* (*g*) admissible to ***corroborate testimony identifying*** a person in court, when involving a former identification made before danger of false suggestion. — (W. § 1130.)

Cross-reference. This could also come in under Rule 89 (*ante*, § 443).

621 RULE 114. *Special Classes of Witnesses.* A prior consistent statement is also admissible for the following special classes of witnesses as herein prescribed:

[1] A few Courts admit. [2] A few Courts admit.
[3] A large number of Courts admit.
[4] This bracketed clause represents the Michigan rule, which is sound and is accepted by a few Courts.
[5] A few Courts admit.
[6] Some Courts confuse this with the next case (par. *f*).

ART. 1. *Rape Complainant.* On a charge of rape, the
622 woman's failure to make fresh complaint being relevant as a self-contradiction under Rule 108, Art. 4 (*ante*, § 586), her making of complaint is admissible by way of rebuttal of her supposed silence; — (W. § 1134.)

subject to the following provisions:

Par. (*a*). The mere fact of making complaint, including
623 its time, place, and addressee, is always admissible [if the woman has testified.] [1] — (W. §§ 1135, 1136.)

Par. (*b*). The lapse of time between the alleged rape
624 and the complaint does not [usually] exclude.[2] — (W. § 1135.)

Par. (*c*). The *detailed statements* of the complaint, in-
625 cluding the identification of the man, are

(1) [admissible if the woman has testified, and if the complaint was freshly made.] [3] — (W. § 1138.)

(2) [admissible if the woman has testified and if some impeaching evidence has been introduced.] [4] — (W. § 1138.)

(3) [admissible under Rule 154 (*post*, § 1237) if the complaint was freshly made, even though the woman does not testify.][5] — (W. §§ 1139, 1760.)

[ART. 2. *Bastardy Complainant.* On an issue of bastardy
626 and the child's paternity, the mother's utterance in travail identifying the father is admissible.] [6] — (W. § 1141.)

[ART. 3. *Owner's Complaint after Theft.* On a charge
627 involving larceny or robbery, the complaint of the owner or bailee, freshly made, is admissible.] [7] — (W. § 1142.)

[1] A few Courts add this clause.
[2] Some Courts follow the bracketed word.
[3] Many Courts adopt this form; but the second clause is unsound.
[4] Many Courts adopt this form, thus consistently applying the ordinary Rule 113 above.
[5] Some Courts adopt this form, making it an exception to the hearsay rule.
[6] A few Courts recognize this; all ought to. Statutes occasionally provide for it.
[7] Several Courts recognize this, usually with quibbling qualifications.

628 [ART. 4. *Accused's Exculpations.* The exculpatory or explanatory statements of an accused, made freshly after notice of the accusation, are admissible.][1] — (W. § 1144.)

Cross-references. Compare the rule for an *accused's* statements in *possession of stolen goods* (Rule 155, *post*, § 1245), an accused's statements indicating *mental condition* (Rule 153, *post*, § 1213), and an accused's *conduct* indicating *consciousness of innocence* (Rule 118, Art. 8, *post*, § 665).

[1] A few Courts accept this; but common sense demands its general extension; for the principle of Rule 113 (*ante*, § 618) applies.

SUB-TITLE IV: PARTIES' ADMISSIONS

Topic I: General Principles

RULE 115. *Definition.* Any utterance, made by a party
630 (or by one for whom he is responsible under Rule 121, *post*, § 685), asserting any relevant fact, in express words or by implication, and offered against the party, is termed an Admission, and is receivable. — (W. § 1048.)

(*Reason.* A party's admission is receivable on the same principle as a witness' inconsistent statement offered to impeach his testimony (Rule 108, *ante*, § 574); because the party has in theory placed himself in the attitude of disputing not only the main issues but all the opponent's evidential facts adduced in their support, and thus any utterance of his which is consistent with any of the opponent's alleged facts is thereby inconsistent with the first party's presumed denial of them, and thus discredits that denial. Nor is it usually necessary for the inconsistency to be shown as a condition precedent, for the opponent's desire to use the admission indicates that it has some such significance.)

RULE 116. *Limitations not Applicable.* A party's admission is not subject to the following limitations:

Art. 1. *Hearsay Exceptions.* A party's admission, not
631 being governed by the hearsay rule (Rule 134, *post*, § 910), need not satisfy any of the exceptions to that rule, and is therefore receivable,

Par. (*a*) though the facts stated were not *against interest* at the time; — (W. § 1048.)

Par. (*b*) though the party is not *deceased* or otherwise
632 unavailable. — (W. § 1049.)

Art. 2. *Witness' Self-Contradictions.* A party's admission
633 is not subject to Rule 108, Art. 3 (*ante*, § 579) requiring

a witness to be warned by prior inquiry as to a supposed self contradiction. — (W. § 1051.)

634 ART. 3. *Witness' Qualifications.* A party's admission is not subject to any rule prescribing testimonial qualifications as to knowledge or the like. — (W. § 1053.)

635 ART. 4. *Not Conclusive (Estoppels; Solemn Admissions; Explanations; Corroboration).* A party's admissions, being merely evidential to discredit his present assertions and support the opponent's, are not conclusive; hence,

636 *Par.* (*a*) the rules of substantive law arising from *estoppel*, *warranty*, or the like, do not apply; — (W. § 1056.)

637 *Par.* (*b*) the rules of pleading and practice, arising from a *solemn admission*, *judicial admission*, *stipulation*, or other *waiver* effecting a limitation of issues (Rule 231, *post*, § 2140), do not apply. — (W. § 1057.)

638 *Par.* (*c*) the party may introduce any suitable other evidence supporting his case and contrary to the admissions; in particular, any circumstances *explaining* the grounds for an express admission, or *rebutting* the inference of an implied admission under Rules 118–121, (*post*, § 664). — (W. § 1058.)

Cross-references. Compare the effect of the rule as to *putting in the precise words* or *the whole* of an admission (Rule 185, *post*, § 1575), and as to *testifying to one's meaning* (Rule 174, *post*, § 1459).

639 *Par.* (*d*) the party may [not] introduce *other utterances* of his, *consistent* with his present claim, on the conditions applicable to a witness' corroboration under Rule 113, Art. 1 (*ante*, § 613).[1] — (W. § 1126, n. 3, § 1133.)

Cross-reference. Compare the rule admitting such statements when part of a *verbal act* (Rule 155, *post*, § 1245).

640 RULE 117. *Limitations applicable.* A party's admission is subject to the following limitations for specific classes of admissions:

[1] The "not" is law in most States.

Par. (*a*) the *confessions* of the *accused* in a criminal case are admissible only on the conditions named in Rule 122 (*post*, § 700), and when admitted they are not sufficient to sustain a conviction except on the conditions named in Rule 180, Art. 7 (*post*, § 1530.)

Par. (*b*) in issues involving *marriage* and *grounds for divorce* the party's admissions are sufficient to sustain a verdict or decree on the conditions named in Rule 181, Art. 3 (*post*, § 1537).

Par. (*c*) in issues involving a *document* a party's admissions as to its *contents* are receivable subject to Rule 127, Art. 2 (*post*, § 807), and as to its *execution*, subject to Rule 130, Art. 5 (*post*, § 852).

Topic II:

Implied Admissions

RULE 118. *Sundry Implied Admissions.* Any conduct or
641 utterance of a party may, in the circumstances of the case, be open to the inference that the party thereby expressed a belief in the truth of some fact; and is then receivable as an implied admission; subject to the further Rules 119–121, when applicable. — (W. § 1060.)

Distinction. An *express* admission is only an evidential fact (not conclusive; *ante*, § 635), *i. e.* merely permits an inference from it to the truth of the fact admitted; and this inference can be explained away by the party (*ante*, § 635). In an *implied* admission, there is needed an additional and prior inference, *i. e.* from the party's conduct or utterance to his belief, thus arriving at a point equivalent to an express admission. It offers thus two opportunities for rebuttal; viz. the rebuttal of the inference that there was an admission at all; and, next, the rebuttal or explanation of the admission, as for express admissions (*ante*, § 635).

Cross-reference. For the rule that the *precise words* of an admission must be offered, see Rule 183 (*post*, §1549).

Art. 1. *Offer to Compromise.* An offer by one party to the
642 other, *i. e.* if by a plaintiff, to accept compensation, and if by a defendant, to make compensation, being open to the infer-

ence that it proceeds only from a desire to end controversy and not from a concession of the correctness of the opponent's case, is not receivable. — (W. §§ 1061, 1062.)

643 *Par.* (*a*). An express admission, though made in course of negotiations for settlement of a claim, is receivable.

644 *Par.* (*b*). Whether a statement is receivable under the present rule does not depend upon whether it is made with a request for secrecy, or with a proviso "without prejudice," or in the course of negotiations for settlement of a claim.[1]

Illustrations. (1) In an action for money owed for broker's commissions to the amount of $100, the defendant writes to the plaintiff's attorney offering to pay $50 if he will give a release; this offer is not admissible; but if the letter contains the express statement that the plaintiff did earn $100 in commissions but that there is a set-off of $50, and thus the defendant is willing to pay $50 to settle, the express admission is receivable; and it is immaterial whether the letter is headed "confidential" or "without prejudice."

(2) In an action for injuries received in a railroad collision, the defendant's payment of money for a release from another person injured in the same collision is not receivable; but his express statement, made to the other person, "We are responsible for this collision," is receivable.

645 *Par.* (*c*). An offer to *confess judgment*, or a *payment of money into court*, made according to a rule of procedure for the purpose of limiting the issues or of affecting the costs of suit, is not receivable as an admission.[2]

Cross-reference. For the scope of *privileged communications* with *attorneys*, see Rule 205 (*post*, §1765).

647 ART. 2. *Measures of Prevention or Remedy.* A party's conduct in taking measures to prevent a future harm or to remedy a past harm is receivable, if in the circumstances of the case it is open to the inference that it proceeds from a belief in the facts as alleged by the opponent.[3] — (W. § 282.)

[1] This article represents the rule now accepted in the best opinion; though in many Courts there are rulings which incorrectly emphasize one or another phase of it.

[2] Statutes sometimes so declare.

[3] Here much must depend on the trial Court's discretion (Rule 18).

Illustration. In an action for injury by the bite of a vicious dog, the owner's habit of keeping the dog tied by a strong chain is evidence of his admission that the dog is vicious.

Par. (*a*). The placing of *insurance* against a particular
648 risk of damage or liability is not receivable. — (W. §§ 282, 393, 949, 969.)

Par. (*b*). The *repairing* of a machine, place, or other
649 thing, after the happening of an injury thereat, is not receivable. — (W. § 283.)

Distinguish (1) an *act of control* over a place, by making repairs, etc., as indicating who is in possession;
(2) *change of condition* of a place or machine, caused by repairs, as relevant under Rules 72, 73 (*ante*, §§ 341, 344);
(3) the *custom of other persons*, in taking precautions to prevent injury, as relevant to the standard of care or reasonableness, under Rule 73 (*ante*, § 354).

ART. 3. *Personal Demeanor in Evasion of an Arrest, Charge,*
650 *or Suit.* A party's conduct before, at, or after the time of being arrested, charged, or sued, is receivable, if in the circumstances of the case it is open to the inference that it proceeds from a belief in the truth of the case alleged against him; [1] — (W. § 273.)
in particular,

651 *Par.* (*a*) his *demeanor* during trial.[2] — (W. § 274.)

Par. (*b*) his *flight, escape, resistance,* or *concealment.* —
652 (W. § 276.)

Cross-reference. That the accused may explain away the inference by showing subsequent voluntary submission, etc., is noted *post*, Art. 8 (§ 665).

Par. (*c*) but not his *transfer of property* to avoid execu-
653 tion on a possible judgment.[3] — (W. § 282, n. 2.)

[1] Here the rule of trial Court's discretion should be supreme (Rule 18, *ante*, § 49).
[2] This is always admissible, without rules as to specific forms of demeanor; except in Illinois.
[3] This is the state of the rulings, and seems fair.

ART. 4. *Fabrication and Suppression of Evidence.* A party's
654 conduct in personally falsifying evidence,
in falsely fabricating it,
in taking measures to destroy or suppress it,
in bribing,
or the like,
is receivable. — (W. § 278.)

Distinctions. (1) The *impeachment of a witness* by his acceptance or offer of a bribe, under Rule 103, (*ante*, § 540), is a different thing.

(2) An *accused's false statement* admissible under the present rule, is not an express *confession* subject to Rule 122 (*post*, § 701).

(3) A *falsely evidenced alibi* is open to the present inference, but not an alibi that merely fails in proof (W. § 279, n. 1); a failure to offer available evidence of an alibi is admissible under Art. 6 (*post*, § 658).

Par. (*a*). Such conduct in *another litigation* is receivable,
655 provided the issue or the supposed motive is substantially the same. — (W. § 280, n. 1.)

Distinguish the use of other frauds as evidence of *intent* under Rule 65 (*ante*, § 301).

Par. (*b*). Such conduct by a *third person* is not receiv-
656 able as an admission unless the party's connivance therewith is evidenced.[1] — (W. § 280.)

ART. 5. *Failure to Sue, Claim, Prosecute, or Defend.* A
657 party's failure, delay, or reluctance to sue, prosecute, defend, or make claim, is in the circumstances of the case receivable.[2] — (W. § 284.)

Cross-references. In the following instances the rule is illustrated, but the question arises whether the failure may be explained away by certain evidence: (1) the woman's *complaint of rape* (Rule 114, *ante*, § 622); (2) the *mother's naming* of a *bastard's father* (Rule 114, *ante*, § 626); (3) the *owner's complaint of robbery* (Rule 114, *ante*, § 627); (4) the *accused's explanation* of the *possession of stolen goods* (Rule 155, *post*, § 1245).

[1] Courts are here commonly too strict.
[2] This is universally conceded; but the circumstances should control.

ART. 6. *Failure to Produce Evidence.* An inference may be
658 drawn from a party's failure to offer in evidence some relevant circumstance, witness, document, or chattel, which would apparently be so useful to support his case or to rebut the opponent's that its use as evidence would be natural;

provided the evidence be not unavailable to the party by reason of his ignorance or its physical situation or the disqualification or privilege of a witness.[1] — (W. §§ 285–287.)

Par. (*a*). If the unproduced evidence is *available for*
659 *both parties*, the inference may [not] be drawn against either.[2] — (W. § 288.)

Par. (*b*). The inference may be applied, in a *civil*
660 trial, to a party's failure to *testify himself;* but otherwise in a *criminal* trial, pursuant to Rule 203 (*post*, § 1746). — (W. §§ 289, 290.)

Cross-references. For the distinction in a criminal trial between the accused's failure to *testify* and failure to *introduce* other evidence, see the same Rule 203, § 1748.

Par. (*c*). The inference that may be drawn is that the
661 fact which might have been evidenced by the unproduced evidence is not of the tenor alleged by the party failing to produce. — (W. § 290, n. 9.)

Par. (*d*). Where the issue is as to the nature of a
662 *chattel* or the *contents* of a *document* alleged to *exist*, the inference from non-production alone is not sufficient, without some other evidence of its identity with the chattel or document alleged.[3] — (W. § 291.)

Cross-reference. For the inference as to *execution* of a document, see Rule 189 (*post*, § 1597).

For the *presumption*, see Rule 228 (*post*, §2069).

Par. (*e*). Where the issue is as to the *non-existence*
663 of a document, the supposed possessor's failure to produce

[1] This rule is difficult to phrase, but its details tend to become mere quibbles.

[2] The affirmative is the most practical solution; Courts hold variously.

[3] This rule is variously phrased.

it may permit an inference as to its non-existence.[1] — (W. § 291, n. 12.)

664 ART. 7. *Explanations.* The party against whom any of the foregoing sorts of conduct is offered may introduce any circumstance relevant to explain away the inference and thus to rebut the implied admission. — (W. § 277, n. 7, § 281, § 290, n. 8.)

665 ART. 8. *Accused's Innocent Conduct.* In a criminal trial, the accused, to rebut the inference that might possibly be drawn from his supposed conduct in failing to deny or otherwise, may [not] introduce his conduct and utterances, after the act charged, tending to evidence his consciousness of innocence.[2] — (W. § 293.)]

Illustrations. Voluntary surrender to the police; protestations of innocence; assistance in searching for the perpetrator, etc.

Cross-reference. Compare Rule 114, Art. 4 (*ante*, § 628), and Rule 153, Art. 3 (*post*, § 1213), admitting an accused's explanatory statements.

666 RULE 119. *Admissions by Implied Assent to a Third Person's Statement.* A statement made by a third person under such circumstances that the party's assent to it may be implied is receivable as an implied admission of the party; — (W. § 1071.)
subject to the following detailed rules:

667 ART. 1. *Statements by a Person Referred to.* A statement made by a third person named by the party as one whose expected utterance he refers to and approves beforehand is receivable. — (W. § 1070.)

668 ART. 2. *Statements in a Party's Presence.* A statement made in a party's presence and not disputed or modified by him is receivable; provided in the circumstances that he

[1] A number of statutes apply this specifically to liquor-licenses, game-licenses, etc.
[2] Only a few Courts concede the affirmative; but it is nevertheless good sense.

probably heard it and that it was a statement likely to have elicited a correction if it were in his belief incorrect.[1] — (W. § 1072.)

Illustrations. (1) In an action for land, a conversation held between A and B concerning the boundary, in the presence of the now claimant, but before he had any interest in the title, is not admissible.

(2) In an action on an insurance policy, defended on the ground of misrepresentations as to health, the insured's acceptance of sick-benefit payments from a fraternal society is evidence of his admission that he was ill at the time.

ART. 2. *Statements in Judicial Proceedings.* Where the
670 statement was made in the course of a judicial proceeding, the silence of a person present does not ordinarily permit the inference of his assent; — (W. § 1072:)

in particular,

Par. (*a*) when it was made by a *witness, counsel,* or *public officer* in the course of his duty;

Par. (*b*) when it was made by a *police officer* [or other person] in the presence of an accused.[2] — (W. § 1072.)

Cross-references. Compare the rules for (1) *failure to testify,* as an admission under Rule 118 (*ante,* § 658), (2) *failure to testify,* as a self-contradiction *impeaching a witness* under Rule 108 (*ante,* § 586).

ART. 3. *Writings in Possession.* Where the statement is
671 contained in a writing sent to the party or found in his possession, the inference of assent may be drawn from the party's failure to reply or otherwise to express his denial, if the circumstances would naturally elicit one; — (W. § 1073.)

in particular, when the statement is

Par. (*a*) a statement of a *claim for liability;*

Par. (*b*) a statement of *account.*

Distinguish the rule as to *Knowledge* (Rule 62, *ante,* § 289).

ART. 4. *Writings Used.* Where the statement is in a
672 writing used by the party, the inference of assent may be

[1] There are here various phrasings; the circumstances should control.

[2] Many Courts extend this to statements by private persons to an accused under arrest; but that is going too far; it depends on the circumstances.

drawn, unless in the circumstances there is an implied repudiation;

in particular, it may be drawn when the statement is

673 *Par.* (*a*) in *proofs of loss* presented by the beneficiary under an insurance policy.[1] — (W. § 1073, n. 5.)

674 *Par.* (*b*) in *account-books* of a *partnership*, as against a *partner*.

675 *Par.* (*c*) in *account-books* of a *corporation*, as against a *stockholder* [who has had access to them.][2] — (W. § 1074, n. 6.)

676 *Par.* (*d*) [but not] in *stock-books* of a corporation, as against one denying that he is a stockholder.[3] — (W. § 1074, n. 8.)

Cross-reference. The books may nevertheless be admitted, under the exception to the hearsay rule, as regular entries (Rules 142–3, *post*, §§ 1002, 1018).

677 *Par.* (*e*) in *depositions*, affidavits, and other forms of testimony introduced by party, if knowingly used for the purpose of evidencing the specific fact asserted. — (W. § 1075.)

Cross-reference. Compare the rule for *pleadings* (Rule 120, *post*, § 680).

Topic III:

Admissions in Pleadings

680 RULE 120. *General Principle.* Since the admissions of an attorney or counsel in the management of a litigation are receivable against the party-client pursuant to Rule 121 (*post*, § 687), the documents of pleading filed in litigation by an attorney or counsel may be introduced against the party; subject to the following exceptions and details:

[1] On the point of *conclusiveness*, the opposite is generally and properly held.

[2] Therefore ordinarily excluded, as most Courts hold.

[3] Most Courts however admit them, but on the other theory above mentioned.

ART. 1. *Common-Law Pleadings in the Same Cause.* All
681 documents of pleading filed in the same cause at common law, being conclusive waivers of proof under Rule 231 (*post*, § 2140), may be referred to by counsel as admissions without formal offer in evidence.[1] — (W. § 1064, n.)

Par. (*a*). *Except* that a pleading on a *separate issue* in the same cause, being intended to avoid dispute apart from that separate purpose, cannot be so used. — (W. § 1064, n. 2.)

ART. 2. *Chancery Pleadings in Other Causes.* A pleading
682 of the party in another cause in chancery is receivable evidentially as an admission in the present cause,

(*a*) if it be an answer.

[(*b*) or a bill.][2] — (W. § 1065.)

ART. 3. *Common-Law Pleadings in Other Causes.* A
683 pleading of the party in another cause at common law is

[(1) not receivable.]

[(2) receivable evidentially as an admission in the present cause, so far as the statements are not expressly hypothetical,

(*a*) if the party signed the pleading

(*b*) or had personal knowledge of its contents.][3] — (W. § 1066.)

ART. 4. *Superseded or Amended Pleadings.* A party's
684 pleading, now withdrawn or changed by amendment, is [not] receivable evidentially as an admission in its original tenor.[4] — (W § 1067.)

TOPIC IV:

ADMISSIONS BY CO-PARTIES, AGENTS AND PRIVIES

RULE 121. *General Principle.* An admission made by
686 another person than the party is receivable against the party

[1] This is not law in Massachusetts.

[2] Many Courts are *contra;* some agree, if the bill is sworn to.

[3] In Common-law States Clause (2) is not law. In Code States it is, though clause (*b*) is not recognized by all. Neither clause (*a*) nor clause (*b*) is sound.

[4] The majority of Courts accept the affirmative.

when that other person is so united in interest on the subject of the admission that his acts may in the substantive law affect the party. Subject to the provisions of the substantive law thus determining the question, the following rules apply: [1]

ART. 1. *Nominal, Representative, and Joint Parties.* The
686 statement of another person is not receivable by reason of his being a nominal party, or a co-party (civil or criminal); and the statement of the same natural person made in another capacity (trustee, guardian, etc.) is receivable against him in that capacity only. — (W. § 1076.)

ART. 2. *Privies in Obligation (Promisor, Agent, Attorney,*
687 *etc.).* The statement of the other person is receivable whenever he is by the substantive law one who could at the time make the party liable in the class of matters mentioned; — (W. §§ 1077–1079.)

that is, among others,

(*a*) a *co-promisor;*
(*b*) a *principal debtor;*
(*c*) an *agent;* [2]
(*d*) an *attorney-at-law;*
(*e*) a *partner;*
(*f*) a *wife* or *husband;*

Cross-reference. For the *privilege* against using them, see Rule 202 (*post*, § 1713).

(*g*) a *co-conspirator;*

Cross-reference. For the *order of evidence* here, see Rule 163 (*post*, § 1352).

(*h*) a joint *tortfeasor.*

ART. 3. *Privies in Title;* 1. *Co-existent Interests (Co-*
688 *obligee, Co-legatee, etc.).* So far as a title or interest, as claimed

[1] The whole matter depends on the substantive law, and may be condensed in a code of evidence, only for the purpose of discriminating those points where the substantive law enters.

[2] The phrase *res gestae* is here not used; it merely confuses. The above phrasing is more liberal than the rule as now enforced in practice.

by a party, could be affected, under the substantive law, by the acts of another person claiming a co-existing interest in the same property, the statements of the other person are receivable against the party as admissions. — (W. § 1081.)

689 *Par.* (*a*). The statements of the other co-claimant are in any case receivable as against himself when he is joined as a party in the litigation.

Illustration. A co-legatee's admissions of the testator's insanity, though they may not be receivable as admissions against the other legatees, would still be receivable against himself if a party.[1]

690 *Par.* (*a*). The foregoing principles receive application to

(1) *co-tenants;*
(2) *co-trustees;*
(3) *co-obligees in contract;*
(4) *co-legatees.*

691 ART. 4. *Privies in Title:* 2. *Successive Interests, depending on Death or Act of Law* (*Decedent, Insured, Bankrupt*). So far as a title or interest, as claimed by the party, could be in the substantive law affected by the acts of another person, whose interest has been acquired after death or by act of law, the statements of that person are receivable as admissions; — (W. §§ 1080, 1081.)

that is, among others, the statements, made while still claiming an interest, of

(*a*) the *decedent* of an heir, legatee, executor, or administrator;

(*b*) the *ward* of a guardian or conservator;

(*c*) the *insured* of the beneficiary of a life-insurance policy;

(*d*) the *debtor* of a creditor levying legal process.

692 ART. 5. *Privies in Title;* 3. *Successive Interests, depending on Grant, Sale, or Indorsement.* So far as a title or interest, as claimed by the party, could be affected by the acts of another person whose interest has been acquired by grant,

[1] This is in most Courts not law as regards co-legatees.

sale, or indorsement, the statements of that person are receivable as admissions; — (W. § 1082.)

that is, the statements made

693 *Par.* (*a*) by a *grantor* of *realty*, while *still claiming* an interest therein. — (W. § 1082.)

Distinctions. (1) The exception to the hearsay rule, for statements of *facts against interest* (Rule 139, *post*, § 968), may also serve, if the declarant is *deceased*.

(2) The rule for *producing the original document of title* may exclude such statements, if the admissions refer to the contents of the document (Rule 127, *post*, § 807).

(3) The scope of the hearsay rule, for declarations of *intent* (Rule 153, *post*, § 1207) has in a few States sufficed for receiving the admissions of a debtor-grantor where creditors aim to set aside a transfer as being made with fraudulent intent. — (W. § 1082, n. 6.)

694 *Par.* (*b*) by a *grantor* of *personalty*, while *still claiming* an interest therein.[1] — (W. § 1083.)

695 *Par.* (*c*) by a prior *holder of a negotiable instrument*, while *still claiming* an interest, in so far as the transfer does not free it from equities and other personal defences.[2] — (W. § 1084.)

696 *Par.* (*d*) but not by a *grantor*, of *realty* or of *personalty*, when made *after transfer* of interest. — (W. § 1085.)

697 *Par.* (*e*) and, in particular, not by a *grantor*, of realty or personalty, when made *after transfer* of interest, where the grantor is a *debtor* and the statements are offered by an attaching creditor *against a transferee* in alleged *fraud* of creditors.[3] — (W. § 1086.)

Distinguish the following rules under which the evidence may nevertheless be receivable:

(1) The rule for *co-conspirators' admissions* (*ante*, Art. 2, § 687) which receives the statements after other evidence of a conspiracy between grantor and grantee is introduced;

[1] In New York this is not law, except to a limited extent.

[2] This also is not law in New York.

[3] All Courts concede this; but most recognize the admissibility of the statements under one or more of the other rules distinguished.

(2) The rule for declarations *accompanying possession* and corroborating the presumption of ownership from possession (Rule 155, *post*, § 1245).

(3) The rule for declarations of *intent*, indicating an intent to defraud (Rule 153, *post*, § 1207).

Par. (*f*) but statements not receivable, under Par. (*e*)
698 against the transferee, are receivable against the creditor, whose claim assumes that the debtor's interest did not cease until the time of levy. — (W. § 1087, n. 3.)

Topic V:

Accused's Confessions

RULE 122. *General Principle.* An admission, made by the
700 defendant on trial, and stating expressly his doing of the act charged or some essential part of it, is termed a Confession.

When not made in open Court, it is inadmissible if it was made under circumstances involving such a hope of benefit or fear of harm as was likely to induce a false confession; subject to the following details and qualifications. — (W. § 822.)

Cross-references. (1) For the rule that the *whole of the confession* must be put in, see Rule 183 (*post*, § 1549).

(2) For the rule as to the *conclusiveness* of a *magistrate's report* of a confession, see Rule 131 (*post*, § 891).

(3) For the admissibility of a *co-conspirator's* confession, see Rule 121, Art. 2 (*ante*, § 687).

(4) For the admissibility of a *third person's* confession under the hearsay exception, see Rule 139 (*post*, § 968).

(5) For the necessity of *corroboration* of a confession when admitted, see Rule 180 (*post*, § 1530).

Art. 1. *Definition of Confession.* The rule for excluding
701 confessions does not apply — (W. § 821.)

(*a*) to the *conduct* of an accused evidencing guilty consciousness, under Rule 118 (*ante*, §§ 641–658);

(*b*) to the accused's *exculpatory* statements, denying guilt;

(*c*) to the accused's admission of a *subordinate fact*, not essential to the criminal act charged.

Illustrations. The accused, on a charge of murder, makes a statement admitting the buying of the knife on the day before and alleging (falsely) that he had been threatened by the deceased on a former occasion, and also offers a witness money to testify to such threats; none of this evidence is governed by the rule for confessions.

ART. 2. *Nature of the Inducement, in general.* The nature
702 of the inducement of hope or fear likely to evoke a false confession may be further tested by the following rules: — (W. §§ 824, 831.)

[*Par.* (*a*). The confession is inadmissible if it was
703 made under the influence of a threat or promise of such a nature that this particular man under these circumstances would thereby be fairly likely to confess falsely.][1] — (W. § 824.)

[*Par.* (*b*). The confession is inadmissible if it was made
704 under the influence of a threat or a promise.][2] — (W. § 825.)

[*Par.* (*c*). The confession is inadmissible if it was not
705 voluntary.][3] — (W. § 826.)

ART. 3. *Person in Authority.* A threat or a promise, to
706 make the confession inadmissible, must come from [some person having apparent power to fulfil the threat or the promise;

and, if the threat or promise concerns the result of the legal proceedings, it must come from some person having influence over the prosecution.][4] — (W. §§ 827–830.)

ART. 4. *Specific Threats and Promises.* In applying the principle to specific threats or promises, in the absence of other controlling circumstances the following rules apply: [5]

[1] This is the orthodox test; the other two are unsound.
[2] Many Courts use this broader test.
[3] Most Courts say this; but of itself it signifies nothing apart from the further details.
[4] Courts differ widely in this respect. The above rule represents a fair medium.
[5] The ensuing rules ought not to be used as such; but they are, in the law of to-day.

707 *Par.* (*a*) a confession influenced by the advice that it would be *better to tell the truth* is [not] admissible.[1] — (W. § 832.)

708 *Par.* (*b*). A confession influenced by a *threat of corporal violence* is inadmissible. — (W. § 833.)

709 *Par.* (*c*). A confession influenced by a *promise of pardon* is inadmissible. — (W. § 834.)

710 *Par.* (*d*). A confession influenced by a promise of *lighter punishment*, milder treatment in prison, cessation of prosecution, release from arrest, or non-arrest or non-prosecution, is not admissible.[2] — (W. §§ 835, 836.)

711 *Par.* (*e*). A confession influenced by the assurance that what is said will be *used for him*, or *against* him, is admissible. — (W. § 837.)

712 *Par.* (*f*). A confession influenced by the advice that he had *better confess* is not admissible.[3] — (W. § 838.)

713 *Par.* (*g*). A confession influenced by *religious* or *moral exhortations* is admissible. — (W. § 840.)

714 *Par.* (*h*). A confession influenced by a *trick* or *fraud* is admissible. — (W. § 841.)

715 ART. 5. *Mental Incapacity.* A confession made during intoxication or other influence disturbing the mental condition is admissible, unless the person was at the time wholly irresponsible mentally.[4] — (W. §§ 499, 500.)

716 ART. 6. *Confessions during Legal Proceedings.* The mere fact that the person while confessing was

(*a*) under arrest, or

(*b*) under examination by a magistrate, with or without oath,

[1] A majority of Courts accept the negative.
[2] Probably every Court would accept this; though it is unsound as a fixed rule.
[3] This is unsound; but practically all Courts so hold.
[4] There is little authority; but it is wiser to admit such confessions except in extreme cases.

does not, of itself and apart from any of the preceding rules, render a confession inadmissible; except as follows;[1] (W. §§ 842–846.)

717 *Par.* (*a*). The mere fact of *arrest*, or of interrogation by a police officer while under arrest, does not exclude.[2] — (W. §§ 847, 851.)

718 *Par.* (*b*). The fact of being *under examination as accused without oath* before a magistrate does not exclude.[3] — (W. §§ 848, 852.)

719 *Par.* (*c*). The fact of being *under examination as accused on oath* before a magistrate, does not exclude

(1) [unless the answers are not made voluntarily.]

(2) [unless the answers are made in ignorance that he is privileged not to answer.][4] — (W. §§ 849, 852.)

720 *Par.* (*d*). The fact of being *under examination as a witness on oath* does not exclude

(1) [unless after claim of privilege an answer is compelled in violation of the privilege against self-crimination under Rule 203 (*post*, § 1740.)][5]

(2) [unless under the circumstances the witness is virtually in the position of an accused and the answers are not made voluntarily.][6] — (W. §§ 850, 852.)

[1] No Court yet accepts the above broad principle; but it is thus stated in order to make more separable the ensuing exceptions, some of which totally undermine the rule as first stated.

[2] This is law everywhere except in Texas and perhaps in England.

[3] This is law in England, but not in many American States; it is law in others; in still others it is law when the additional clause in Par. (*c*) is fulfilled.

[4] This is not law in England, by statute. In the United States some Courts accept the simple rule without brackets; others add one or the other of the two bracketed clauses; a few follow the English rule.

[5] This is the rule in England and in many States.

[6] This is the rule in some States which accept clause (1) under Par. (*c*) above. Still other States have slightly differing details.

The sound rule in all four paragraphs is the portion without brackets.

Illustration. On a trial for murder, the prosecution offers the answers made by the now accused when he testified as a witness before the coroner, being under suspicion but not arrested, and the answers made by him afterwards when arrested and examined before a magistrate for committal; both of these ought to be admissible, but some Courts would exclude the latter if made on oath, or if made without receiving a caution as to his privilege; some Courts would exclude the former if made without receiving a caution.

721 ART. 7. *Terminating the Inducement.* If an improper inducement (threat or promise) appears to have been given, a confession made thereafter is inadmissible, unless the influence of the inducement upon the accused appears to have been negatived in the meantime. — (W. §§ 853–855.)

Illustration. After a promise by the chief of police to release an accused if he confesses and discloses the principal offender, the prosecuting attorney warns the accused that no promises will avail to release him; a confession made before this warning is inadmissible, but one made afterwards is admissible.

722 ART. 8. *Confirmation by Discovered Facts.* If, in consequence of a confession which is otherwise inadmissible, search is made and circumstances are discovered which confirm its correctness in material points,

(1) [the confession becomes admissible.] [1]

(2) [the part of the confession thus confirmed becomes admissible.] [2]

(3) [the confession itself does not become admissible, but the discovery of the facts in consequence of the confession is admissible.] [3] — (W. §§ 856–859.)

Illustration. On a trial for murder by stabbing, the defendant's confession was made after improper promises, but a search made in the place named revealed the deceased's body buried as described in the confession; the whole confession should be admissible.

723 ART. 9. *Burden of Proof.* A confession is

(1) [admissible, unless it appears to have been made under improper inducement.]

[1] This is the law in a few States, and is the only sound rule
[2] This is the law in many States.
[3] This is the rule in a majority of States.

(2) [inadmissible, unless it appears to have been made without improper inducement.] [1] — (W. § 860.)

ART. 10. *Judge and Jury.* The admissibility of a confes-
724 sion is determined by the judge, who applies the foregoing rules, pursuant to Rule 229, Art. 1 (*post*, § 2101.) — (W. § 861.)

Par. (*a*). When a confession has been admitted, the
725 jury may in their deliberations reject it

(1) [if they regard it as not trustworthy.]

(2) [if they regard it as obtained by improper inducement under the foregoing rules of law.] [2]

Par. (*b*). The judge must hear evidence, if offered, on
726 the preliminary question of admissibility.

Par. (*c*). The jury may afterwards hear this and other
727 evidence affecting the trustworthiness of the confession, if it is admitted.

[*Par.* (*d*). The trial judge's determination of admissi-
728 bility is final, under Rule 18 (*ante*, § 52.)] [3]

TITLE III:

AUTOPTIC PROFERENCE (REAL EVIDENCE)

RULE 123. *General Principle.* Wherever the existence or
730 the external quality or condition of a person or thing is material or relevant to the issue, the third source of evidence (Rule 24, *ante*, § 105), namely, the inspection of the person or thing itself, by production before the tribunal, by experimentation, or by visit of the tribunal, is admissible, subject to any specific exception to the contrary. — (W. §§ 1150–1152.)

Distinctions. Inspection, as a source of evidence, may be forbidden by some *independent* rule of evidence equally applicable here (W. §§ 1154–1156); namely:

[1] The first bracketed clause is the sound rule; but a majority of Courts accept the second one.

[2] Many Courts accept the second bracketed clause; but the first is the only sound one.

[3] Many Courts profess this; few observe it.

(1) By some rule of *relevancy* of circumstantial evidence.

Illustration. The features of a child, resembling the defendant in a bastardy case, may not be admissible as evidence of paternity, under Rule 41 (*ante*, § 209); hence they could not be evidenced by inspection of the Court, any more than by testimony.

(2) By some rule of *privilege.*

Illustration. In a criminal case, the defendant may be privileged from compulsory self-crimination under Rule 203 (*post*, § 1737) by placing his foot in a mould to discover its shape; hence, the privilege applies equally to such compulsory disclosure for the tribunal's inspection; so also in a civil case, for the plaintiff in personal injury claims (Rule 201, *post*, § 1702).

ART. 1. *Unfair Prejudice.* An exhibition to the jury of
731 weapons, wounds, or other things calculated to excite emotional prejudice and overcome the reasoning powers, unfavorably to the party in a criminal or a civil case, may be forbidden by the Court in the circumstances of the case.[1] — (W. §§ 1157, 1158.)

ART. 2. *Indecency, Impropriety, Inconvenience.* An exhibition, inspection, or experiment, may in the circumstances of the case be forbidden when not relatively important for ascertaining the truth, — (W. §§ 1159–1161.)

Par. (*a*) if it would otherwise be inadmissible under
732 Rule 195 (*post*, § 1652) as being *indecent* or *improper;*

733 *Par.* (*b*) if it would cause *inconvenience* in the trial.

Illustrations. Exhibiting the naked person; bringing in a bulky machine.

ART. 3. *View by Jury.* When the object to be inspected
734 cannot be conveniently produced in Court, the jury may be taken to the place and there view it; — (W. § 1162.)
subject to the following details and qualifications:

Cross-references. For inspection regarded as subject to the party's *privilege to refuse*, see Rule 201 (*post*, § 1702) and Rule 203 (*post*, § 1737).

[1] But this prohibition is rarely made.

735 *Par.* (*a*). The issue may be a [*criminal* or a] civil one.[1] — (W. § 1163.)

736 *Par.* (*b*). The inspection may be of a *place*, [a *person*, or a *chattel*, or of an *experiment* therewith.][2] — (W. § 1163.)

737 *Par.* (*c*). The desirability of a view is determined by the trial Court in the circumstances of the case.[3] — (W. § 1164.)

738 *Par.* (*d*). The inspection must be made by all the jurors, going together, as directed by the Court. — (W. §§ 1165, 1166.)

Cross-references. The Hearsay rule forbids the reception of evidence at a view, otherwise than by the jurors' inspection; thus arise questions as to the *listening to witnesses*, the pointing out by *official showers*, and the *accused's presence*, under Rule 156 (*post*, § 1266).

739 *Par.* (*e*). The information obtained by the jurors by their inspection is evidence, *i. e.* a lawful source of belief;[4] and the impracticability of transmitting it to the court of appeal in the record does not prevent their use of such information. — (W. § 1168.)

740 [ART. 3. *View by Expert.* The judge may order an inspection by an expert witness, as provided in Rule 224, Art. 1 (*post*, § 1992).]

[1] Some Courts reject the bracketed clause.
[2] A few Courts incline to limit views to places.
[3] Under Rule 18 (*ante*, § 49; trial Court's discretion).
[4] Some Courts are *contra;* but the question is chiefly a quibble over definitions.

PART II:

RULES OF AUXILIARY PROBATIVE POLICY

RULE 125. *Definition and Classification.* All evidence,
745 though relevant under the foregoing rules, may be further subjected to rules of auxiliary probative policy, *i. e.* rules based on experience of the special dangers or weaknesses of untrustworthiness in specific classes of evidence, and designed to strengthen the weaknesses, avoid the dangers, and provide desirable safeguards. — (W. §§ 1171, 1172.)

These rules are classified as follows:

I. *Preferential Rules;* which operate by requiring one class of evidence to be used in preference to another, either absolutely, or conditionally on its being procurable.

II. *Analytic* (or Scrutinative) *Rules;* which operate by applying tests calculated to expose possible weaknesses which might otherwise remain undiscovered.

III. *Prophylactic Rules;* which operate by using expedients calculated to remove some danger or weakness before the evidence is admitted.

IV. *Simplificative Rules;* which operate by eliminating evidence likely to confuse the general process of investigation.

V. *Quantitative* (or Synthetic) *Rules;* which operate by requiring certain kinds of evidence to be associated with other evidence before the whole case is allowed to go to the jury.

ART. 1. *Best Evidence Rule.* There is no general rule
746 that the best evidence must be introduced, or that better evidence must be introduced before inferior evidence; there are only certain special rules as to special classes of evidence, as enumerated hereafter. — (W. §§ 1173, 1174.)

TITLE I: PREFERENTIAL RULES

SUB-TITLE I: PRODUCTION OF DOCUMENTARY EVIDENCE

747 RULE 126. *General Principle.* (A) In proving a writing, (B) production must be made, (C) unless it is not feasible, (D) of the original writing itself, (E) whenever the purpose is to establish its terms. — (W. § 1178.)

(*Reason and Policy.* The policy of the rule is based on the risk of errors, wilful or inadvertent, in a witness testifying by copy or by recollection, and on the relative importance of even slight errors in words and phrases of writings, which usually by their tenor affect decisively the rights of the parties and the facts of the case.) — (W. §§ 1179, 1180.)

ART. 1. " (A) IN PROVING A WRITING;" *Rule not applicable to Chattels.* The rule does not apply

748 *Par.* (*a*) to *chattels uninscribed* [[except in special circumstances]];[1] — (W. § 1181.)

749 *Par.* (*b*) to *chattels inscribed,* unless the inscription affects the rights of the parties or is important as evidence;[2] — (W. § 1182.)

Illustrations. A baggage-check, an express-label, a policeman's star, might thus come under the rule.

750 *Par.* (*c*) but the rule applies to all writings, *i. e.* materials bearing words and existing as such solely for the sake of the inscription. — (W. § 1183.)

751 ART. 2. " (B) PRODUCTION MUST BE MADE;" *Rules concerning Production.* The rule requires that the writing be brought into court and offered to the tribunal for inspection. — (W. § 1185.)

[1] The double-bracketed clause is not law; but it ought to be.
[2] No Court has phrased the rule in any form of wide acceptance; the above represents good sense and most of the cases.

752 *Par.* (*a*). The writing need not be *read* aloud, unless the Court so requires.

753 *Par.* (*b*). The writing need not be perused by or *shown* to a witness, except as required by other rules of evidence.

Cross-references. This requirement may be made

(1) under Rule 87 (*ante*, § 418), where a witness *identifying a signature* may have to look at the document;

(2) under Rule 127 (*post*, § 812), where a witness who is to be *contradicted by his own writing* may have the document first shown to him.

754 *Par.* (*c*). The production of the original is *always allowable*, even when a copy is admissible under the ensuing Rules; unless prohibited by some rule of privilege (Rules 200–212) or by some policy (Rule 196) requiring public records not to be removed from the place of custody. — (W. § 1186.)

755 *Par.* (*d*). Even when the original is produced, a *copy also* may be introduced, if evidentially useful. — (W. §§ 1190, 1229.)

Illustration. A copy of an illegible deed; or a photograph of a disputed signature under Rule 93 (*ante*, § 484).

ART. 3. "(C) UNLESS IT IS NOT FEASIBLE;" *General Principle.*

756 The production of the original writing may be dispensed with where it is not feasible;[1] — (W. § 1192.)

subject to the details and qualifications of Arts 4–12 following:

757 *Par.* (*a*). The production of the original is not dispensed with merely because its *genuineness* is not in dispute. — (W. § 1187.)

758 *Par.* (*b*). Where production is dispensed with by reason of loss or some other ensuing excuse, the *order of evidence* as to the *loss*, the *contents*, and the *execution* of the writing

[1] No Court lays down this broad rule yet, except in the "best evidence" formula.

depends upon the circumstances of each case.[1] — (W. § 1189.)

Illustration. Action on a policy of insurance; plea, no policy executed. The plaintiff may first show the loss of an instrument purporting to be a policy, then prove the terms of that instrument by a copy, and then introduce his evidence of its execution; but if the real dispute was as to the terms, not the execution, his evidence of execution should come second, and then his alleged copy.

ART. 4. *Same:* (1) *Loss or Destruction.* The production
759 of the original is dispensed with where the party is unable to produce it because it is destroyed or lost. — (W. § 1193.)

Par. (*a*). In evidencing loss or destruction the *sufficiency*
760 of the evidence depends on the circumstances of each case.[2] — (W. § 1194.)

Par. (*b*). In particular, [no fixed rule requires that] the
761 *latest known custodian* shall testify, or [that] the latest known place of deposit shall be searched.[3] — (W. § 1195.)

Par. (*c*). The *replies* made to a searcher are [not] ad-
762 missible as circumstantial evidence of inability to find.[4] — (W. § 1196.)

Par. (*d*). Even the *offering party's own intentional*
763 *destruction* of the original [dispenses him from producing it, provided the circumstances negative a fraudulent intent to suppress the truth.][5] — (W. § 1198.)

Illustration. In an action on a contract, the party offers a copy of a telegram received by him; if he has destroyed the original before controversy arose as a matter of routine in disposing of old papers, the copy is admissible; otherwise, if it appears that he destroyed it after request for inspection by the other party and refusal to allow inspection.

[1] Some Courts lay down fixed rules; but they are impracticable.

[2] This is therefore for the trial Court's discretion (Rule 18, *ante*, § 49).

[3] But some Courts have the affirmative rule.

[4] Some Courts use the bracket.

[5] A few Courts are over-strict; other Courts differ in their phrasing.

Distinguish the question of substantive law whether the grantee's destruction of a deed *revests title* in the grantor.

ART. 5. *Same:* (2) *Detention by Opponent.* The production of the original is dispensed with where the party is
764 unable to produce it because it is detained by the opponent; *i. e.* where

it is in the opponent's possession or control, and

he has been requested by notice to produce it at the trial, and

he has failed to produce it. — (W. § 1199.)

Par. (*a*). The opponent is in *control* of the document,
765 even where it is in the hands of a third person, within or without the jurisdiction, provided it is still subject to the opponent's right to resume its custody. — (W. § 1200.)

Illustration. A bill in the hands of an attorney, or a deed in custody of a real estate agent, might thus be in the party's control; but perhaps not a note placed in the hands of a bank for collection.

Par. (*b*). The opponent's *possession* must be *evidenced*
766 by the party desiring to prove the document; but it may be evidenced in any ordinary mode, in particular, by the course of the mails, pursuant to Rule 36 (*ante*, § 131). — (W. § 1201.)

Distinguish the question whether the opponent's *attorney* is *privileged* not to testify to possession under Rule 205 (*post*, § 1783).

Par. (*c*). The request or *notice to the opponent* must be
767 made wherever the party is relying on the opponent's detention as the excuse for non-production. — (W. §§ 1202, 1203.)

Illustration. In proving the contents of a letter mailed to the opponent, the opponent admits receiving it; here a notice is necessary; but if he denies receiving it, the letter is virtually lost, and no notice is needed.

Par. (*d*). The notice to the opponent must be given
768 *expressly in writing;*

except that the pleadings may suffice to give *implied notice* that the document will be needed. — (W. § 1205.)

Illustration. In trover for a deed, ejectment for land claimed under a grant named, or contract based on an account stated, the pleadings may suffice as an implied notice.

769 *Par.* (*e*). The notice

(1) must be given at a *time* before trial sufficient for finding and bringing the document;

(2) must be given to the *opponent* or his *attorney;*

(3) and must *describe* the document sufficiently to identify it.[1] — (W. § 1208.)

770 *Par.* (*f*). The notice may be given *orally at the trial,* if the document is there in the opponent's control. — (W. § 1204.)

771 *Par.* (*g*). The rule for notice is [not] applicable when the desired document is *itself a notice;* except when it is a notice to produce under the present rule.[2] — (W. § 1206.)

772 *Par.* (*h*). The opponent's *failure to produce* a document for which the foregoing rules have been satisfied permits the first party to evidence it otherwise, no matter what the ground for the failure to produce. — (W. § 1209.)

773 *Par.* (*i*). The opponent who thus *fails to produce* is not allowed afterwards to produce it for the purpose of disputing the first party's evidence of its tenor.

Cross-references. Compare also the rules

(1) that the jury may *infer from his conduct* the tenor of the document (Rule 118, Art. 6, *ante,* § 662),

(2) that the party may be defaulted for *refusing* to give an opportunity of *inspection before trial* (Rule 161, Art. 4, *post,* § 1335).

774 ART. 6. *Same:* (3) *Detention by Third Person.* The production of the original is dispensed with where the party is unable to produce it because it is detained by a third person not subject to his control. — (W. § 1211.)

775 *Par.* (*a*). If the third person is *within the jurisdiction,*

[1] There is some variance of ruling as to Clause (2). The whole matter is one for the trial Court's determination.

[2] The decisions are not harmonious.

[redacted]

[redacted]

[redacted]

that its repeated production would cause unreasonable inconvenience to the owners or users of it.] [1] — (W. § 1223.)

Illustrations. Bank-records, church-registers, title-abstracts, and perhaps records of public-service corporations.

Cross-reference. For the ordering of an inspection of such a document before trial by an *expert witness*, see Rule 123 (*ante*, § 740).

For such inspection by a *party-opponent*, see Rule 161, Art. 4 (*post*, § 1335).

ART. 11. *Same:* (8) *Recorded Conveyances.* The produc-
781 tion of the original is dispensed with where it is a document of grant or authority recorded pursuant to law in a public office; [2] — (W. §§ 1224–1227.)

(1) [provided the original is not within the offeror's control.] [3]

(2) [provided neither the offeror nor the opponent is the grantee named in the document.] [4]

Cross-references. (1) For the rule as to *government grants*, depending on which is the original, see Rule 126 (*post*, § 791).

(2) For the rule as to admitting a *certified copy*, under the exception to the hearsay rule, see Rule 148 C (*post*, § 1161).

(3) For the rule admitting *abstracts* of burnt records of deeds, see Rules 150, 184 (*post*, §§ 1183, 1565).

ART. 12. *Same:* (9) *Voluminous Documents.* Where a
782 fact to be evidenced by documents would require an inspection of numerous documents made up of multifarious details, so as to make inspection or reading of all the details at the trial unreasonable, other evidence, summarizing the contents, may be introduced; provided that the trial Court may in the circumstances require the originals to be made accessible to the Court and the opponent for inspection and may require

[1] There are specific rulings and statutes on such documents, but no general rule in this broad form.

[2] The majority of Courts now follow this rule, by common law or by statute, without either of the provisoes. A few do not recognize at all a special exemption for recorded conveyances.

[3] Several Courts follow this proviso, under statute; the phrasings differ slightly.

[4] This proviso is peculiar to the New England Courts, with slight local variations.

the reading or production of particular portions. — (W. § 1230.)

Illustrations. Pecuniary accounts; copyright infringement; corporate records.

ART. 13. " (D) OF THE ORIGINAL WRITING ITSELF." *What is*
783 *the original.* The rule requires the production of the specific document (the " original ") whose contents are to be proved in the state of the substantive law and the pleadings; and it does not matter whether the document so desired was written before or after (*i. e.* a " copy ") some other document. — (W. § 1231.)

In determining what is the original so desired, the following further details apply:

ART. 14. *Same:* (1) *Duplicates and Counterparts.* Where
784 the document came into existence in duplicate or multiplicate, any one of these may be introduced, without accounting for the non-production of another;

and all must be accounted for before other evidence is admissible. — (W. §§ 1232, 1233.)

This rule includes

Par. (*a*). A document of a *bilateral transaction* executed
785 by the parties in duplicate; — (W. § 1232.)

Illustration. A counterpart-lease or an indenture.

Par. (*b*). A unilateral *notice* written twice at one
786 sitting;[1] — (W. § 1234.)

Par. (*c*). Multiplicate impressions from a *printing-press*
787 with a single unaltered type-setting;

except so far as one particular sheet becomes the original by virtue of Art. 15 (*post*, § 790) or of Art. 16 (*post*, § 791); — (W. § 1234.)

[*Par.* (*d*). Multiplicate impressions from a *typewriter*,
788 *manifolder*, or other machine, in so far as the circumstances show identity of impression;][2] — (W. § 1234.)

[1] This is law, but is not sound.
[2] This is probably not yet law, but it seems practical.

789 *Par.* (*e*). But not a *blotter-press* copy. — (W. § 1234.)

ART. 15. *Same:* (2) *Copy Acted on or Dealt with as Original.*
790 Where an act material or relevant consists partly in acting on or otherwise dealing with a document so as to make the terms of the document a part of the act, the production of that document is required. — (W. § 1235.)

Illustrations. In an action on an account stated, the document sent to the debtor, even though it is made by copying the account books, is the original to be produced, because the debtor's assent to the account therein stated is the basis of the claim.

ART. 16. *Same:* (3) *Copy made Original by Substantive*
791 *Law.* Where two or more documents were made by copying one from the other, either may become the original required to be produced, if it is the specific document material under the rule of substantive law applicable to the case. — (W. §§ 1236–1240.)

Illustrations. (1) The plaintiff, in an action on a *contract* made by *telegram* desires to prove the making of the contract by telegram. Whether the telegram-sheet delivered to the defendant must be produced depends on whether the substantive law declares the contract to have been made by that sheet or by the one handed to the operator by the offeror.

(2) In an action against a reporter for a *libel* published in a *newspaper*, a number of that issue of the newspaper is the original for proving publication; but in an action by the reporter for salary earned by writing the article, the manuscript is the original for proving performance.

(3) In a *land-grant* by the State or Federal Government, in substantive law the effective document of grant may be the document given to the grantee or the document retained as part of the Government records; thus, whether a patent, scrip, location, certificate, *testimonio*, *expediente*, or other such document is the one required to be produced depends on the principle of the land-law.

(4) Similar questions arise for *ballots*, *tax-lists*, *notary's protests*, and a variety of other documents.

ART. 17. *Same:* (4) *Exclusive Memorials under the Parol*
792 *Evidence Rule.* Whenever by the parol-evidence rule (Rule 217, *post*, § 1920) a particular document has become the exclusive memorial of the transaction, superseding other writings,

that document is the one required to be produced, in proving the transaction. — (W. § 1241.)

Cross-reference. For the *burden of proof* as to producing the writing in such a case, see Rule 217, Art. 7, (*post*, § 1941).

ART. 18. "(*E*) WHENEVER THE PURPOSE IS TO ESTABLISH
793 ITS TERMS." *General Principle.* In pursuance of the reason (*ante*, § 747) of the rule requiring production, it applies only where the purpose of the party, under the issues, is to establish the terms (or contents) of the document, and therefore does not apply when the purpose is merely to prove some other fact relating to the document or some other separate part of a transaction in which the document formed only one part. — (W. § 1242.)

Distinguish the statement that the rule does not apply to a document which is only "collaterally in issue"; this phrase is often applied to express the above principle, but correctly it should be applied only to the exception to the rule (*post*, Rule 127, Art. 1, § 806).

ART. 19. *Same: Applications of the Principle.* The foregoing principle applies in the following classes of cases, among others: [1]

Par. (*a*). The rule does not apply in proving an *oral*
794 *utterance accompanying* some dealing with a document. — (W. § 1243.)

Illustration. In an action for slander, whose publication consisted in reading aloud to hearers the contents of a letter-draft, the words uttered orally may be proved without producing the document.

Distinguish cases where the oral part of a transaction is invalid under the parol-evidence rule, Rule 217 (*post*, § 1920).

Par. (*b*). The rule does not apply in proving a person's
795 *knowledge* or *belief* of the contents or existence of a document. — (W. § 1243.)

Illustration. In proving a purchaser's knowledge or belief as to a prior incumbrance on the land, the document need not be produced.

[1] The rule for trial Court's discretion here applies (Rule 18, *ante*, § 49).

796 *Par.* (*c*). In stating the *identity* of a document already in the case with one whose contents are otherwise irrelevant,

or the identity of a person or thing with one mentioned in a document whose contents are otherwise irrelevant,

the irrelevant document need not be produced,

unless its precise terms are essential in the identification. — (W. § 1244.)

Illustration. In an action for non-delivery of a specific lot of cotton, the fact that the agent had given a receipt for thirty-six bales of cotton may be testified to, in identifying the lot, without producing the receipt.

797 *Par.* (*d*). In proving a *general fact resulting* from *written entry* or item or series thereof, the writing need not be produced,

unless in the circumstances the precise terms of the writing are involved. — (W. § 1244.)

Illustrations. (1) Whether the yearly sales amounted to eight thousand dollars, would not require production of the books; but whether a bill rendered was for eight dollars, would require production.

(2) Whether a lawsuit was pending, would not require production; but a judgment had been entered, would require production.

(3) That a liquor-license had been granted to M., would require production; but that no entry of a grant of license to M. could be found, would not require production of the entire record.

Cross-reference. For the admissibility of a custodian's certificate that no record exists, see Rule 148 C, Art. 6 (*post*, § 1152).

798 *Par.* (*e*). In proving the act of *payment* in discharge of a written claim, the fact and the amount of payment may be evidenced without production,

unless the terms of a specific document are necessarily involved. — (W. § 1245.)

Illustrations. (1) In an action for money due on a draft the fact of payment may be evidenced without producing the draft; but if the payment was made by check, or if the application of the payment to one or another purpose is disputed and the payment was made by letter stating the purpose, the check or the letter might require to be produced.

(2) Upon payment, a receipt is given; the payment may be evidenced without producing the receipt; except so far

as the parol-evidence rule requires otherwise (Rule 217, *post*, § 1926).

799 *Par.* (*f*). In proving the fact of *ownership*, *tenancy*, or *sale*, the document of title need not be produced, unless in the circumstances its specific terms are material. — (W. §§ 1246, 1247.)

Illustrations. (1) In an action for personal injury on a railroad said to be leased and controlled by the defendant, the document of lease need not be produced; unless, by reason of dispute as to the identity of the lessee, the terms of description in the lease are material.

(2) In an action for mesne profits, an expert witness to land-values, who qualifies by having bought and sold land, need not produce the deeds of sale; but the defendant, justifying as owner and testifying to purchase from M, must produce the deed.

800 *Par.* (*g*). In proving the fact of *existence*, *execution*, *sending*, *delivery*, or *publication* of a document, it need not be produced, unless in the circumstances its specific terms are material. — (W. § 1248.)

Illustrations. (1) In an action on a contract made by a partner, testimony to his authority to act, as shown in his frequent prior execution of notes for the firm, may be given without producing those notes.

(2) In an action for goods converted by a consignee, the act of shipment and of taking a bill of lading may be testified to without producing the bill of lading; but in an action against the carrier for misdelivery of the goods contrary to the terms of the bill, the bill must be produced.

801 *Par.* (*h*). In proving the fact of *conversion*, *loss*, or *larceny* of a document, *service* of a writ or notice, *possession* of a deed, or any other conduct dealing with a document, its production is not required, unless in the circumstances its specific terms are material. — (W. §§ 1249, 1250.)

Illustration. In an action for services rendered in serving processes, the writs or summons need not be produced; but in an action for converting a horse, with a justification under a writ of replevin, the writ must be produced in proving the justification.

Distinguish (1) the question whether, in excusing the non-production of a *lost original*, under Art. 4 (*ante*, § 759), the party may prove the loss without first introducing some evidence of contents.

(2) the question whether testimony to the fact of ownership, possession, etc., violates the *opinion* rule (Rule 173, *post*, § 1455).

805 RULE 127. *Exceptions to the Rule.* The rule requiring production of the original document is subject to the following exceptions, in which cases the original writing need not be produced nor accounted for before any other evidence of its contents is admissible:

806 [ART. 1. *Documents Collateral to the Issue.* The rule does not include documents whose terms are not material to the main issues of the case nor to any important fact relevant to those issues.][1] — (W. §§ 1252–1254.)

Illustration. (1) In a prosecution for assault on a constable while acting under a writ, the production of the writ is not required, its contents being immaterial and unimportant; and even if the question arose of a mistake in serving the wrong person, the contents though material and relevant might still be unimportant.

(2) In the same case, in testfying to the assaulted person's status as constable, the record of his appointment to office need not be produced, being ordinarily not material nor important. — (W. §§ 1728, 2535.)

Distinguish the cases arising under the limitation of Arts. 18 and 19 (*ante*, §§ 793–801), which may often lead to the same result; a number of Courts use the present term " collateral " in applying those limitations. But the present exception should exist, apart from those limitations.

807 ART. 2. *Documents evidenced by Party's Admission of Contents.* The rule does not include documents whose contents are evidenced by the party-opponent's admission — (W. §§ 1255–1257.)
provided either

[1] This is law in many States and ought to be extended.

Par. (*a*). That the admission is made while testifying, on the stand or by deposition;[1]

808 *Par.* (*b*) or, That the admission is made in a writing;[1]

809 [*Par.* (*c*) or, That the admission is oral and out of court, if the making of such admission is not *bona fide* disputed by the opponent;[1]]

810 *Par.* (*d*) or, That the original is lost or otherwise accounted for.[2]

Illustrations. (1) In an action on a debt, with a plea of discharge in insolvency, the plaintiff's admission that the defendant had been adjudged on the record a discharge in insolvency would be receivable if made in testifying on the stand, or in a letter; but not if made in conversation before trial, provided the fact of the utterance of such admission was *bona fide* disputed by him.

(2) In an action of ejectment by M against N, a recital, in a deed by M's predecessor, of the contents of a prior deed by him to N's ancestor, is admissible against M.

[(3) In an action of ejectment by R against S, (*a*) the oral statement of S's grantor that he had in 1859 made a deed to R's ancestor is admissible against S, provided the existence and loss of such a deed is shown under Par. (*d*) *supra;* (*b*) but the oral statement of S's grantor that he was only a lessee is not admissible, if S has already shown a purporting title by deeds].[3]

Distinguish (1) the *judicial admission* (Rule 231, *post*, § 2140) which dispenses the party from all evidence on that subject;

(2) the opponent's declaration, claiming or disclaiming title, when offered as a *verbal act* accompanying occupation, in an issue of adverse possession (Rule 155, *post*, § 1245);

(3) a deceased third person's declaration of tenancy only, as a statement of a *fact against interest* (Rule 139, *post*, § 968).

[1] Probably all Courts would concede Par. (*a*). Most Courts would concede Par (*b*). On Par. (*b*) Courts are divided, usually stating the rule of its first clause *pro* or *con;* but if the second clause be added, the objections to the unqualified first clause disappear.

[2] All Courts would concede this; but it is not a genuine exception, for it assumes the rule of production to be enforced.

[3] This illustration exhibits the local New York rule, followed by a few other States.

ART. 3. *Documents affecting a Witness on Voir Dire.*

811 Where a witness' interest, disqualifying [or impeaching][1] him, depends on the terms of a document, it need not be produced, unless the party needing it knew of that need before trial. — (W. § 1258.)

ART. 4. *Documents admitted by Witness on Cross-Examination.* Where the purpose is to impeach a witness by prior statements of his in writing, the rule for production applies, subject to the following qualifications: — (W. §§ 1259–1263.)

812 [*Par.* (*a*). The writing need not be shown or read to him before asking him as to its contents].[2]

813 *Par.* (*b*). But the tenor and circumstances of the supposed statement must be sufficiently specified to him orally in a question, pursuant to Rule 108 (*ante*, § 579),

814 [*Par.* (*c*). If he admits, in replying to such question, that he did make the statement asked about, the writing need not be produced by the impeaching party, unless the trial Court deems it fair to do so].[3]

815 *Par.* (*d*). If the witness denies that he made the statement, the impeaching party must produce the writing;[4] but before introducing it in impeachment he must evidence its genuineness in some method, pursuant to Rule 188 (*post*, § 1591).

816 [*Par.* (*e*). Whether the witness denies or admits the writing, the party for whom the witness testifies may produce the writing and read the statement, together with any explanatory parts admissible under Rule 185 (*post*, § 1575)].[5]

817 *Par.* (*f*). Whether the impeaching or the sustaining party may or must produce the writing immediately

[1] This bracketed clause seems logically to be required.

[2] The contrary is the law in most jurisdictions; but is a gross error of principle and policy.

[3] This stands or falls with Par. (*a*) above.

[4] In strictness, only when he desires to prove the making of the statement; but to prevent false insinuations, the above rule is needed.

[5] This is probably not law, but ought to be.

after the witness' reply or not until some appropriate later stage of the case, [is determined by the trial Court according to the circumstances.] [1]

818 *Par.* (*g*). The foregoing rules apply to a writing made by the witness himself,
or made by another person as a verbatim report of the witness' testimony or deposition-answers.

Illustrations. On cross-examination of a witness to the delivery of a bill of goods, the counsel desires to use against him an entry in a delivery-book, kept by him, reading "Party not found." The witness must be asked whether in a delivery book he ever wrote that about these goods, but he need not be shown the book. If he admits it, the book need not be produced; though perhaps the sustaining counsel might desire to call for it and might be able by means of it to refresh the witness' memory in explanation. If he denies it, the impeaching counsel must produce it; but he need not ordinarily offer it in evidence till he puts in his own party's case.

Distinctions. In using a deposition, the questions may arise (*a*) whether it can be used in the above manner, but on direct examination, to *discredit one's own witness* under Rule 97 (*ante*, § 504);

(*b*) whether, if thus allowable only to *refresh memory*, it is a proper writing for that purpose under Rule 90 (*ante*, § 448).

820 RULE 128. *Kinds of Secondary Evidence of Contents.* When pursuant to the foregoing rules the terms of a writing may be evidenced otherwise than by production of the writing itself, all other kinds of evidence, circumstantial and testimonial, are admissible,
subject to the following exceptions and qualifications:

821 ART. 1. *Circumstantial Evidence.* There are no special rules excluding circumstantial evidence of contents.
except that any rule, hereafter mentioned, preferring copy-testimony to other evidence, applies also to circumstantial evidence. — (W. § 1267.)

Illustration. Where the contents of a lost deed are to be evidenced, the parties' intentions, as shown in letters and deed-drafts, and their subsequent conduct in taking and

[1] It is commoner to say merely that the writing need not ordinarily be put in till the examiner's own case arrives.

giving possession, etc., are chief among the few available kinds of circumstantial evidence; any rule, however, preferring a copy of a recorded deed would prevail.

822 ART. 2. *Testimonial Evidence* (*Copy, Recollection*). Testimonial evidence may consist in

a. Oral testimony, based on recollection, whether aided or unaided by memoranda pursuant to Rules 89, 90 (*ante*, §§ 431, 444).

b. Written testimony, i. e. by *copy*, transcribing the words of the original.[1]

c. Parties' admissions. — (W. § 1268.)

Distinguish the rule of Completeness, which prescribes whether *the whole* or a part or every word of a document, as well as of an oral statement, must be testified to (Rule 184, *post*, § 1561).

823 ART. 3. *Same: Personal Knowledge of Witness.* A witness to the contents of a document must be qualified by personal observation of its contents, pursuant to Rule 86 (*ante*, § 400); unless in special circumstances as determined by the trial Court. — (W. §§ 1277–1280.)

In particular:

(1) A copy-witness must have *read the* original; except when the transcription is made

(*a*) by two persons, one reading aloud and the other transcribing;

or, (*b*) by a machine producing facsimiles.

(2) A copy-witness need not himself be the *transcriber*, provided at some time he personally compared transcription and original.

(3) The transcription must have been made *at the time of reading*, in order to rank as a copy preferred under Art. 5 below; unless at a later time the witness personally compared transcription and original.

824 ART. 4. *Same: Verifying Copy by Calling Witness.* No paper can be received as a copy unless evidenced as such by a witness.

[1] In strict theory, a copy is merely a variety of recorded past recollection.

But the witness may give his evidence by certificate or otherwise, so far as permitted by the various exceptions to the hearsay rule (Rule 148 C, *post*, §§ 1145).

ART. 5. *Rules of Preference:* (1) *No Absolute Exclusion*
825 *of Recollection-Testimony.* The principle of preferred evidence (Rule 129, *post*, § 850) finds here the following applications. — (W. § 1265.)

(1) There is no rule *absolutely excluding* recollection-testimony (" parol "), even for lost judicial records, deeds, or wills. — (W. § 1267.)

Cross-reference. Compare the rule as to proving the *substance* of the document (Rule 184, *post*, § 1561).

(2) There are rules *conditionally excluding* recollection-testimony until a copy is shown to be unavailable, as follows:

ART. 6. *Same:* (2) *Copy preferred to Recollection-Testimony.* A copy must be used, in preference to recollection-testimony, in the following cases:

[*Par.* (*a*). For *deeds* and other documents of title or
826 obligation, if a copy is in the party's control.][1] — (W. § 1268.)

Par. (*b*). For *a record* or other document in *public*
827 *official custody*, if available at the time of trial for the purpose of copying. — (W. § 1269.)

Par. (*c*). For a *record of conviction of crime*, offered to
828 disqualify or impeach a witness,

[except when the witness himself on examination admits the conviction.][2] — (W. § 1270.)

[1] Some Courts deny this altogether; some accept it, but enlarge the second clause to require searching for it in the control of others; some differ as to the kinds of documents covered by it.

[2] This is widely provided by statute. Some Courts preserve the common-law rule requiring a copy invariably. A few statutes go to the other extreme, by permitting recollection-testimony from other witnesses also. In a few jurisdictions the statutes differ for criminal and for civil cases.

Par. (*d*). For a *foreign law*, so far only as in the circum-
829 stances the precise terms of a *legislative or administrative enactment* are the essential object of the testimony.[1] — (W. § 1271.)

Distinguish (*a*) witness' qualifications as an *expert* under Rule 83 (*ante*, § 382); (*b*) the admissibility of *certified* and *printed copies* under Rule 148 C (*post*, §§ 1152, 1164); (*c*) the admissibility of *opinion* under Rule 173 (*post*, § 1447); (*d*) the function of *judge* and *jury* under Rule 229 (*post*, § 2100).

ART. 7. *Same:* (3) *Certified and Sworn Copies.* No specific
831 kind of copy need be used, in preference to some other kind.

(*a*) In particular, a copy *certified* or *judicially* established is not preferred to a sworn copy.[2] — (W. § 1273.)

ART. 8. *Same:* (4) *Copy of a Copy.* An immediate copy
832 is not preferred to a mediate copy, or *copy of a copy*, [[except where the trial Court deems it preferable in the circumstances]]; subject to the following specific rules:[3] — (W. §§ 1274, 1275.)

Par. (*a*). Where the original, being an existing public
833 record, is accessible for copying, and the mediate copy was made from an immediate copy of that record, an immediate copy is preferred.

Par. (*b*). Where the original is a lost or otherwise
834 inaccessible private document, and an official record of it is accessible, an immediate copy of that record is preferred to a mediate copy of the record or of the original.

Par. (*c*). A mediate copy which has been compared
835 with the original is admissible as an immediate copy; but a mediate copy is not admissible at all unless the correctness of the immediate copy from which it was made is evidenced.

Illustrations. (1) At a former trial of the same issue a sworn copy of a lost deed was introduced. The stenographer tran-

[1] Many jurisdictions do not state the rule so liberally.
[2] A few Courts are *contra* on Clause (*a*).
[3] It is difficult to codify the complicated situations here presented; the soundest thing is to eliminate all quibbling rules of detail and leave it to the trial Court. The two rules in Par. (*a*) and (*b*) are Mr. Justice Story's.

scribed it. The stenographer's copy is admissible at the second trial, without accounting for the sworn copy; the deed not having been recorded. But if the deed had been recorded, then a certified copy would be obtainable and therefore required.

(2) Action on a promissory note; plea, payment; the defendant had given the note with a chattel mortgage; the defendant's copy had been made from the public record, but afterwards the defendant had compared it with the plaintiff's original; the record being for other reasons not legally admissible, yet the defendant's copy would be admissible.

SUB-TITLE II: TESTIMONIAL PREFERENCES

RULE 129. *Definition and General Principle.* (1) A rule of
850 testimonial preference is one which prefers the assertion of a specific witness to that of some other.

(2) A rule of *conditional preference* requires that the preferred witness be called to testify, if obtainable, before any other witness is called on that topic.

(3) A rule of *absolute preference* requires that the preferred witness' testimony, if obtainable, be the sole testimony on that topic and be not disputed by other testimony.

(4) There are *no rules of preference* except those contained in the ensuing Rules 130–133, and in the preceding Rule 128 applicable to the contents of documents. — (W. §§ 1285, 1286.)

Topic I: Conditional Preferences

RULE 130. *Attesting-Witness to Documents; General Prin-*
851 *ciple.* (*a*) Where the execution of any document is required by law to have been made in the presence of another person

(*b*) who subscribes it for the purpose of validating its execution,

(*c*) a party desiring to prove its execution

(*d*) against an opponent entitled in the state of the issues to dispute its execution

(*e*) must before introducing other evidence

(*f*) introduce the attester as witness

(*g*) in such numbers as are required by law for attestation,

(*h*) or show his or their testimony to be unavailable

(*i*) and also authenticate the attestation, unless that is not feasible,

(*j*) as well as authenticate the party's signature. — (W. §§ 1287, 1288.)

(*Reason and Policy.* The policy of the rule of substantive law requiring the execution to take place in the presence of

other persons is in part based on the importance of providing in advance adequate testimony in case of a dispute over the authenticity of the transaction. Hence the law of Evidence should insist on obtaining the testimony of such pre-appointed persons, if possible.)

ART. 1. "(*a*). *Where the execution of any document is*
852 *required to have been made in the presence of another person.*" The rule does not apply to a document which was attested but was not required to be attested as a condition of validity.[1] — (W. § 1290.)

Illustrations. Practically the rule applies to *wills* only, in most jurisdictions; deeds, contracts, notes, etc., are therefore without its scope.

ART. 2. "(*b*) *Who subscribes it for the purpose of validating*
853 *its execution.*" The rule does not apply to a public officer's certification or subscription for some other required purpose than to validate execution. — (W. § 1292.)

Illustration. A notary's subscription to a certificate of acknowledgment of a deed, required by law in order to obtain public record of it, is not an attestation.

ART. 3. "(*c*) *A party desiring to prove its execution.*"
854 The rule does not apply where the purpose is only to prove contents, delivery, existence, identity, or other circumstance not involving the authentic execution by the purporting maker. — (W. § 1293.)

Illustration. Trover for chattels obtained by fraud in exchange for a worthless deed; to prove the transaction of exchange, the rule does not apply.

[*Par.* (*a*). The rule does not apply where the execution
855 is only *collaterally* in issue.][2] — (W. § 1291.)

ART. 4. "(*d*) *Against an opponent entitled in the state of*
856 *the issues to dispute execution.*" The rule does not apply

[1] At common law this limitation did not exist; sound policy has almost everywhere legislated as above.

[2] This is unnecessary, though some Courts recognize it. Some of these rulings had really in mind the rule of Art. 3 above; others were merely mitigating the needless strictness of the common law rule.

where the document's execution can not be disputed by the opponent;
in particular,

857 *Par.* (*a*) Because of an *estoppel* or other rule of substantive law. — (W. § 1294.)

858 *Par.* (*b*) Because of a rule of *pleading*. — (W. § 1295.)

Illustration. Where by statute a sworn denial of execution is necessary and the execution is not in issue without such sworn denial, no attesting witness need be called; but such statutes may not apply to wills.

859 *Par.* (*c*). Because of a *judicial admission* of execution. — (W. § 1296.)

Distinguish the ordinary admission under Art. 5, *infra*.

860 *Par.* (*d*). Because of the opponent's *claim under the same instrument*. — (W. § 1297.)

Illustration. Trover for goods taken by an executor; the defendant pleads a bequest in the will; the plaintiff, in using the will, need not prove it, much less call the attesters.

861 *Par.* (*e*). But not because of the opponent's *mere production* of the instrument without claiming under it.[1] — (W. § 1298.)

Distinguish the rule by which the opponent may be defaulted for *refusal to produce* on notice (Rule 161, *post*, § 1335).

ART. 5. "(*e*). *Must before introducing other evidence.*" The 862 rule requires the calling of the attester before introducing any other evidence on that topic;
in particular,

863 [*Par.* (*a*) before introducing the testimony of the *maker* of the document.][2] — (W. § 1299.)

[1] There was once some authority to the contrary in England.
[2] This is over-strict and probably not law in most jurisdictions; it has, moreover, practically no application nowadays, because wills alone are involved under the modern law.

Par. (*b*) before introducing the *opponent's extra-judicial*
864 *admissions.*[1] — (W. § 1300.)

[*Par.* (*c*) before introducing the opponent's personal
865 testimony as a witness.][2] — (W. § 1301.)

ART. 6. "(*f*). *Introduce the attester as witness.*" The
866 rule requires merely that the attester be used as witness. Hence, it does not prevent the party, after so doing, from then introducing other evidence to prove execution,

even though the attester's testimony

(1) *fails to remember* the facts of execution;

(2) or, *denies* the facts of execution. — (W. § 1302.)

Distinctions. (*a*) The rule against *impeaching one's own witness* (Rule 97, *ante*, § 515) does not forbid the foregoing.

(*b*) A peculiar statutory Illinois rule does forbid the use of other testimony on an appeal from a grant of probate, but not from a refusal of probate. — (W. § 1303, note 3.)

(*c*) If the witness' present recollection fails, his *attesting signature*, authenticated by himself or another, serves as testimony to the facts of execution, under Art. 9, *infra*.

Par. (*a*). The rule is here satisfied if the attester's
867 *deposition* or *former testimony* is used, where otherwise admissible under Rule 136 (*post*, § 928). — (W. § 1305.)

ART. 7. "(*g*). *In such numbers as are required by law for*
868 *attestation.*" As many of the attesters must be introduced as were required by law to make the execution valid.[3] — (W. § 1304.)

Illustration. If three persons attested, but only two were required by law to attest, at least two must be produced; but any two.

[1] Courts differed as to this, under the common-law scope of the rule; but as applied to wills, the above rule is presumably universal.

[2] Courts differed as to this; but it ought not to be law, even for wills.

[3] In common-law courts, one sufficed; in chancery, the required minimum number were usually called. By statutes, the rule varies, and is often ambiguous; the best policy seems to require the rule stated above.

ART. 8. "(*h*). *Or show his or their testimony to be un-*
869 *available.*" In order to proceed to other evidence of execution without the testimony of an attester, the party must satisfy the judge that all the attesters, to the number required by law for documentary execution,[1] are out of his power to introduce for purposes of examination. — (W. §§ 1308, 1309.)

The following specific circumstances suffice to show an attester unavailable:[2]

870 *Par.* (*a*). That the attester is *deceased.* — (W. § 1311.)

Par. (*b*). That the document is more than *thirty years*
871 *old*, so that the attesters are presumably deceased. — (W. § 1311.)

Par. (*c*). That the attester [is *without the jurisdiction*,
872 and is likely not to return before the close of the trial.][3] — (W. § 1312.)

Par. (*d*). That the attester *cannot be found* after diligent
873 search. — (W. § 1313.)

Par. (*e*). That the attester's name is *not known*, by
874 reason of the loss or illegibility of the document bearing it. — (W. § 1314.)

Par. (*f*). That the attester is so *ill* or *infirm* that his
875 attendance would involve danger to his life or his health. — (W. § 1315.)

Par. (*g*). That the attester is *imprisoned* or otherwise
876 detained under sentence of court. — (W. § 1315.)

[1] At common law, the rule would have applied to all, regardless of the legal number.

[2] Note that these specific circumstances are usually enumerated incompletely in statutes, but the statutory list is not exhaustive. — (W. § 1310.)

[3] There is here some difference of practice as to the permanence of the attester's absence, as to the sufficiency of proof of it, and as to the necessity of trying to obtain his deposition; these should all be left to the trial Court's determination, under Par. (*k*), *infra*.

877 *Par.* (*h*). That the attester's testimony would be *inadmissible* by reason of interest, infamy, insanity, blindness, disease of memory, or otherwise. — (W. § 1316.)

878 *Par.* (*i*). That the attester, without the party's collusion, *refuses to testify*, by reason of privilege or otherwise. — (W. § 1317.)

879 [*Par.* (*j*). That the document is one which by law is required to be recorded in a public office, after attestation before a public officer, and is provable by certified copy of the record.][1] — (W. § 1318.)

880 [*Par.* (*k*). The trial Court may allow other circumstances to dispense with the production of an attester; and may in any appropriate case require additional precautions, such as an attempt to obtain the deposition of an attester who is out of the jurisdiction or imprisoned or ill.][2]

883 ART. 9. "(*i*). *And also authenticate the attestation, unless that is not feasible.*" When the testimony of an attester is dispensed with, under Art. 8 above, the party must nevertheless, before proceeding to other evidence of execution, introduce some evidence authenticating the genuineness of the attester's signature;[3] — (W. § 1320.)
subject to the following detailed rules:

884 *Par.* (*a*). The authentication must be made for the signature of *as many attesters as are not produced*, until the number required by law for execution is fulfilled, either

[1] This was universally held for deeds; but whether it would now be applied to wills is doubtful.

[2] This rule is not now recognized in this form; but it supplies a desirable flexibility, so as to avoid the detailed questions that have hitherto arisen under Par. (*c*), (*d*), etc.

[3] This was the rule at common law in England, but not in many American courts, for all attested documents; but it was the rule for wills in all courts. By statutory phrasings, not always clear, the above is commonly made the rule for wills.

by producing the attester or evidencing his signature.[1] — (W. § 1306.)

885 *Par.* (*b*). The authentication of signatures may be *dispensed with* where it is not feasible, by reason of lack of witnesses to handwriting or otherwise; but this does not relieve the party from somehow evidencing the fact of attestation where the validity of the document depends on attestation. — (W. § 1321.)

886 *Par.* (*c*). The signature of the attester, when evidenced, implies an assertion by him (admissible by exception to the hearsay rule under Rule 141, *post*, § 1000) of all the facts essential to the act of execution of the document, even though these facts are not expressly stated in a clause of attestation accompanying the signature.[2] — (W. §§ 1511, 1512.)

887 ART. 10. "(*j*). *As well as authenticate the party's signature.*" When the authentication of the attesters' signatures is made, under Art. 9 above, and no attester's testimony is produced, [the trial Court may also require some evidence of the signature of the party to the document, or of his identity with the party in the case, or of both.][3] — (W. § 1513.)

890 RULE 131. *Reports of Prior Testimony.* Whenever a magistrate or other officer has by law a duty to report in writing the entire tenor (not merely a part or the substance) of testimony orally delivered before him, his report is preferred conditionally; — (W. §§ 1326–1328.)

that is to say,

(1) It must be produced, or accounted for as lost or otherwise unavailable, before other evidence of the tenor of the testimony is received;

[1] At common law, for ordinary documents, proof of one attester's signature sufficed; but the rule for wills would be as above. Statutory phrasings are common, but often ambiguous.

[2] The last clause is doubtful in a few jurisdictions.

[3] At common law, Courts were divided on this point; by statute, for wills, proof of the testator's signature is usually required. The above rule, by leaving it to the trial Court, secures the needed flexibility.

(2) If it is lost, or inadmissible because not lawfully taken (under Rule 148 B, *post*, § 1134), or otherwise unavailable, any other evidence on the subject is admissible;

(3) If it is inadmissible, it may still be made use of, either as a memorandum of recollection by the officer when testifying on the stand, or as a confession of an accused if read over to him and acknowledged correct;

(4) After it is produced and read, its correctness as a report may be disputed by other evidence, except so far as forbidden by Rule 133 (*post*, § 902).

Cross-reference. For the *admissibility* of these reports, by exception to the hearsay rule, see Rule 148 B, (*post*, § 1134).

ART. 1. *Accused's Statement.* The rule applies to a magis-
891 trate's report of statements made by an accused on examination before him.[1] — (W. § 1326.)

ART. 2. *Magistrate's Report of Witness' Testimony.* The
892 rule applies to a magistrate's report of testimony delivered before him.

ART. 3. *Other Person's Reports of Testimony.* The rule
893 does not apply to any other person's report of testimony, even though stenographic,

[except to an official stenographer's report.][2] — (W. § 1330.)

Cross-reference. For *dying declarations*, see Rule 138, *post*, § 951.

ART. 4. *Depositions.* The rule does not apply to a deposi-
894 tion *de bene* reduced to writing by an officer authorized to take depositions; inasmuch as a deposition is the testimony itself (Rule 94, *ante*, § 490), and not merely a report of the testimony; so that the proof of its tenor is governed by the rule of integration, or parol evidence (Rule 219, *post*, § 1946), hence the modifications contained in clauses 2, 3, and 4, of this Rule 131, cannot be availed of.

[1] Statutes usually make it the magistrate's duty to report, but often only "the substance."

[2] A majority of the few Courts that have ruled upon this are *contra* to the clause in brackets.

Par. (*d*). A witness testifying by *copy*, to the contents of a document, is not preferred to a witness testifying by recollection, except as provided in Rule 128 (*ante*, §§ 826–835).

Topic II: Absolute Preferences

900 RULE 133. *General Principle.* A rule of absolute preference for a specific person's testimony (Rule 129, *ante*, § 850), inasmuch as it makes that person's testimony exclusive of all other evidence on the subject, is not recognized, in the policy of the law,

except [where the fact to be evidenced is one which affects innumerable parties in a right or duty common to all, or where adequate evidence of it would ordinarily be likely to become practically unavailable shortly after the occurrence, and where therefore the preappointment of some officially prepared testimony, to be conclusive as to the fact, would be desirable.][1] Accordingly,

There are *no rules of absolute preference*, except as herein declared. — (W. §§ 1345, 1348.)

901 Art. 1. *Nature of an Absolute Preference.* Testimony is said to be absolutely preferred, where it is both exclusive and conclusive, *i. e.* where to evidence a given fact a particular person's testimony (oral on the stand or written in report or record) will alone be received and may not be disputed by other evidence.

Distinctions. (1) *Parol Evidence Rule.* Where a transaction is reduced to a single writing or memorial, and the preceding oral negotiations are superseded, the "parol evidence," or integration rule (Rule 217, *post*, § 1920), may make the writing conclusive, *e. g.* in the case of a contract, deed, corporate record, etc.; but this is because the written memorial *is* the transaction and supersedes the other utterances, not because it is conclusive evidence in the true sense of "evidence." Such cases are therefore not instances of the present rule. — (W. § 1346.)

(2) *Judgments.* Where by any judicial proceeding a fact in controversy is determined, that fact may no longer be

[1] No such generalization has been judicially made. But the clause attempts to state the principle actually underlying the recognized exceptions.

disputable in any other suit or court; because the judgment is enforced without renewed investigation into the facts. This is not because the judgment is conclusive evidence, but because the later Court is willing, as a matter of procedure, to enforce the prior judgment without inquiring into the facts at all. Such cases are therefore not instances of the present rule. Examples of judgments in various forms are: the certificate of *privy examination of a married woman* executing a deed; *sheriff's returns*, as between the parties; *land-office* rulings, etc. — (W. § 1347.)

902 ART. 2. *Magistrate's Report of Testimony.* A magistrate's report of testimony delivered before him by an accused or a witness is not conclusive as to the tenor of the testimony.[1] — (W. § 1349.)

Cross-references. (1) For the theory of a *deposition*, see Rule 131, Art. 4, *ante*, § 894.

(2) For the *conditional preference* of a magistrate's report, see Rule 131, Arts. 1, 2, *ante*, §§ 891, 892.

903 ART. 3. *Enrolled Copy of Legislative Act.* The enrolled copy of a legislative act, signed by the proper officers and preserved in the proper place, is [not] conclusive, and thus is [not] indisputable by the journals or other evidence, in respect to

(1) the *tenor* of the act;[2]

(2) the due performance of any *rules of procedure* of passage, such as the number of votes or the like.[3] — (W. § 1350.)

904 ART. 4. *Certificate of Election.* The certificate of election officers is [not] conclusive.

(1) that a certain candidate has been elected;

(2) or, that a required number of qualified voters did vote for a certain candidate;

except where the ballots have been destroyed or appear untrustworthy.[4] — (W. § 1351.)

[1] In England, the rule as to an accused's statements was otherwise.

[2] Many Courts hold *contra*.

[3] Many Courts hold *contra*, especially where the Constitution requires the procedure to appear in the journals.

[4] Courts differ here more or less; and statutes often make express provision.

905 ART. 5. *Sundry Instances.* The following kinds of conclusive testimony, being affected by the policy of the substantive law concerned, are not dealt with in this Code: — (W. § 1352.)

(1) a *statutory recital;*
(2) a *certificate of taking an oath;*
(3) a *certificate of acknowledging a deed;*
(4) a *record of a deed;*
(5) a *notary's protest.*

906 ART. 6. *Constitutionality of Statutes.* The Legislature can [not] validly prescribe a rule of conclusive evidence binding the Judiciary in the determination of controversies of fact coming properly before them.[1]

But this does not prevent the Legislature from

(1) regulating the effect of a judicial *judgment* or limiting appeal from an inferior judicial officer; or

(2) giving conclusiveness to an *executive* or administrative officer's determination in matters concerning the performance of his duties. — (W. §§ 1353, 1354.)

Illustrations. (1) A statute may make conclusive a bankruptcy commissioner's finding as to the debtor's insolvency; *i. e.* may limit the right of appeal from him as a judicial officer.

(2) A statute may make conclusive the determination of a land-officer as to the price for which public land ought to be sold; but not the determination of an immigration officer as to the citizenship of a person excluded as an alien immigrant but claiming to be a citizen.

Distinctions. (1) A statute may validly make a rule of substantive law, even though in the language of a rule of evidence; *e. g.* a statute making the setting of fire to be conclusive evidence of negligence is really a statute creating liability irrespective of negligence.

(2) A statute may be invalid by reason of some constitutional provision protecting property rights; *e. g.* a statute giving a building lien and making the land owner's failure to forbid it conclusive evidence of consent, gives the lien virtually without consent, and thus may violate the guarantee of due process of law.

907 *Par.* (*a*). The Legislature may make, under Rule 8 (*ante*, § 31), a rule of presumption (Rule 228, *post*, § 2034),

[1] There is much confusion here in the precedents.

TITLE II:

ANALYTIC RULES (HEARSAY RULE)

SUB-TITLE I: HEARSAY RULE IN GENERAL

910 RULE 134. *General Principle.* Every human assertion, offered testimonially (Rule 24, Art. 1, *ante*, § 106), *i. e.* as evidence of the truth of the fact asserted, must be subjected to two tests: — (W. § 1362.)

(1) The person making the assertion must be subjected to *cross-examination* by the opponent, *i. e.* must make it under such circumstances that the opponent has an adequate opportunity, if desired, to test the truth of the assertion by questions which the person is obliged to answer;

(2) The person making the assertion must be *confronted* with the opponent and the tribunal, *i. e.* must be in their presence when making the assertion.

(*Reason and Policy.* The test of cross-examination is found by experience to provide the most powerful means of ascertaining the circumstances which affect the trustworthiness of the witness' assertion. The mere assertion of the witness, especially when he is a partisan, leaves undisclosed innumerable details which may affect his grounds of knowledge, his interest, his bias, his character, and the supplementary and qualifying facts of the issue. The mere assertion is related to all these possible facts much as a flat outline drawing is to a painting with lights, shadows, perspective, and color. These additional elements can often be supplied by cross-examination only. Cross-examination is thus contrasted with three other conceivable modes of ascertaining the same facts: (1) *Direct* examination by the party offering the witness; here the party has a motive to suppress, rather than to disclose the discrediting facts; (2) Examination of *other witnesses* by the opponent; here the other witnesses will commonly not know the facts peculiarly affecting the first witness' credit; moreover, they might not be believed, whereas the witness would be, in discrediting himself; (3) *Judge's* questions to the witness; this is inadequate, under our system, because the judge has no prior information as to the probable facts, and because only a partisan counsel can

properly assume the necessary attitude of skepticism toward the witness.) — (W. §§ 1367, 1368.)

Illustration. Breach of warranty of a horse; the plaintiff alleged that the horse was not 'kind' and could not be shod. The defendant called two witnesses. The first was a blacksmith who had shod the horse often; he answered that "he had no difficulty in shoeing him," that "he stood perfectly quiet." The second witness was an old man who had formerly owned the horse; when asked whether he had any trouble in getting the horse to a blacksmith's shop, he replied that he "never took him to a blacksmith's shop, while he owned him, for shoeing." The jury found for the defendant. The next day, the blacksmith explained away, to an attorney-friend, the witnesses' apparently convincing testimony: "I told the attorney that the horse stood perfectly quiet while I shod him; so he did; but I didn't tell that I had to hold him by the nose with a pair of pincers to make him stand. The old man said he never took the horse to a blacksmith's shop while he owned him; and no more did he; but he had to take him out into an open lot and cast him, before he could shoe him." Here a proper cross-examination would have exposed these facts and shown the real value of the testimony for the defendant.

ART. 1. *Cross-examination essential, but not Confrontation.*
911 The opportunity of cross-examination is indispensable, and is governed by Rule 135 (*post*, § 913).

The confrontation is designed primarily to secure the opportunity of cross-examination. Its subsidiary purpose, to secure an opportunity of observing the demeanor of the witness while testifying, may be dispensed with if not feasible, and is governed by Rule 136 (*post*, § 928). — (W. § 1365.)

ART. 2. *Hearsay Extra-judicial Assertions.* No extra-
912 judicial assertion, *i. e.* uttered otherwise than as provided in Rules 135 (Cross-examination) and 136 (Confrontation), is admissible for the purpose of giving credit to it as evidence of the fact asserted in it, whether it be oral or written, sworn or unsworn;

unless it falls within one of the exceptions provided in Rules 137–154 (*post*, § 950).

But an utterance not offered as a testimonial assertion, *i. e.* offered for some other purpose than to be credited as evidence of the fact asserted in it, is not forbidden by the present rule. The various classes of utterances thus falling

without the scope of the rule are enumerated in Rule 155 (*post*, § 1240).

Topic I:

The Right to an Opportunity of Cross-Examination of an Opponent's Witness

RULE 135. *General Principle.* Every testimonial assertion
913 must be so presented that the opposing party has an opportunity to test its credit by cross-examination of the person making the assertion;

subject to the following details: — (W. § 1371.)

Art. 1. *Kind of Tribunal or Officer; Notice.* The testi-
914 mony must have been given before a tribunal or officer having by law the authority to take testimony and affording in practice an opportunity for cross-examination. — (W. §§ 1373–1376.)

Illustrations. The tribunal may be a *land-commissioner, bankruptcy-referee, arbitrator, coroner*, or any other, provided the above rule is fulfilled. The powers of officers, and the details of the procedure, do not fall within the scope of this Code (*ante*, § 11).

Par. (*a*). The circumstance that the officer cannot of
915 his own motion *compel an answer* without express ruling by a superior court is immaterial, provided he is by law authorized to take testimony.[1]

Par. (*b*). Where the officer is not a tribunal having
916 regular pleadings or other prior litigious proceedings, but is merely an officer to take depositions, it must appear that the opponent was given a fair opportunity to cross-examine;

in particular,

(1) a written *notice* of the intended taking of the testimony at the time and place of taking; and

(2) a [*reasonable interval of time*] to attend.[2] — (W. §§ 1378–1382.)

[1] This is the case with notaries and other deposition-officers in many States.

[2] Statutes usually prescribe mandatory rules of thumb; but they should be left to the trial Court's discretion, as directory only.

Par. (*c*). Where the testimony is taken in *perpetuam*
917 *memoriam*, *i. e.* in view of possible litigation,

(1) the notice may be given [by *publication*, to all persons not specifically known or attainable;] [1]

(2) the testimony may be *recorded* in a public office for the purpose of further effects of notice.[1] — (W. § 1383.)

Par. (*d*). An *affidavit*, or other statement made under
918 oath but not satisfying the present rule, is not admissible by reason merely of the oath. — (W. § 1384.)

Cross-reference. By Rule 4 (*ante*, § 8), the present rules do not apply in *ex parte* proceedings; affidavits may therefore in them be admissible.

ART. 2. *Issues and Parties.* The testimony must have
919 been given in a controversy in which the issues and the parties were

(1) substantially the same as in the present cause where offered;

[[or, (2) so nearly the same that, in the trial judge's determination, the opportunity of cross-examination then actually offered to the opponent was an adequate equivalent for the purpose of testing the trustworthiness of the testimony.]] [2] — (W. §§ 1386–1388.)

Illustration. In an action by a child for personal injury, the testimony of M, defendant's car-driver, is given for the defendant. After M's death, an action for loss of services is brought by the parent who was in charge of the child at the time of injury. On a plea of contributory negligence, the issue is now different from that of the first action; and M's testimony would not be receivable, under Cl. (1). But if in fact M was or might have been then cross-examined as to the circumstances of the parent's conduct, his testimony should be receivable, under Cl. (2).

Distinguish (1) former testimony of a *opponent party* offered as an admission, under Rule 119, Art. 5 (*ante*, § 672);

(2) former testimony, in *malicious prosecution*, offered as evidencing probable cause (Rule 136, *post*, § 944).

[1] Statutes usually cover this. The above seems the simplest solution.

[2] The double-bracketed clause is not yet law. But there has been a mass of futile quibbling over the rule of Clause (1), and it is rational and unpractical in its arbitrary limitations. Statutes sometimes prescribe a rule of thumb.

920 *Par.* (*a*). It is not necessary that there should be mutuality of use, *i. e.* that the testimony now offered by A against B could equally have been offered by B against A. — (W. § 1388.)

In particular, the party who formerly was the opponent may now introduce the testimony then introduced against him; inasmuch as the party then offering it had opportunity of examination on it, though not in form a cross-examination.

921 *Par.* (*b*). A deposition taken before trial, but *not used by the party taking it*, may nevertheless be introduced by the opponent, inasmuch as the party taking it had opportunity of examination. — (W. § 1389.)

Distinguish the question whether the rule against *impeaching one's own witness* applies in such case to either party (Rule 97, Art. 5, *ante*, § 509).

ART. 3. *Procedure of the Examination.* 922 The opportunity of cross-examination may have been inadequate by reason of some circumstance of the examination itself, [[and in such case the trial Court may admit or exclude the testimony already obtained by direct examination]] [1];

in particular, it may be inadequate because cross-examination, or a substantial part of it, was *made impossible*

923 *Par.* (*a*). By the witness' *death* or *illness* intervening after the direct examination; [unless the cross-examining party was responsible for the interruption.] [2] — (W. § 1390.)

924 *Par.* (*b*). By the witness' *refusal* to answer on a substantial part of the cross-examination. — (W. § 1391.)

925 *Par.* (*c*). By a *non-responsive* answer to a question, when the examination is had by written interrogatories filed beforehand, *i. e.* by so answering that the cross-examiner will have had no notice of some subject of the answer requiring cross-examination. — (W. § 1392.)

[1] The double-bracketed clause is not law, but ought to be.
[2] There is some variance of ruling on this subject.

926 *Par.* (*d*). By an answer to a *general* interrogatory filed beforehand, *i. e.* a question so broad that the answer produces the same unfairness as in Par. (*c*). — (W. § 1392.)

927 [*Par.* (*e*). By any other circumstance which substantially prevents a cross-examination where needed.][1] — (W. § 1393.)

Illustrations. An interpreter for an alien witness might leave after direct examination; etc.

Topic II:

The Right to Confrontation of an Opponent's Witness

928 RULE 136. *General Principle.* Every testimonial assertion must be made in the presence of the tribunal and the opponent, primarily in order that the opponent may exercise his opportunity to cross-examine (Rule 135), and, secondarily, in order that the tribunal may be enabled to observe the personality and the demeanor of the witness, while testifying, for the purpose of assisting in determining the credit to be given to his testimony. — (W. § 1395.)

929 Art. 1. *Confrontation Dispensable where not Feasible.* The first purpose being the primary one, the second one may be *dispensed with*, if it is no longer feasible, provided the first has been attained under Rule 135. — (W. § 1396.)

Par. (*a*). In a *criminal* case, the constitutional provision for confrontation does not prevent it from being dispensed with, where not feasible, but only requires that there shall have been an opportunity of cross-examination, under Rule 135, and thus admits

(1) depositions and

(2) former testimony

on the same terms as in civil cases.[2] — (W. §§ 1397, 1398.)

[1] This general phrasing has not yet been used; but it is justified by casual instances.

[2] In six or eight States, the Constitution has been interpreted otherwise, but erroneously.

Distinguish the situation where no *power* has been given to any officer to *take depositions* for the prosecution in criminal cases, under Rule 135 (*ante*, § 914); the deposition would there be inadmissible because of initial lack of power to take it, not because of the present principle.

Par. (*b*). For the same reason, the Constitutional provision does not, in a criminal case, prevent the use of

(1) *dying declarations*

(2) nor, of other statements admissible under the usual exceptions (Rule 137, *post*, § 950) to the hearsay rule. — (W. § 1398.)

Cross-reference. For the rule as to an *accused's presence* at a *jury's view*, see Rule 156, Art. 1 (*post*, § 1269).

ART. 2. *Conditions permitting it to be dispensed with.* A 930 deposition or former testimony, given so as to satisfy Rule 135 (*ante*, § 913) requiring an opportunity of cross-examination, may be received, instead of calling the witness to confront the tribunal and there testify, whenever the personal attendance of the witness for the purpose of testifying is not feasible; [1] — (W. §§ 1402, 1411–1413.)

that is to say,

931 *Par.* (*a*). When the witness is *dead*. — (W. § 1403.)

932 *Par.* (*b*). When the witness is *absent from the jurisdiction*, [unless the trial Court deems it reasonable to adjourn the trial or to require efforts made to persuade his attendance.] [2] — (W. § 1404.)

933 *Par.* (*c*). When the witness *cannot be found* after diligent search. — (W. § 1405.)

934 *Par.* (*d*). When the witness has been by the *opponent procured* to absent himself. — (W. § 1405.)

935 *Par.* (*e*). When the witness is so *ill*, *infirm*, or *aged*, that his attendance to testify would be impracticable or dangerous. — (W. § 1406.)

[1] Statutes always prescribe rules of thumb for depositions, and occasionally for former testimony.

[2] The bracketed clause is probably not law in more than a few States. Some Courts and statutes require residence, not merely absence, out of the State; this is too rigorous. A few decline to apply the rule in criminal cases.

936 *Par.* (*f*). When the witness is by reason of *official duty* privileged under Rule 200 (*post*, § 1685) from attending court. — (W. § 1407.)

937 *Par.* (*g*). When the witness *resides* [*at such a distance* from the place of trial that his personal attendance would cause excessive inconvenience.][1] — (W. § 1407.)

938 *Par.* (*h*). When the witness is now *disqualified* from testifying, by reason of *insanity*, *interest*, *infamy*, or otherwise. — (W. §§ 1408–1410.)

939 [[*Par.* (*i*). When for any other reason the trial judge deems the witness to be unavailable for present testimony.]][2]

940 ART. 3. *Proof of foregoing Conditions.* (1) The party offering the deposition or former testimony must satisfy the judge that one of the foregoing conditions is fulfilled.

[(2) But where, for the purpose of taking the deposition originally, a cause was shown which is likely to have continued to trial, the judge may dispense with further evidence.][3] — (W. § 1414.)

941 *Par.* (*a*). Where the witness is shown to be in court or otherwise available, his testimony in personal confrontation cannot be dispensed with.[4] — (W. § 1415.)

942 ART. 4. *Rule not Applicable.* In determining the scope and application of the rule, the following distinctions arise: — (W. § 1416.)

Par. (*a*). When the deposition or former testimony of a *party opponent* as witness is offered against him as an admission, under Rule 119, Art. 5 (*ante*, § 672), the foregoing conditions do not apply.

943 *Par.* (*b*). When a deposition *taken but not used* by an opponent is offered, the foregoing conditions do apply.

[1] Statutes regulate this, for depositions, by a rule of thumb; but not for former testimony.

[2] This is not law, but ought to be.

[3] This would probably be law in most jurisdictions.

[4] A few Courts are *contra*, for depositions, erroneously construing statutes.

944 *Par.* (*c*). When an action is brought for *malicious prosecution*, and testimony at the original prosecution is offered in the action, the foregoing conditions do apply.

945 ART. 5. *Exceptions to the Rule.* The foregoing conditions do not apply in chancery proceedings, or wherever by analogy the chancery procedure is applicable.[1] — (W. § 1417.)

[1] This is necessary, to cover a few anomalous instances (Illinois probate procedure, Federal *dedimus potestatem* commission, etc.), in which by statute the deposition is receivable unconditionally.

SUB-TITLE II:

EXCEPTIONS TO THE HEARSAY RULE

RULE 137. *General Principle.* An extra-judicial assertion, 950 offered testimonially, but not satisfying the requirements of Rules 135 (Cross-examination) and 136 (Confrontation), may nevertheless be admitted, exceptionally, provided three general conditions are found fulfilled:

(1) a *necessity* for using it;

(2) a circumstance diminishing the *risk of untrustworthiness* ordinarily to be guarded against in hearsay assertions;

(3) a *testimonial qualification* such as would have been required of the person if called as a witness. — (W. § 1420.)

This general principle is applied in the following specific rules.

(*Reason and Policy.* The foregoing principle is thus justified:

Necessity. The necessity may consist in the unavailability of other testimony from the same person, — as where he is deceased, or out of the jurisdiction, or detained by official duty; or in the probable inferiority of other evidence from the same person or other persons, and therefore in the probable loss of superior evidence, — as where the person is now biased but was then unbiased, or where the matter is ancient and the earlier evidence is perhaps superior. — (W. § 1421.) In such cases, it would be unreasonable to adhere rigidly to the rule.

Trustworthiness. The circumstances diminishing the risk of untrustworthiness may be such as make it likely that the utterance would be naturally sincere; or, if they were not inherently so, that other considerations, such as the danger of detection and the fear of punishment, would counteract the motive to falsify; or that the utterance was made under such conditions of publicity that an error, if any, would have been corrected by others, regardless of the original motives of the speaker or writer. These circumstances may be found, alone or united, to produce a diminution of the risk of untrustworthiness. — (W. § 1422.) In such conditions, the relaxation of the rule involves fewer drawbacks than it avoids.

Testimonial Qualifications. The assertion must have been ade by a person who in the elements of knowledge, memory,

lack of self-interest, and the like, would have been qualified as a witness to testify if present; because the assertion is offered testimonially, and a less qualification could not be conceded to a witness speaking out of court than when speaking in court.) — (W. § 1424.)

RULE 138. *Dying Declarations.* A statement made by a person who is near to death and conscious thereof is admissible, after his death.

(*Reason.* The solemn situation is likely to silence the selfish motives for falsehood, and to impel only sincere utterances. The decease makes it impossible to obtain the person's testimony in court. The principle of Rule 137 is thus fulfilled.)

The following limitations apply:

ART. 1. *Scope of the Issue.* The issue may be

952 (1) a criminal charge of homicide, in which the death of the declarant is an essential element of the charge; — (W. §§ 1432, 1433, 1435.)

[[(2) or, any other issue.]] [1] — (W. §§ 1431, 1436.)

ART. 2. *Subject of the Statement.* The statement must con-
953 cern the circumstances of the act causing the declarant's injury.[2] — (W. § 1434.)

ART. 3. *Mental Condition of the Declarant.* The declarant
954 must be conscious that death is impending.

(1) *speedily*

(2) and *certainly.* — (W. §§ 1438–1441.)

Par. (*a*). If the mental condition of the declarant is so
955 affected by *hatred*, *disease*, or otherwise, as to make his statement untrustworthy, it is inadmissible. — (W. § 1443.)

[[*Par.* (*b*). Whether the declarant's mental condition
956 is such as to render the statement admissible, is determined

[1] This is not now law, though it once was. Of course the limitation of cl. (1) is irrational.

[2] This is law, but equally irrational.

by the *trial judge*, under Rule 18 (*ante*, § 49).]][1] — (W. § 1442.)

ART. 4. *Testimonial Qualifications, etc.* The statement is
957 not admissible as to any facts upon which the declarant would not have been qualified as a witness. — (W. § 1445.)

Par. (*a*). Answers obtained by suggestive questions
958 (Rule 92, Art. 1, *ante*, § 462) are admissible, unless the trial judge deems them untrustworthy. — (W. § 1445.)

Par. (*b*). A statement in *writing*, not assented to by
959 the declarant, may be used as a memorandum of recollection, under Rules 89, 90 (*ante*, §§ 431, 444). — (W. § 1445.)

Par. (*c*). The declarant may be *impeached* or *corrob-*
960 *orated* as other witnesses are, by any appropriate mode. — (W. § 1446.)

Cross-reference. For the specific rule as to *prior self-contradictions*, see Rule 108, Art. 3 (*ante*, § 579).

ART. 5. *Other Rules of Evidence applicable.* Other inde-
961 pendent rules of evidence are here applicable or not, as follows:

Par. (*a*). The rule against *opinion* (Rule 168, *post*, § 1410) is [[not]] here applicable.[2] — (W. § 1447.)

Par. (*b*). The rule of *completeness* (Rule 182, *post*,
962 § 1547) applies to exclude a statement which is only a part of what the declarant intended to make; but not to exclude a statement which covers only a part of the facts of the occurrence. — (W. § 1448.)

Par. (*c*). The rule as to *preferred reports* of testimony
963 (Rule 131, *ante*, § 890) applies as follows:

[(1). The *written report* of a hearer, giving the oral statement, is not preferred;][3]

[1] This is not law now; but it would save us in the future from a mass of lumber on the subject, now in Supreme Court rulings.

[2] The double-bracketed word is not law; but for lack of it, many ridiculous quibbles disfigure our decisions.

[3] A majority of rulings say this; but perhaps it is not good policy.

(2) A written report of the statement, prepared by another person and *assented to by the declarant*, is preferred, but its correctness may be disputed;

(3) Where two statements are made at distinct times, and the later one is reduced to writing, either may be offered without the other. — (W. § 1450.)

964 ART. 6. *Judge and Jury.* Under Rule 229 (*post*, § 2100), the trial judge determines the conditions for admitting the statement; but after it is admitted, its credibility is for the jury's discretion, [without regard to the legal rules of admissibility.] [1]

966 RULE 139. *Statements of Facts against Interest.* A statement of a fact which is against the interest of the declarant is admissible, if the declarant cannot be procured to testify in court.

(*Reason.* Self-interest induces men to be cautious in stating facts which are against that self-interest; the disserving nature of the fact diminishes decidedly the risk of untrustworthiness ordinarily present. When the declarant cannot be obtained to testify, a necessity arises for resorting to these statements. Thus the principle of Rule 137 (*ante*, § 950) is satisfied.) — (W. §§ 1455, 1457.)

The following limitations apply:

967 ART. 1. *Necessity for Using (Death, Absence, etc.).* The statement is admissible if the declarant is

(1) *deceased;*

[(2) or, *absent* from the jurisdiction;]

[[(3) or, *not to be found* after diligent search;]]

[(4) or, disqualified by *insanity* or otherwise;]

[[(5) or, not now available, by any other reason, as a witness.]] [2] — (W. § 1456.)

[1] A few Courts, however, hold incorrectly that the jury may or must reject it if it does not fulfil the rule as to consciousness of death.

[2] The precedents recognize only one or two of these grounds; but there is no reason for drawing an arbitrary line.

ART. 2. *Nature of the Interest disserved.* The interest dis-
968 served by the fact stated must be one so palpable and positive that it would naturally be present in the declarant's mind at the time of the utterance;

in particular, it may be

969 *Par.* (*a*) a *proprietary* interest. — (W. §§ 1458, 1459.)

Illustrations. A declaration that he held only a life-estate, or that his land-boundary went only to a certain tree.

970 *Par.* (*b*) a *pecuniary* interest. — (W. § 1460.)

Illustrations. A receipt for money; an indorsement discharging a mortgage.

971 [[*Par.* (*c*) a *penal* interest]].[1] — (W. §§ 1476, 1477.)

Illustration. A fugitive from justice writes a letter from a foreign country confessing his own guilt and exonerating another person now charged; it ought to be admissible.

Distinguish the use of confessions of a *co-conspirator*, as admissions of a co-party (Rule 121, *ante*, § 687).

Par. (*d*) any other interest involving a substantial
972 *liability*, *incapacity* or *loss*.[2] — (W. § 1461.)

Illustration. In a collision of vehicles, the owner of one states that it was his fault, in not keeping a careful lookout; this is admissible.

ART. 3. *Measure of Interest, etc.* In determining the
973 existence of an interest disserved by the fact stated, the following distinctions apply:

Par. (*a*). The existence of a *counter-interest* does not exclude. — (W. § 1464.)

Illustration. In accounts, the self-charging entries are not made inadmissible because there are also discharging entries.

[1] This is not yet law; but it is absurd to maintain such a limitation. Esterhazy's confession from London, in the Dreyfus case, could not have been received under our law.

[2] Numerous precedents are recorded, but no such large phrasing.

974 *Par.* (*b*). An admissible statement which refers to or incorporates other statements makes them also admissible. — (W. § 1465.)

Illustration. An entry, in an account-book, of receipt of payment on July 1 for services performed on Jan. 1 admits the entry of services on Jan. 1 as thus referred to.

975 *Par.* (*c*). The fact stated must have been against interest *at the time* of the statement;

in particular,

(1) where the entry is a creditor's receipt of payment by the debtor, and the payment is relied upon as an acknowledgment taking the debt out of the limitations-statute, the time of the entry must have been before expiry of the statutory period.[1] — (W. § 1466.)

976 ART. 4. *Sundry Rules applicable.* The following further rules apply here:

Distinctions. (1) An *opponent's admissions* are receivable on a distinct principle, having different limitations (Rule 116, *ante*, § 631).

(2) So also an *accused's confessions* in a criminal case (Rule 122, *ante*, § 700).

Par. (*a*). The declarant must be qualified as a witness, under Rule 86 (*ante*, § 400), to the fact stated. — (W. § 1471.)

977 *Par.* (*b*). The form of the statement may be *oral* or *written*.[2] — (W. § 1469.)

978 *Par.* (*c*). A written statement is subject to the ordinary rules for Production of Documentary Originals (Rule 126, *ante*, § 747), for Authentication (Rule 189, *post*, § 1595), and other rules applicable to writings. — (W. § 1472.)

[1] A few statutes expressly forbid the use of such entries; but this is unnecessary. Many States by statute deny to the debtor's mere act of payment any effect on the limitations-period, and thus the above evidence of entries is immaterial.

[2] In Massachusetts, statements of facts against pecuniary interest must be written and formal.

RULE 140. *Statements about Family History (Pedigree).*

980 The statement of a family-member, or the general family-repute, concerning a fact of family history, is admissible, when the declarant, or the family-members, are no longer available to testify in court. — (W. §§ 1480, 1482.)

(*Reason.* The mention or discussion of interesting facts of family history goes on ordinarily, in the daily life of the family, with spontaneous sincerity; moreover, the speakers, or some of them, have personal knowledge of the events. The statements are thus the natural effusions of persons who have knowledge and whose minds stand in an even position. Furthermore, the general repute in the family is the result of much discussion, in the course of which differing accounts have been reconciled and a residuum of unanimous belief is attained. There is a necessity for such evidence when the individual declarant cannot be had as a witness, or when the family-members whose repute is offered cannot be had. Thus the principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is satisfied.)

ART. 1. *Necessity for Using (Death, etc.).* The statement

981 is admissible only when other evidence from the same source is not available; — (W. § 1481.)

in particular, is admissible

Par. (*a*). When the declarant (if the statement is that of a specific individual) is *deceased, disqualified by insanity* or otherwise, *out of the jurisdiction*, [*not to be found*, or otherwise unavailable as a witness].[1] — (W. § 1481.)

Par. (*b*). When the most important *family-members*

982 having personal knowledge (if the statement is in the form of general family-repute) are *not available* as witnesses.[2] — (W. § 1481.)

Illustration. By Art. 4 (*post*, § 993), an anonymous inscription of a death-date in a family Bible or on a tombstone represents the family-repute; in offering it, the mother and father should be shown to be deceased or otherwise unavailable. But if the statement is contained in a will or letter of the father, it is an individual statement, and only the father need be shown unavailable.

[1] The precedents do not go so far as this; but the principle is plain.

[2] There is confusion in the precedents; the above seems a liberal and practical solution.

ART. 2. *Absence of Bias or Interest.* The statement (or
983 repute) must not be made under circumstances likely to create in the declarant's (or family's) mind a palpable bias or interest on the subject of the statement. — (W. § 1484.)

In particular,

(1) it must be of a time before knowledge of any controversy, within or without the family, concerning the subject of the statement.[1] — (W. § 1483.)

ART. 3. *Testimonial Qualifications of the Declarant.* The
984 declarant (if an individual) must be one who, by kinship to the person referred to in the statement, [or otherwise by living with the person or family,[2]] has had adequate means of knowledge of the matter mentioned or of the family-tradition thereon. — (W. §§ 1486, 1488.)

In particular,

Par. (*a*). He need not have had *personal observation*
985 of the event (as required ordinarily for witnesses by Rule 86, Art. 5, *ante*, § 405); it suffices if he has heard the family discussion or tradition from members of it. — (W. § 1486, n. 1.)

Illustration. The deceased grandson's letter telling his grandfather's name is admissible, though he never saw his grandfather.

[*Par.* (*b*). He may be a *person not related* by blood or
987 by marriage, provided he has lived so long and so intimately with the family or a member of it as to acquire knowledge of its repute.][3] — (W. § 1487.)

Illustration. A letter of a deceased housekeeper, who had lived forty years in the family, describing the wedding of one of the daughters, is admissible.

Par. (*c*). He may be *related* either by *blood* or by *mar-*
988 *riage*, and in any degree [unless under the circumstances he appears to have been without adequate sources of information.][4] — (W. § 1489.)

[1] The precedents have not agreed entirely; but the above represents the kernel of the rule.

[2] This is to cover the rule of Par. *b*, *infra*.

[3] This is not conceded by a majority of Courts; but it is sound on principle.

[4] The bracketed clause may not be law; but ought to be.

Illustration. The declarant may be *husband*, or *wife*, or *brother-in-law*, of the person mentioned.

989 [*Par.* (*d*). He need not be related to any *person other than the one* who is the subject of the statement; in particular, to a third person whose estate, rights, or liabilities are the subject of the litigation.][1] — (W. § 1491.)

Illustration. George Roe, son of John Roe, living in Boston, in 1894 frequently mentions that his father had a brother James who went out to California to seek gold in 1854. After George's death, these statements are offered to show that a certain James Roe of California was related to John Roe of Boston. These may be admitted on showing George to be John's son, and without showing George to be a nephew of James. But some Courts would make the second requirement, if it happened to be James who had since become rich and left an estate to which George's relatives made claim.

990 *Par.* (*e*). The relationship is not to be determined by the rules of property-inheritance, but by the natural conditions of family life.

[In particular,

(1) a declarant's statement about a person who is a natural but illegitimate relation is admissible.][2] — (W. § 1492.)

991 *Par.* (*f*). The person testifying on the stand to the declaration admissible under the present rule need not himself be qualified under the foregoing rules; but merely must have heard or seen the declarant's statement or have been acquainted in the family enough to know its repute. — (W. § 1490, n. 1.)

Distinguish the use of a deceased person's statements of his family history offered merely to *identify* him with another person having a certain family history, and not to evidence the facts (W. § 1494). Here the statements are used circumstantially, under Rule 155 (*post*, § 1258).

992 ART. 4. *Form of the Statement.* The form of the statement or repute may be anything involving an assertion of fact. — (W. § 1495.)

[1] The contrary of this has been maintained, but erroneously, by some Courts.

[2] Where the declarant is not a *parent*, but some other member of the family, a few Courts are *contra*, but erroneously.

In particular,

Par. (*a*). If an *individual statement*, it may be in words or in conduct, oral or written.

Illustrations. Wearing a ring engraved with a marriage date; educating a child as one's legitimate son; rehearsing a pedigree in a will.

Par. (*b*). If a family *repute*, it may be any word or act
993 of any person assented to by the conduct of family life.

Illustration. Having in the family burial-lot a tombstone with an inscription; keeping in the common room a Bible with a record of family events; omitting to enter in the Bible record the name of an alleged child.

Par. (*c*). A person's testimony on the stand as to his
994 *own age* may be admitted as testimony to the family repute of his age. — (W. § 1493.)

Cross-reference. It may also be admitted as a statement from his own knowledge under Rule 86 (*ante*, § 405).

ART. 5. *Subject of the Statement.* The subject of the state-
995 ment may be any matter of the personal history of a member of the family, likely to be mentioned and accurately known in the family;

in particular,

(1) the fact, place, and time of birth, marriage, and death, the names, the degrees of relationship;

[(2), and any other such facts.][1] — (W. §§ 1500–1502.)

ART. 6. *Kind of Litigation.* The statement is admissible
996 [(1) regardless of the issue or kind of litigation in which it is offered.]

[(2) only in an action involving descent as an essential element of the issue.][2] — (W. § 1503.)

Illustrations. On offering a family Bible to evidence age, the issue may arise on a plea of infancy to a note, or in a prosecution for marrying a minor, or on a representation in an insurance policy.

[1] The bracketed clause goes perhaps beyond the precedents; but there has been far too much strictness in them.

[2] Clause (1) is the only sound rule; Clause (2) is the rule of England and a minority of American States.

ART. 7. *Other Rules applicable.* The other rules concerning
997 writings are here applicable; in particular,

(1) the rule for Production of Documentary Originals (Rule 126, *ante*, § 747)

(2) the rule for Authentication (Rule 189, *post*, § 1585); but conduct or writing offered as embodying family-repute, under Art. 4 (above), need not be authenticated as that of a specific individual, and, conversely, conduct or writing offered and authenticated as that of an individual need not be shown to have been assented to by the family. — (W. § 1496.)

Illustration. If a record in a family Bible is offered as family repute, the handwriting need not be identified.

RULE 141. *Attestation of a Subscribing Witness.* Whenever
1000 the attesting witness to a will or other document is not available for testifying in court to the execution of the document, his attestation may be used as testimony to the fact of execution, by authenticating his signature; subject to the detailed provisions of Rule 130 (*ante*, § 841). — (W. §§ 1505, 1508.)

(*Reason and Policy.* The witness' death or absence creates a necessity for resorting to his attestation-statement. That statement was made with deliberation and formality, looking forward to the probability of giving testimony thereto, and subject to possible prosecution for complicity in a forgery if falsely made. Thus there is a lessened risk of untrustworthiness; and the principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is satisfied.)

Par. (*a*). The attesting-witness' credit may be *im-*
1001 *peached* or *supported* like that of other witnesses. — (W. § 1514.)

Cross-reference. For impeachment by *self-contradictions*, see Rule 108 (*ante*, § 579).

RULE 142. *Regular Entries in General.* Entries of acts or
1002 occurrences, made regularly in the course of one's occupation, freshly after the event, are admissible, when the entrant is deceased or otherwise unavailable for testimony in court. — (W. §§ 1518, 1519, 1522.)

(*Reason and Policy.* The habit and system of making regular entries for business purposes produces usually a correct statement, by the very trouble and difficulty of making false statements frequently, and by the usual absence of a motive to do so. An erroneous entry, if made, is likely to be detected and disputed by the associates or customers of the entrant. Moreover, when the entry is by a clerk or agent, his responsibility to his superior produces additional caution. When the entrant cannot be had, to testify in court, a necessity arises to take such other evidence from him as his entries supply. Thus the principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is fulfilled.)

ART. 1. *Necessity for Using (Death, etc.).* The entry is
1003 admissible only when the entrant is
deceased,
disqualified by insanity or otherwise,
out of the jurisdiction,
[or otherwise unavailable to testify in court.][1] — (W. § 1521.)

Par. (*a*). Where an entry is made on the information
1004 of other persons, the practical difficulty of finding or procuring the other persons may suffice to admit the entry, as provided in Art. 3 (below).

ART. 2. *Circumstances and Form of the Entry (Regularity,*
1005 *etc.).* The entry must have been made in keeping a record of matters occurring in one's relations with others and as a part of some occupation in life. — (W. § 1523.)

Illustrations. A priest's marriage-register, a ship-captain's log-book, a carpenter's day-book of work done, would be admissible; but not a private diary of weather, books read, etc.

Par. (*a*). The entrant need not be under any *duty* to
1006 another person to make the entry.[2] — (W. § 1524.)

Par. (*b*). The entry must have been *one of a series*,
1007 not a casual or isolated one. — (W. § 1525.)

Par. (*c*). The entry must have been near enough to
1008 the *time of the event* for the entrant's recollection to be fairly trustworthy. — (W. § 1526.)

[1] Some Courts do not go so far as this broad phrasing. English rule was *contra*.

+ How about case where he has "forgotten" the items but can [illegible] to the accuracy of the entry?

Ans. This is not a Q of regular entries. Just of refreshing W's memory from a memo.

Par. (*d*). The entry must be *recorded in writing* or
1009 equivalent symbols. — (W. § 1531.)

Illustration. An employee's or watchman's time-register would be admissible.

Par. (*e*). The *lack of an entry* in a series of written
1010 entries is admissible as an implied statement that no event occurred of the kind that would have been recorded. — (W. § 1531.)

Par. (*f*). An *oral* report, made as one of a regular
1011 series, is not admissible;

except (1) under Art. 3 (below);

[(2) or, where in the circumstances it appears trustworthy.[1]] — (W. § 1528.)

ART. 3. *Personal Knowledge of the Entrant; Composite*
1012 *Entries.* On the principle of Rule 86, Art. 5 (*ante*, § 405), the entry must be based on personal observation; but this may be satisfied in any of the following ways: — (W. § 1530.)

Par. (*a*). The entrant himself may have had personal
1013 observation of the event or transaction recorded; in this case, his absence must be accounted for under Art. 1 (above).

Par. (*b*). The entrant may have only recorded an oral
1014 report or written memorandum, made in the regular course of business by *another person* or persons, the last of whom had personal observation, and each of whom makes a report or memorandum in a series which finally reaches the entrant; in this case, besides accounting for the absence of the entrant, the other person or persons must be accounted for

(1) either by reason of being deceased or otherwise unavailable, as in Art. 1 (above);

[(2) or, by reason of the practical difficulty of identifying or of procuring the personal attendance of the various persons.] [2]

[1] This is the rule in England only; but it deserves adoption.
[2] Not all Courts have yet agreed to accept this broad form of statement.

Illustrations. In an action for work done under a paving contract with a city, to prove the amount of work done the plaintiff produces a set of books kept by his clerk; the workmen had made oral reports to the foremen, the foremen had weekly time-sheets, and had handed them to the clerk, and the clerk had entered them; here the workmen need not be individually accounted for, under Cl. (2); the foremen should be individually accounted for, unless they were too numerous; the clerk should be accounted for; if the clerk is produced, the case falls under Par. (*c*).

Par. (*c*). If the entrant is produced, and uses his
1015 entries as records of past recollection under Rule 89, Art. 4 (*ante*, § 438), then the other persons must still be accounted for under Par. (*b*).

Cross-reference. If the other persons also are produced as witnesses, then no exception to the hearsay rule is needed, and the joint testimony to the writing as a record of joint past recollection is admissible under Rule 89, Art. 4 (*ante*, § 438).

ART. 4. *Production of Original Entry; Ledger.* Under the
1016 principle of Rule 126 (*ante*, § 747), the original document of entry must be produced or accounted for. — (W. § 1532.)

Par. (*a*). Where a composite entry is used under Art. 3 (above), the extent to which intermediate memoranda must be produced depends on the circumstances of each case.[1]

Par. (*b*). As between *ledger* and day book or other kinds, the book required is that which contains the first regular and collected record of the transactions. — (W. § 1532.)

RULE 143. *Regular Entries in Parties' Books.* Books of
1018 regular entries, made in the course of business, by a party to the cause or his agents, are admissible by exception to the hearsay rule; subject to the following distinctions: — (W. §§ 1519, 1536.)

Par. (*a*). The entries may be used, without needing any exception to the hearsay rule, as *records of past*

[1] This is the only practical way to treat this question.

recollection or *aids to present recollection*, by the maker of the entry, under Rules 89 (*ante*, § 431) or 90 (*ante*, § 444).[1]

Distinction. In such a case, any casual memorandum may suffice; hence regularity of entry is immaterial.

Par. (*b*). The entries may be used by satisfying the requirements of Rule 142 (*ante*, § 1002) for the *general exception* in favor of regular entries.

Cross-reference. (1) For the use of a party's books by *opponent*, as *admissions*, see Rule 115 (*ante*, § 630). — (W. § 1557, n. 3.)

(2) For *corporate books*, as *admissions* by the stockholders, see Rule 119, Art. 4 (*ante*, § 672).

Par. (*c*). The entries may be used under a *special exception* to the hearsay rule, in favor of parties' account-books, as provided in the ensuing articles:

(*Reason and Policy.* This special exception grew into shape when the parties to a cause were disqualified as witnesses; hence, they might be totally unable to recover the just claims of ordinary mercantile litigation, for lack of testimony; and thus arose a necessity for using such evidence as was available. The shop-books were less likely to be untrustworthy, for reasons similar to those of Rule 142 (*ante*, § 1002). Thus the principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, was satisfied. Since the abolition of parties' disqualification, this special exception has no longer a reason for survival; all its purposes can be attained under Par. (*a*) or Par. (*b*) above. But statutes had already enacted it; hence it remains. — (W. §§ 1536, 1537, 1546, 1560, 1561.)

1019 [ART. 1. *No clerk.* The party must have been without a clerk who could testify to the transactions recorded.[2]] — (W. § 1538.)

1020 ART. 2. *Subject of Entry; Cash Transactions.* The entries must not be of a matter on which other evidence would ordinarily be accessible by business custom;

in particular, they must not be

[1] This needs to be stated, though practitioners often forget it.

[2] Most Courts seem to ignore this in modern rulings, probably because the statutes usually ignored it.

[*Par.* (*a*). Of *cash* transactions (payments, loans, receipts) of which other written memorials would ordinarily be extant.][1] — (W. §§ 1539, 1549.)

Par. (*b*). Of a transaction to which third persons could
1021 testify;
or of the terms of a *special contract;*
or of *large* transactions. — (W. §§ 1540–1543.)

ART. 3. *Kind of Occupation* The party's occupation
1022 must be one in which account-books of business transactions are necessary to be kept. — (W. § 1547.)

ART. 4. *Kind of Book; Regularity, Contemporaneousness, Honest Appearance.*
1023 The entries must be made

Par. (*a*) as part of a *regular series,* not casual nor intermittent. — (W. § 1548.)

Par. (*b*) at a *time* near enough to the transaction for
1024 the entrant's recollection to be fairly trustworthy. — (W. § 1550.)

Par. (*c*) without mutilation, erasures, or other *marks*
1025 *of dishonest manipulation.* — (W. § 1551.)

ART. 5. *Reputation of Entrant.* There must be testimony
1026 to the good repute or habit of the party as to honest and correct accounting.[2] — (W. § 1552.)

ART. 6. *Form of Entry.* In form, the entry may be
1027 (1) on *any material,* or with any symbols;

Illustrations: in pencil or ink, on paper or wood, etc.

[(2) *affirmative* or *negative;* the lack of an entry being an implied statement that no transaction was had.[3]] — (W. § 1556.)

[1] A minority of Courts are *contra;* a few statutes and decisions limit the admissible amounts to $5 or so.
[2] Perhaps this would not be enforced to-day.
[3] Some Courts deny this.

ART. 7. *Personal Knowledge of Entrant; Composite Entries.*
1028 The entry must be based on the personal observation of the entrant, subject to the same detailed rules as provided in the general exception for regular entries by Rule 142, Art. 3 (*ante*, § 1012). — (W. § 1555.)

Par. (*a*).
1029 The party must by his oath verify the correctness of the entries. — (W. § 1554.)

Par. (*b*).
1030 This oath of the party is not equivalent to testimony, in the application of Rule 84, Art. 2 (*ante*, § 391) forbidding a survivor to testify against the deceased party to a transaction. — (W. § 1554.)

Par. (*c*).
1031 But the party may be cross-examined on the subject of the entries, and may be otherwise impeached. — (W. § 1554, n. 4, § 1557.)

ART. 8. *Production of the Original Entry; Ledger.*
1032 Under the principle of Rule 126 (*ante*, § 747), the original document of entry must be produced or accounted for; and the application of this rule to ledgers or intermediate memoranda is made as provided in the general exception for regular entries by Rule 142, Art. 4 (*ante*, § 1015). — (W. § 1558.)

RULE 144. *Statements about Private Boundaries.*
1035 A statement as to the location of a boundary of private land, by a disinterested person, is admissible; subject to the following provisions: — (W. §§ 1564, 1566.)

(*Reason and Policy.* The perishableness of landmarks and the frequent scarcity of evidence identifying boundary locations, especially in matters coming from a former generation, create an urgent necessity to use any evidence not palpably untrustworthy. The statements of disinterested persons are free from some of the ordinary risks of untrustworthiness. The principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is thus fulfilled.)

ART. 1. *Declarant Unavailable.*
1036 The declarant must be
deceased,
[out of the jurisdiction,
or otherwise unavailable].[1] — (W. § 1565.)

[1] For the bracketed clause there appear to be no precedents.

ART. 2. *Declarant Disinterested.* The declarant must be
1037 a person who is not interested in the land, or who, if interested, is stating a fact against his interest.[1] — (W. § 1566.)

[ART. 2*a*. *Declarant in Possession and on the Land.* The declarant must have been at the time of the declaration
in possession as owner of the land,
on the land
and pointing out its boundaries.[1] — (W. § 1567.)]

ART. 3. *Declarant's Knowledge.* The declarant must have
1038 been qualified by knowledge of the boundary, as surveyor or otherwise. — (W. § 1568.)

ART. 4. *Form of the Statement.* The statement may be
1039 oral or written.

Illustrations. Maps, surveys, etc., may be used.

Distinctions. (1) *Official maps* and surveys are also admissible under the exception of Rule 148 B, Art. 2 (*post*, § 1133).

(2) *Reputation* as to boundary, voiced by deceased individuals, is admissible under the exception of Rule 147, Art. 1 (*post*, § 1052).

(3) Statements of facts *against proprietary interest* are admissible under the exception of Rule 139, Art. 2 (*ante*, § 968).

(4) A party's or privy's *admissions* of another's title are admissible under Rule 121, Art. 4 (*ante*, § 691).

(5) Statements coloring the occupation, in title depending on *possession*, are admissible as verbal acts, under Rule 155, Art. 2 (*post*, § 1245).

RULE 145. *Ancient Deed-Recitals.* The recitals in an old
1040 deed of grant or the like are admissible to prove certain matters of which other evidence is likely to be scarce, with the following limitations: — (W. § 1573.)

(*Reason and Policy.* Similar considerations to those of Rule 144 justify this exception. The occurrence of the statements in a formal document of an actual transaction lessens the risk of untrustworthiness.)

[1] Art. 2 is the orthodox rule. Art. 2*a* is the Massachusetts form (followed in two or three Courts), and is essentially different; it is really an application of Rule 155, Art. 2 (*post*, § 1245).

ART. 1. *Deed must be Ancient.* The deed must be one
1041 executed in a prior generation.[1]

ART. 2. *Corroboration by Possession.* The premises must
1042 have been in possession of the party claiming under the deed [unless the circumstances sufficiently explain the lack of possession].[2]

1043 ART. 3. *Subject of the Recital.* The recital may state
(1) either the *contents of another deed*, which is shown to have once existed and to be now lost;
(2) or, the facts of *family relationship* of a party concerned in the title;
[(3) or, the location of a boundary, which has been acted on by possession in accord with the recital].[3]—(W. § 1573.)

Distinctions. (1) The recitals may also be used, but against privies in title only, as *admissions*, under Rule 121, Art. 4 (*ante*, § 691).
(2) The recitals in a *sheriff's* or other official's deed may be admissible under the exception of Rule 148 B, Art. 1 (*post*, § 1131).
(3) The use of a deed as *evidence of possession* (Rule 41, Art. 7, *ante*, § 203) or as a *verbal act* (Rule 155, Art. 2, *post*, § 1245) involves distinct rules.

[RULE 146. *Statements of Deceased Persons in general.* A
1045 statement of any person deceased is admissible in the following cases]:— (W. § 1576.)

[*Par.* (*a*). In case of any action brought *by or against*
1046 *the representatives* or privies in title of the deceased person;][4]

[*Par.* (*b*). In *any case*, when under the circumstances
1047 it appears to have been made in good faith and upon personal observation.][5]

[1] There is little authority. The details of Rule 190 (*post*, § 1608) would presumably apply, in evidencing genuineness.
[2] Most Courts require this; the bracketed clause gives the necessary flexibility.
[3] This is a Massachusetts rule only.
[4] This is the statutory law in Connecticut, and, in part, in Massachusetts and Oregon.
[5] This is by statute the law in Massachusetts only; but it should be universally adopted.

(*Reason and Policy.* The person being deceased, no living testimony from him can be had. When, further, the circumstances indicate trustworthiness, the principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is fulfilled. This broad exception is an indispensable safety-valve, to relieve from the otherwise too inflexible limitations of the other exceptions).

RULE 147. *Reputation.* Reputation in the community is
1050 admissible [to evidence those classes of facts in which there is usually a scarcity of other and more satisfactory evidence and upon which the general and settled belief of the community is likely to have been formed after thorough discussion among persons having adequate sources of correct information; in particular,] to evidence land-boundaries and related facts, general history of the community, marriage of a couple, and individual moral character;

subject to the following details:

(*Reason and Policy.* The principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is here satisfied as follows: For *land-boundaries*, and land-possession, the lapse of years is likely to destroy the landmarks and to leave no surviving witnesses; the repute of the community, as handed down in tradition, was formed among those who have personally observed, and discussion of matters having a common interest to the neighborhood is likely to sift out inaccurate rumors. For *general history*, the same considerations *apply;* here the discussion takes place between skilled investigators in their writings, and the repute is handed down in written form in books of history. For *marriage*, and other events of family-history, the necessity is a marked one, in a community having no systematic, compulsory, and exhaustive records, and living also in chronic habits of migration; the repute is formed among those who have personally observed the conduct of the pair, and have had occasion to act socially and commercially on their belief. For *moral character*, the necessity lies in the dearth of other evidence, inasmuch as particular acts of conduct are largely excluded by Rules 43 and 105, and individual opinion is excluded by Rule 176; the repute is founded on discussion among those who have observed the person's conduct, and represents the net result after the sifting of inaccurate rumors.)—W. §§ 1582, 1583 (land), §§ 1597, 1598 (history), § 1602 (marriage), § 1610 (character).

ART. 1. *Reputation of Land-Boundaries and Land-Customs.*
1052 Reputation in the community is admissible to evidence such

matters affecting land as are usually not evidenced by the records of title;

subject to the following details:

Par. (*a*). The matter must be *ancient, i. e.* in a prior
1053 generation. — (W. § 1582.)

Par. (*b*). The repute must concern a matter of general
1054 interest to the community; in particular, it may concern

(1) a boundary or custom affecting *public land.* — (W. § 1586.)

(2) or, a boundary or custom affecting *private land,* provided it affects a large number of lands in common.[1] — (W. § 1587.)

[(3) or, a *possession* of land, provided the circum-
1055 stances were likely to create a repute.[2]] — (W. § 1588.)

Distinguish the use of repute here circumstantially to evidence the *knowledge* by the other party of a claim of adverse possession, under Rule 62, Art. 9 (*ante,* § 286).

(4) but not a specific *act done* on or about the land.
1056 — (W. § 1585.)

1057 (5) nor a *title* to the land. — (W. § 1587.)

Par. (*c*). The repute must have existed *before controversy*
1058 on the subject. — (W. § 1588.)

Par. (*d*). The repute must arise in the *community*
1059 *where the land is.* — (W. § 1591.)

Par. (*e*). The repute must represent the opinion of the
1060 community; but it may be presented

in oral statements of *deceased individuals* expressly declaring their understanding as to the repute,

or in *maps, surveys,* deeds, etc., indicating a repute. — (W. §§ 1584, 1592.)

Illustrations. (1) The statement of R, deceased, that he owned land and that the boundary of his land was the highway is not admissible; but his statement that people always believed the highway to be bounded on his land is admissible.

[1] This is the rule in the United States, though not in England.

[2] Not all Courts concede this.

(2) An old survey of 1842 was then recorded, and in subsequent conveyances has been frequently referred to in descriptions of various tracts of land; this survey thus represents the accepted repute in the community.

Distinguish the use of a *survey* as a disinterested person's statement, under Rule 144 (*ante*, § 1037), or as an official's statement, under Rule 148 B (*post*, § 1131), in which uses the survey must be authenticated and the maker identified.

ART. 2. *Reputation of Events of General History.* Reputa-
1062 tion in the community is admissible to evidence matters of history in the community,
subject to the following details: — (W. § 1597.)

Par. (*a*). The matter must be *ancient*, *i. e.* in a prior
1063 generation.[1] — (W. § 1597.)

Par. (*b*). The matter must be of *general importance* in
1064 the community. — (W. § 1598.)

Par. (*c*). The reputation may be presented in a *printed*
1065 *treatise* or *essay* generally accepted as correct. — (W. § 1598.)

Distinguish (1) the use of *scientific treatises*, under Rule 149 (*post*, § 1170), which in some respects would cover this class of evidence.

(2) the *judicial notice* of notorious facts, under Rule 230 (*post*, § 2120), which would exempt from any offer of evidence.

ART. 3. *Reputation of Marriage, and other Matters of*
1066 *Family History.* Reputation is admissible to evidence the relation of a couple as married or not, and other important facts of family-history;
subject to the following details: — (W. § 1602.)

Distinguish (1) the use of *marital cohabitation* as circumstantial evidence, under Rule 63 (*ante*, § 293).

(2) the necessity of an *eye-witness*, as additional evidence, in certain issues, under Rule 181, Art. 3 (*post*, § 1537).

Par. (*a*). The reputation may be *negative*. — (W.
1067 § 1603.)

[1] Statutes sometimes ignore this; but modern matters are taken care of by Rule 149, *post*, § 1170 (scientific treatises).

[*Par.* (*b*). The reputation need not be *unanimous*.] [1] —
1068 (W. § 1603.)

[*Par.* (*c*). The reputation may concern such facts
1069 (besides marriage) of *family history* as are likely in the circumstances to have given rise to a trustworthy repute; including birth, legitimacy, death, race-ancestry.] [2] — (W. § 1065.)

Cross-reference. For *family repute* on such matters, see Rule 140 (*ante*, § 980).

ART. 4. *Reputation of Moral Character.* Reputation in
1071 the community is admissible to evidence an individual's moral character;

subject to the following details: — (W. § 1610.)

Distinguish (1) the question when the *moral character* itself is *relevant* and admissible, under Rules 30–33 (*ante*, §§ 130–152) and Rule 98 (*ante*, § 518).

(2) the question when the *repute* is *in issue* by the substantive law and the pleadings, under Rule 34 (*ante*, § 153).

(3) the question when the repute is circumstantial evidence of *some other person's notice* of the fact reputed, under Rule 62 (*ante*, § 277). — (W. §§ 1608, 1609.)

Illustrations. (1) In a trial for homicide, the prosecution may or may not be allowed to use the defendant's character for violence; but the reputation would be a proper mode of evidencing that character if it were admissible.

(2) In an action for slander, the plaintiff's bad repute may become a part of the issue, under the rule of damages diminishing compensation according to the amount of injury to the reputation.

(3) In an action for injury by an employee's negligence, the plaintiff being a fellow-servant, the injuring employee's repute as to incompetence may be circumstantially evidential of the employer's knowledge of his actual incompetence, and may also be admissible under the present rule as hearsay evidence of that incompetence.

Par. (*a*). The repute must be *general*, though it need
1072 not be unanimous. — (W. § 1612.)

Par. (*b*). The repute may be *negative*, *i. e.* that nothing
1073 has been said against him. — (W. § 1614.)

[1] Courts are here divided.

[2] Courts are here divided; but the above rule is a practical one, and falls within the general principle.

Cross-reference. (1) For the testing of an *impeaching witness* on cross-examination by asking him to *name* the persons who have spoken unfavorably, see Rule 111 (*ante*, § 604).

(2) For the testing of a *supporting* witness by asking if he has not heard unfavorable rumors, see Rule 105 (*ante*, § 557).

1074 *Par.* (*c*). The repute must be among people who have had an adequate opportunity of observing the person's conduct;

in particular,

(1) in the *neighborhood* of his home. — (W. § 1615.)

Cross-reference. For the qualification of the reputation-witness, as to *knowledge* of this reputation, see Rule 87, Art. 2 (*ante* § 417).

1075 [(2) or, in the group of persons with whom he follows his *occupation* or otherwise associates intimately.][1] — (W. § 1616.)

Illustrations. In a factory, commercial association, social club, etc.

1076 *Par.* (*d*). The repute *before the time of* the matter in issue is admissible, so far as the character before that time is admissible under Rule 98, Art. 2 (*ante*, § 521). — (W. § 1617.)

1077 *Par.* (*e*). The repute *after the time* of the matter in issue is

(1) admissible to evidence the character of a *witness* who is not a party nor equivalent to a party;

(2) but not admissible to evidence the character of a party, [[in so far as the controversy is likely to have affected the reputation unfavorably]].[2] — (W. § 1618.)

1078 *Par.* (*e*). The *kind of character* which may be evidenced by repute includes, besides the moral traits of a witness and a party as ordinarily involved, — (W. §§ 1620, 1621.)

(1) the *chastity* of a woman;

[1] This is not the law in most States; but it is demanded by modern conditions.

[2] The double-bracketed clause represents the principle, and ought to be included in the rule.

Distinguish here particularly the use of repute as evidence of the actual character and as itself material under the issue, under Rule 34 (*ante*, § 163) and Rule 49, Art. 3 (*ante*, § 234).

(2) the character of a person keeping or resorting to
1079 a *bawdy-house*, and the habitual use of such house.

Cross-reference. For such character as in issue, see Rule 34 (*ante*, § 163) and Rule 49, Art. 2 (*ante*, § 233).

(3) the *habitual conduct* of a person charged as a
1080 common offender.

Cross-reference. For such character as in issue, see Rule 49, Art. 1 (*ante*, § 231).

[[(4) the habitual use or avoidance of intoxicating
1081 *liquor;*]] [1]

[(5) the qualifications of a witness or a party as to
1082 *skill;*] [2]

1083 (6) but not a person's mental condition as to *sanity*.

ART. 5. *Reputation of other Personal Facts.* Reputation
1084 in the community as to other personal facts than character may or may not be admitted in the circumstances of the case, as follows:

[*Par.* (*a*). To evidence *solvency* or *wealth*, or the oppo-
1085 sites.] [3] — (W. § 1623.)

Distinguish the circumstantial use of reputation to evidence *some other person's knowledge* of solvency, under Rule 62, Art. 8 (*ante*, § 285).

Par. (*b*). Not to evidence a *partnership*. — (W.
1086 § 1624.)

Distinguish here also the circumstantial use under Rule 62, Art. 10 (*ante*, § 287).

1087 [*Par.* (*c*). To evidence *incorporation*.] [4] — (W. § 1625.)

[1] Courts generally deny this; but repute is worth admitting.
[2] This is generally denied.
[3] This is conceded by the majority of Courts.
[4] This is the rule by statute in many jurisdictions.

RULE 148. *Official Statements in general.* A statement in
1090 writing, made by a public officer, acting under a duty or authority to make the statement, and qualified by personal observation, is admissible;

subject to the provisions of this Rule and Rules 148A–148C.

(*Reason and Policy.* The principle of Rule 137 (*ante*, § 950), underlying the exceptions to the hearsay rule, is here satisfied as to both necessity and trustworthiness. The necessity consists in the practical impossibility of requiring the official's attendance as a witness to testify to the innumerable transactions occurring in the course of his duty and requiring to be evidenced. The diminished risk of untrustworthiness is found, first, in the sense of official duty which has led to the making of the statement; secondly, in the penalty which usually is affixed to a breach of that duty; thirdly, in the routine and disinterested origin of most of such statements (analogous to the exception for regular entries in the course of business); and fourthly, in the publicity of record, commonly found, which makes more likely the prior exposure of such errors as might have occurred.) — (W. §§ 1631, 1632.)

ART. 1. *Officer need not be Accounted for.* The statement
1091 is admissible without showing that the officer is deceased or otherwise unavailable; [[provided that the officer may by order of the trial judge be required to attend, unless where he is privileged under Rule 200 (*post*, § 1685).]] [1]

ART. 2. *Nature of the Duty; Kinds of Officers.* The state-
1092 ment must be made by a person having a lawful duty or authority to make it; subject to the following details: — (W. § 1633.)

Par. (*a*). The duty or authority need not be expressly
1093 declared by statute or departmental regulation,[2] but may be implied from the nature of the office.

Par. (*b*). The officer need not be a person whose sole or
1094 main occupation is official, or who has general official duties additional to that of making the statement; but must be a person having a duty to make the statement by virtue of his occupation and not merely as a mode of providing evidence against himself.

[1] The double-bracketed clause seems a desirable addition to the law.

[2] The several thousand statutes on the subject are mostly unnecessary.

Illustrations. A record of marriage, made by a clergyman having a governmental duty to make it, is admissible, even though the clergyman has otherwise no official status; but a record of sales of liquor, made by an apothecary, under a statutory duty, is not admissible, because the main object of the statute is to provide a check upon the apothecary's violation of the law as to liquors.

1095 *Par.* (*c*). The officer may be one of a foreign sovereignty, acting under a duty imposed by the foreign law.

Illustrations. The record of a deed, kept by a Louisiana notary, is admissible in New York, even though notaries in New York have no official duty to record deeds.

Distinguish the rule that the law of the forum determines which rule of evidence shall be enforced (Rules 6, 7, *ante*, §§ 17, 21).

Cross-references. For illustrations of the application of this principle, see *post*, § 1110 (records of deeds), § 1146 (notary's certificates).

1096 *Par.* (*d*). The officer making the statement may be one or more subordinate officers in the staff of the officer who signs it,

provided that at least one of the persons is qualified under Art. 3, below,

and provided that a subordinate using the name or seal of the chief officer is authorized for the purpose. — (W. §§ 1633, 1635.)

1097 ART. 3. *Officer's Personal Knowledge.* The officer signing the statement (or at least one of those persons in his staff who act for him under Par. (*d*) of Art. 2, above) must be qualified by personal observation, like other witnesses under Rule 86, Art. 5 (*ante*, § 405), except so far as expressly otherwise provided in the ensuing rules. — (W. § 1635.)

1098 ART. 4. *Classes of Documents.* The various kinds of official statements are classified, with reference to the foregoing principles, into three groups,

A. Registers and Records;

B. Returns and Reports;

C. Certificates. — (W. § 1637.)

A. A *register* or *record* is a series of entries on related subjects, made in a single continuous volume or series of volumes, and kept in official custody.

B. A *return* or *report* is a single separate document, made as occasion arises, and kept in official custody.

C. A *certificate* is a single separate document, not kept in official custody, but made and given out on each occasion to the person applying for it.

The ensuing rules apply to the various documents thus defined, regardless of the term applied by custom to the particular document.

1100 RULE 148 A. *Registers and Records.* Wherever there is a duty for an officer to do or observe a thing, there is implied in law a duty to make a record of what is done or observed, and the record is admissible, except as otherwise herein provided.[1] — (W. § 1639.)

Sundry Illustrations. The records of a county treasurer, a Federal lighthousekeeper, a State surveyor, a city auditor, etc.

1101 ART. 1. *Assessor's Record.* An assessor's record of property assessed is admissible to show the

[ownership,][2] occupancy, [location, and value][3]

of the property. — (W. § 1640.)

Distinguish the use of such books as against the assessee only; on the principle that they embody his admissions made in his sworn and filed statement (Rule 118, *ante*, § 641).

1102 [ART. 2. *Ship's Log-book.* The log-book kept by the officer of a ship is admissible to evidence the matters required by law to be recorded.][3] — (W. § 1641.)

1103 ART. 3. *Register of Marriage, Birth, and Death.* A record of marriages, births, or deaths, kept by an officer having

[1] Almost all the specific statutes on this subject are superfluous. The Code of California has hardly any provision except the general one.

[2] Courts differ on these points; the real doubt arises from the principle of Rule 148, Art. 3 (*ante*, § 1097).

[3] This is not generally conceded, except under the Federal statute; but it might well be.

the duty, or by any other person expressly by law so authorized, is admissible to evidence the matters required to be recorded;

subject to the following details (W. §§ 1642–1644):

1104 *Par.* (*a*). So far as the record is based on the *report of another person*, that report must be one required by law to be made by him.[1]

1105 *Par.* (*b*). So far as the record states facts which are not within the *personal knowledge* of the recording officer, it is admissible to evidence [any facts required to be reported by others to him or customarily so reported and entered.][2]

Illustrations. The town-clerk's record of the birth, date and the sex of a child, made on the report of a parent as required by law, is admissible. The clerk's record of the time and the cause of a death, reported by a physician, and the clerk's record of the names of persons married, reported by a clergyman who performed the ceremony but had never before seen the parties, is admissible.

1106 *Par.* (*c*). A *certificate of marriage*, given out to the parties by the person performing the ceremony, [is admissible if a record kept by the same person, or by another official on his report, would be admissible.][3]— (W. § 1645.)

Distinguish the admissibility of a *certified copy* of a record of marriage; this is also but improperly called a certificate, and would in any case be admissible under Rule 149 C, Art. 6 (*post*, § 1152).

Cross-references. (1) For the *authentication* of a certificate, see Rule 193 (*post*, § 1633).

(2) For the admissibility of a marriage register under the exception for *regular entries*, even though not receivable under the present exception, see Rule 1, Art. 143 (*ante*, § 1022).

(3) For the use of a *certificate* acted upon by a deceased family member and thus becoming admissible under the exception for statements about family-history, see Rule 140, Art. 4 (*ante*, § 992).

[1] *I. e.* in order to obtain somewhere in the record some one's personal knowledge, under Rule 148, Art. 3 (*ante*, § 1097).

[2] There is much uncertainty in the rulings. The above seems a practical rule.

[3] There is some dissent and much confusion on this subject; but for our communities this seems the only practicable rule.

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ART. 4. *Register of Ships.* A register of ships, in so far as
1107 it is based merely on the filed statement of a person claiming to be owner, is not admissible.

Distinguish its use against the declarant, as embodying his admission, under Rule 118 (*ante*, § 641).

ART. 5. *Register of Conveyances.* A register of conveyances,
1110 kept by an officer authorized to record conveyances, is admissible to prove the contents and the execution of a recorded conveyance which

(1) is of a class authorized to be recorded, and

(2) has been recorded as prescribed by law;

subject to the following details: — (W. §§ 1648–1651.)

[*Par.* (*a*). If the register is kept in *another jurisdiction*,
1111 the due authority for keeping it is determined by the law of that jurisdiction.][1] — (W. § 1652.)

Par. (*b*). . If the registry law does not provide for
1112 recording any proper testimony to the *execution* of documents, the register is [not] admissible to evidence the *contents* only.[2] — (W. § 1653.)

Par. (*c*). If the register of a specific document does not
1113 fulfil the requirements as to testimony of *execution*, it is still admissible to evidence the document's contents, if its execution is *otherwise evidenced.* — (W. § 1653.)

Par. (*d*). The requirement of some testimony of execu-
1114 tion to be recorded is sufficient when it consists in [3]

(1) a certificate of *acknowledgment* of execution by the maker of the document before the recording officer, or before some separate officer, such as a notary, a mayor, or other officer, domestic or foreign, as provided by the registry law;

(2) or, a certificate of *probate* of execution, by one or more witnesses attesting the fact of execution in their presence or the genuineness of handwriting (if the

[1] There is here little authority, and not harmonious.

[2] There is difference of rulings on this point; the "not" is unsound.

[3] The different States here vary somewhat.

maker is deceased), or otherwise as provided by the registry law. — (W. § 1653.)

1115 *Par.* (*e*). If the *original document* of conveyance is *produced*, the register may still be used to evidence the document's execution. — (W. § 1653.)

Cross-reference. Whether the original document *must* be produced, is determined by Rule 126, Art. 11 (*ante*, § 781).

1116 *Par.* (*f*). Wherever the register itself would be admissible for any purpose,

(1) its *production* is excused, under Rule 126, Art. 9 (*ante*, § 779);[1] *and*

(2) a *certified copy* of it is admissible, under Rule 148 C, Art. 8 (*post*, § 1161);[1] *or*

(3) a *sworn copy* of it is admissible, under Rule 128 (*ante*, §§ 820–835).[2] — (W. § 1655.)

Cross-reference. (1) Whether the original *certificate of execution*, on the deed itself, can be used to evidence execution, where the original deed is produced and not the register nor a copy of the register, is determined by Rule 148 C, Art. 2 (*post*, § 1147).

(2) What sort of *seal*, or other means, suffices to *authenticate a certified copy*, is determined by Rule 193 (*post*, § 1633).

1117 ART. 6. *Register of Assignment of Patent.* A register of assignments of patents of invention [is admissible under the same principles as provided in Art. 5 for other conveyances.[3]] — (W. § 1657.)

1118 ART. 7. *Register of Wills.* The judicial record of a will, made in a court having authority to probate it, is a judgment conclusive of the subject adjudicated. It is provable under Rule 126, Art. 8, (*ante*, § 778) without producing the original, and under Rule 148 C, Art. 7 (*post*, § 1160) by a certified copy. — (W. § 1658.)

1119 ART. 8. *Register of Government Land-Office.* The register of patents of land, scrip, and the like, in the office having

[1] The statutes invariably enact in the same section these three results, *i. e.* of the present rule and the two above cited.
[2] The statutes usually do not cover this point.
[3] This point has not yet been settled.

charge of grants of government land, is by substantive law either an original constitutive document of title, or a record of original documents of title. If it is the latter, the record (or a copy) is admissible under the present Rule, Art. 5. — (W. § 1659.)

Cross-reference. The chief question here, depending on the above two theories of the title, is whether the *original patent* etc., *must be produced* or accounted for under Rule 126, Art. 11 (*ante*, § 781) and Art. 16 (*ante*, § 791).

ART. 9. *Judicial Records.* A judicial record is a judgment,
1120 ending a controversy and requiring enforcement without re-inquiry in another court, according to the law of judgments. It is provable under Rule 126, Art. 8 (*ante*, § 778) without producing the original, and under Rule 148 C, Art. 7 (*post*, § 1160) by a certified copy. — (W. § 1660.)

ART. 10. *Corporate Records.* The records of a corporation
1121 private or public, are admissible in the following ways:[1] — (W. § 1661.)

Par. (*a*). The records of the *proceedings of a meeting* of a *private* corporation are receivable [either under Rule 142 (*ante*, § 1002) as regular entries in the course of business, or] under Rule 218 (*post*, § 1944) as the exclusive memorial of the proceedings, according to the principle accepted by the substantive law. But if the corporation is a *public* one, the records are receivable under the present Rule without calling as a witness the officer making them, and their contents are provable under Rule 126, Art. 9 (*ante*, § 779) without producing the record itself, and under Rule 148 C, Art. 6 (*post*, § 1152) by a certified copy.

Par. (*b*). The records of the *acts* done by the corpora-
1122 tion or its officers are receivable, [if of a private corporation, as regular entries in the course of business, or,] if of a public corporation, as official statements, under the Rules mentioned in Par. (*a*), above.

[1] There is much looseness and confusion here in the precedents; and statutes often enter.

1123 *Par.* (*c*). The records of a *private* corporation are further admissible against parties privy to their contents, under Rule 119, Art. 4 (*ante*, § 671), governing parties' admissions.

1124 ART. 11. *Legislative Records.* The records of a Legislature are admissible as follows: — (W. § 1662.)

Par. (*a*). The *journals* of proceedings are admissible as official statements, under the present Rule, without calling as a witness the officer making them.

Cross-references. (1) Whether they are *conclusive*, or can be used to correct the enrolled act, is determined by Rule 133, Art. 3 (*ante*, § 903).

(2) Whether they are provable by *printed copy* is determined by Rule 148 C, Art. 10 (*post*, § 1164).

1125 *Par.* (*b*). The *recitals* in a *public* act are admissible, under the present Rule, [unless it appears that the principle of Rule 148, Art. 3 (*ante*, § 1012), requiring adequate means of information, is substantially not fulfilled].[1]

1130 RULE 148 B. *Returns and Reports.* A return or report (as defined in Rule 148, Art. 4, *ante*, § 1098) is admissible, subject to the ensuing details, on these conditions:

(1) Whenever the duties of an officer require him, while within or *without the premises* of his office, to *do* or *observe* something, he has an *implied* authority, on returning to the official premises, to write down what he did or observed, and this written statement is admissible.

(2) Whenever the duties of an officer require him to obtain information *other than by personal observation* (under Rule 148, Art. 3, *ante*, § 1093), his return or report is admissible only when he had *express* authority, by legislative enactment or by executive command, to make it upon such information.[2] — (W. §§ 1664, 1670, 1672.)

[1] The precedents are uncertain; the above seems a fair compromise.

[2] This seems to be the effect of the precedents, which however do not furnish so broad a statement.

ART. 1. *Sheriff's Returns and Recitals.* A sheriff's return
1131 of acts done by him under the duties of his office is admissible. — (W. § 1664.)

Distinguish the *conclusiveness* of the return, as against the parties, by the law of judgments.

Par. (*a*). The *recitals* in a sheriff's deed as to the con-
1132 tents of the judgment authorizing the sale on execution, are [not] admissible.[1] — (W. § 1664.)

Cross-reference. Whether the *whole* of the record of judgment, etc., must be evidenced, is determined by Rule 184 (*post*, § 1561).

ART. 2. *Surveyor's Return* (*Map, etc.*). A surveyor's return,
1133 in the form of a description or map, of the location of lines, landmarks, and other things done or seen by him in the course of his duty, is admissible. — (W. § 1665.)

Distinguish the other hearsay exceptions affecting *boundaries* and the like (Rule 144, *ante*, § 1035; Rule 147, *ante*, § 1050).

ART. 3. *Report of Testimony.* The report of testimony at
1134 a trial, made by a person authorized thereto, is admissible.
In particular:

Par. (*a*). The *notes* taken by a *judge* of a superior court
1136 are not admissible. — (W. § 1666.)

Par. (*b*). A *committing magistrate's* report, when made
1137 under a duty to report the whole, is [not] admissible.[2] — (W. § 1667.)

Cross-reference. For the rules *preferring* the magistrate's report to other evidence, see Rules 131 and 133 (*ante*, §§ 890, 900).

Distinctions. (1) A report not admissible under this Rule may be used as a record of recollection under Rules 89 or 90 (*ante*, §§ 431, 444).

(2) A report not admissible under this Rule may be received as an *admission* or *self-contradiction*, if it was assented to as correct by the accused or witness. — (W. § 1667.)

[1] This was not so at common law; but statutes have usually eliminated the "not."

[2] A majority of Courts properly admit this.

(1) Whenever an *express* authority, by legislative enactment or by executive command, has been given to an officer to prepare and deliver out a certificate of something done or observed by him in his office, this certificate is admissible.[1] — (W. § 1674.)

Illustrations. The vast majority of certificates are governed by this rule, — prison-discharge, army-discharge, auditor's account, grain-inspection, land-office, factory-inspection, etc.

(2) There is no *implied* authority in an officer to deliver out a certificate, except as stated in the ensuing articles. — (W. § 1674.)

(3) Whenever the certificate concerns an act done to or in some document not retained in the officer's custody (deed, note, affidavit), the certificate must be *attached* to the document.[2]

Par. (*a*). The certificate itself will be *authenticated*, as to gen-
1145 uineness, according to the general provisions applicable to the authentication of official documents, under Rule 193 (*post*, § 1633).

Wherever by that Rule an officer's certificate does not authenticate itself by seal alone, but the annexed certificate of another officer authenticates itself by seal alone, the second officer hereby is given an implied authority under the present Rule to certify to the genuineness of the first officer's seal and certificate.

In particular,

1. For a document, *not a judicial record*, coming from any part of the *United States*, the second officer may be
the Secretary of State,
or, the judge of a court of record,
or, the mayor of a city.[3]

2. For a document, *not a judicial record*, coming from a *foreign country*, the second officer may be
the Secretary of State,
or, a United States diplomatic or consular officer.[3]

[1] There are here several hundred statutes. For creating the duty, they are necessary; for securing admissibility, they are not.
[2] This represents the practice and is expressly stated in many statutes.
[3] See Note 1, next page.

3. For a document, *being a judicial record*, the second officer may be

the chief judge, if in the United States,

or, the chief judge and a United States diplomatic or consular officer, if in a foreign country.[1]

4. For a document, *not a judicial record*, coming from any part of the United States, the second officer may be

the Secretary of State or the Governor

or, the presiding justice of the jurisdiction together with the clerk of his court.[1]

5. For a document, *being a judicial record*, coming from any part of the United States, the second officer may be

the judge, chief justice, or presiding magistrate.[1]

1146 ART. 1. *Notary's Certificate for Commercial Paper.* A notary's or other officer's certificate of matters relating to the negotiation of a negotiable instrument is admissible, to the extent that the facts stated are within the scope of his duty as defined by custom or statute;

in particular, to the facts of presentment, demand, refusal to accept or to pay, [mode of notifying the parties, and residence of the parties; whether the instrument be a bill, note, or check, and whether it be inland or foreign].[2] — (W. § 1675.)

Cross-reference. For *authentication* by seal of the notary, see Rule 193, Art. 4 (*post*, § 1640).

1147 ART. 2. *Certificate of Execution of Deeds.* The certificate of an officer authorized to witness the maker's acknowledgment of the execution of a deed, will, or other instrument of conveyance is admissible to evidence that fact, as follows:

Par. (*a*). Where the instrument is one entitled to be *recorded*, and *has been recorded* upon the fulfilment of the

[1] Clauses 1, 2, and 3 represent the substance of the rule under the California Code; Clauses 4 and 5, under the Federal statute. There are numerous other varieties of rule, in different States, mostly made by patchwork for different classes of documents. Some simple, uniform, and flexible rule like that of the California Code, applied without technicality, is the desideratum.

[2] By statute in most States the rule has been extended to include the scope of the bracketed clause.

requisites thereto, the certificate of acknowledgment is admissible to evidence the execution of the original instrument.[1] — (W. § 1676, par. (1).)

Par. (*b*). Where the instrument

1148 (1) is one *not entitled* to be recorded,

(2) or, is one entitled to be but *not actually* recorded,

the certificate is not admissible, unless express authority has been given to certify to such acknowledgments otherwise than for the purpose of recording.[2] — (W. § 1676, par. (2).)

Cross-reference. For the rule here applicable where a *foreign law* authorizes such certificates, see Rule 148, Art. 2 (*ante*, § 1092).

ART. 3. *Certificate of Oath.* The certificate of an officer
1149 authorized to administer an oath (affidavit, deposition) is admissible. — (W. § 1676, par. (3).)

ART. 4. *Certificate of Marriage, etc.* A certificate of mar-
1150 riage, birth, or death, is admissible as provided in Rule 148 A, Art. 3 (*ante*, § 1103).

ART. 5. *Postmark.* A postal-officer's stamp on matter
1151 passing through the mail is admissible to evidence the time and the place of stamping. — (W. § 2152.)

Cross-reference. For the presumed *genuineness* of a postmark, see Rule 191, Art. 2 (*post*, § 1624).

ART. 6. *Certified Copy, in general.* The official custodian
1152 of a document has an implied authority to make a copy and to certify its correctness by certificate delivered to an applicant; and such certificate is admissible to evidence the matters within his authority of office;

subject to the following details:[3] — (W. §§ 1677, 1680.)

[1] This is a universal implication from the recording system.

[2] A majority of States now have some such statutory provisions, but usually except from their scope wills and negotiable instruments.

[3] This was not the English common law, but is in general the American common law. Nevertheless, several thousand statutes (following an early legislative custom caused by the English rule) now superfluously provide admissibility for specific classes of documents.

1153 *Par.* (*a*). The certificate is admissible to evidence the *contents*

(1) of all *official records* or other documents there lawfully preserved, whether originating there or in another office;

(2) and of all *private* documents lawfully filed or deposited there;

and of those only.

1154 *Par.* (*b*). The certificate is admissible to evidence the *genuineness* ((execution)

(1) of all such official *documents;*

(2) but not of such *private* documents, originating without the office, [unless required by law, before being placed in official custody, to be executed before some other officer and to bear his certificate of execution.] [1] — (W. § 1677, par. (2).)

1155 *Par.* (*c*). The certificate must purport to give a *literal copy* of the original;

unless the custodian is entitled to state only the *substance* or *effect* of the original,

(1) either by *express authority*, under legislative statute or executive command,

[[(2) or by the determination of the trial Court under the circumstances.]] [2] — (W. § 1678, par. 4.)

Cross-reference. Whether the *whole*, or a *part merely*, may be copied, is a different question, depending on Rule 184, Art. 3 (*post*, § 1658).

1156 *Par.* (*d*). A certificate that a document or entry of a specific tenor *cannot be found*, after diligent search, in the custody of the officer, is [not] admissible.[3] — (W. § 1678, par. (5).)

[1] Here there is much haziness in the precedents; the above rule is required by principle, by the analogy of deeds, etc., and by practical safety.

[2] Numerous statutes give such authority; but the Court ought to give further elasticity when needed, as provided in the bracketed clause.

[3] The affirmative is not the common law, but ought to have been. Some States have so provided by statute.

Distinguish the question arising under Rule 126, Art. 19 (*ante*, § 794), whether a *witness on the stand* can testify to the non-existence of a record or entry *without producing* the entire files.

1157 *Par.* (*e*). The certified copy may be used without *producing the original*, as provided in Rule 126 (*ante*, § 747).

1158 *Par.* (*f*). The certified copy must itself be *authenticated* (as to genuineness) by the custodian's *seal*, or when that does not suffice, by the *further certificate* of another officer, or otherwise, as provided in Par. *a*, Rule 148 C (*supra*, § 1145) and in Rule 193 (*post*, § 1633). — (W. § 1679.)

1160 ART. 7. *Certified Copy of Judicial Record.* The clerk of the court having custody of a judicial record has implied authority to certify to the existence and contents of the record, and such certificate is admissible.[1] — (W. § 1681.)

Cross-reference. For *authentication* by seal, etc., see Rule 193 (*post*, § 1633) and § 1145, *supra*. Art. 7 is merely an application of Art. 6; but the class of records in Art. 6 would be authenticated by a different kind of seal or additional certificate.

1161 ART. 8. *Certified Copy of Recorded Deed.* The officer having custody of a register of deeds or other instruments of conveyance has authority to certify a copy of the record of any instrument lawfully recorded, and such certificate is admissible. — (W. § 1682.)

1162 *Par.* (*a*). The certificate is admissible to evidence the *execution*, and other matters concerning the instrument, in so far as the register itself would be admissible to evidence them, under Rule 148 A, Art. 5 (*ante*, § 1110).

Cross-reference. For *authentication* by seal, etc., see Rule 193 (*post*, § 1633) and § 1145 (*supra*).

1163 [ART. 9. *Certified Copies of Private Record.* The custodian of a private person's record (*e. g.* church records, corporation records) has authority to certify a copy, if the record is one which need not itself be produced under Rule 126, Art. 10

[1] This was not common law in England, but is in the United States. Statutes also everywhere so provide.

(*ante*, § 780), and if it is accessible to all parties interested for the purpose of verifying the copy.][1] — (W. § 1683.)

1164 ART. 10. *Officially Printed Copy.* A printed copy of [a public record, or of a document lawfully on file in a public office,][2] is admissible if it was printed

(1) by an *official printer* of the State;

(2) or, in an *official periodical* exclusively containing public records;

(3) or, by a *private printer expressly authorized* by the officer having power to publish.[3] — (W. § 1684.)

Cross-reference. (1) For the presumption of *genuineness* of such copies, see Rule 193 (*post*, § 1644).

(2) For the admissibility of *privately printed copies* of decisions and statutes, see Rule 151, Art. 1 (*post*, § 1181).

(3) For the *production of the original*, instead of using a copy, see Rule 126, Art. 9 (*ante*, § 779).

1170 RULE 149. *Scientific Treatises.* A treatise or essay on a subject of science or art, composed by a person expert in the science or art, is admissible;

subject to the following provisions:[4] — (W. §§ 1690–1693, § 1696.)

(*Reason and Policy.* The fundamental considerations underlying the exceptions to the hearsay rule (Rule 137, *ante*, § 950) are here satisfied. There is a necessity, because the most authoritative writers on scientific subjects can rarely be obtained in person on the witness-stand, either because they live without the jurisdiction, or because the relative expense of obtaining them could be great. There is a diminished risk of untrustworthiness, because the publication was made for scientific purposes, free from motives affecting the

[1] A number of statutes admit copies, so certified, of specific classes of records. For the purpose of a general rule, the above limitations seem desirable.

[2] The statutes here usually name only legislative acts and municipal ordinances; but some are as broad as above stated.

[3] Under Clause (3) numerous statutes expressly make such copies admissible, but that is superfluous.

[4] The exception in this broad form is recognized in a few jurisdictions only; but it should be extended. So far as there is such an exception universally recognized for specific subjects, these are noted in Art. 2, below.

litigation in hand, and subject to refutation by the criticism of other scientists. And the writer is qualified as a witness in his subject.)

[ART. 1. *Approval by Expert Witness.* The trustworthiness
1171 of the treatise or essay must first be evidenced by a witness on the stand, expert in the subject, who will testify

(1) that the writer is approved in his profession as expert in the subject;

(2) and that the passages to be offered in evidence would be relied upon by the witness himself.][1] — (W. § 1694.)

ART. 2. *Subject of the Evidence.* The subject of the evi-
1172 dence thus offered may be [any topic of science or art on which an expert witness could testify on the stand;][2]
in particular,

1173 *Par.* (*a*). A matter of *foreign law.* — (W. § 1697.)

Cross-reference. (1) Whether a foreign *statute* must be evidenced by a *copy*, depends on Rule 128, Art. 6 (*ante*, § 826).

(2) Whether a *witness* to foreign law is *qualified*, depends on Rule 83, Art. 3 (*ante*, § 381).

(3) Whether *opinion* on foreign law is admissible, depends on Rule 173, Art. 1 (*post*, § 1447).

Par. (*b*). *Statistical* or *mathematical* data, as contained
1174 in computations in an *almanac*, a *mortality-table*, or the like. — (W. § 1698.)

Par. (*c*). Definitions given in *dictionaries* and similar
1175 works of reference. — (W. § 1699.)

Cross-reference. (1) For the *judicial notice* of such facts, without evidence, see Rule 230 (*post*, § 2135).

(2) For the use of treatises embodying reputation on *matters of general history*, see Rule 147, Art. 2 (*ante*, § 1062).

Par. (*d*). In the foregoing specific classes, the authority
1176 of the specific treatise as a standard one may be noticed by the Court without calling a witness to approve it under Art. 1 above.

[1] This is an amplification of the principle applied by the few Courts recognizing the rule.

[2] The bracketed clause represents the broad rule as it ought to be, but only a few jurisdictions so accept it.

ART. 3. *Use of Treatises by Counsel.* The counsel, on
1177 cross-examination of an expert witness, may not quote the writings of another expert,[1]

[(1) unless such writing has already been approved as in Art. 1, above];

(2) or, unless the cross-examined witness has in his direct or cross-testimony referred to the writing in support and it is desired to contradict him by showing that he has cited incorrectly. — (W. § 1700.)

RULE 150. *Commercial and Professional Lists, Registers,*
1180 *and Reports.* A list, register, or report, containing data of general interest to some commercial, industrial, or professional occupation, and compiled and published for use therein, is admissible [whenever the compilation is approved by a qualified witness as one of standard reference in the occupation and one on which he would himself rely; and in particular][2] when it is one of the following classes: — (W. §§ 1702, 1706.)

(*Reason and Policy.* The fundamental considerations underlying the exceptions to the hearsay rule (Rule 137, *ante*, § 950) are here fulfilled. There is a necessity, in that the expense and delay of calling or accounting for the compilers would involve inordinate inconvenience. There is diminished risk of untrustworthiness, because the compilation is made for use in the occupation, without motives for deception, and is actually relied upon in the occupation as trustworthy.)

Illustrations. Name-directory, stud-book, shipping-register.

ART. 1. *Statutes and Judicial Decisions.* A printed copy
1181 of a judicial decision or a legislative enactment is admissible, [when it is contained in a volume of an edition circulated for the use of the legal profession, and (if it concerns the law of another jurisdiction) commonly admitted in the courts thereof.][3] — (W. §§ 1684, 1703.)

[1] The majority of Courts now observe this; and it would be equally proper under the broad rule recommended as Rule 149, if the bracketed clause be added.

[2] The clause in brackets is probably not law in this broad form, but might well be.

[3] This is generally covered by statute, but without the first half of the bracketed clause. The statutes vary slightly, and seldom cover all the above points.

ART. 2. *Price-Lists and Market Reports.* A printed report
1182 of current sales, shipments, or other transactions done or offered in the open market, is admissible, if published in the usual course of trade and indorsed by a qualified witness as trustworthy.[1] — (W. § 1704.)

[ART. 3. *Abstracts of Title.* A set of abstracts, copies,
1183 minutes, or extracts of title-deeds or records thereof is admissible, in place of the record or deeds themselves,
provided

(1) the official records of such deeds are destroyed,

(2) and the abstracts, etc., were fairly made, before the destruction of the records, by a person in the ordinary course of business,

(3) and a substantial part of the relevant records is contained therein.][2] — (W. § 1705.)

Par. (*a*). Such documents may be evidenced by a
1184 *copy*, under Rule 126, Art. 10 (*ante*, § 780), when an opportunity has been given to the opponent to verify its correctness.

RULE 151. *Affidavits.* A statement made under oath, but
1186 not subject to confrontation and cross-examination by the opponent according to Rules 135, 136 (*ante*, §§ 913, 928), is not admissible, except as herein provided. — (W. § 1708.)

Distinguish the use of affidavits in proceedings *interlocutory* to a main issue, and in proceedings where only *one party* is heard, and in other proceedings not covered by the present Code as limited in Rule 4 (*ante*, § 8).

(*Reason and Policy.* The vital element in the prohibition of hearsay assertions is the lack of subjection to cross-examination; hence the administration of an oath does not suffice to supply that safeguard. But the fundamental considerations (Rule 137, *ante*, § 950) underlying all the exceptions to the hearsay rule are sometimes here also fulfilled. There are certain classes of cases in which serious, frequent, and needless inconvenience would be caused by calling the

[1] This represents the substance of what has been usually conceded so far as the question has been decided.
[2] Statutes so provide in a number of States.

witness to the stand, and in which experience shows that there is little reason to fear false testimony. These classes are represented in Art. 1; the necessary judicial discretion to extend the exception, when needed, is given by Art. 2.)

[ART. 1. *Sundry Exceptions.* In the following classes of
1187 cases an affidavit is admissible to evidence the fact named:[1] — (W. § 1710.)

Par. (*a*) the *publication* of a printed notice;

1188 *Par.* (*b*) the *service* of a process or a notice;

1189 *Par.* (*c*) the official *analysis* of a food or a fertilizer;

1190 *Par.* (*d*) the *transcription* of stenographic notes;

1191 *Par.* (*e*) the *translation* of foreign testimony;

Par. (*f*) the *inventory* of an executor or adminis-
1191*a* trator].

[[ART. 2. *Facts not Disputed, etc.* The trial Court may
1192 admit an affidavit to evidence

(1) any fact as to which there is *no bona fide dispute;*

(2) any other fact as to which the Court finds it reasonably necessary or useful.]][2] — (W. § 1380, n. 3.)

[[ART. 3. *Judicial Discretion; Right of Cross-examination.*
1193 Where an affidavit has been admitted under the foregoing rules, the affiant may afterwards be caused to attend for cross-examination

(1) in any case, in the trial Court's discretion;

(2) in all cases under Art. 2, clause (2), on motion by the opponent]].[3]

[1] Every State has some statutes of this sort; the following paragraphs enumerate the more common ones.

[2] This is not law now in the United States; but the equivalent has been law in England for thirty-five years.

[3] This is not law in the United States; but it is a part of the modern flexible procedure in England, and something of the kind is needed by us.

RULE 152. *Voter's Statements.* A statement of a voter as
1195 to his qualifications, domicil, vote, or intent to vote, is not admissible, except as follows: — (W. §§ 1712, 1713.)

(*Reason and Policy.* The fundamental reasons (Rule 137, *ante*, § 950) underlying the exceptions to the hearsay rule do not here obtain. In a contested election, there is no more serious inconvenience in obtaining the voter as a witness on the stand than in obtaining witnesses to his extra-judicial statements. Moreover, amidst the general and partisan gossip that accompanies such controversies, there is no diminution of the ordinary risk of untrustworthiness, but rather an increase.)

ART. 1. *Qualifications; Domicil.* (1) A voter's extra-
1196 judicial statement of his *intent*, as affecting domicil and thus his qualification, is admissible under Rule 153, Art. 2 (*post*, § 1207), and not otherwise.

(2) A voter's extra-judicial statement as to *any other fact* affecting his qualifications is [not] receivable as an admission of a party or privy under Rule 115 (*ante*, § 630), except where he is a formal party to the record.[1]

ART. 2. *Tenor of Vote.* A voter's extra-judicial statement
1197 as to the *tenor* of his vote is not admissible.

Cross-reference. For the voter's *privilege* on the stand not to disclose his vote, see Rule 201, Art. 6 (*post*, § 1700).

ART. 3. *Intent of Vote.* A voter's extra-judicial statement
1198 as to the *intent* of his vote is not admissible.

Cross-reference. The admissibility of the voter's *testimony on the stand* to the tenor of his vote, depends on the rule against parol evidence (Rule 218, Art. 1, *post*, § 1945).

RULE 153. *Statements of Physical Sensation or Mental Con-*
1200 *dition.* A person's extra-judicial statement as to his physical sensation or mental condition is admissible, without calling him to the stand or accounting for his absence;

subject to the following provisions: — (W. §§ 1714–1716.)

[1] The affirmative rule is accepted in England and in some States.

(*Reason and Policy.* The fundamental considerations (Rule 137, *ante*, § 950) underlying the exceptions to the hearsay rule are here fulfilled. There is a necessity, because a person's physical sensation and mental condition are invisible to others, and the circumstantial evidence of them is often scanty. There is a diminished risk of untrustworthiness, relatively, because testimony given on the stand, after a lapse of time and the excitement of controversy, is likely to be inferior in value to the prior extra-judicial statements.)

ART. 1. *Statements of Physical Sensation.* A person's
1201 statement of a physical sensation then existing, including a statement of pain, is admissible;

with the following distinctions and limitations: — (W. § 1718.)

Distinctions. Any statement not admissible under the present Rule may be admissible in some other aspect:

(1) By Rule 86, Art. 2 (*ante*, § 402) and Rule 106, Art. 2 (*ante*, § 561) a physician may be examined as to the *grounds of his opinion*, and in giving them the conduct and perhaps the utterances of the patient, as observed by the physician, may be stated.

(2) A *party's statement* as to health, etc., may always be offered against him or his privies as an *admission*, under Rules 115, 121 (*ante*, §§ 630, 691).

(3) A person's conduct or utterance *circumstantially* evidencing his state of mind as to *knowledge* of his physical condition may be admissible under Rule 63 (*ante*, § 290).

Par. (*a*). A statement of *present pain* or other sensation
1202 is admissible

[(1) whether made to a physician for treatment or to any other person].[1]

[(2) only when made to a *physician* for treatment; except that an inarticulate exclamation of pain made in the presence of any person is admissible.][2] — (W. § 1719.)

Illustration. An assertion "My back aches" is admissible only when made to a physician, by Cl. (2); but a scream, "Ouch," is admissible in any case.

Distinction. A ruling may be directed at the physician's testimony rather than the patient's statement. The physician

[1] This is the orthodox and only sound rule.

[2] This is the New York rule, elsewhere adopted by a few Courts.

must be *qualified by personal observation;* hence, under Rule 86, Art. 5 (*ante*, § 405) his opinion itself may be excluded, in some Courts, because it was based in part on symptoms not observed by him but only reported to him by the patient or the attendants. — (W. § 1720.)

1203 *Par.* (*b*). A statement of *past pain* or other sensation is not admissible, [unless made to a physician called for treatment].[1] — (W. § 1722.)

1204 *Par.* (*c*). A statement of the *external condition* of the body, or of the *circumstances attending* a corporal injury, is not admissible. — (W. § 1722.)

1205 *Par.* (*d*). A statement made *after litigation begun*, or to a physician called for the purpose of being a witness in litigation, is not admissible, [[unless in the circumstances the trial Court deems it not untrustworthy by reason of such facts]].[2] — (W. § 1721.)

1207 ART. 2. *Statements of Design, Intent, Motive, Emotion, etc.* A person's statement of a present mental condition, including design, intent, motive, emotion, and the like, is admissible, where no special circumstances make it likely to have been untrustworthy.

In particular:

1208 *Par.* (*a*). A statement of a *design* or *plan* to do some specified act, where the existence of such a design or plan is relevant under Rule 37 (*ante*, § 177) or otherwise.[3] — (W. §§ 1725, 1726.)

Illustrations. In an action on a disputed oral contract, a statement of intention to make it; in a prosecution for homicide at Millville, the deceased's statement of intention to go to Millville at the alleged time.

Distinctions. (1) Whether, when a *death* is explained by the defendant as suicide or the act of a third person, the statements of design by the deceased or by the third person

[1] The bracketed clause is law in Massachusetts and a few other States.

[2] Nowadays this principle is hard to apply. It seems better to leave its application exclusively to the trial Court.

[3] A few Courts ignore this.

are *alone* sufficient evidence to go to the jury, is a question arising under Rule 40, Art. 3 (*ante*, § 194).

(2) The verbal-act, doctrine, under Rule 155 (*post*, § 1240) has here no application, though it is sometimes invoked.

Par. (*b*). A statement of a *design* to *reside* or to *remove*,
1209 when relevant on an issue of *domicil*. — (W. § 1727.)

Cross-reference. Such statements are usually receivable equally on the theory of Rule 155, Art. 2 (*post*, § 1245).

Par. (*c*). A statement of a *design* to leave, stay, or
1210 return, when relevant in *bankruptcy* cases to indicate an act of bankruptcy. — (W. § 1728.)

Cross-reference. Such statements are usually receivable under Rule 155, Art. 2 (*post*, § 1245).

Par. (*d*). A statement of the *motive*, *reason*, or *intent* of
1211 a specific act done. — (W. § 1729.)

Illustrations. (1) In an action for damage by a boycott, the issue being whether certain persons' custom had been withdrawn from the plaintiff because of the boycott, letters from such persons, refusing to deal with him because his name was on the defendant's blacklist, are admissible.

(2) In an action for false representations, the plaintiff's letters stating that he was acting on the faith of them are admissible, on an issue of the materiality of the representations.

Distinctions. Statements of *intent* accompanying an act are equally admissible under Rule 155, Art. 2 (*post*, § 1245); by that Rule the statement must accompany the act; by the present Rule, the statement must be of an existing mental condition; so that the result is the same.

Par. (*e*). Statements of *emotion*, including bias, malice,
1212 affection, fear, disgust, and the like. — (W. § 1730.)

Illustration. In an action for alienation of a wife's affections, the wife's letters and other utterances showing the state of her affections are admissible.

ART. 3. *Statements by an Accused.* The statements of an
1213 accused person are admissible under the present Rule like those of other persons; — (W. § 1732.)
in particular,

1214 *Par.* (*a*) statements, made before an act, of a ***design*** (threat) to do or not to do an act charged;

Cross-reference. The relevancy of the design itself is determined by Rule 37 (*ante*, § 177) and Rule 59 (*ante*, § 266).

1215 *Par.* (*b*). Statements, made before an act, of a ***feeling*** of malice, [good-will,] fear, or the like, towards a particular person or class of persons.[1]

Cross-reference. The relevancy of the feeling itself is determined by Rule 38 (*ante*, § 185) and Rule 67 (*ante*, § 322).

1216 *Par.* (*c*). Statements, made at the time of an act, of the *intent* or motive for doing it.

1217 *Par.* (*d*). But not statements, made *after an act*, as to a past intent or motive;

except so far as admissible

(1) under Rule 63 (*ante*, § 294) or Rule 118 (*ante*, § 665) as evidential of consciousness of innocence,

(2) or under Rule 118 (*ante*, § 641) as an admission.

1218 ART. 4. *Statements of a Testator.* The statements of a testator, on an issue as to the validity of his will, are admissible, with the following limitations and distinctions: — (W. § 1734.)

1219 *Par.* (*a*). To evidence the fact that a will

was *executed*,

or contained a specific provision,

or was altered before or after execution,

or was revoked,

the deceased's statement, *made before the time* of the alleged act, of a *design* to do or not to do the act, is admissible under Art. 2, Par. (*a*), above. — (W. § 1735.)

1220 *Par.* (*b*). To evidence the foregoing class of facts, the deceased's statement, *made after the time* of the alleged act, [(1) is not admissible.][2]

[1] Some Courts exclude utterances of good-feeling and the like.

[2] Many Courts take this view.

[(2) is admissible.] [1]

[(3) is admissible if in the circumstances the trial Court deems it useful].[2] — (W. § 1736.)

1221 *Par.* (*c*). To evidence the fact of *revocation*, the deceased's statements *before* or *after* the time of the alleged act are governed by Par. (*a*) and Par. (*b*) above;

but his statements *at the time* of an act of destruction or the like, alleged to be an act of revocation, are admissible under Rule 155, Art. 2 (*post*, § 1245). — (W. § 1737.)

1222 *Par.* (*d*). To evidence the fact of *undue influence* or *fraud*, the deceased's statement is not admissible, insofar as it is offered as a *direct assertion of the fact* of influence or fraud. — (W. § 1738.)

1223 *Par.* (*e*). To evidence the fact of *undue influence* or *fraud*, the deceased's statement is admissible, insofar as it is offered to evidence circumstantially his *mental condition* under the principle of Rule 54 (*ante*, § 251);

in particular,

(1) to evidence his *incapacity to resist pressure* and his *susceptibility to deceit;*

(2) or, to evidence his *normal state of testamentary inclinations*, as a standard from which can be determined whether the terms of the will as made are a deviation due to the alleged coercion or fraud.[3] — (W. § 1738.)

Illustrations. The testator said: "I have made my will; I could not help it, but I do not like it: I never know what I am doing when James talks to me." "I am very fond of Joseph; I wish he could have all my property." "George was here, and made me sign a will he brought." The first would perhaps be admissible under Cl. (1), the second under Cl. (2); the third would be inadmissible under Par. (*d*).

1224 *Par.* (*g*). To evidence the fact of *sanity* or *insanity*, the testator's utterances are admissible, under the principle of Rule 55 (*ante*, § 252) and Rule 57 (*ante*, § 264).

[1] Some Courts take this view.

[2] A few Courts take this, the only practical view.

[3] These distinctions are fairly well accepted, subject to local peculiarities.

RULE 154. *Spontaneous Exclamations.* A statement made
1230 by a person spontaneously in consequence of a sudden outward occurrence causing excitement or shock, is admissible; subject to the following limitations and distinctions:— (W. §§ 1747–1749.)

(*Reason and Policy.* The fundamental considerations (Rule 137, *ante*, § 950) underlying the hearsay exceptions are here fulfilled. There is a diminished risk of untrustworthiness, in that the stress of excitement stills the reflective faculties and makes likely a sincere utterance. There is a necessity, in the sense that on the subjects covered there is no other testimony likely to be as sincere and free from calculation.)

Illustrations. (1) The plaintiff's intestate died of an illness whose cause is in issue. The intestate, a week before, had risen from bed at midnight, gone down the back stairs, and in fifteen minutes returned, and entered his son's bedroom asking for help; his scalp was bleeding, his face cut, and his clothes torn; his statement, then made to his son, that he had slipped and fallen downstairs, or had been attacked by burglars, or had felt faint and awoke with the hurts upon him, is receivable.

(2) After a railroad collision, the engineer, upon being extricated from the overturned engine, says, "I thought that they had given me No. 10's schedule;" this is admissible.

ART. 1. *Nature of Occurrence.* The occurrence may be
1232 anything involving sudden outward physical force apt to overwhelm the attention and prevent cautious reflection as to one's utterances.[1]

Illustrations. A railroad collision, an assault with a knife, a runaway horse, an explosion, a fire alarm, a shipwreck.

ART. 2. *Time of Utterance.* The utterance may be at any
1233 time during or after the occurrence, if before time enough has elapsed to devise anything for his own interest.[2]— (W. §§ 1750, 1756.)

Illustration. (1) After a collision between a ship and a steamer, the steamer is backing off, and as it tries to turn, some five minutes after the actual collision, the pilot finds that the helm will not obey, and stamps his feet, exclaiming, "The rudder-chain is broken;" this may be admissible.

[1] There are few precedents defining this part of the rule.
[2] This is Lord Holt's time-honoured phrase, when he invented the exception, and cannot be improved upon.

(2) The body of man is found, wounded and senseless by the railroad track; he is carried to a hospital, and after an hour he regains his senses, and asks where he is; they tell him; and show him the cuts on his hands; he says, "The horse must have run away when I stopped to mend the brake," or "I thought that I could cross the track before the train came;" this may be admissible.

1234 [*Par.* (*a*). The time depends solely on the circumstances of each case.] [1]

1235 ART. 3. *Subject of Utterance.* The utterance must relate to the circumstances of the occurrence that gave rise to it.[2] — (W. § 1750.)

Illustration. After a street-car has run over a child, and is stopped, and while the body is being extricated, the motorman says: "I saw the boy and rang the bell, and thought he could cross over, but he fell. The boys have often done this kind of thing before, in a dare, and to worry me." The first sentence is admissible, but not the second.

1236 ART. 4. *Personal Knowledge; Bystander.* On the principle of Rule 86, Art. 5 (*ante*, § 405), the person must have had personal observation of the matter spoken of, and under the present Rule, Art. 1, he must have been subjected to the influence of the outward occurrence.

Therefore, he may be

Par. (*a*). An *actor* or *participant* in the occurrence.

Illustrations. In a street car collision, the motorman or the conductor of the street car colliding, or a passenger therein; in an affray, the injured or the injuring party; in a runaway, a passenger or the driver; etc.

1237 [*Par.* (*b*) or, a *bystander.*] [3] — (W. § 1755.)

Illustration. A bystander cries out to M that B is drawing to shoot M, and B shoots M; this is admissible.

1238 [ART. 5. *Complaint of Rape or Robbery.* A complaint of a crime of violence, stating the details thereof, is admissible

[1] This puts the ruling entirely in the trial Court's determination under Rule 18 (*ante*, § 49). A few Supreme Courts observe this; but most of them misguidedly revise such rulings and try to make precedents.

[2] Courts have seldom defined this part of the rule.

[3] Many Courts deny this, but not soundly.

when made freshly after the time of the act, within Art. 2 above, "provided there is other evidence of violent assault," in the following cases:]

[*Par.* (*a*). *Rape* or *attempted* rape.][1] — (W. §§ 1760, 1761.)

Cross-reference. For another rule applicable to such utterances, in corroboration of the complainant as a witness, see Rule 114, Art. 1 (*ante*, § 622).

1239 [*Par.* (*b*). *Robbery*, *larceny*, or *burglary*.][2] — (W. § 1762.)

Cross-reference. For another rule applicable to such utterances, see Rule 114, Art. 3, (*ante*, § 627).

[1] A few Courts recognize the above rule. The majority govern such evidence by the other rule referred to. — The proviso is necessary, under the present rule.

[2] A few Courts recognize this.

SUB-TITLE III: HEARSAY RULE NOT APPLICABLE

RULE 155. *General Principle.* The hearsay rule, being
1240 designed to test the trustworthiness of testimonial assertions offered to evidence the matters asserted (Rule 134, *ante*, § 910), does not apply to utterances not so offered; these are therefore admissible (if otherwise relevant and admissible), without being required to satisfy the conditions of the foregoing exceptions.

Such utterances are of four sorts:

(1) Utterances forming a *part of the issue;*

(2) Utterances forming a *verbal part of an act* which is in itself otherwise material;

(3) Utterances *relevant circumstantially*, not testimonially.

(4) Utterances admissible to *explain* and *complete* another utterance. — (W. § 1768.)

Par. (*a*). The *jury may be instructed* that an utterance
1241 admitted under the present rule is not to be given any testimonial credit as an assertion of fact.[1]

ART. 1. *Utterances forming a Part of the Issue.* Where the
1242 utterance of specific words is itself a part of the details of the issue, under the substantive law and the pleadings, the utterance may be introduced for that purpose. — (W. § 1770.)

In particular:

Par. (*a*). Utterances material in the *formation* or the
1243 *performance* of a *contract;*

Illustrations. (1) In an action for goods sold, the defendant alleged that they were sold to M, and that the defendant was merely agent for M. The defendant had applied as a purchaser, and had referred the plaintiff to M for information as to credit; the plaintiff's letter to M, inquiring as to the defendant's credit, and stating that the plaintiff was selling

[1] This follows from Rule 15 (*ante*, § 42) and Rule 5, Art. 4 (*ante*, § 15).

to the defendant on condition of his credit being satisfactory, is admissible as part of the negotiations of contract.

(2) In a life-insurance policy, it is provided that before the insurer becomes liable the insured's representative shall furnish a physician's certificate of the cause of death; this certificate is admissible as a part of the performance of the condition precedent in the contract.

1244 *Par.* (*b*). Utterances forming or excusing a *tort*.

Illustrations. The utterance sued upon in libel; the threats of assault justifying self-defence.

ART. 2. *Utterances forming a Verbal Part of an Act.* Where 1245 an utterance forms a verbal part of a person's act or conduct to which some legal effect is attached, it is admissible, provided

(1) the act or conduct must be *independently material* in the case;

(2) the act or conduct must be *equivocal* or *ambiguous* in tenor, *i. e.* is not of itself complete in legal significance;

(3) the utterance must *aid in giving this legal significance;* and

(4) the utterance must *accompany in time* the act or conduct. — (W. §§ 1772–1776.)

Illustrations. (1) Issue of payment by P to J; P had handed money to J; P's words at the time of handing the money, "This is the money I borrowed," are admissible, as indicating whether it is a loan or a payment or a deposit, because the act of handing the money is independently material in the case. But if P takes M down in his cellar, and shows some money concealed, his words "This is the money I am collecting to pay back to J" are not admissible, because the act of concealing, keeping, or showing the money to M is not otherwise material.

(2) In an action for suing out an attachment without probable cause, the defendant's probable cause is alleged to be that the plaintiff had given a chattel mortgage to another person while insolvent. The defendant's statement at the time of applying for the attachment-writ is not admissible, because the act of so applying is not equivocal. But if the defence is that the defendant did not actually serve the writ, but merely went to the plaintiff's house to demand payment and to threaten suit, then the utterance of the defendant while on the plaintiff's premises with the writ in his possession is admissible, because his presence is an equivocal act needing the words to complete its tenor.

(3) In a land action based on prescriptive title, the plaintiff's acts of occupation being material, his statement, when building a fence, that the fence would keep his land from being intruded on, is admissible, because the words serve to give to the equivocal act of building a fence (which might be that of a carpenter or a tenant or a claimant in fee) its full tenor as an act of claim of title. But the plaintiff's statement, while building the fence, that the defendant's father had once been driven out of town for horse-stealing, or that the defendant himself had got his land by fraudulent entry at the land-office, does not aid in giving significance to the plaintiff's own act, and is not admissible.

(4) In an action to set aside a conveyance by a bankrupt, the time of the act of bankruptcy is material. The debtor having left the town on Jan. 1, and returned on Feb. 1, and the departure being alleged as an act of evasion, a letter from him on Jan. 15, stating that he was called away by his mother's illness, or that he was not coming back unless his creditors agreed to release him, may be admissible; because the act of evasion of creditors is a continuous one, and any utterances made during that absence may be admissible, though not those made after his return.

In particular, the significance of the following classes of acts may be thus aided by considering the accompanying utterances:

1246 *Par.* (*a*). An act of *handing* or of *taking* money, document, or other *chattel;* to ascertain whether it is a payment, loan, sale, gift, advancement, consideration, conversion, etc. — (W. § 1777.)

1247 *Par.* (*b*). An act of *entry on land;* to ascertain whether it is a lease, grant, acceptance, disseisin, etc. — (W. § 1778.)

1248 *Par.* (*c*). An act of *occupation of land;* to ascertain whether the occupation is adverse, on an issue of *title by prescription.*[1] — (W. § 1778.)

And such accompanying utterances

(1) may be those of a *tenant* occupying under a claimant to title;

(2) may consist in *deeds* or other documents indicating the area claimed;

[1] There are here rulings apparently contrary; these are due to the other rules sometimes invoked.

1249 [*Par.* (*d*). An act of *occupation or custody of land* or *chattels;* to ascertain whether the declarant has possession under claim of title, and thus to enable the *presumption of title from possession* (Rule 228, Art. 16, *post*, § 2067) to operate.][1] — (W. § 1779.)

[And in particular,

(1) on an issue whether a *chattel attached by a creditor* is the property of the debtor or of a third person claimant; the declarations of claim or disclaim, by the person in possession, whether debtor or third person claimant, being admissible either for the creditor or for the claimant.][2]

Distinctions. (1) Statements of *facts against proprietary interest* may be admissible as an exception to the hearsay rule, under Rule 139, Art. 2 (*ante*, § 968).

(2) Statements concerning *boundaries* may be admissible as an exception to the hearsay rule, under Rule 144 (*ante*, § 1035).

(3) Statements by a party or privy, as to his title-defects, may be receivable *against him* as *admissions*, under Rule 121, Arts. 4, 5 (*ante*, §§ 691, 692). But admissions of the *contents of a deed* are subject to Rule 127, Art. 2 (*ante*, § 807).

Illustrations. (1) In an action between Jones and Smith for title to land, Jones claims by inheritance from his uncle who had a deed from M, and Smith claims by prescription under N. Smith may introduce his own statements claiming title when he was in occupation, under Rule 155, Art. 2, Par. (*c*), but not otherwise; he may also introduce the statements of M, and here would be admissible under Rule 121, Art. 4, without showing M to be deceased, etc., but under Rule 139, Art. 2, M must be shown deceased, etc. Jones may introduce his uncle's statements of claim while in possession, under Rule 155, Art. 2, par. (*d*). Jones may introduce the admissions of N that he had no deed, under Rule 121, Art. 5, provided they were made before N gave up possession to Smith. Jones may also introduce N's admissions that Jones' uncle had a deed from M, unless by Rule 127, Art. 2, he is first required to evidence the existence and loss of such a deed.

(2) In an action of trover by Perkins against creditors attaching a wagon as the property of their debtor Williams,

[1] Courts are here divided.

[2] This clause ignores some of the subtle distinctions that could be made; but they are for practical purposes mere quibbles, and should not be perpetuated.

in whose possession it is, the declarations of claim by Williams could be used by the creditors under Rule 155, Art. 2, par. (*d*); and his declarations of disclaim could be used by Perkins under Rule 121, Art. 5; furthermore, if Perkins derives title by purchase from Williams, the latter's declarations of claim could also be used by the creditors under Rule 121, Art. 5, which however has peculiar limitations.

1250 [*Par.* (*e*). An act of *taking* or *possessing* a chattel; to determine whether the taking was done with criminal intent, on a charge of *larceny* or the like.][1] — (W. § 1781.)

Cross-reference. (1) For the use of such statements to *corroborate* the *accused's testimony*, see Rule 114, Art. 4 (*ante*, § 628).

(2) For the *presumption* from *unexplained possession* of recently stolen goods, see Rule 228, Art. 15 (*post*, § 2066).

1251 *Par.* (*f*). An act of tearing, burning, or cancelling a *will;* to determine whether it was a *revocation*. — (W. § 1782.)

Cross-reference. For statements *before* or *after* the act, see Rule 153, Art. 4 (*ante*, § 1221).

1252 *Par.* (*g*). An act of *refusal to pay*, departure from domicil, or other act in obstruction or evasion of a creditor's claim; to determine whether it was an *act of bankruptcy*. — (W. § 1783.)

Cross-reference. For the use of such statements under the exception for statements of *intent*, see Rule 153, Art. 2 (*ante*, § 1207).

1253 *Par.* (*h*). An act of *staying* in *or removing* from a place; to determine whether there was a *domicil* at that place or elsewhere. — (W. § 1784.)

Cross-reference. For the use of such statements under the exception for statements of *intent*, see Rule 153, Art. 2 (*ante*, 1207).

1255 ART. 3. *Utterances used as Circumstantial Evidence.* Where an utterance is relevant and admissible as circumstantial evidence for some purpose, it may be received for that purpose, subject to an instruction under this Rule, par. (*a*)

[1] There is room here (as in the rulings) for sundry subtle distinctions; but no harm is done practically by ignoring them.

(*ante*, § 1241), not to give to it any testimonial credit. — (W. § 1788.)

In particular, such utterances may be of the following sorts introduced for the following purposes:

1256 *Par.* (*a*). A statement made by one person and brought to the notice of another person, or a repute in the community, to evidence the *other person's mental condition* as to *knowledge, belief, good faith, reasonableness, motive, sanity*, or the like, under Rule 55, Art. 5 (*ante*, § 257), Rule 62, Arts. 1–11 (*ante*, §§ 277–288), Rule 67, Art. 1 (*ante*, § 324), ib. Art. 6 (*ante*, § 329), Rule 126, Art. 4 (*ante*, § 759), and elsewhere. — (W. § 1789.)

1257 *Par.* (*b*). A statement made by a person, to evidence circumstantially his *own state of mind*, under Rule 55, (*ante*, § 252), Rule 59 (*ante*, § 266), Rule 60 (*ante*, § 270), Rule 63 (*ante*, § 290), Rule 67, Art. 4 (*ante*, § 327), and elsewhere. — (W. § 1790.)

1258 *Par.* (*c*). A statement used to *identify* a time, place, or person, under Rule 68, Art. 3 (*ante*, § 336). — (W. § 1791.)

1259 *Par.* (*d*). A statement used to *impeach* a witness by way of *self-contradiction*, under Rule 108 (*ante*, § 574) or of *bias*, under Rule 102, Art. 2 (*ante*, § 537), or of *corruption*, under Rule 103 (*ante*, § 540), or to *corroborate* a witness by way of *consistency*, under Rules 113 and 114 (*ante*, §§ 612, 621), or to impeach a *party* by way of *admissions* or *confessions* under Rules 115–122 (*ante*, §§ 630–724). — (W. § 1792.)

1260 Art. 4. *Utterances used by way of Completeness.* When for the purpose of explaining and completing the correct significance of an utterance already in the case, the *remainder of a document, conversation*, or other utterance, is receivable as a complement thereof, under Rule 185 (*post*, § 1575), it is not excluded by the hearsay rule; but is subject to an instruction, under this Rule, par. (*a*) (*ante*, § 1241), as to testimonial credit. — (W. § 1786.)

SUB-TITLE IV: HEARSAY RULE AS APPLICABLE TO COURT OFFICERS

RULE 156. *General Principle.* The respective officers in a
1265 court are subject, like other persons, to the hearsay rule, *i. e.* in that every testimonial statement desired to be used in persuading the tribunal as to facts in issue must be presented subject to the test of cross-examination.

ART. 1. *Juror.* A juror is not to use as evidence any
1266 testimonial statement not duly presented in court under the test of cross-examination;

subject to the following distinctions and qualifications:

Par. (*a*). A juror having *personal observation* of any
1267 relevant fact must testify to it like any other witness. — (W. §§ 1800, 1801.)

Distinctions. (1) When a matter is *notorious* so as to be available for *judicial notice*, the juror may use it without testifying, under Rule 230 (*post*, § 2120).

(2) A policy prohibiting a juror from testifying, or *disqualifying* him as a juror because he may be a witness, involves Rule 167, Art. 3 (*post*, § 1405).

Illustration. In a personal injury case, one of the jurors lived near the place of the injury and knew of the track-gate being out of order. This he should testify to, like any witness. But the fact that at five o'clock in midwinter it was dark at the track-crossing might be judicially noticed by him, on motion made. Whether he would be disqualified as juror by reason of his personal knowledge would be a different question.

Par. (*b*). A juror is not to listen to any testimonial
1268 statements, relative to the cause, made *out of court*, in particular, at a *view;*

except the statements made by the *showers*, judicially appointed to point out the place or thing to which the testimony relates. — (W. § 1802.)

Distinctions. (1) Whether a juror's improper conduct in so listening is *ground for setting aside the verdict* is a further question, belonging to the law of procedure.

(2) Whether the jurors may take with them, on retiring, *documents duly in evidence*, is a question of the law of procedure.

(3) Whether the jurors may consider as *evidence* the matters personally observed at a *view*, is a question of the theory of a view, under Rule 123, Art. 3 (*ante*, § 734).

1269 *Par.* (*c*). The principle of Confrontation, as provided in Rule 136 (*ante*, § 928), does not require that the *party to the case* should be *present*, or have an opportunity to be present, at a view;

[nor, in particular, the *accused* in a criminal case].[1] — (W. § 1803.)

1270 ART. 2. *Judge.* A judge having personal observation of any relevant fact must testify to it like any other witness. — (W. § 1805.)

Distinctions. (1) Where a matter is so *notorious* as to be available for *judicial notice*, the judge may use it without testifying, under Rule 230 (*post*, § 2120);

(2) whether policy prohibits the judge from *resuming the bench* after testifying involves Rule 167, Art. 2 (*post*, § 1404).

1271 ART. 3. *Counsel.* A counsel is not to make or use any *testimonial statement*, directly or indirectly, for persuading the tribunal, without presenting it in the usual manner under the test of cross-examination;

subject to the following distinctions and qualifications:

1272 *Par.* (*a*). He is not to assert in argument or other speech any matter of fact upon which evidence has not *already* been *introduced*, or is not *bona fide* intended to be introduced, by testimony formally given by himself or by others. — (W. § 1806.)

Cross-reference. For the rule as to *conditional admissibility*, see Rule 16 (*ante*, § 45), and Rule 163, Art. 2 (*post*, § 1360).

1273 *Par.* (*b*). He may assert any matter so *notorious* as to be capable of *judicial notice* under Rule 230 (*post*, § 2120). — (W. § 1807.)

[1] Some Courts here hold the contrary.

1274 *Par.* (*c*). He may assert in argument any matter which serves as an *illustration*, *symbol*, or *analogy;*

a test is whether the correctness of the specific fact asserted would be immaterial to the case in hand.[1] — (W. § 1807.)

1275 *Par.* (*d*). He may assert in argument any matter said to be *logically inferrible* from some fact in evidence. — (W. § 1807.)

Illustrations. To illustrate the anomalous shrewdness of insanity or vagaries of sanity, he may cite alleged instances of other persons' conduct, under Par. *c;* but under Par. *a* he must not attribute such to the party without evidence. To illustrate the evils of bribery, he may quote a description of the upas tree, under Par. *c;* but under Par. *a* he must not assert that the National Political Committee's complicity is a sinister influence to be repudiated by the verdict, unless under Par. *d* he offers this as an inference from some evidence in the case. He may refer under Par. *b* to the notoriety of lynchings, but he must not state that this defendant was almost lynched before the trial.

1277 *Par.* (*e*). In stating an *offer of evidence*, he must present it either in *writing*, or in the *absence of the jury*, wherever the mere offer is likely to make an undue impression upon the jurors of the truth of the supposed fact. — (W. § 1808.)

1278 *Par.* (*f*). In seeking answers from a witness, he must not *ask a question*

(1) when his sole purpose is to *insinuate to the jury a fact* [which he does not expect to be able to evidence] [2] [which he does not believe to be probable]; [2]

in particular, a fact discrediting moral character under Rule 105, Art. 2 (*ante*, § 552),

(2) or, when substantially the same matter has been *already objected to and ruled* inadmissible; subject to the right to renew an offer under Rule 19, Art. 2 (*ante*, § 61). — (W. § 1809.)

1280 ART. 4. *Interpreter.* An interpreter's or translator's report of another person's statement is itself testimony. Hence

[1] This class is difficult to define.

[2] The first and stricter of these clauses may not be law; and the phrasing of the second clause is difficult.

1281 *Par.* (*a*). When the testimony of a witness given at a *former trial* or by *deposition* through an interpreter or translator is to be introduced, the interpreter or translator must be called to testify or must be accounted for as unavailable under Rule 136, Arts. 1 and 2 (*ante*, §§ 929, 930);

(1) *except* when the interpreter or translator was appointed by judicial order or was otherwise officially authorized under Rule 148, Art. 2 (*ante*, § 1092), Art. 3 (*ante*, § 1134). — (W. § 1810.)

1282 *Par.* (*b*). When a statement made by a person *out of court*, speaking through an interpreter, is to be introduced, the interpreter must be called as the witness to the statement;

(1) *except* where under the circumstances the person speaking was a party who made the interpreter his agent to speak for him. — (W. § 1810.)

TITLE II: PROPHYLACTIC (OR, PRECAUTIONARY) RULES

SUB-TITLE I: OATH AND AFFIRMATION

RULE 157. *General Principle.* Every person giving testi-
1285 mony in court or by deposition must publicly make oath or affirmation that he will in that testimony speak truth. — (W. § 1824.)

(*Reason and Policy.* The object of both oath and affirmation is to remind the witness of his solemn moral obligation, specially incumbent in a court of justice, to speak the truth as he knows it. The oath exceeds the affirmation in that it reminds him of his theological belief as to future divine punishment for lying. Where such belief is lacking, the peculiar feature of an oath is ineffective; the witness should, however, not be excluded on that account, but merely caused to affirm. The inefficiency of the oath to cause some people to speak truth is no reason for abolishing it, if there are others whom it does impress.)

ART. 1. *Nature of the Oath.* The oath is a promise to speak
1286 truth, made under a sense of the divine punishment for speaking falsely.[1] — (W. §§ 1816, 1817.)

ART. 2. *Capacity to take Oath.* A witness is capable to
1287 take oath whose creed or theological belief makes him capable of being impressed by the fear of divine punishment. — (W. § 1817.)

Par. (*a*). *No particular tenet, sect* or creed of religion or
1288 theology is requisite, otherwise than as above. — (W. § 1817.)

Par. (*b*). No particular age, and no formal theological
1289 learning, is required for a *child.* — (W. § 1821.)

Cross-reference. For the rule as to *age*, apart from the oath, see Art. 7 (*post*, § 1305; affirmations) and Rule 81 (*ante*, § 370; testimonial capacity in general).

[1] A few Courts formerly held that the punishment must be in a future life.

1290 *Par.* (*c*). No particular degree of mental intelligence is required for a person of *weak* or *unsound mind.* — (W. § 1822.)

Cross-reference. For the rule as to *testimonial capacity* for such persons, see Rule 80 (*ante*, § 367).

1291 *Par.* (*d*). A person offered as a witness is *presumed* capable to take oath; but his appearance as a child or otherwise may remove the presumption. — (W. § 1820, n. 1.)

1292 ART. 3. *Mode of ascertaining Capacity.* In ascertaining capacity, testimony may be taken

[(1) from the proposed witness himself;[1] subject to his privilege under Rule 201, Art. 5, *post*, § 1699;]

(2) and also, from other witnesses. — (W. § 1820.)

1293 *Par.* (*a*). A *child* may be examined, in public, or in private in the counsels' presence, by the *judge.* — (W. § 1820, n. 2.)

1294 *Par.* (*b*). A child, deficient when examined, may be *instructed* so as to become capable.[2] — (W. § 1821, n. 9.)

1295 ART. 4. *Form of taking Oath.* No particular form of procedure is requisite in taking oath;

subject to the following exceptions and distinctions: — (W. § 1818.)

1296 *Par.* (*a*). The form must be one which the *particular witness regards* as subjecting him to the divine punishment for false speaking.

1297 *Par.* (*b*). Except where otherwise ordered by the judge,[3] or where needed for a particular witness, the form shall

[1] Some Courts, mainly in early decisions, deny this; but it is the sound rule; the witness is sufficiently protected by his privilege.

[2] This is law; but it is futile, and would be useless under Art. 8, *post*, § 1307.

[3] This provides for variations of local custom.

consist in *raising the right hand* and [saying, I do, to] [1] [[repeating aloud]] the following words of oath as first pronounced by the clerk:

"I solemnly swear to tell the truth, the whole truth, and nothing but the truth, So help me God."

[[*Par.* (*c*). The oath shall in no case be administered
1298 to *more than one person* at one time,
nor before the witness enters the witness-stand]].[2] — (W. § 1819, n. 1.)

Par. (*d*). The oath need not be administered *more than*
1299 *once* [[on the same day]] [in the same trial] [3] to the same witness.

ART. 5. *Opponent's Waiver of the Oath.* Where a witness
1300 has testified without taking oath, and the opponent has failed to object before testimony begun, the lack of the oath cannot later be excepted to, on the principle of Rule 20, Art. 1 (*ante*, § 72);

[unless the opponent without fault believed at the time of testimony begun that the oath had been taken].[4] — (W. § 1819.)

Par. (*a*). On objection made after testimony begun
1301 and before close of the trial, the oath may be taken and the witness may re-testify, and the testimony thus given is not open to exception.

ART. 6. *Witness' Exemption from Oath.* The taking of the
1302 oath is dispensable;
subject to the following distinctions: — (W. § 1828.)

[1] The single-bracket clause represents the practice; but the other would be a decided improvement.

[2] This is probably not law anywhere; but the deplorable practice in most Courts of swearing all the witnesses at once at the opening of the case is responsible largely for the ineffectiveness of the oath.

[3] The latter of these clauses is the practice; but the former would conduce to truth by renewing the reminder when needed.

[4] Some Courts seem to countenance this proviso, but it is unsound.

1303 *Par.* (*a*). A person *having the capacity* defined in Art. 2 is required to take oath; except that he has the *option to decline*

(1) when by his creed he has conscientious scruples against taking oaths in general;

[(2) or, when he prefers for any other reason not to take oath but to make affirmation].[1]

1304 *Par.* (*b*). A person *not having the capacity* defined in Art. 2 is not required [nor allowed] [2] to take oath.

1305 ART. 7. *Affirmation as a Requirement.* A person who pursuant to Art. 6 does not take oath must make affirmation. — (W. § 1828.)

1306 ART. 8. *Form of Affirmation.* The form of affirmation shall be to repeat the words "I do solemnly affirm that I will tell the truth, the whole truth, and nothing but the truth," and in all other respects the rules of Art. 4 shall apply.

1307 [*Par.* (*a*). For a *child*, the judge may allow the use of such form of words as seems suitable in the circumstances.] [3]

[1] A few statutes make this enlargement; but it is poor policy.

[2] This is not the law in those States where the constitutional provision is construed to allow *e. g.* an atheist to take oath.

[3] Some such flexibility is desirable, and corresponds to practice.

SUB-TITLE II:

PERJURY - PENALTY

RULE 158. *General Principle.* Every person who gives
1310 testimony in court or by deposition is liable to legal punishment, as defined in the Penal Code, for a knowingly false statement. — (W. § 1831.)

(*Reason and Policy.* A main object in this penalty is to make the witness more inclined to refrain from knowing falsities. The fear of temporal punishment, thus created, complements the fear of divine punishment involved in the oath. Nevertheless, as the object is merely to provide an additional safeguard when available, there is no reason to exclude those who are not effectively reached by it.)

ART. 1. *No Rule of Exclusion.* No person is excluded from
1311 testifying because under the circumstances he is legally or practically not amenable to the penalty for perjury. — (W. § 1832.)

Illustrations. A child; a person deposing in a foreign country; a person deposing *in perpetuam memoriam;* etc.

SUB-TITLE III:

PUBLICITY

RULE 159. *General Principle.* All testimony given before
1312 a judge or by deposition shall be given publicly, that is to say, it shall be delivered in the hearing of such persons at large as may be admitted to the place under general rules of court, and may be printed in the same manner as other parts of the judicial proceedings. — (W. §§ 1834–1836.)

(*Reason and Policy.* The publicity of judicial proceedings, while having larger reasons, is important also in its effect on testimony. Subjectively it tends to stimulate the witness' social responsibility to tell the truth, and also to fear the exposure of falsities by those who hear or read it. Objectively, it makes possible such exposure from those who hear or read.)

SUB-TITLE IV:

SEQUESTRATION OF WITNESSES

RULE 160. *General Principle.* Persons about to be wit-
1314 nesses, in court or by deposition, may by order of the judge or officer be so separated from each other as not to be able to communicate, while waiting, on the subject of the testimony; and may be forbidden to communicate, with or without such separation. — (W. §§ 1837, 1838.)

(*Reason and Policy.* The separation of opposing witnesses prevents them from obtaining suggestions enabling them to shape their testimony falsely. The separation of witnesses on the same side, besides tending to the same end, also tends to detect falsities concocted by connivance before coming to court, *i. e.* the inconsistent details of two witnesses whose testimony, harmonious in other respects, ought to have been harmonious also in those details, tend to show that the harmony, as far as it went, was artificial.)

ART. 1. [*Not*] *Demandable as of Right.* Separation is
1315 ordered by the trial judge
of his own motion
or on motion by either party [whenever in the opinion of the judge the request is reasonable].[1] — (W. § 1839.)

ART. 2. *Procedure.* The order of sequestration may be
1316 carried out as follows: — (W. § 1840.)

Par. (*a*). A *written list specifying the witnesses* may be furnished to the proper court-officer; or a *general oral notice* to all prospective witnesses may be issued.

Par. (*b*). The *place* of sequestration may be such that
1317 the prospective witnesses

(1) cannot hear a *testifying witness;*

(2) and cannot consult with *each other;*

[1] The majority of Courts add this bracketed clause; a few Courts and some statutes adopt the safer rule of making the order demandable as of right.

(3) and cannot consult with a witness who has *left the stand;*

[(4) and cannot consult with an *attorney in the case.*] [1] but in any case the first of these is essential; and in any case the order may be modified as the judge may think fit.

ART. 3. *Persons included in the Order.* The persons to be
1318 included in the order of sequestration may be any prospective witness,

subject to such exceptions as the judge may authorize,[2]

and subject to the following rules in the absence of such authorized exceptions: — (W. § 1841.)

Par. (*a*). The *party demanding* the sequestration cannot
1319 as of right insist on the *inclusion* of specific persons in the order.

Par. (*b*). The *party against whom the demand is made*
1320 cannot as of right insist on the *exemption* of specific persons from the rule;

(1) *except* for his *attorney* or *counsel* actively engaged in the conduct of the trial;

[(2) and *except* for *himself the party;*] [3] [[but in such case the judge may require the party so exempted to testify first of the witnesses on his side]]. [4]

Cross-reference. For the rule of some States requiring a party to testify first in all cases, see Rule 163, Art. 1 (*post*, § 1353).

ART. 4. *Disqualification for Disobedience.* The judge
1321 may exclude from testifying a person who has knowingly disobeyed an order of sequestration, [provided the party for whom he is offered has connived at the disobedience]. [5] — (W. § 1842.)

[1] There is difference of ruling here.

[2] It is generally conceded, except as noted in Par. (*b*), that the trial Court's discretion controls.

[3] The great majority of Courts and statutes accept this clause.

[4] This should be added, to lessen the dangers of the foregoing clause; but it is not law except in Tennessee.

[5] A large minority of Courts add this proviso.

SUB-TITLE V:

DISCOVERY OF EVIDENCE BEFORE TRIAL TO THE OPPONENT

RULE 161. *General Principle.* Whenever a party has been
1325 duly called upon before trial, by the opponent, in pursuance of the following rules [[or by special order of Court]],[1] to disclose before trial

(1) the contents of any *document*,

(2) or, the *name* of any *witness*,

(3) or, the tenor of his *own testimonial knowledge*,

[[(4) or, the tenor of any other *expected witness' testimony*,

(5) or, the nature of any *expected evidential fact*,]][1] and fails to comply, the evidence thus withheld may be excluded by the Court, if offered by the party at the trial; [and the Court may further compel obedience to the order or may direct a nonsuit or a default or may strike out a pleading, as seems fit].[2] — (W. §§ 1845–1847.)

(*Reason and Policy.* The disclosure, before trial, of the information which a party possesses, involves the risk that an unscrupulous opponent will tamper with witnesses or manufacture counter-evidence. This risk, however, does not apply to the party's own testimony, nor to documents, chattels, or premises having evidential uses. But the advantages of such disclosure are important. In fairness, it enables an opponent to protect himself against falsities and to search for counter-evidence. In larger aspects, it tends to diminish misguided litigation, by exposing to each of the parties the respective strengths and weaknesses of their cases. In these respects it is as essential a feature of sound policy as are the pleadings themselves. The law has gradually come to enlarge the scope of this compulsory discovery before trial.)

[[ART. 1. *Circumstantial Evidence.* Wherever any fact
1326 circumstantially evidential is inadmissible partly or wholly

[1] These clauses are not yet law. The scope of discovery thus far is recognized for the first three classes only, and under specific rules, not entirely in the Court's discretion.

[2] Courts and statutes do not all recognize these several modes as available, except in chancery.

because of the risk of unfair surprise, *i. e.* the risk that, if the testimony to it were false, the opponent for lack of prior notice of its offer would be at the trial unprepared to refute its falsity, the party desiring to offer it may do so if he has before the offer given to the opponent such notice as the Court may deem reasonable and if the Court finds no other policy violated by the evidence.

This rule is applicable to offers of

(1) particular misconduct to *impeach the character* of a witness, under Rule 101 (*ante*, § 532),

(2) particular *errors of testimony* to impeach a witness, under Rule 107 (*ante*, § 567),

(3) particular acts to evidence the *character* of any person, other than the accused in a criminal case, or the *intent*, *motive*, etc., of any person, under Rules 43 to 68 (*ante*, §§ 218–336),

(4) particular events, instances, etc., to show the nature or condition of a *place or thing*, under Rule 73 (*ante*, § 344).]][1] — (W. § 1849.)

ART. 2. *Testimonial Evidence in Criminal Cases.* In a
1327 criminal cause, the accused shall be furnished, on application after indictment found, [or information filed,] a list of the witnesses for the prosecution; subject to the following exceptions and distinctions: — (W. §§ 1851–1854.)

Par. (*a*). The list shall *include the names* and *addresses*
1328 [2][of the witnesses examined before the grand jury.]
[3][or, for an information, of the witnesses known to the prosecuting attorney at the time.]
[4][of all the witnesses intended to be used on the trial.]

Par. (*b*). The *time* and *mode* of furnishing the list shall
1329 be

[1] This is not law anywhere, but ought to be, so as to give flexibility to the existing rules.
[2] Almost all States make this provision.
[3] About ten States provide thus. It is complementary to the first clause.
[4] This is the English and Federal rule, followed in two or three States. It is exclusive of the other two clauses.

[1][at the time of returning the indictment, by filing the list therewith.]

[2][or, for an information, at the time of filing it, by filing the list therewith, and later, by filing a supplementary list of witnesses later known to him, on application by the accused, or at such times as the rule of Court prescribes.]

[3][on application by the accused at any time after indictment returned.]

Par. (*c*). The trial Court has *discretion to admit* any
1330 person as witness whose name as a possible witness was before trial known to the accused, or whose testimony would for any other reason not cause unfair surprise; this rule may be applied to admit

[4](*c*) (1) A person who was examined before the grand jury and therefore ought to have been listed, under Par. (*a*), but was not; [5]

(2) A person who was not examined before the grand jury, and therefore need not have been listed, under Par. (*a*), and was not;[and in such case his admission as a witness shall be as of right].[6] — (W. §§ 1852, 1855.)

[7](*cc*) (1) A person who was known to the prosecuting attorney, and therefore ought to have been listed, under Par. (*a*), but was not; [8]

(2) A person who was not known to the prosecuting attorney, and therefore need not have been listed, under Par. (*a*).[9] — (W. § 1853.)

[10](*ccc*) A person whose name was not upon the list furnished, or was so misdescribed as not to be identi-

[1] This clause belongs with the first clause of Par. (*a*).
[2] This belongs with the second clause of Par. (*a*).
[3] This belongs with the third clause of Par. (*a*). The time varies in each statute.
[4] This clause belongs with the first clause of Par. (*a*).
[5] Two or three States, anomalously, deny this.
[6] A large minority of Courts thus treat Cl. (2).
[7] This belongs with the second clause of Par. (*a*).
[8] A few Courts possibly deny this.
[9] None deny this..
[10] This belongs with the third clause of Par. (*a*).

fiable; and in such case the witness shall be excluded as of right; [1]

but where no list at all was furnished, and the accused might have had it upon motion before trial, no witness shall be excluded for this reason. — (W. § 1854.)

[[*Par.* (*d*). The prosecution may on motion obtain
1331 before trial a list of the accused's expected witnesses.]] [2]

ART. 3. *Testimonial Evidence in Civil Cases.* In any civil
1332 case a judge may on motion of a party order any other party before trial to make disclosure of the following sorts: [3] — (W. § 1856.)

Par. (*a*). The *personal testimony* and admissions of the examined party;

1333 [[*Par.* (*b*). The names of his expected witnesses;]] [4]

[[*Par.* (*c*). The important evidential facts expected to
1334 be offered.]] [5]

[ART. 4. *Documents.* In any civil case a judge may on
1335 motion by a party before trial order any other party

to allow an inspection, by the first party or his attorney or witnesses,

or to furnish a copy,

or to do both,

as to any document in his control relating to any matter in question in the cause,

except so far as any privilege would prevent disclosure at the trial, and except so far as the judge may deem the dis-

[1] This is law, but is unsound; the trial Court's discretion ought equally here to control.

[2] This is not law anywhere; but it ought to be.

[3] This is covered by statutes and rules of court having varying details not here represented.

[4] No Court or statute does this; but why not?

[5] Few Courts, if any, go this far.

closure unnecessary for the purposes of justice.][1] — (W §§ 1857–1859.)

1336 [*Par.* (*a*). The party on whom the order is asked may be required also to state what documents are in his possession and what is his knowledge as to the whereabouts of any document.][2]

Distinctions. (1) Whether there is a *party's privilege at the trial* to withhold documents is dealt with in Rule 201, Art. 8 (*post*, § 1702); the privilege at trial is much rarer and narrower than the right to withhold disclosure before trial.

(2) A *notice to produce* an original, under Rule 126, Art. 5 (*ante*, § 764), merely serves to allow the notifier to use a copy at the trial, if the original is not produced by the opponent.

(3) The *non-production* of a relevant document in a party's control may permit a circumstantial *inference as to its unfavorable contents*, under Rule 118, Art. 6 (*ante*, § 658), even though no order or request has been made under the present rule.

(4) A rule requiring a copy of a document to be *annexed to the party's pleading* is a rule of pleading, not here involved.

1337 [*Par.* (*b*). A party, even though not ordered or requested before trial, may be required to furnish to the other party, a reasonable time before trial, a copy of a document in a *third person's possession*, as a condition precedent to using such a copy in evidence, in the following classes of documents:

(1) Recorded deeds;

(2) Abstracts of title.][3]

1339 [Art. 5. *Premises, Chattels.* In any civil case a judge may on motion by a party before trial order any other party to allow the detention, preservation, inspection, or sampling,

[1] Nearly every State has a statute similar to this, though none are worded precisely as above. The Federal statute and a few others have sometimes been construed not to compel any disclosure before trial. The scope of the disclosure is unwisely limited, in some jurisdictions, to documents affecting the applicant's case; here preserving the chancery rule.

[2] This is attainable under Art. 3, but ought equally to be available here, and is so, by some statutes.

[3] In several States a statute of this sort is found.

(1) of any place or thing relating to a matter in the cause,

(2) by a party or his attorney or expected witnesses,

except so far as any privilege would prevent disclosure at the trial, and except so far as the judge may deem the disclosure unnecessary for the purposes of justice.][1] — (W. § 1862.)

Cross-reference. For a similar provision giving to the judge the power to order, on his own motion, such inspection by *expert witnesses* called by the judge, see Rule 224, *post*, § 1990.

1340 *Par.* (*a*). The inspection of the *body* of the opponent party before trial may be ordered, as provided in Rule 208, Art. 8 (*post*, § 1702).

1341 ART. 6. *Application of these Rules to Third Persons.* A party may not obtain inspection, production, or testimony before trial, in the foregoing manner, from a third person not a party to the cause;

subject to the following exceptions and distinctions:

Par. (*a*). The *testimony* of a third person may be obtained

(1) *After suit begun*, by deposition taken *de bene* for the causes specified in the Code of Procedure; but not otherwise. — (W. § 1856, n. 5.)

[(2) *Before suit begun*, on motion granted by judge, when the third person is expected to be made a party and his knowledge is necessary to enable suit to be begun.][2]

1342 [*Par.* (*b*). A *document* in the control of a third person may on motion be ordered to be produced or to be submitted for inspection or copy or both, after suit begun, whenever the judge deems it useful for the purposes of justice, and except so far as any privilege would prevent disclosure at the trial].[3] — (W. § 1858, n. 17, § 1859, n. 15.)

[1] British jurisdictions and a few American States have such a statute; the phrasings vary. Chancery powers would suffice without statute.

[2] This is a matter of chancery practice seldom covered by statutes.

[3] This is the law in a few jurisdictions only, but ought to be everywhere.

1343 [*Par.* (*c*). A *place* or *thing* in the control of a third person may on motion and order be subjected to detention, preservation, inspection, or sampling, on the same conditions as in Par. (*b*)].[1] — (W. § 1862.)

1344 [[ART. 7. *Application of these Rules to Criminal Cases.* The foregoing rules of Articles 4 to 6 are applicable in criminal cases, except so far as the privilege against self-crimination prevents.]][2] — (W. § 1858, n. 16, § 1862, n. 8.)

Cross-reference. For the bearing of the privilege against *self-crimination*, see Rule 203 (*post*, § 1730).

1345 ART. 8. *Document Used but not Offered at Trial.* A party having a *document at the trial*, and intending to use it in evidence, must permit the opponent, on request, to inspect it even before formal offer, in the following cases: — (W. § 1861.)

(1) When it is shown to a witness to *aid his recollection*, under Rule 88 or Rule 89 (*ante*, §§ 431, 444);

(2) When it is shown to a witness to *identify* or *authenticate*, and the opponent desires to cross-examine the witness as to the document.

Distinguish (1) the rule that the *opponent's inspection* of a document produced on demand for his use makes the *whole of the* document evidence (Rule 187, *post*, § 1589).

(2) the rule that a document used to *impeach a witness* by an inconsistent statement must be *shown to the witness* before asking him about it (Rule 127, Art. 4, *ante*, § 812).

[1] This is as yet law in probably British jurisdictions alone. But it is a sensible rule, much needed in many classes of litigation.

[2] Presumably none of the rules would now be applied in criminal cases. But why not? Moreover the accused would equally obtain the benefit of them against the prosecution.

TITLE IV:

SIMPLIFICATIVE RULES

SUB-TITLE I:

ORDER OF INTRODUCING EVIDENCE

RULE 162. *General Principle.* In introducing any par-
1350 ticular witness or any particular topic or piece of evidence, the time thereof, with reference either to the stage of the case or of a witness' examination or to the introduction of any other evidence, is determined by the trial judge, under the circumstances of the particular case.[1] — (W. § 1867.)

Subject to an express ruling by the trial judge, the provisions of Rules 163 and 164 (*post*, §§ 1352–1380) are to be observed for this purpose.

(*Reason and Policy.* Some conventional order for the introduction of evidence is desirable; first, to make the mass of evidence more intelligible to the tribunal; secondly, to make it possible for the parties to prepare themselves to meet the opponent's case; and, thirdly, to check the laxity which heedless and incompetent counsel would indulge in if not forced by rules to be orderly. Nevertheless, the varieties of situation in each litigation are such that a rigid system of rules would too frequently suppress valuable evidence; hence a safeguard must be provided in the trial Court's discretion. Further, to avoid the injustice and expense of new trials for relatively minor reasons, this discretion must be absolute.)

ART. 1. *Waiver.* Either party may by express or implied
1351 waiver lose the use of any of the ensuing stages of evidence, or the order of evidence regularly provided therefor; and in such a case the trial Court's ruling is necessary for restoring the rule thus waived.[2]

[1] This is universally conceded in theory, but seldom practically enforced by Supreme Courts. It is merely a special extension of Rule 18 (*ante*, § 49).

[2] There is little authority; but the subject ought to be thus regulated.

Topic A:

Order of Evidence in Stages of the Whole Case

RULE 163. *General Principle.* (1) The stages of the whole
1352 case, for the introduction of evidence by the respective parties, are as follows:

1. *Putting in the Case at Large.*
   a. Proponent's Case in Chief.
   b. Opponent's Case in Reply.
   c. Proponent's Case in Rebuttal.
   d. Opponent's Case in Rejoinder.
2. *Case Closed.*
   a. By proponent.
   b. By opponent.
3. *Argument begun.*
4. *Charge given.*
5. *Jury retired.*

(2) The general rule for the time of introduction of evidence is that all evidence must be introduced at the earliest stage when it is appropriate and feasible to introduce it; and, conversely, that at a later stage evidence is not admissible which was appropriate and feasible to introduce at any earlier stage. — (W. § 1866.)

(*Reason and Policy.* There are three possible methods of dealing with the stages of the case. One is to make no rules, but to allow the parties at any time to rebut the topic momentarily brought out by a witness, each interrupting the other in turn and irregularly. A second and opposite method is to allot only two fixed stages, obliging first one party to put in all of his evidence, and then the other to put in all of his. The third is to oblige each party to put in at once all that is then appropriate, and to permit at a later stage that evidence only which has been made necessary to rebut the opponent's intervening evidence. The last is the method of our law. It purports to obtain the maximum of clearness with the minimum of rigidity.)

Art. 1. *Specific Rules applicable to Either Party.* The
1353 following rules apply to specific topics and witnesses irre-

spective of the party's stage of the case: — (W. §§ 1869, 1870.)

Par. (*a*). In *treason*, the overt act must be evidenced
1354 as provided in Rule 179, Art. 1 (*post*, § 1503).

Par. (*b*). In other *criminal cases*, the *corpus delicti*
1355 must be evidenced as provided in Rule 181, Art. 2 (*post*, § 1536).

Par. (*c*). In evidencing a *co-conspirator's admissions*, the
1356 conspiracy must be evidenced as provided in Rule 21, Art. 2 (*ante*, § 687).

Par. (*d*). In evidencing a *copy* of a *document*, the *loss*
1357 and *execution* of the original must be evidenced as provided in Rule 126, Art. 2 (*ante*, § 751).

[*Par.* (*e*). In using a *party* as witness, he must testify
1358 first of the witnesses on his side.] [1]

Cross-reference. For the rule that the party must testify first if he does not go out with the other witnesses when *sequestrated*, see Rule 160, Art. 3 (*ante*, § 1318).

ART. 2. *Same: Conditional Relevancy.* Where two or
1360 more evidential facts are so connected, under the issues, that the relevancy or the materiality of one depends upon another not yet evidenced, and the party is unable or unwilling to introduce them both at the same moment, the following rules apply: — (W. § 1871.)

Par. (*a*). If the fact offered has an apparent relevancy or materiality to the case, it is admissible unconditionally.

Par. (*b*). If the fact offered has no apparent relevancy or materiality, the offering counsel may be required by the Court, as a condition precedent,

(1) to state the supposed connecting facts,

(2) and to promise to evidence them later.

except that a counsel cross-examining need not make such a statement.

[1] A few States so provide.

Par. (*c*). If a promise thus made is not fulfilled, the Court may strike out the evidence thus conditionally admitted, if a motion is made by the opposite party.[1]

Illustration. In an action to set aside a deed made in fraud of creditors, the plaintiff claiming as assignee of the creditors' grantee M, the judgment and the execution-deed may be evidenced first, because their connection is apparent, and the deed from M to the plaintiff can be evidenced later. But if the plaintiff offered to evidence admissions of K that the land was sold in fraud of creditors, these would be apparently irrelevant, and the plaintiff might be required to state that K was said to be the defendant's agent to transfer to R in fraud of the creditors and to promise the introduction of such evidence.

ART. 3. *Proponent's Case in Chief.* In the proponent's
1361 case in chief all facts and witnesses relevant to sustain his allegations in the issues as defined by the pleadings must then be introduced (pursuant to the general Rule above). — (W. § 1873.)

ART. 4. *Opponent's Case in Reply.* The facts and wit-
1362 nesses relevant

(1) to sustain the allegations of the opponent in the issues as defined by the pleadings, and

(2) to deny or to explain away the evidential facts of the proponent adduced to sustain his allegations,

are to be introduced according to the following rules: — (W. § 1872.)

Par. (*a*). None may be introduced by the opponent
1363 *until* the *proponent has finished* his case in chief,

(1) *except* that he may do so on cross-examination of a witness of the proponent, as provided by Rule 164, Art. 4 (*post*, § 1376),

(2) and *except* that he may read the *remainder of a document* partly read by the proponent, as provided by Rule 185 (*post*, § 1575).[2]

Par. (*b*). All must be introduced *during* the opponent's
1364 *case in reply* and without reserving any for a later stage.

[1] In perhaps a few Courts no motion is required; but this is unsound.

[2] There is little authority; but this is fair.

ART. 5. *Proponent's Case in Rebuttal.* The proponent may
1365 in his case in rebuttal introduce facts and witnesses appropriate to deny, explain, or discredit the facts and witnesses adduced by the opponent;

but not any facts or witnesses which might appropriately have been introduced in the case in chief. — (W. § 1873.)

Illustration. In probating a will, the proponent is entitled to a presumption of sanity of the testator, on evidence of the testator's due execution of the document; hence, he need not in his case in chief introduce any witness to sanity; and hence, if the opponent disputes the sanity and introduces evidence on that issue, the proponent may introduce witnesses to sanity, in his case in rebuttal, for that is the first appropriate stage. But if, by the rule in a few States, the proponent raises no presumption of sanity by merely the evidence of execution, and must also introduce some express testimony to sanity, this is an appropriate stage for all his evidence of sanity, and it must then be introduced, leaving for rebuttal that only which is specifically needed in rebuttal.

ART. 6. *Opponent's Case in Rejoinder, and Subsequent*
1366 *Stages.* In the opponent's case in rejoinder, and in subsequent stages for either party, facts and witnesses may be introduced which are appropriate to deny, explain, or discredit the facts and witnesses adduced by the opponent in the next preceding stage of the case; but no others. — (W. §§ 1874, 1875.)

ART. 7. *Case Closed, Argument Begun, etc.* Neither party
1367 shall introduce any facts or witnesses

Par. (*a*) after he has declared his evidence to be all introduced and his case closed; — (W. §§ 1876, 1877.)

Par. (*b*) after the argument is begun; — (W. § 1878.)

Par. (*c*) after the judge's charge is given; — (W. § 1879.)

Par. (*d*) after the jury has retired. — (W. § 1880.)

TOPIC B:

ORDER OF EVIDENCE IN THE EXAMINATION OF AN INDIVIDUAL WITNESS

RULE 164. *General Principle.* (1) The stages of examina-
1369 tion, for the testimony of an individual witness, are as follows:

1. *Original Call*
   a. Direct examination (by the proponent).
   b. Cross-examination (by the opponent).
   c. Re-direct examination.
   d. Re-cross-examination

and so forth.

2. *Recall*
   a. For direct examination. b. For cross-examination.

3. *Re-call;* and later recalls.

(2) The general rule for the order of examination of all witnesses and of individual witnesses is as follows:

1370 *Par.* (*a*). Each witness shall be examined by *completing all the stages* before another witness is called.

1371 *Par.* (*b*). In each stage of examination all matters *appropriate to that stage* must be completely examined, and, conversely, no matters can be examined at a later stage which were appropriate at an earlier stage. — (W. § 1882.)

(*Reason and Policy.* There are three possible methods of allotting the stages of examination. One is to fix no rule, but to allow either party to interrupt the other's examination by asking questions bearing on those just answered, or to call another witness on the same topic, thus aiming at continuity of topics. A second is to allow each party to finish his examination of all his witnesses, before the other party examines any of them. A third is to require each party to finish his examination of each witness, so far as possible before any other witness is called. The third is the method of our law, and aims at obtaining the maximum of continuity of topics consistent with the orderly disposal of each witness' testimony.)

1372 ART. 1. *Rules applicable to Specific Topics.* The following rules apply to specific topics irrespective of the party or stage of examination:

Par. (*a*). Where the *execution of a document* is sought to be evidenced, and a witness has testified to the execution of the document shown to him for the purpose, it must be offered in evidence before the close of that stage of examination of the witness, in order that the other party

may have an opportunity to examine upon it before the witness leaves.[1] — (W. §§ 1883, 1884.)

ART. 2. *Rules applicable to Stages in general.* The following rules apply to the stages in general, irrespective of parties:

1373 *Par.* (*a*). A party who *waives* the use of a stage of the examination will not lose it under Rule 162, Art. 1 (*ante*, § 1351), if he expressly reserves it for a specified later time. — (W. § 1884.)

1374 *Par.* (*b*). Where there are *two or more parties* on one side, there is no specific rule for the order of their examinations. — (W. § 1884.)

Cross-reference. For the rule as to *number of examiners* for a single party, see Rule 92, Art. 5 (*ante*, § 473).

1375 ART. 3. *Direct Examination.* On the direct examination the calling party must by his questions seek to obtain all the testimony which that witness is qualified to give in support of the party's allegations on the issues as defined by the pleadings (pursuant to Par. 2 (*b*) of the general Rule above). — (W. § 1883.)

1376 ART. 4. *Cross-examination.* On the cross-examination, the party may by his questions seek all facts tending to impeach the personal credit of the witness under Rules 96–122 (*ante*, §§ 500–724);

and, in addition,

(*a*) [2] [All facts *referred to by the witness* in his direct examination, and no others.]

(*aa*) [2] [All facts connected with the matters *referred to by the witness* in his direct examination, and no others.]

(*aaa*) [2] [All facts which tend to disprove, modify, or

[1] There is little authority here, but it supports this rule of fairness.

[2] These are three varieties of the inferior and quibbling rule accepted in many States.

explain the facts *referred to by the witness* on his direct examination, and no others.]

(*b*) [1] [All facts which *tend to* disprove, modify, or explain the *proponent's case*, and no others.]

(*c*) [2] [All facts material and relevant to the issues, including facts relating to the cross-examiner's *own affirmative case*.] — (W. §§ 1885–1890.)

Illustration. In an action on a note made to M and indorsed to P, with a plea of fraudulent representations by M and notice by P, the making of the note is evidenced by M, testifying on direct examination to the single fact of its signature being the defendant's. On cross-examination, the defendant under Forms (*a*), (*aa*), and (*aaa*), cannot question M as to the fraud and the notice; under Form *b*, he might question him as to the fraud but not as to the notice; under Form *c* he could question him as to the whole case.

Cross-references. (1) The exclusion of hearsay statements for *lack of the opportunity to cross-examine* is dealt with in Rule 135 (*ante*, § 913).

(2) The *kinds of discrediting facts* admissible to *impeach a witness' character*, but only on cross-examination, are dealt with in Rule 105, Art. 2 (*ante*, § 552).

(3) The *form and manner of questions* put on examination (leading, misleading, abusive, etc.) are dealt with in Rule 92 (*ante*, §§ 461–475).

(4) The *accused's waiver of privilege* so as to be compellable to answer on cross-examination is dealt with in Rule 203, Art. 6 (*post*, § 1749).

1377 [*Par.* (*a*). The opponent, when prevented by Clauses (*a*), (*aa*), (*aaa*), or (*b*), in Art. 4, from cross-examining on certain facts, may seek them by *calling the witness for direct examination* at the later stage of putting in his own case.] [3]

Cross-reference. The Rules which would then affect him in dealing with the witness are the rule against *impeaching one's own witness* (Rule 97, Art. 5, *ante*, § 509) and the rule against *leading questions* (Rule 92, Art. 1, *ante*, § 462).

[1] This is the medium form of rule, used in some States.

[2] This is the orthodox common-law rule, the only sound one; it obtains in the large minority of States.

[3] This rule is unnecessary for Courts following Clause *c*.

1378 [*Par.* (*b*). For an opponent desiring under Clause (*c*) to cross-examine for facts relating to his own case, the witness is deemed to have reached the stage for cross-examination

if he has been *questioned* by the other party and *made* an admissible *answer*,

or if he has produced a document and has made an answer tending to prove it;

but not otherwise.] [1] — (W. §§ 1892–1894.)

1379 ART. 5. *Re-Direct Examination; Re-Cross-Examination.* On a re-direct examination and a re-cross-examination the party may seek by his questions to obtain such testimony as tends to deny, modify, or explain the facts answered in the next preceding stage of examination; and no others. — (W. § 1896.)

Cross-references. (1) For the rule as to *repetition of the same questions*, see Rule 92, Art. 4 (*ante*, § 469).

(2) For the admissibility of irrelevant facts to *explain irrelevancies introduced on cross-examination*, see Rule 17 (*ante*, § 46).

(3) For the admission of the *whole of a conversation*, see Rule 185 (*post*, § 1575).

(4) For the classes of facts admissible to *support a witness' credit*, see Rules 109–114 (*ante*, §§ 595–628).

1380 *Par.* (*a*). Stages after the first re-direct and the first cross-examination are allowable on a ruling by the trial Court under Rule 162 (*ante*, § 1350).[2] — (W. § 1897.)

1381 ART. 6. *Recall.* After the stages of a witness' examination are declared by counsel to be closed, a recall for re-direct or for re-cross-examination is allowable only on a ruling by the trial Court under Rule 162 (*ante*, § 1350); — (W. §§ 1898–1900.)

(1) *except* where a party, for putting facts relating to his own case, under Art. 4 above, calls for the first time a witness already examined by the other party;

(2) and *except* where a party seeks, before impeachment by self-contradiction, to put the question required by Rule 108, Art. 3 (*ante*, § 579).

[1] This rule only comes into application under Clause *c* above.

[2] There is little authority; but this is a fair rule.

SUB-TITLE II:

SUNDRY RULES TO AVOID CONFUSION OF ISSUES OR UNDUE PREJUDICE

TOPIC A: CIRCUMSTANTIAL EVIDENCE

RULE 165. *General Principle of avoiding Excessive Con-*
1383 *fusion of Issues.* Wherever the admission of a particular class of relevant evidential facts would tend, by reason of the amount of evidential data, the complication of subordinate issues, or the length of time spent on relatively minor details, to obstruct the tribunal's ascertainment of the truth, either by unduly distracting attention from the substantial issues, or by unnecessarily confusing or obscuring them,

the evidence may be, in a general class of cases or in a particular case,

(1) admitted with limitations or conditions,

(2) or excluded. — (W. § 1904.)

ART. 1. *Operation with other Principles.* The present Rule,
1384 and Rule 161 (*ante*, § 1326; discovery before trial, to prevent unfair surprise), and Rule 166 (*post*, § 1390; rule to avoid undue prejudice), or all three, may operate together to effect such exclusion or limited admission, even though no one of the principles would by itself have sufficed to that effect. — (W. § 1904.)

[ART. 2. *Trial Court's Determination.* The application of
1385 the present Rule, alone or in combination with Rule 161 or Rule 166, may in any case be made by the trial Court, acting on the circumstances of each case.] [1]

ART. 3. *Specific Applications of the Rule.* To the following
1386 classes of evidence, this Rule, alone or together with Rule

[1] This is law in Massachusetts and New Hampshire, for some of the rules under Art. 3; but otherwise it is presumably not law, though it ought to be.

161 or Rule 166, is applicable as elsewhere defined in this Code:

Par. (*a*). Particular acts of misconduct, to evidence the *moral character* of a party (Rules 42–49, *ante*, §§ 215–239).

Par. (*b*). Particular criminal acts, to evidence *intent, knowledge, motive*, etc. (Rule 65, *ante*, § 297, Rule 67, *ante*, § 322).

Par. (*c*). Particular events or instances to evidence the *nature* of a *machine, highway*, or the like (Rule 73, *ante*, § 344).

Par. (*d*). Particular acts of misconduct, to evidence the *moral character of a witness* (Rules 101, 105, *ante*, §§ 532, 549).

Par. (*e*). Particular errors, to evidence the general *incredibility* of a witness (Rules 107, 108, *ante*, §§ 567–591).

RULE 166. *General Principle of avoiding Undue Prejudice.*
1390 Wherever the admission of a particular class of relevant evidential facts would tend, by stimulating an excessive emotion or a fixed prejudice as to a particular subject or person involved in the issues, to dominate the mind of the tribunal so as to prevent a rational determination of the truth, and the evidence having this tendency is not important to the ascertainment of the truth,

the evidence may be, in a general class of cases or in a particular case,

(1) admitted with limitations or conditions,

(2) or excluded. — (W. § 1904.)

ART. 1. *Operation with Other Principles.* The present
1391 Rule, and Rule 161 (*ante*, § 1326; discovery before trial to prevent unfair surprise) and Rule 165 (*ante*, § 1384; rule to avoid excessive confusion of issues), or all three, may operate together to effect such exclusion or limited admission, even though no one of the principles would by itself have sufficed to that effect. — (W. § 1904.)

[ART. 2. *Trial Court's Determination.* The application of
1392 the present Rule, alone or in combination with Rule 161 or Rule 165, may in any case be made by the trial Court, acting on the circumstances of each case.] [1]

ART. 3. *Specific Applications of the Rule.* To the following
1393 classes of evidence this Rule, alone or together with Rule 161 or Rule 165, is applicable as elsewhere defined in this Code:

Par. (*a*). *Moral character*, to evidence the doing of an act (Rules 30–33, *ante*, §§ 130–152).

Par. (*b*). Particular *acts of misconduct*, to evidence the *moral character* of a *party* (Rules 42–49, *ante*, §§ 215–239).

Par. (*c*). Particular acts *of misconduct* to evidence *intent*, *knowledge*, *motive*, etc. (Rule 65, *ante*, § 297, Rule 67, *ante*, § 322).

Par. (*d*). Particular *acts of misconduct*, to evidence a *witness' moral character* (Rules 101, 105, *ante*, §§ 532, 549).

Par. (*e*). Autoptic proference of a *corporal object* (Rule 123, *ante*, § 730).

TOPIC B: TESTIMONIAL EVIDENCE

RULE 167. *General Principle.* In pursuance of the principles
1400 of Rules 165 and 166, the testimony of one or more witnesses may be excluded or may be admitted with limitations or conditions, in the classes of cases herein specified. — (W. § 1906.)

ART. 1. *Witnesses merely Cumulative in Number.* Wherever
1401 an unlimited number of witnesses to the same issue would cause excessive and unnecessary confusion of evidence, so that the inherent value of their testimony for the ascertainment of the truth would be relatively small in comparison with the general obstruction thereby caused to the tribunal in its determination of the controversy, the number of wit-

[1] See Note to § 1385.

nesses may be limited, by ruling of the trial Court upon the circumstances of the case, — (W. §§ 1907, 1908.)

provided the limitation is applicable

(1) only to the *same issue* of fact under the pleadings; [1]

(2) *and*, equally to all parties in the case; [2]

(3) *and*, only after notice to the parties, [when feasible,] before the introduction of any testimony on the issue to which it relates; [3]

but it need not be restricted

[(4) to issues uncontroverted]; [4]

[or, (5) to issues collateral or subordinate]; [5]

[or, (6) to issues where the other evidence is regarded as sufficiently convincing by the judge.] [6]

In the following classes of issues, in particular, the limitation may be applied:

1402 *Par.* (*a*). Any issue permitting *expert testimony* under Rule 83 (*ante*, § 379). — (W. § 1908.)

Cross-reference. — For the *judge's power* to call expert testimony, see Rule 224, Art. 1 (*post*, § 1991).

1403 *Par.* (*b*). Any issue of *character* permitting testimony to reputation, under Rules 29 to 34 (*ante*, §§ 126–163). — (W. § 1908.)

1404 ART. 2. *Judge as Witness.* A judge who is qualified as a witness and is sitting in the trial of the cause may give testimony (under the conditions otherwise required by Rule 156, Art. 2, *ante*, § 1270);

provided that if the giving of the desired testimony would tend seriously to embarrass his impartial action as judge,

(1) he may of his own motion transfer the cause to another judge, postponing the trial if necessary;

[1] All Courts agree on this.
[2] All Courts agree on this.
[3] Some Courts ignore the bracketed clause.
[4] Some Courts hold the contrary.
[5] Some Courts hold the contrary.
[6] Some statutes provide the contrary.

[(2) or, he must, on motion by a party, transfer the cause to another judge.] [1] — (W. § 1909.)

ART. 3. *Juror as Witness.* A juror who is qualified as a
1405 witness and is sitting in the trial of the cause may give testimony (under the conditions required by Rule 156, Art. 1, *ante*, § 1266), and may after testifying return to the panel;

[*provided* that if the giving of the testimony would tend seriously to embarrass the juror or other jurors in the determination of the cause, the judge may

(1) declare the juror disqualified if he testifies;

(2) or, may refuse to permit him to testify].[2] — (W. § 1910.)

ART. 4. *Counsel or Attorney as Witness.* A counsel or
1406 attorney of record in the cause at trial, if qualified to testify, may give testimony (under the conditions required by Rule 156, Art. 3, *ante*, § 1271); — (W. § 1911.)

[*provided* that the trial Court

(1) may require the counsel or attorney to withdraw as such from the cause after testifying;

(2) or, may refuse to permit him to testify where the proposed testimony is not essential to the determination of the issue, or where the counsel or attorney could by diligence have avoided putting himself in the position of possessing useful testimony.] [3]

(*Reason and Policy.* The evil moral tendency of combining in the same person the functions of witness and advocate lies in the combination occurring habitually or frequently, because thereby the general conduct of the profession and the public respect for it is affected. The rule of evidence should therefore aim to discourage it as a habit, and to permit it only when unavoidable and indispensable.

[1] Some Courts have a rule practically equivalent; but it seems unnecessary.

[2] Some statutes have an equivalent provision.

[3] Some Courts have a qualification corresponding in principle to this proviso.

SUB-TITLE III:
OPINION TESTIMONY

TOPIC A:
OPINION, IN GENERAL

1410 RULE 168. *General Principle.* A witness may not in his testimony state an inference (opinion) from observed data, *provided* the observed data on which the inference is based have been or can be reproduced and communicated to the jury, by the words and gestures of this witness or others, so fully, exactly and adequately, as a basis for the inference, that the witness' inference (opinion) is merely cumulative as an assistance to the jurors in the ascertainment of the truth.[1] — (W. §§ 1918–1924.)

(*Reason and Policy.* The reasons for the Opinion rule are two. (1) The testimony is superfluous, and hence takes the time of the tribunal unnecessarily. But this reason is now void, for the time taken in applying the rule is so excessive that the waste of time is now caused by the rule itself, rather than by the lack of the rule. (2) Being superfluous, the cumulation of opinions of influential or numerous witnesses might be abused so as to influence the jury unduly by the opinions of the public. But this reason, of rare application, is easily corrected by the trial Court's discretion.

The following supposed reasons have no bearing. (1) Opinion *versus* fact. There is no such valid distinction in testimony. (2) Usurping the functions of the jury. No witness *can* usurp the functions of the jury; therefore the reason amounts to nothing.)

1411 ART. 1. *Rule applied to a Lay Witness.* If the subject of the testimony is one to which any lay witness would be qualified to testify under Rule 83 (*ante*, § 379), the rule admits his inference,

(1) when it is based upon the condition of a *corporal object* which cannot be *shown to the jurors* for that purpose,

[1] This rule is universally accepted, but ought to be abandoned. With it would go all the ensuing Rules 169–176. For a substitute, see Rule 168 A, *post*, § 1424.

in or out of court, in the same condition as it was when the witness observed it;

(2) *but not* when it is based on data *observed by the witness himself* but capable of being adequately communicated to the jurors, by words or gestures, as defined in the general Rule above.

(3) *nor* when it is based on matters stated to the jurors *in the testimony of other witnesses.*

1412 *Par.* (*a*). Where the inference is allowable to state, under Clause (2) above, the witness must nevertheless, *before stating it*, state such of the observed data as are capable of being communicated in words or gesture.

Illustrations. (1) A police officer is called to testify to the condition of a door in the house of a murder, and is asked whether from the appearance it was broken off from within or from without the house. This in an inference. If the door is or can be shown to the jurors in the same condition as when observed by the officer, his inference is not admissible.

(2) In the same case, the officer having heard human noises in the house as he approached, his inference that they were sounds of violent quarrel, not of pain or suffering, is admissible. But under Par. (*a*) he must first state all the data capable of being stated in words or other form.

(3) If another person in the same case has testified that he found the inside handle-knob to be missing, the officer's inference from this that the door was opened from the outside or the inside is not permissible.

Distinctions. (1) In Illustration (1) above, if the desired testimony were whether a cut in the door had been made by a chisel or by a gouge. the subject would presumably require an expert carpenter, under Rule 83 (*ante*, § 839), and hence the police officer's inference would be excluded even if the door could not be shown to the jury. Conversely, if the Court in such a case should rule that the police-officer could testify, it would be a ruling both that he was qualified under Rule 83 and that his inference was admissible under the present rule.

(2) In illustration (2) above, if the persons in the house were German and the police officer were asked to state in English what they said, and the Court ruled that he could so state, this would be a ruling that he was qualified under Rule 83, not a ruling under the present Rule.

1413 ART. 2. *Rule applied to an Expert Witness.* If the subject of the testimony is one for which an expert witness would

be required under Rule 83 (*ante*, § 379), the same special experience which qualifies the witness is deemed also to supply, as a basis for inferences, some data which are not possessed by the jurors as persons of only ordinary experience; and therefore his inference is always admissible

(1) whether it is based in part on the condition of a *corporal object* which is or can be shown to the jury;

(2) or, whether it is based in part on data *observed by the witness himself* and capable of being adequately stated to the jurors;

(3) or, whether it is based in part on matters stated to the jurors in the *testimony of other witnesses.*

Illustrations. (1) In Illustration (1) of Art 1, if the desired inference is whether a cut on the door had been made by a chisel or by a gouge, and an expert carpenter were ruled to be necessary, the carpenter's inference would be permissible even though the door were before the jury in its original condition.

(2) So, also, in the same case, if the door were no longer to be had, and the witness had seen it shortly after the murder, his inference would be allowable even though he could adequately describe the position, shape, edges, length and depth of the cut.

(3) In the same case, if other witnesses who had seen the door had testified to the position, shape, edges, length, and depth of the cut, the carpenter's inference based on the data so testified to would be admissible.

1414 *Par.* (*a*). Insofar as a witness called to testify to a subject requiring expert qualifications under Rule 83 testifies *also to a subject not requiring* such qualifications, the rule of Art. 1 applies to that subject.

Illustration. If the carpenter, in the foregoing Illustration, should be asked whether a door so treated could have been broken down by a woman of ordinary strength, his inference would be excluded if the inference was one capable of being made from the appearance of the door, or from his description of it, by the jurors as persons of ordinary experience; and if not, the expert data could be supplied by a physician, but not by a carpenter.

1415 *Par.* (*b*). Insofar as a witness testifies as an expert to an inference, he need not state beforehand the data for his inference, as required for a lay witness under Par. (*a*) of

Art. 1, but may be required to state them on cross-examination, under Rule 86, Art. 2 (*ante*, § 402).

ART. 3. *Hypothetical Statement of Data.* Insofar as a
1416 witness, qualified as an expert, testifies to inferences based in part or wholly on data supplied by the testimony of other witnesses (under Clause 3 of Art. 2 above), the testimonial validity of his inference, for use by the jurors, depends on whether the jurors find ultimately that the data on which it is based are correct; and therefore his answer, or the question of counsel to which the answer is given, must make substantially clear to the jurors

(1) the conditional or *hypothetical* nature of his inference; and

(2) the *specific data* upon which it is based. — (W. §§ 672, 673, 683.)

Illustrations. A medical expert to the insanity of a testator is desired to give an opinion on the significance of the testator's conduct. The expert had never seen the testator; but several friends of the testator have testified to his improvidence in business, his hallucinations, and violent brutality to his family; two others, however, contradict explicitly the brutal conduct in the instances specified. In obtaining the opinion of the expert, the answers must be made to depend on the correctness of the other testimony, and the specific supposed facts on which it rests must be made clear; so that when the jury pass upon the contradictory testimony they may be able to reject the expert opinion if it is based on the supposed conduct which they find not to have occurred.

[*Par.* (*a*). The hypothetical specification of data by
1417 an expert witness is not necessary insofar as the data were *personally observed* by him];[1] — (W. §§ 675, 678.)

but the data are subject to be required on cross-examination, pursuant to the general principle of Rule 86, Art. 2 (*ante*, § 402).

Par. (*b*). The hypothetical specification of data, for
1418 the purpose of obtaining an inference or opinion, may be used for *any subject of testimony* requiring an expert witness, and for any such witness. — (W. § 677.)

[1] Some Courts are *contra*, but not soundly.

1419 *Par.* (*c*). The hypothetical specification of data is not allowable for a subject of testimony *not requiring an expert witness.* — (W. § 679.)

1420 *Par.* (*d*). In specifying the data hypothetically, the specification must be so made that the *precise data* to which the witness' answer applies are, in the circumstances of the case, *substantially plain* to the jurors.[1] — (W. § 681.)

In particular, the following forms of question are *ordinarily not proper:*

[(1) " Upon all the testimony in the case."][2]

[(2) " Upon what you have heard of the testimony in the case."][3]

[(3) " Assuming the truth of the testimony for the plaintiff," or " for the defendant."][4]

[(4) " Assuming the truth of the testimony of witnesses A, B, C, etc."][5]

The following forms of question are *ordinarily proper:*

[(5) " Assuming the truth of the testimony of witness A."][6]

1421 *Par.* (*e*). The data specified must be such that there is at least a fair possibility of the jurors finding them to be true. In general, it suffices if there is *some evidence tending to support* the data *specified.*[7] — (W. § 682.)

1422 *Par.* (*f*). The data specified need not include *all the facts alleged* in the case of the party questioning. But the question must be inclusive enough not to be capable of misleading the jury by falsely appearing to apply the answer to the whole of a particular witness' testimony or the whole of a party's case. — (W. § 682.)

[1] Here the rule for trial Court's determination should be strictly enforced (Rule 18, *ante*, § 49).
[2] Many Courts allow this form where the testimony is not conflicting.
[3] Sometimes this has been allowed.
[4] Usually this is allowed.
[5] This form is often allowed.
[6] This form is often not allowed.
[7] The phrasing differs in different Courts.

1423 *Par.* (*g*). The data specified must not be so lengthy or so confused as to tend to mislead the jury. — (W. § 682.)

1424 [[RULE 168 A. *General Principle.* An inference or opinion may always be stated in testimony to the jurors, provided the witness is qualified

(1) by personal observation, under Rule 86 (*ante*, § 400) of the data from which his inference is drawn,

(2) *and* by special experience, so far as it is required under Rule 83 (*ante*, § 379);

and it is *immaterial*

(3) whether the data are capable of being so described by him in words or gestures that the jurors are equally capable of drawing an inference;

(4) or, whether the inference involves the very subject of an issue before the jurors;

(5) or, whether the data are stated by him before stating the inference;

provided that the trial Court may in any instance exclude testimony of inferences whenever under the circumstances it is

(6) merely cumulative and superfluous,

(7) or, tends unduly to influence the jurors by reason of the personality of the witness.]] [1] — (W. § 1929.)

1425 [[ART. 1. Wherever the inference is that of a witness qualified as an expert and is based in part or wholly upon data not personally observed by him but supplied in the testimony of another witness (etcetera as in Art. 3 of Rule 168 above).]]

(*Reason and Policy.* The Opinion rule as now enforced is anomalous in theory and vicious in policy. It is historically a mere blunder, the growth of the past century. It is devoid of any practical service whatever. The rare possibility of abuse for lack of it is easily checked by the judicial discretion above provided for. The rule is such a pernicious blight upon straightforward common-sense methods of getting at the truth that it ought to be rooted out. Every vestige should go. Nothing should remain as a handle for employing the old useless quibbles. If the memory of the rule could be assimilated to that of the fossil learning of essoins and common recoveries, the law of procedure would have nothing to regret and much to be thankful for.)

[1] This is nowhere law; but is proposed as the substitute of the future.

Topic B:

Opinion Rule applied to Specific Topics of Testimony

RULE 169. *Sanity or Insanity.* The principle of Rule 168
1430 does not prevent a qualified witness, even though not an expert, from stating his inference or opinion as to the mental condition of a person with reference to sanity or other analogous fact material on an issue of capacity;

subject to the following distinctions and modifications: [1] — (W.§§ 1933–1938.)

Art. 1. *Knowledge.* The witness must be qualified by
1431 his own personal observation of the person in question, under the general principles of Rule 86 (*ante*, § 400) and Rule 87, Art. 1 (*ante*, § 416.)

[Art. 2. *Prior Specification of Data.* The witness must
1432 first specify the data of conduct observed by him in the person in question, pursuant to the general principle of Rule 168, Art. 1, Par. *a* (*ante*, § 1412).] [2]

Art. 3. *Attesting Witness.* An attesting-witness to a will
1433 may state his opinion without regard to the two foregoing requirements.[3]

[Art. 4. *Opinion limited to Specific Acts.* The witness'
1434 opinion must not relate to the person's general mental condition, but must be limited to

(1) The quality of the specific conduct observed.[4]

(2) The quality of the specific acts observed, in respect to the impression produced as to them on the witness.[5]]

Distinctions. An opinion as to *mental capacity* in general may run counter to the opinion rule in another aspect, as forbidding an inference of law, under Rule 173, Art. 4 (*post*, § 1454).

[1] None of these Rules 169–176 are needed if Rule 168 A (*ante*, § 1424) be adopted.

[2] A majority of Courts require this, but unsoundly.

[3] This is a mere historical relic, and is unsound.

[4] This is an attempt to state the New York quibble.

[5] This is an attempt to state the Massachusetts quibble. — There may be a few other local forms of quibble.

Cross-reference. For the application of the opinion rule to other topics of *medicine* and *health*, see Rule 175, Art. 2 (*post*, § 1472).

RULE 170. *Value.* The principle of Rule 168 does not
1435 prevent a qualified witness from stating his inference or opinion as to the value of property or services;

subject to the following distinctions and modifications: — (W. §§ 1940–1944.)

[ART. 1. *Land.* Where the issue involves the total loss or
1436 increase of value caused by the taking of a piece of land under eminent domain, the witness may state only the value before taking and the value after taking.] [1]

[ART. 2. *Personalty.* Where the issue involves the amount
1437 of damage to personalty, the witness may state only the value before the injurious act and the value afterwards.] [2]

[ART. 3. *Services, Tort-Damage, Contractual Non-Performance.*
1438 Wherever the issue involves the amount of damage caused by a tort or a breach of contract, the witness may state only abstract value of the services, goods, or other thing involved, and may not state the value of the actual loss or damage in the specific case.] [3]

RULE 171. *Insurance Risk.* When in an action on a contract
1440 of insurance the issue is whether a particular circumstance was "material to the risk" or caused an "increase of risk," testimony by expert opinion is not excluded under the general principle of Rule 168 (*ante*, § 1410);

subject to the following distinctions and modifications: — (W. §§ 1946, 1957.)

[ART. 1. *Actual Risk.* If under the contract the term
1441 "risk" signifies the actual risk of loss by fire, the testimony

[1] Some Courts draw this distinction, but unsoundly. There are also other occasional local quibbles.

[2] Some Courts sanction this quibble.

[3] There is in many Courts some such quibble, difficult to define, because not rational.

of expert witnesses thereto is receivable or not, according to the circumstances of the case, pursuant to the general principle of Rule 168, Art. 2 (*ante*, § 1413).][1]

1442 [ART. 2. *Classified Risk.* If under the contract the term "risk" signifies the classified schedule of risks adopted by insurers in general or by the contracting insurer in particular, the testimony of expert witnesses is receivable as to the risks as thus classified by the trade or by the particular insurer, but not as to the actual risk of the particular circumstance.][2]

1443 [ART. 3. *Known Risk.* If under the contract the term "risk" signifies the risk as known to the insured, the testimony of expert witnesses is not receivable, except so far as under the circumstances it is admissible under the general principle of Rule 168 (*ante*, § 1410) to show the insured's probable knowledge of the risk.][3]

1445 RULE 172. *Quality of a Thing or of Human Conduct as to Reasonableness, Care, Duty, Safety, and the Like.* The principle of Rule 168 (*ante*, § 1410) does [not] prevent a qualified witness from stating his inference or opinion as to the quality of a thing or of human conduct as to reasonableness, care, duty, safety, necessity, sufficiency, propriety, or the like, or their opposites.[4] — (W. §§ 1949–1951.)

Distinctions. (1) The fact of *other persons' conduct* may be relevant to evidence the reasonableness, care, or the like, of the person in issue, under Rule 73, Art. 5 (*ante*, § 354).

(2) The application of the opinion rule to *moral character*, *negligent character*, and *professional skill* is covered by Rule 170 (*post*, § 1478).

[1] Most Courts take this view; but its construction of the contract is usually not correct.

[2] A minority of Courts use this rule, which will commonly be the correct construction.

[3] Once in a while a Court takes this view, which is often the correct construction.

[4] A few Courts recognize the negative form of this rule. But the great majority, in one aspect or another, exclude such testimony. The opinion rule here appears in its most senseless and unpractical aspect.

RULE 173. *Law.* The principle of Rule 168 (*ante*, § 1410)
1446 excludes a witness' statement of his opinion or inference on a matter of law; with the following distinctions and modifications: — (W. § 1952.)

ART. 1. *Foreign Law.* A witness qualified as an expert
1447 witness under Rule 83, Art. 4 (*ante*, § 382) may state his inference or opinion as to a rule of law in a foreign jurisdiction. — (W. § 1953.)

Par. (*a*). A State or Territory or Dependency of the
1448 United States is not a foreign jurisdiction, except insofar as a system other than the Anglo-American common law forms a substantial part of its law.[1]

Par. (*b*). The opinion may be stated even though the
1449 text of a statute is involved and is duly evidenced to the tribunal.

Cross-references. (1) Whether the *text of a statute must* be evidenced is governed by Rule 128, Art. 6 (*ante*, § 826).

(2) Whether the determination of the foreign law is for the judge or for the jury is governed by Rule 229 (*post*, § 2115).

ART. 2. *Trade Usage.* A witness to trade usage may not
1450 state his inference as to the legal right or liability produced thereby. — (W. § 1954.)

ART. 3. *Interpretation of Documents.* A qualified witness
1451 to the application of a document may state as follows: — (W. § 1955.)

Par. (*a*). He may state the *technical meaning* of words or phrases said to be governed by a special usage.

Distinctions. (*a*) Whether the *judge* or the *jury* is to determine the meaning depends on Rule 229 (*post*, § 2110).

(*b*) Whether the *parol evidence* rule permits interpretation by special usage at all depends on Rule 222, Art. 2 (*post*, § 1962).

[*Par.* (*b*). He may state the application of descriptive
1452 words and phrases, whether or not they have a technical

[1] This point seems not to have been decided.

meaning, to specific actual places, so far as he is acquainted with those places.] [1] — (W. § 1956.)

1453 *Par.* (c). He may state the effect or substance of the *contents of a lost document*, so far as Rule 184, Art. 2 (*post*, § 1565), requiring completeness, does not prevent. — (W. § 1957.)

1454 ART. 4. *Accused's or Testator's Capacity.* A qualified witness to the mental powers of an accused or a testator may state his inference or opinion, provided it does not involve stating a legal definition or conclusion.[2] — (W. § 1958.)

1455 ART. 5. *Sundries.* A qualified witness to the fact of solvency, possession, title, or the like, may state his inference or opinion, provided it does not involve stating a legal definition or conclusion.[3] — (W. §§ 1959, 1960.)

1457 RULE 174. *State of Mind* (*Intention, Feelings, Knowledge, Meaning, Understanding*, etc.). The principle of Rule 168 (*ante*, § 1410) does not prevent a qualified witness from stating his inference or opinion as to another person's state of mind, in particular, as to the person's intention, feelings, knowledge, meaning, understanding, or the like;

with the following distinctions and modifications: — (W. § 1962.)

1458 ART. 1. *State of Mind in general.* A qualified witness may [not] state his inference or opinion as to another person's intention, feeling, knowledge, or sensation, as based upon an observation of the person and his conduct and the surrounding circumstances, [but may state merely the observed data from which the inference may be drawn.] [4] — (W. §§ 1963, 1966.)

[1] A few Courts do not concede this, but unsoundly.
[2] There is much quibbling here.
[3] This produces merely useless quibbles.
[4] Many Courts adopt the form of the rule in brackets. — The Court of Alabama has a bizarre set of rules peculiar to itself.

Distinctions. (*a*) A few Courts exclude such testimony on the ground of lack of *knowledge*, under Rule 86, Art. 5 (*ante*, § 405).

(*b*) An objection to such testimony as to *one's own intent*, under Rule 84, Art. 3 (*ante*, § 392) has been generally repudiated.

(*c*) The intent of another person or of oneself may be immaterial under the substantive law of *defamation*, *dedication*, *crime*, or the like, and thus the testimony may be inadmissible without regard to the present rule.

(*d*) In the same way, a person's *intent* may be immaterial under some branch of the parol evidence rule, particularly under Rule 214, Art. 5 (*post*, § 1895) or Rule 222, Art. 4 (*post*, § 1970).

(*e*) Whether a person's intent may be evidenced by *his own statements* of intent involves the hearsay rule, either under the exception for mental condition (Rule 153, Art. 2, *ante*, § 1207, Art. 4, *ante*, § 1218), or under the verbal act doctrine (Rule 155, Art. 2, *ante*, § 1245).

Illustrations. (1) Prosecution for assault with a deadly weapon. A bystander's opinion as to the accused's intent to kill the assaulted person would be inadmissible because the intent to kill is immaterial under the charge. But on a charge of assault with intent to kill, the bystander's opinion would be admissible, under Art. 1 above, by one view, and inadmissible, by the other.

(2) In a proceeding to probate a will, the document containing an alteration substituting the name of John for James, and the issue being whether the alteration was made before or after execution, the testator's declarations of intent after execution are not admissible either to evidence the execution under Rule 153, Art. 4 (*ante*, § 1218) or to interpret the document under Rule 223, Art. 1 (*post*, § 1976); but his intention and his declarations of intentions before executing are evidential under Rule 37, Art. 4 (*ante*, § 184) and Rule 153, Art. 4 (*ante*, § 1218), and an observer's opinion of the ante-testamentary intention ought to be admissible under the present Rule.

ART. 2. *Meaning of an Utterance.* Where the meaning of
1459 an utterance depends in part on the conduct of the person uttering, or on circumstances special to those who heard or read it, or on technical usage, a qualified witness may [not] state his inference or opinion of the intended meaning of another person's utterance, or the impression or effect produced as to that meaning, whether in a conversation or any other

form of utterance, [but may state merely the specific words and conduct as observed].[1] — (W. §§ 1969–1972.)

Distinctions. (1) A witness' "impression" or "belief" may be excluded because it is not based on personal observation, under Rule 86, Arts. 3, 5 (*ante*, §§ 401, 405).

(2) A witness' opinion as to another person's meaning may be excluded because the person's individual meaning may be *immaterial under* the substantive law, *e. g.* of contract or of defamation.

(3) In the same way, the other person's meaning may be *immaterial under the parol evidence* rule (Rule 214, Art. 5, *post*, § 1895; Rule 222, Art. 4 *post*, § 1970).

Illustrations. In an action for defamation in calling the plaintiff a "frozen snake," the defendant's individual meaning is immaterial, by the law of defamation. The individual meaning accepted by a specific reader might also be immaterial. The opinion of an ordinary witness as to the ordinary meaning would usually be excluded, because the jurors have equal means of interpreting it. But where the conduct of the utterer, or the circumstance attending the utterance, may affect the meaning, one who has observed them might testify, by the liberal form of the rule. Where technical usage is involved, an expert witness to the usage might in any case state the meaning, as also provided by Rule 173, Art. 3 (*ante*, § 1451).

RULE 175. *Sundry Topics.* The principle of Rule 168
1461 (*ante*, § 1410) does not prevent a qualified witness from stating his inference or opinion as follows:

ART. 1. *Corporal Appearance of Things and Persons.* He may state his inference or opinion as to the corporal appearance of a thing or person with reference to any quality or condition therein exhibited.[2] — (W. § 1974.)

Illustrations. Whether a person looked sad, shouted in distress, seemed afraid or envious, appeared lame or intoxicated, etc.

ART. 2. *Medical, Surgical, and Pathological Appearances.*
1462 He may state his inference or opinion as to an appearance of

[1] A majority of Courts apply the bracketed form of the rule; but this is unsound, even by a strict application of the opinion rule.

[2] Here are found a mass of quibbles.

health, disease, injury, or any other medical, surgical, or pathological matter. — (W. § 1975.)

Cross-reference. For the line between *lay* and *expert* qualifications in such matters see Rule 83, Art. 4 (*ante*, § 382).

1463 ART. 3. *Probability and Possibility, Cause and Effect, Capacity and Tendency.* He may state his inference or opinion as to the probability or possibility of a thing occurring or being done, the cause or effect of an act or an occurrence, the capacity or tendency of a thing or a person to do or to become.[1] — (W. § 1976.)

Illustrations. Whether a train could be stopped; what caused a wound; the probable life of timber; the effect of an increase of speed; etc.

1464 ART. 4. *Distance, Time, Speed, Size, Weight, Direction, Form, Identity, etc.* He may state his inference or opinion as to distance, time, speed, size, weight, direction, form, identity, and the like.[2] — (W. § 1977.)

1468 RULE 176. *Moral Character and Professional Skill.* The principle of Rule 168 (*ante*, § 1410) prevents a qualified witness from stating his inference or opinion as to the qualities of another person in respect to moral character or professional skill;

subject to the following distinctions and modifications: — (W. §§ 1983–1985.)

Cross-reference. For *reputation* as a mode of evidencing, see Rule 147, Art 4 (*ante*, § 1071).

1469 ART. 1. *Moral Character (Accused, Deceased, Rape, Complainant, etc.).* The moral character of a person, when relevant or material, whether that of an accused in a criminal case, a complainant in a rape charge, a deceased in a homicide charge, or any other person, may [not] be evidenced by the

[1] Here countless barren quibbles defy exact statement of the actual law.

[2] Very few Courts push the opinion rule so far as to exclude any of this kind of testimony.

inference or opinion of a witness qualified by personal observation under Rule 86 (*ante*, § 800).[1] — (W. § 1983.)

Cross-reference. For *particular acts* as evidence, see Rules 43–49 (*ante*, §§ 218–239).

1470 ART. 2. *Character for Care, Competence, or Skill.* The character of a person, for care, competence, or skill, when relevant or material, whether a party or a third person, may [not] be evidenced by the inference or opinion of a witness qualified by personal observation under Rule 86 (*ante*, § 800) and by special experience when required under Rule 83 (*ante*, § 379).[2] — (W. § 1984.)

Cross-references. For *particular acts* as evidence, see Rule 46 (*ante*, § 228), Rule 49, Arts. 6, 7 (*ante*, §§ 237, 238).

1471 ART. 3. *Character of a Witness.* The testimonial character of a witness, whether in general or only for the particular trait of veracity, as relevant under Rule 98, Art. 1 (*ante*, § 519) or Rule 110 (*ante*, § 596), may not be evidenced by the inference or opinion of a witness qualified by personal observation under Rule 86 (*ante*, § 800);[3] — (W. § 1985.)

[*provided* that a person who is acquainted with the witness' reputation as to veracity [or general character][4] may state whether, from that knowledge of the reputation, he would believe the witness on oath.]

Cross-reference. For the methods of *discrediting the impeaching witness*, see Rule 111, Art. 1 (*ante*, § 604).

1475 RULE 177. *Handwriting.* Wherever the authorship of a piece of handwriting is to be evidenced from the type or trait of handwriting belonging to a particular person, under Rule 36 (*ante*, § 170) and Rule 66, Art. 5 (*ante*, § 321), a witness who is qualified by a knowledge of genuine specimens

[1] A senseless rule, in the negative form; but only two or three Courts give any recognition to the affirmative form.

[2] A majority of Courts properly accept the affirmative form of this rule.

[3] All Courts go this far; then most accept the proviso. The rule is senseless.

[4] According as this is or is not admissible under Rule 98, Art. 1 (*ante*, § 519).

of the person's type of handwriting, whether or not he has special experience in handwriting, may state his inference or opinion that the writing in issue is or is not that of the person whose handwriting-type is known to him;

subject to the following distinctions and modifications:

ART. 1. *Lay Witness having Personal Knowledge.* A witness
1476 who has obtained his knowledge of the type of handwriting by observation of specimens known to him as genuine in one of the methods recognized as sufficient under Rule 87, Art. 3 (*ante*, § 418), that is, by having seen the person write or by having exchanged correspondence or been the custodian of documents or otherwise, may state his inference or opinion, without further conditions.[1]

[*Par.* (*a*). If the witness is the *custodian of ancient docu-*
1477 *ments*, he may bring the specimen documents into court and compare them with the writing in issue, even though he has no special experience in handwriting.][2] — (W. § 2006.)

Par. (*b*). If the witness desires to *refresh his memory*
1478 as to the type, he may bring into court the specimens which formed the basis of his opinion, and peruse and compare for that purpose. — (W. § 2007.)

ART. 2. *Lay Witness not having Personal Knowledge.* A
1479 witness who has not obtained a knowledge of the type of handwriting by observation of specimens known to him as genuine by one of the methods recognized as sufficient under Rule 87, Art. 3 (*ante*, § 418), and who has no special experience in handwriting, may not state his inference or opinion. — (W. § 2004.)

ART. 3. *Expert Witness.* A witness who has obtained no
1480 knowledge of the type of handwriting by observation of specimens known to him to be genuine as provided in Art. 1, but has a special experience in handwriting, may [not] state

[1] This is simply the corollary of Rule 87, when the opinion rule is invoked.

[2] This is perhaps still the law, though it is anomalous.

his inference or opinion on the following conditions: [1] — (W. § 2008.)

1481 *Par.* (*a*). His experience, either in scientific study or in professional occupation, must have given him a *special skill* in the identification of handwriting. — (W. § 2012.)

1482 *Par.* (*b*). He must have *inspected specimens* purporting to be those of the person to whose type of handwriting he is to testify;

(1) *and* the inspection may have been made *out of court;*

(2) *but* the specimens must, on demand of the opponent or on order of the judge, be *produced* in court. — (W. § 2011.)

1483 *Par.* (*c*). The specimens inspected by him *must have been evidenced as to their genuineness* in some manner that does not violate the principles of avoiding excessive confusion of issues (Rule 165, *ante*, § 1383) or unfair surprise to the opponent (Rule 161, *ante*, § 1326); that is to say, they must be

[2][(1) Specimens which have been determined to be genuine *by the judge*, on evidence offered to him;] — (W. §§ 2013, 2020.)

[3][(2) or, Specimens conceded by the *opponent's admission* to be genuine;] — (W. §§ 2013, 2021.)

[4][(3) or, Specimens furnished by *documents otherwise material* or *relevant* in the case and therefore admissible, on evidence of genuineness, independently of the present purpose;]

[1] A few Courts still exclude expert opinion entirely, as at common law in England. Most Courts admit it on one of the following conditions.

[2] This is the only sound method; by common law or by statute it obtains in a few States. Nevertheless, it need not be exclusive of the other methods.

[3] This is the rule in some States.

[4] This is the rule in some States. A majority of States accept both Clause (2) and Clause (3). A few States impose the quite erroneous limitation that the document must satisfy *both* Clause (2) and Clause (3.)

1484 *Par.* (*d*). The specimens must not have been so selected as to be *unfair indications of the person's type of handwriting*, by reason either of their number, kind, or time of making; [[and for this purpose the judge may require them to be submitted to the opponent's inspection at a suitable time and place]].[1] — (W. §§ 2009, 2018.)

1485 *Par.* (*e*). The specimens may be *photographic* or other facsimile *copies*, provided their originals are unavailable for production under the principle of Rule 126, Art. 3 (*ante*, § 754).[2] — (W. §§ 797, 2010, 2019.)

1486 *Par.* (*f*). In any case the witness may by *photographic enlargement*, or otherwise, pursuant to the principle of Rule 93, Art. 2 (*ante*, § 480), exhibit to the jurors the details of the specimens so as to explain his opinion. — (W. §§ 797, 2019.)

1487 ART. 4. *Testing the Witness on Cross-Examination.* [Any witness may be *tested on cross-examination*, pursuant to the principles of Rule 106 (*ante*, § 558), Rule 107, Art. 2 (*ante*, § 572), and Rule 108, Art. 2 (*ante*, § 578), by specimens selected by the counsel and shown to the witness, with or without evidence of their genuineness, subject to the trial Court's limitation of unfair or unreasonable methods.][3] — (W. § 2015.)

Illustrations. (1) Several witnesses for the prosecution unite in identifying a signature as the accused's. Counsel then shows to each another signature, and upon this they disagree radically. Irrespective of the genuineness of the second signature, their harmony of opinion as to the former signature is thus discredited.

(2) A witness denies the authenticity of a signature to a note sued upon. He is then shown another signature, which he affirms to be genuine. A person who saw the second signa-

[1] This general principle is everywhere law; but the numerous rulings as to specimens made *post litem motam*, etc., are matters entirely for the trial Court's determination, not for any specific rule. The double-bracketed clause is not law, but should be.

[2] No more detailed rule than this is desirable.

[3] Here the Courts vary much in their rulings. Good sense requires a liberal untrammeled rule as above.

ture written then testifies to its genuineness. Thus the first witness' credit is shaken.

ART. 5. *Exhibiting Specimens to the Jury.* Wherever the
1488 authorship of a piece of handwriting is to be evidenced from the type or trait of handwriting belonging to a particular person, under Rule 36 (*ante*, § 170), it may be evidenced, pursuant to the principle of Rule 66, Art. 5 (*ante*, § 170), by specimens of the handwriting of the person, on the following conditions: — (W. § 2016.)

Par. (*a*). The specimens must fulfil the conditions of
1489 Art. 3, Par. (*c*), (*d*), and (*e*), above, as to genuineness, selection, and copies.

Par. (*b*). The specimens may be handed *to the jury for*
1490 *inspection;* [but may not be shown by photographic enlargement or otherwise artificially, except in connection with an expert witness' testimony under Art. 3, Par. (*f*), above].[1]

ART. 6. *Expert Testimony to Ink, Spelling, Imitations,*
1491 etc. Wherever the authorship of a piece of handwriting, or any other fact material or relevant to authorship or to handwriting, is to be evidenced by some circumstance concerning ink, spelling, paper, type, illegibility, imitation, erasure, alteration, or the like, the circumstance may be evidenced

(1) by an expert witness,

(2) or, by specimens,

subject to the applicable limitations of Arts. 1 to 5 above.[2] — (W. §§ 2023–2027.)

[1] The bracketed clause may not be law.

[2] There are some erratic rulings in this field. Detailed rules are futile. A general section like this suffices; the determination of the trial Court should control in its application, under Rule 18 (*ante*, § 49).

TITLE V: QUANTITATIVE (OR, SYNTHETIC) RULES

SUB-TITLE I. NUMBER OF WITNESSES REQUIRED

RULE 178. *General Principle.* Subject to the exceptions
1500 prescribed in Rules 179 and 180 (*post*, §§ 1500, 1516) no specific number or kind of witnesses is required for evidencing any material or relevant fact; and the testimony of a single qualified witness to such fact may therefore suffice to be admitted and to go to the jury without any additional testimonial or circumstantial evidence. — (W. §§ 2033, 2034.)

(*Reason and Policy.* Though there are occasional dangers in trusting to a single witness, yet the mere number does not necessarily remove the dangers, inasmuch as the credibility of a witness is a quality varying infinitely, being irrespective of numbers, and the testimonial value is always likely to be sufficiently exposed by cross-examination and the other methods of impeachment. Moreover, rules of number introduce new dangers of collusion and new obstructions to honest cases, and tend to mislead the jurors into numbering instead of weighing the testimony.)

Cross-references. (1) For the rule that the testimony of a single witness does not *need to be believed*, even though no impeaching evidence has been introduced, see Rule 5, Arts. 3 and 4 (*ante*, §§ 14, 15).

(2) For the rule that the judge may refuse to submit to the jury the case of any party who has introduced *sufficient evidence* on the whole issues or any particular issue, see Rule 226 (*post*, § 2002).

RULE 179. *Rules of Number for Specific Issues.* In the
1502 specific issues here enumerated, one witness is not sufficient:

ART. 1. *Treason.* On a charge of treason, there must be
1503 two witnesses testifying credibly to the same overt act; *unless* the accused confesses in open court. — (W. §§ 2037–2039.)

ART. 2. *Perjury.* On a charge of perjury, there must be
1504 (1) either a second witness to the falsity alleged,
(2) or, corroboration of a single witness by some other form of evidence. — (W. §§ 2041–2043.)

Par. (*a*). This rule does not apply where the falsity
1505 can be inferred from a contradictory statement made by the accused [under oath].[1] — (W. § 2043.)

ART. 3. *Sundry Crimes.* On a charge of [enticement for
1506 prostitution] [violation of election-laws] [false pretences] [a capital crime], there must be
(1) either a second witness to a material part of the criminal act,
(2) or, corroboration of a single witness by some other form of evidence.[2] — (W. § 2044.)

[ART. 4. *Chancery Bill.* In issues arising under a bill in
1507 chancery, where the defendant has under oath directly denied the allegation, there must be some corroborating evidence for a single witness.][3] — (W. § 2047.)

ART. 5. *Wills.* In proof of testamentary acts, the following
1508 rules apply:

Par. (*a*). On an issue of the execution of a *written will* required to be *attested* at the time of execution, it is not necessary that the elements of execution be evidenced by more than one witness, whether he be an attesting witness or not, and whether his testimony be given in court or by means of the attestation signed by him.[4]

But this does not dispense with the calling of the required number of attesters, or with the proof of the required number of attestations, pursuant to Rule 130, Arts. 6, 7 (*ante*, §§ 866, 867).

[1] A few Courts have denied this whole exception. A few others accept it with the bracketed clause.
[2] A number of States have local rules for one or more crimes; the list varies widely.
[3] Not all Courts continue to maintain this rule.
[4] A few statutes, however, do provide that the will must be *proved* by two witnesses.

Cross-reference. The same result is reached by the provision of Rule 130, Art. 6 (*ante*, § 866), declaring that even if an attesting witness when called proves nothing, either because he has no memory or denies the execution, it may be evidenced by other qualified witnesses; for the object of the attesting-witness rule is satisfied by the mere procuring of the testimony of the witness before the tribunal. There is then no rule of the present sort requiring that a certain number must testify affirmatively to sustain the issue.

1509 [*Par.* (*b*). Where *no written attestation* of the will at the time of execution is required, the elements of execution must be evidenced by two witnesses or by corroborative evidence additional to a single witness.] [1]

1510 *Par.* (*c*). On an issue of the execution of a *nuncupative* will, there must be [two] [three] witnesses who were present at its making.[2] — (W. § 2050.)

1511 [*Par.* (*d*). On an issue of the execution of a *holographic* will, there must be [two] [three] witnesses to the testator's handwriting.] [3] — (W. § 2051.)

1512 [*Par.* (*e*). On an issue of *revocation* or *alteration* of a will, there must be [two] [three] witnesses.] [4] — (W. § 2051.)

1513 [*Par.* (*f*). On an issue of a *lost will* not produced, there must be two witnesses to its terms.] [5] — (W. § 2052.)

Cross-references. (1) For the rule as to the *completeness* of detail of the contents to be proved, see Rule 184 (*post*, § 1561).

(2) For the rule as to measure of persuasion by *preponderance* of evidence, see Rule 227 (*post*, § 2027).

(3) For the rule as to a *copy* being preferred, see Rule 128, Art. 5 (*ante*, § 825).

1514 ART. 6. *Sundry Civil Cases.* [6]

[1] This is the law in Pennsylvania only.
[2] The number varies in different States.
[3] A few States so enact.
[4] A dozen States so provide.
[5] A number of States so require by statute.
[6] In a few States there are other rules for specific issues.

RULE 180. *Rules of Number for Specific Kinds of Witnesses.*

1516 For the specific kinds of witnesses here enumerated, the single witness of that kind is not sufficient:

ART. 1. *Accomplice.* In a criminal charge, an accomplice's

1517 testimony alone, uncorroborated by other evidence, is [not] sufficient.[1] — (W. §§ 2056–2060.)

[*Par.* (*a*). The corroborative evidence must apply to

1518 the accused's identity as a participator.][2]

Par. (*b*). The judge may caution the jury to scrutinize

1519 with special care the testimony of an accomplice, pursuant to Rule 5, Art. 4 (*ante*, § 15).

ART. 2. *Woman Complainant.* In a criminal or civil case

1520 involving a wrong by a man to a woman's chastity, or analogous thereto, the complainant woman's testimony alone, uncorroborated by other evidence, is [not] sufficient.[3] — (W. §§ 2061, 2062.)

This rule applies in issues of
[rape], [seduction],
[enticement for prostitution],
[bastardy],
[breach of marriage-promise].

[[ART. 3. *Illegitimate's Mother.* On an issue of the illegiti-

1521 macy of the child of a married woman, the testimony of the mother to non-access of her husband during marriage is not sufficient without corroboration by other evidence.]][4]— (W. § 2063.)

[1] The negative form is law in nearly one-half the jurisdictions; but in some the rule is limited to felonies, in others, to specific crimes.

[2] This applies in jurisdictions taking the negative form. Any further details of rule, as sometimes laid down, are futile.

[3] A majority of jurisdictions have a statutory rule in the negative form. The specific issues to which it applies vary locally.

[4] This is the original rule, presumably not law anywhere now.

Cross-references. (1) For the rule *prohibiting the testimony* of either *father* or *mother* in such cases, see Rule 85, Art. 3 (*ante*, § 398).

(2) For the *presumption of legitimacy*, see Rule 228 (*post*, § 2080).

1522 [ART. 4. *Surviving Claimant.* On an issue involving a claim against the estate of a deceased person, the testimony of the claimant to a personal transaction with the deceased from which arose the claim is not sufficient without corroboration by other evidence.][1] — (W. § 2065.)

Cross-reference. For the rule excluding entirely such testimony, see Rule 84, Art. 2 (*ante*, § 390).

1523 [ART. 5. *Sundry Kinds of Witnesses.* The testimony of a person of the following classes is not sufficient without corroboration by other evidence:[2] — (W. § 2066.)

Par. (*a*). Children.

1524 *Par.* (*b*). Chinese, in cases of alien immigration.

1525 *Par.* (*c*). Prostitutes and private detectives, in divorce cases.]

1526 ART. 6. *Parties in Divorce.* The testimony of a party in a divorce suit is not sufficient without corroboration by other evidence, in the following respects:

1528 [*Par.* (*a*). The testimony of the *complainant.*][3] — (W. § 2046.)

1529 *Par.* (*b*). The testimony or extra-judicial confession or plea of confession of the *respondent*, as to any fact constituting a ground for divorce.[4] — (W. §§ 2067–2069.)

[1] This is the law in a few jurisdictions. It is preferable to the highly impolitic rule, above cited, prohibiting the testimony entirely.

[2] Each of these paragraphs is the law in one or two jurisdictions.

[3] This is the rule at common law in two or three States. In several others, a statute applying to "parties" is made to include the complainant.

[4] A few States limit the scope to adultery or cruelty.

ART. 7. *Accused in Criminal Case.* In a criminal case
1530 an extra-judicial confession of the accused is not sufficient, unless corroborated by other evidence

(1) [tending to confirm the truth of the confession.] [1]

(2) [directly relating to the *corpus delicti*.] [2] — (W. §§ 2070, 2071.)

Par. (*a*). The term *corpus delicti* signifies that

1531 (1) the loss or injury alleged has actually occurred;

[(2) and, its occurrence is due to the criminal act of some person.] [3] — (W. § 2072.)

Illustrations. In homicide, the decease of the person; in arson, the burning of the house; in larceny of a horse, the disappearance of the horse. Under Clause (2), the additional evidence would go to negative the deceased's suicide or the house's accidental burning or the horse's straying.

Cross-references. (1) For the rule that the *corpus delicti*, with or without a confession, must be evidenced by an *eye-witness*, see Rule 181, Art. 2 (*post*, § 1536).

(2) For the *definition* of a confession, see Rule 122, Art. 1 (*ante*, § 701).

Par. (*b*). The *order of evidence*, as between the con-
1532 fession and other evidence of the *corpus delicti*, is for the former to follow the latter, subject to any order which the trial Court may determine, pursuant to Rule 162 (*ante*, § 1350). — (W. § 2073.)

Par. (*c*). The sufficiency of the other evidence of the
1533 *corpus delicti* is determined by the trial Court, pursuant to Rule 163 (*post*, § 1352) and Rule 18 (*ante*, § 52).

[1] Cl. (1) is the rule of a few jurisdictions.
[2] Cl. (2) is the rule of most jurisdictions.
[3] Some Courts unsoundly add Cl. 2.

SUB-TITLE II:
KINDS OF WITNESSES REQUIRED FOR SPECIFIC ISSUES

RULE 181. *General Principle; Eye-Witnesses.* No par-
1534 ticular kind or quality of person (other than as qualified by the general rules of Part I, Title II, in this Code) is required as a necessary witness in the proof of any specific issue; — (W. § 2078.)

except that an *eye-witness* of a fact material to the issue is required in the specific issues hereafter mentioned:

(*Reason and Policy.* There is no class of qualified witnesses which in experience has been found specially necessary. For eye-witnesses, the special value of their testimony justifies no rule of requirement as indispensable, because if available they will be secured by the parties' own self-interest, and if they are not available the sufficiency of the other evidence may nevertheless justify a verdict.)

Distinguish the rule of Preference for an *attesting-witness* (Rule 130, *ante*, § 841), which only requires the attester to be called first, if available; the present class of rules makes the testimony of the specific kind of witness to be indispensable, whether called first or not.

ART. 1. *Eye-Witnesses in a Criminal Case.* In a criminal
1535 case the prosecution is [not] required to obtain the testimony of

(1) the witnesses who *testified* before the *grand jury;*

(2) the witnesses who had *personal observation* of the alleged criminal act.[1] — (W. § 2079.)

Cross-reference. For the rule *excluding* witnesses who testified before the grand jury but have not been notified to the accused by *indorsement* of their names on the indictment, see Rule 161, Art. 2 (*ante*, § 1327).

ART. 2. *Eye-Witness of Corpus Delicti.* In a criminal case,
1536 testimony of an eye-witness to the doing of the alleged criminal act or to the loss or injury involved therein

[1] Only two or three jurisdictions accept the affirmative form of the rule, which is thoroughly unsound.

(1) [is required.] [1]

(2) [is required where obtainable.] [2]

(3) [is not required.] [3] — (W. § 2081.)

Distinguish the rule that an accused's *confession* must be *corroborated* by some other evidence of the *corpus delicti* (Rule 180, Art. 7, *ante*, § 1530).

Cross-reference. For the definition of *corpus delicti*, see Rule 180, Art. 7 (*ante*, § 1531).

ART. 3. *Eye-Witness or Certificate of Marriage.* On an
1537 issue of marriage, the testimony of an eye-witness of the act of exchanging consent is not required; — (W. §§ 2083, 2084.) *except* in the following classes of trials:

Par. (*a*). It is required in an action for *criminal conversation.* [4] —
1538 (W. § 2085.)

[*Par.* (*b*). It is required in a prosecution for *bigamy.*] [5] —
1539 (W. § 2085.)

[*Par.* (*c*). It is required in a prosecution for *adultery*
1540 or *incest.*] [6] — (W. § 2085.)

[*Par.* (*d*). It is required in all criminal cases.] [7] —
1541 (W. § 2085.)

Par. (*e*). The requirement of an eyewitness is [not]
1542 applicable where the marriage is evidenced by the defendant's *admissions.* [8] — (W. § 2086.)

[1] Two jurisdictions so provide.
[2] A few jurisdictions so modify it.
[3] Most Courts accept this.
[4] Probably all jurisdictions accept this; but it is unsound.
[5] Most jurisdictions now deny this, by statute or by decision.
[6] Almost all jurisdictions repudiate this.
[7] Almost all jurisdictions repudiate this.
[8] A minority of Courts accept the affirmative form for one or more kinds of litigation.

1543 *Par. (f).* A *certificate* or *register of marriage*, being the statement of an officer present at the formal act of marriage-consent,

(1) is *sufficient* in so far as any rule requiring eye-witness testimony is to be satisfied.

(2) *But* in no event is a certificate or register of marriage required in preference to other eye-witness testimony;

(3) *And* where no rule requires eye-witness testimony, a certificate or register is not required. — (W. § 2088.)

Distinctions. (1) The other usual evidence of a marriage includes the parties' *behavior*, admissible under Rule 63, Art. 3 (*ante*, § 293), the *reputation* in the community, admissible under Rule 147, Art. 3 (*ante*, § 1066), and deceased *family members'* statements, admissible under Rule 40, Art. 5 (*ante*, § 995). One or more of these suffices, in the absence of any rule requiring eye-witness testimony.

(2) Where the substantive law does not make a *formal public act* necessary to the validity of the marriage, and thus *cohabitation* or other informal private exchange of consent is valid, the testimony of an eye-witness will often be unavailable, because there was none, and therefore the indirect effect of the eye-witness rule will virtually be to render the consent invalid if not performed publicly before witnesses.

(3) The *uncorroborated confession* of the *accused* in a *bigamy* charge may be insufficient, under Rule 180, Art. 7 (*ante*, § 1530), and also of a *respondent* in *divorce*, under Rule 180, Art. 6 (*ante*, § 1529).

(4) Whether the *certificate* or *register* of marriage is admissible at all depends on Rule 148 A, Art. 3 (*ante*, § 1103).

1544 [ART. 4. *Owner of Goods in Larceny.* On a charge of larceny, the owner's testimony to his lack of consent to the taking of the goods is required, if obtainable.][1] — (W. § 2089.)

1545 [ART. 5. *Written Admission of a Sale.* On an issue of goods sold to the value of $ — there must be some note or memorandum in writing, signed by the party to be charged.][2] — (W. § 2091.)

Cross-reference. For the effect of such a writing as essential to the *validity* of the sale, and not merely as necessary evidence of the sale, see Rule 219 (*post*, § 1950).

[1] Three or four jurisdictions accept this unsound rule.
[2] This covers the Statute of Frauds, where in force.

SUB-TITLE III: VERBAL COMPLETENESS

1547 RULE 182. *General Principle.* (A) In evidencing the tenor of an utterance material or relevant, made in words, whether written or oral, in original or in copy, the whole of the utterance on a single topic or transaction must be taken together. For this purpose it must be evidenced with

such *precision*, in respect to words,

and such *entirety*, in respect to component parts,

as is necessary to avoid the risk of misrepresenting the utterance;

(B) and in so far as such completeness is not required of the party offering, the opponent may evidence any other parts of the utterance useful to convey its whole tenor;

subject to the exceptions and distinctions in Rules 183 to 185. — (W. §§ 2094–2096.)

(*Reason and Policy.* Since single words are so capable of important legal effects, precision in the words evidenced is important. And since a thought is frequently complex and may be expressed in several related utterances, other parts may need to be considered for ascertaining the modifications to be applied to the part offered. Nevertheless, since the memory of oral utterances is often imperfect, completeness of tenor is more or less impracticable, and some compromise is necessary. And because the production or copying of an entire set of documents would often be onerous, some line must be drawn. The first part of the rule is designed to insist on the offering party's evidencing of the whole, where less than the whole would commonly be dangerous. The second part of the rule is designed to permit the opponent to cure any misconceptions which may have arisen in the circumstances of the case, but not to license mere hearsay.)

Topic A: Compulsory Completeness

1548 RULE 183. *Oral Utterances.* When an oral utterance is to be evidenced, the offering party must evidence the whole of it;

subject to the following exceptions and distinctions: [1]

[1] The authorities throughout this subject are inclined not to observe fixed definite rules.

ART. 1. *Verbal Precision.* The precise words are not
1549 required in evidencing an oral utterance; the substance or effect, as literally as feasible, suffices. — (W. § 2097.)

Illustrations. On a charge of murder, a witness who heard a long altercation between the defendant and the deceased may testify that the defendant threatened the deceased's life if he came on the land again, and that the deceased promised not to do so. Whether the witness can recall any precise words does not matter.

In particular,

Par. (*a*). *Admissions* and *confessions* are governed by
1550 this rule. — (W. § 2098.)

Distinction. A witness' *impression* or *understanding*, as representing the substance of what was said, may suffice under the present Rule. But by Rule 174, Art. 2 (*ante*, § 1459), the prohibition against opinions may exclude it.

Par. (*b*). *Testimony* at a *former trial* is governed by
1551 this rule; — (W. § 2098,)

[(1) *except* that the substance must be the *substance in facts*, and not merely in legal effect.] [1]

Illustration. That A in former testimony "proved a writing of B" would be its legal effect; that he stated his knowledge of B and B's handwriting and declared that the signature shown to him was B's would be the substance of A's facts stated.

(2) and *except* that *all material parts* of the witness' testimony on that topic, both on direct and cross-examination, must be given, pursuant to Art. 2 (*post*, § 1557); *unless* a part is offered merely as a *self-contradiction* or an *admission* to impeach a witness or a party.

(3) and *except* that when the testimony is evidenced by a *written report* taken stenographically, the rule for documents is applicable (Rule 184, Art. 1, *post*, § 1562).

[*Par.* (*c*). But in actions for *defamation* the rule does not
1552 apply, and the precise words must be evidenced.] [2] — (W. § 2097.)

[1] Many Courts make this distinction.

[2] Most Courts over-strictly so hold. But the doctrine of variance in pleading is often hard to distinguish.

ART. 2. *Entirety of Parts.* Entirety of parts is not required
1553 in evidencing an oral utterance; so that the offering party need put in only so much as serves his purpose;

subject to the following exceptions and distinctions:[1] — (W. §§ 2099, 2100.)

Par. (*a*). For utterances constituting a *contract* or other
1554 legal act, all the essential parts, so far as feasible, must be evidenced.

Par. (*b*). For a witness' *self-contradictions* and an oppo-
1555 nent party's *admissions*, only the part that serves the offering party's purpose need be evidenced.

Par. (*c*). For *dying declarations*, the whole must be
1556 evidenced, so far as feasible, pursuant to Rule 138, Art. 5 (*ante*, § 961).

Par. (*d*). For *testimony* at a *former trial*, the material
1557 parts must be evidenced as provided in Art. 1, Par. (*b*) above.

Par. (*e*). For a *confession*, the whole must be evidenced,
1558 so far as feasible;

but a separate utterance at a different time need not be evidenced. — (W. § 2100.)

Cross-reference. (1) For the question whether the prosecution *must omit* certain parts, see Rule 185, Art. 1 (*post*, § 1577).

(2) For the question whether the *magistrate's report* must be used, see Rule 131, Art. 1 (*ante*, § 891), and Rule 133, Art. 2 (*ante*, § 902).

ART. 3. *Parts may be Rejected.* Under the general principle
1559 that the jury determine for themselves the weight to be given to evidence (Rule 5, Art. 3, *ante*, § 14), the jury may give such credit as they think fit to any parts of an utterance introduced as a part of the whole under the present Rule. — (W. § 2100, n. 3.)

RULE 184. *Documents.* Where a document is available
1561 for evidence by original or by copy, the whole must be evi-

[1] The authorities here are often not definite.

denced; otherwise, the substance of the material parts suffices; subject to the following exceptions and modifications:

ART. 1. *Document produced in Court.* Where a document is
1562 evidenced by original or by copy, the whole of the document is to be introduced in evidence; but the offering party need not read to the jury more than he sees fit; leaving the other parts if desired to be read by the opponent under Rule 185, (*post*, § 1575).[1] — (W. § 2102.)

Par. (*a*). If the document is a *deposition*, or a report
1563 of *testimony at a former trial*, the whole [of the direct examination only,] [so far as pertinent], must be put in, whether used by the taker of the deposition or by the non-taker.[2] — (W. § 2103.)

Par. (*b*). If the document is an *opponent's answers to*
1564 *interrogatories* of discovery, its use is governed by Rule 186 (*post*, § 1583).

Par. (*c*). If the document contains a *reference* to *another*
1565 *document*, the other must also be evidenced if in the circumstances the latter is requisite to a correct and full understanding of the former. — (W. § 2104.)

ART. 2. *Document lost or destroyed.* If the document is
1566 lost or destroyed or is otherwise unavailable in the original (except an existing public record under Art. 3, *post*, 1568), and is therefore evidenced by recollection only or by any means other than a copy, the substance of the material parts suffices. This rule applies, in particular,

Par. (*a*). To a *deed* or a *contract*. — (W. § 2105.)

Par. (*b*). To a *will*. — (W. § 2106.)

Par. (*c*). To a *public record*. — (W. § 2107.)

[1] This is the fairest solution of a matter on which practice has varied.

[2] Some Courts accept the two bracketed clauses; some accept one only; some accept neither. It is really a question for the trial Court, under Rule 18 (*ante*, § 52).

Illustration. A lost deed being material in a chain of title but the only issue being as to the parties, it may be evidenced by a witness who recollects the names of the parties, the sealing and the date of execution, and the general identity of the land, even though the details of the description of the land or of the covenants cannot be given.

Cross-references. (1) For the rule that a *copy* is *preferred*, if it can be had, see Rule 128, Art. 6 (*ante*, § 826).

(2) For the rule that an *abstract* made by a conveyancer is admissible, see Rule 150, Art. 3 (*ante*, § 1183).

(3) For the rule against a witness' *opinion* as to the effect of a document, see Rule 173, Art. 3 (*ante*, § 1451).

(4) For the rule as to a *lost will's* contents being evidenced by two witnesses, see Rule 179, Art. 5 (*ante*, § 1508).

(5) For the rule as to the *measure of persuasion* as to the contents of a *lost will*, see Rule 227, Art. 2 (*post*, § 2027).

ART. 3. *Public Record.* Where the document is a public
1568 record existing and accessible for copying, and a copy is used to evidence it, pursuant to Rule 128, Art. 6 (*ante*, § 826), the copy must include all the necessary parts, as follows: — (W. § 2108.)

Par. (*a*). For a *private document* copied into the record,
1569 the whole of the document so far as it would have been required under Art. 1, *supra*. — (W. § 2109.)

Par. (*b*). For a series of *official entries*, as many as are
1570 relevant to the matters in issue. — (W. § 2109.)

Par. (*c*). For a *judicial record*, the final order of judg-
1571 ment and as much more as may be necessary in the circumstances to avoid misunderstanding or supply material data. — (W. § 2110.)

Par. (*d*). For a record of *conviction of crime*, as much
1572 as is needed to identify the offence and the offender.

Cross-reference. For the rule *exempting* from a copy, see Rule 128, Art. 6 (*ante*, § 826).

Par. (*e*). For a *sheriff's* or *tax-collector's* deed on execu-
1573 tion, the judgment and the execution.

Cross-reference. For the rule as to using the deed's *recitals* to evidence this, see Rule 148 B, Art. 1 (*ante*, § 1131).

Topic B: Optional Completeness

RULE 185. *General Principle.* The opponent may introduce
1575 the remainder of an utterance of which any part has been introduced by the other party;

provided that

(1) No utterance irrelevant to the issue is receivable; and

(2) No more is receivable than such remaining part as concerns the same subject [and is explanatory of the first part];[1] and

(3) The remainder thus received is usable to aid in the construction of the utterance as a whole, and not as testimony in itself; — (W. § 2113.)

subject to the following exceptions and modifications:

Art. 1. *Parts of Same Utterance admitted.* The present
1576 Rule applies to admit all the parts of a single utterance, oral or written, of the following classes, among others:

Par. (*a*). *Conversations* in general,
an opponent's *admissions*,
a witness' *self-contradictions*. — (W. § 2115.)

Cross-references. See also Rule 116, Art. 4 (*ante*, § 635) for a party's *admissions*, and Rule 108, Art. 6 (*ante*, § 591) for a witness' self-contradictions.

Par. (*b*). *Confessions* of an accused; — (W. § 2100.)

1577 (1) including the mention of *another crime* by the accused, when contained in one entire statement and offered by the prosecution;[2]

(2) *and including* the mention of *another person* as a participant in the same crime; but here the Court may instruct the jury not to use the confession against the other person except as a co-conspirator's admission under Rule 121 Art 2 (*ante*, § 687).

Par. (*c*). *Sundry writings*, including depositions and
1578 reports of former testimony. — (W. § 2116.)

[1] This bracketed clause is sound, if its enforcement is left to the trial Court under Rule 18 (*ante*, § 51), and not quibbled over. But it is not law in some States.

[2] The definition is in some Courts stricter. Their desire is to avoid violating Rule 43, Art. 1 (*ante*, § 219).

Par. (*d*). *Discharge* statements, by a person admitting
1579 a charge but also stating something in discharge. — (W. § 2117.)

ART. 2. *Separate Utterance excluded.* The present Rule does
1580 not apply to admit an utterance separate in time and form; subject to the following exceptions and modifications: — (W. § 2119.)

Par. (*a*). The whole of an *account* on a subject of which
1581 some items have been introduced is admissible. — (W. § 2118.)

Par. (*b*). A prior or subsequent utterance *referred to*
1582 in one already introduced is admissible, so far as it serves to avoid misunderstanding the one introduced. — (W. § 2120.)

TOPIC C: COMPOSITE RULES

RULE 186. *Party's Answer to Interrogatories of Discovery.*
1583 The foregoing Rules 182 to 185, concerning compulsory and optional completeness, are applied to a party opponent's answers to interrogatories of discovery as follows:

ART. 1. *Chancery Answer to Bill of Discovery.* An answer
1584 in chancery to a bill of discovery is admissible as follows: — (W. §§ 2121–2123.)

Par. (*a*). If it is offered in a *trial at law*, as the party's written admission, the whole must be introduced, pursuant to Rule 184, Art. 1 (*ante*, § 1562).

Par. (*b*). If it is offered in *another chancery cause*, as
1585 the party's admission, the same rule applies.

Par. (*c*). If it is offered in the *same chancery cause*, as
1586 a pleading containing admissions, the plaintiff may use as admissions whatever parts of the answer are so construable without severing statements grammatically connected;

but the defendant is [not] thereby entitled

(1) to treat any other parts, not so used by the plaintiff, but directly responding to interrogatories, as taken for true; or

(2) to shift upon the plaintiff the burden of proving or disproving any fact so responded to by the defendant, whether negatively or affirmatively, of which the plaintiff would not otherwise have had the burden of proof or disproof.[1]

ART. 4. *Party's Answer to Statutory Interrogatories.* A
1587 party's answers to interrogatories of discovery authorized by statute are governed by the principle applicable to

(1) [a party's *answer to a bill of discovery*, under Art. 1, Par. (*a*), (§ 1584), requiring to put in the whole.][1]

(2) [a witness' deposition, under Rule 184, Art. 1, Par. (*a*) (*ante*, § 1562), requiring to put in such parts as are pertinent.][1] 2124.)

(3) [a party's *oral admission*, under Rule 183, Art. 2, Par. (*b*) (*ante*, § 1555), permitting to put in one or more of the answers without putting in the others, except so far as others are so connected as to require in fairness to be read together].[2] — (W. § 2124.)

Par. (*a*). The remaining answers may be used by the
1588 party making them, under Rule 185 (*ante*, § 1575), so far as they serve to explain the answers already introduced.

RULE 187. *Inspection of Opponent's Document, to admit the*
1589 *Whole.* Where a party during the trial calls for inspection of a document in possession of the opponent, and the inspection is allowed, [no part of] the document so used is thereby treated as introduced in evidence by the party calling for it.[3] — (W. § 2125.)

[1] The bracketed clause is law in perhaps the minority of States, but is the only sound one. The rule is not easy to phrase correctly.

[2] Various Courts or statutes accept one or the other of these forms. The last is the best.

[3] The bracketed clause represents the sound rule; though some jurisdictions still recognize the contrary early rule.

SUB-TITLE IV: AUTHENTICATION

TOPIC A: AUTHENTICATION IN GENERAL

RULE 188. *General Principle.* A writing or other thing
1591 purporting to have been made, sent, authorized, used, or acted on by a specific person, and desired to be offered as such, cannot be received for the purpose of being shown or read to the jury as material or relevant, unless there is also offered some evidence authenticating the person's supposed connection therewith.

(*Reason and Policy.* The general mental tendency is to jump to the conclusion without evidence, whenever a corporal object is produced as purporting to be one used or made by a particular person. The mere sight of it in existence seems to prove something. This tendency is especially noticeable with documents. Being a tendency of special danger, the rules of evidence seek to avoid this danger by enforcing the logical necessity of offering some evidence of the supposed connection, before the thing itself is admitted. The specific rules for this purpose concern chiefly documents).

ART. 1. *Chattels, etc.* There are no specific rules for the
1592 authentication of chattels or other corporal objects. — (W. § 2130, n. 1.)

Illustration. On a prosecution for murder, a knife found sticking in the corpse of the deceased may be introduced upon evidence of such finding. But if the knife is offered as one found in the possession of the defendant and capable of having been used for the killing, then there must first be evidence of such possession. That it was found in his room on the floor, might suffice; or that it was found in his trunk in another man's room.

Cross-references. (1) The general principle of the *judge's control* over sufficiency of evidence (Rule 226, Art. 3, *post*, § 2002) disposes of this class of questions.

(2) The various kinds of *evidence* of *identity*, admissible under Rule 68 (*ante*, § 333) may here become involved.

(3) The principle of *undue prejudice* by autoptic proference under Rule 123 (*ante*, § 730) may also here apply.

(4) For the *order of evidence*, see Rule 163, *ante*, § 1352.

ART. 2. *Brands on Animals and Logs.* The presence on a
1593 purporting brand or mark customarily used by a particular person on stock-animals, timber-logs, etc., is sufficient evidence to admit the mark to be used as evidence of identity or of ownership, under Rule 41, Art. 2 (*ante*, § 198).

ART. 3. *Telephone-Message.* A telephone message, pur-
1594 porting to come from a particular person, may be sufficiently authenticated as to the person

(1) by the person's *voice*, as recognized by the hearer;

(2) by the person's subsequent admissions, by the tenor of the message, or by other *circumstances;*

(3) if a *reply-message*, by the message purporting to come in answer to a call made in the customary manner by using the name and number of a specific person.][1] — (W. § 2155.)

Par. (*a*). On an issue as to the *authority* of a person answering on behalf of another, or from his office, there must be other evidence than the mere purporting message.

Par. (*b*). Where the message is evidenced to have been spoken by an operator or other person as an *intermediary*, at the request of a party to the case, the intermediary is agent to transmit, and the message as spoken by him is receivable. — (W. § 669, § 2155, n. 8.)

[1] This Clause 3 is law in a few Courts, and is safe.

TOPIC B: AUTHENTICATION OF DOCUMENTS

RULE 189. *General Principle.* No writing alleged or pur-
1595 porting to have been made, sent, authorized, used or acted on by a specific person, and desired to be offered as such, may be read or shown to the jury unless upon some evidence of such person's connection, sufficient to satisfy the ensuing Rules 189–192, or to satisfy the judge on the circumstances of the particular case under the general principle of Rule 226, Art. 2 (*post*, § 2002.)

ART. 1. *Kinds of Evidence.* The evidence thus sufficient
1596 may be any admissible evidence of one of the three general sorts; — (W. § 2131) namely:

(1) Autoptic proference (Real evidence);

Illustration. The party or witness writing his name in the jury's presence in court.

(2) Testimonial evidence;

Illustration. A witness who saw the document written or used; any person qualified under Rule 87, Art. 3 (*ante*, § 418). The party's extra-judicial admission that he used or wrote it.

(3) Circumstantial evidence.

Illustrations. (1) Style of handwriting, under Rule 36, Art. 1 (*ante*, § 171), as evidenced in its turn by witnesses who know the person's style, under Rule 87, Art. 3 (*ante*, § 418) or are expert in handwriting, under Rule 177, Art. 3 (*ante*, § 1480), or by specimens of the person's handwriting, under Rule 66, Art. 5 (*ante*, §321) and Rule 173, Art. 5 (*ante*, §1488).

(2) Sundry circumstances in the nature of motive, design, traces, and the like, under the general rules of circumstantial evidence.

(3) Specific circumstances, giving rise to the specific rules of sufficiency (Rules 189–193, *post*, §§ 1595, 1633).

ART. 2. *Authentication, when Unnecessary.* Evidence to
1597 authenticate a writing is not needed whenever the fact of its use, making, or authorizing by a specific person is

(1) immaterial under the issues;

(2) *or* conceded under the issues;

subject to the following details: — (W. § 2132.)

Par. (*a*). Evidence to authenticate is not necessary
1598 when *only* the document's *contents* or *existence* is material.

Illustration. (1) In an action of trover for bonds, the identity of the bonds involves merely the purporting signatures, hence their genuineness need not be evidenced; unless on the issue of damages their value depends on genuineness.

(2) Under a claim of title by adverse occupation, the occupier's scope of possession may depend on the description in certain deeds giving color of title; but their genuineness is immaterial and need not be evidenced for this purpose.

Par. (*b*). Evidence to authenticate is not needed where
1599 by the pleadings or by stipulation or by other form of judicial *admission* under Rule 231 (*post*, § 2140) the execution of the document is conceded by the opponent;

in particular,

(1) where the opponent makes *claim* or *defence* under the same instrument, as provided in Rule 130, Art. 4 (*ante*, § 846);

(2) but *not* where the opponent merely has possession of the instrument and *produces it on demand* without making claim or defence under it, as provided in Rule 130, Art. 4 (*ante*, § 846).

Par. (*c*). Evidence to authenticate is not dispensed
1600 with by an opponent's *extra-judicial admission*, *i. e.* as defined in Rule 116, Art. 4 (*ante*, § 635), which is merely some evidence of authentication as declared in Art. 1, *supra*.

In particular,

(1) The opponent's *destruction* or *spoliation* of the document is not a conclusive or judicial admission, but merely some evidence, admissible as provided in Rule 118, Art. 4 (*ante*, § 654).

Par. (*d*). Evidence to authenticate is not dispensed
1601 with by evidence of *loss* or other circumstance *dispensing*

with production of the original under Rule 126, Art. 3 (*ante*, § 754). — (W. § 1188.)

1603 ART. 3. *Order of Evidence of Authenticity, Loss, and Contents.* Where a document is said to be lost or otherwise not producible in the original, so as to be evidenced by copy, the order of evidence for the facts of loss, contents, and execution is as provided in Rule 126, Art. 2 (*ante*, § 751).

1604 ART. 4. *Authentication-Rules of Sufficiency and of Presumption.* The ensuing rules merely declare certain circumstantial evidence to be sufficient evidence to permit the document to go to the jury (Rules 90–193, §§ 1608–1643), and do not create any presumption of execution (on the principle of Rule 226 Art. 2, *post*, § 1999) except where expressly so provided. — (W. § 2135.)

1605 ART. 5. *Other Rules for Documents distinguished.* The rules for Authentication of documents have no relation to the evidential rules on the following topics concerning documents, elsewhere provided for in this Code:

(1) the *possession* of a document to evidence *knowledge* of its contents, under Rule 62, Art. 12 (*ante*, § 289).

(2) the *possession* of an instrument of obligation, to evidence its *discharge*, under Rule 41, Art. 6 (*ante*, § 202).

(3) the presumption of identity of person from *identity of names* in a document, under Rule 228 (*post*, § 2082).

(4) the preference for an *attesting-witness* to evidence the execution of the document, under Rule 130 (*ante*, § 841).

(5) the *degree* of *persuasiveness* required for the evidence of execution of a *lost will*, under Rule 227 (*post*, § 2029).

(6) the presumption of *delivery*, from proof of *signing* a deed, under Rule 228 (*post*, § 2069).

(7) the presumption as to an *alteration* being made *before* or *after* execution, under Rule 228 (*post*, § 2069).

(8) the presumption as to the existence of a *lost grant*, under Rule 228 (*post*, § 2069).

(9) the admissibility of a *recital* in an *ancient deed* to evidence the existence of another and lost deed, under Rule 145 (*ante*, § 1040).

Topic C:

Specific Rules of Sufficiency for Authentication of Documents by Circumstantial Evidence

RULE 190. *Authentication by Age of Document.* A document
1608 which has been in existence for thirty years, is produced from a custody appropriate under the circumstances, and bears no appearance raising suspicion of fraud, is admissible, without other evidence of authenticity. — (W. § 2137.)

(*Reason and Policy.* After the lapse of a generation, testimony by witnesses knowing the handwriting is likely to be unavailable. The three circumstances mentioned are of considerable weight in combination. The likelihood of a forgery for the benefit of a future generation is small.)

Art. 1. *Age.* The document must be evidenced to have
1609 existed for thirty years, and the actual date cannot be merely assumed from the purporting date of execution. — (W. § 2138.)

Par. (*a*). The time is reckoned from the time of exist-
1610 ence of the document (not of its taking effect in law) to the time of offering in court (not to the time of suit begun).

Art. 2. *Custody.* The custody may be that of any place
1611 or person where under the circumstances that particular document would naturally be found if genuine. — (W. § 2139.)

Illustration. A counterpart of a lease, found in the lessor's possession; an old plan, found in the town-clerk's records.

Art. 3. *Appearance.* The document must not bear any
1612 appearances raising suspicion of fraud in making or altering the document. — (W. § 2140.)

Art. 4. *Possession of Property described.* Where the docu-
1613 ment purports to give an interest in real property, an occupation of the land, during some part of the time since the purporting date of execution, by the party claiming under it or his predecessor,

(1) [is also necessary.]

(2) [is also necessary, or else some other circumstance,

such as the claimant's payment of taxes or the non-occupation by adverse claimants, indicating the absence of doubt of the document's genuineness.]

(3) [is not necessary.] [1] — (W. § 2141.)

ART. 5. *Original and Copy; Recorded Deeds.* The foregoing
1614 rule is applied as follows where a copy of a deed or will is concerned: — (W. § 2143.)

Par. (*a*). Where an alleged ancient *original* is *lost*, and a purporting *ancient copy*, not official and otherwise unauthenticated, is offered, the copy is admissible on the same conditions defined in Arts. 1–4.

Par. (*b*). Where an alleged ancient *original* is *lost*, and
1615 a purporting ancient *official record* or *record-copy* exists which is not admissible under Rule 148 A, Art. 5 (*ante*, § 1110) because the record was not made in pursuance to authority, the ancient record, or the ancient record-copy (or a duly certified copy newly made from the record) [is admissible.] [2]

Par. (*c*). Where an ancient *original* is *produced*, an
1616 official *record* of it, or copy thereof, which would be inadmissible under Rule 148 A, Art. 5 (*ante*, § 1110) because not made in pursuance to authority, is receivable in corroboration [and to supply any requirement of Art. 4 above]. [3]

ART. 6. *Authority to Execute.* When a document is ad-
1617 missible under the conditions of Arts. 1–5 above, the same circumstances suffice as evidence of the existence of any agent's authority, or other fact necessary to valid execution, which purports in the document to have existed. — (W. § 2144.)

[1] These differing rules are favored in different jurisdictions.

[2] Here there are numerous statutes, varying in detail in different jurisdictions. Most of them lessen the period to twenty years; some require possession; most are limited to deeds.

[3] This applies where Clauses 1 or 2 of Art. 4 are in force. Statutes sometimes cover this.

ART. 7. *Kinds of Documents.* The foregoing rules, where
1618 not otherwise expressly declared, apply to any kind of document. — (W. § 2145.)

RULE 191. *Authentication by Contents.* The genuineness of
1620 a document may be sufficiently evidenced by its contents,

(1) if the subject of the communication is one peculiarly in the knowledge of the alleged author;

[[or, (2) if the document bears a stamp or imprint purporting to describe a particular person as author or publisher.]] [1] — (W. §§ 2148, 2149.)

Illustrations. (1) In a notice of a bank-balance overdrawn the reference to the bank deposit may suffice to authenticate it as coming from a bank's officers.

(2) Newspapers, books, letter-heads may suffice, as provided in Arts. 1–3.

[ART. 1. *Printed Matter.* In a printed book, pamphlet,
1621 periodical, or newspaper, the purporting printed name of the author and the publisher is sufficient to authenticate it.] [2] — (W. § 2150.)

Par. (*a*). A printed volume purporting to contain a
1622 copy of a legislative statute, municipal ordinance, administrative regulation, or judicial decision, domestic or foreign, and to be printed *by official authority*, is sufficiently authenticated to make the copy admissible under Rule 148 C, Art. 10 (*ante*, § 1164.) [3] — (W. § 1684a)

Par. (*b*). A printed volume purporting to contain
1623 a legislative statute or a judicial decision, and *not* purporting to be printed by *official* authority, is sufficiently authenticated if it purports to be one of an issue or series which is otherwise evidenced or judicially known to be *commonly treated and used* by the legal profession as

[1] This is not yet law, in so broad a form. But it ought to be, to correspond to the facts of commercial usage.

[2] This is law in perhaps a few jurisdictions only; but it is the only sensible rule. The current practice is absurdly overtechnical.

[3] Nearly every State has a statute to this effect.

authentic in the jurisdiction in question and therefore to be a copy admissible under Rule 150, Art. 1 (*ante*, § 1181). — (W. §§ 1684, 1703.)

ART. 2. *Postmark.* On an envelope or cover the impress
1624 purporting to be the postmark of a government postal officer canceling the mail is sufficiently authenticated to make the postmark admissible under Rule 148 C, Art. 5 (*ante*, § 1151). — (W. § 2152.)

ART. 3. *Reply-letter.* A letter arriving by course of mail
1625 purporting to come in reply to a communication sent to the purporting author is sufficiently authenticated. — (W. § 2153.)

Cross-reference. For the rule that the *mailing* of a letter to the addressee is evidence of its *due arrival*, see Rule 36, Art. 1 (*ante*, § 171).

[ART. 4. *Reply-telegram.* A telegram arriving in due
1626 course purporting to come in reply to a communication sent to the purporting author is sufficiently authenticated.] [1] — (W. § 2154.)

Cross-reference. For the rule as to authenticating a *reply-telephone* and a *brand* on stock or timber, see Rule 188, Arts. 2, 3 (*ante*, §§ 1593, 1594).

ART. 5. *Identity of Name.* In applying the foregoing rules,
1627 identity of name is sufficient evidence of identity of person; but no presumption arises except according to Rule 228, Art. 21 (*post*, § 2082).

RULE 192. *Authentication by Official Custody.* The existence
1630 of a document in the appropriate official custody is sufficient to authenticate

(1) An *official* document.

[(2) A *private* document required or authorized to be filed in official custody,

provided (*a*) the document is of a class required to be evidenced as genuine to the custodian before filing, so that

[1] A majority of the Courts have not yet accepted this; but it is sound.

his record or certificate would be admissible under Rule 148 A, Art. 5 (*ante*, § 1110), or under Rule 148 C, Art. 2 (*ante*, § 1147), or Art. 6 (*ante*, § 1152),

(*b*) or, the document has been treated as genuine, in judicial proceedings, by the Court or by the party now charged.][1] — (W. §§ 2158, 2159.)

ART. 1. *Witnesses to Custody.* The testimony to official
1631 custody may be that of

(1) the *official custodian* himself, either testifying in court to the original document, or certifying a copy under Rule 148 A, Art. 5 (§ 1110), Rule 148 C, Art. 2 (*ante*, § 1147), or Art. 6 (*ante*, § 1152).

(2) or, a *private person*, testifying to the original or to a copy, who has seen the original in the proper official custody.[2] — (W. § 2158.)

Distinguish the question whether the original is *forbidden to be removed* from official custody into court, under Rule 196 (*post*, § 1654).

RULE 193. *Authentication by Official Seal or Signature.*
1633 An impression purporting to be the seal or stamp of an officer sufficiently authenticates the document bearing it;

subject to the following exceptions and distinctions: — (W. § 2161.)

(*Reason and Policy.* In the frequent daily use of official documents, great inconvenience and expense would be caused if direct testimony to their genuineness were required. The forgery of the official seal would be a crime. Detection would be not difficult. In experience, such falsification is relatively rare. Hence the purporting impression of such a seal is circumstantially sufficient.)

ART. 1. *Authentication, Hearsay Exception, Judicial*
1634 *Notice, distinguished.* When any document is offered as an official statement admissible under Rule 148 (*ante*, § 1090), and bears the purporting seal of the officer, and the offer thus involves three elements,

[1] There is little authority on Clause (2), but the above seems a practical rule.

[2] A few statutes anomalously require a private copy to bear an official seal.

(1) that such an *officer's statement is admissible* to evidence the fact stated;

(2) that the person named *is such an officer;* and

(3) that the document was genuinely *executed by that officer* by affixing his seal or stamp,

(1) the first element is governed by Rule 148 (*ante*, § 1090), determining the admissibility of official statements;

(2) the second element is governed by Rule 229 (*post*, § 2120), permitting judicial notice to be taken of the incumbency and official character of certain persons;

(3) the third element is governed by the present Rule. — (W. § 2161.)

1635 *Par.* (*a*). Wherever under the present Rule the genuineness of the seal or stamp is taken as sufficiently evidenced, the *official character* or incumbency of the person using it is also judicially noticed, unless otherwise expressly provided. — (W. § 2168.)

1636 *Par.* (*b*). Wherever under the present Rule the purporting seal is *not sufficient evidence* of its genuineness, and other evidence is therefore needed, it may be supplied by an *official certificate of genuineness* appended thereto, and made by another officer duly authorized, so as to be admissible as an official statement under Rule 148 C (*ante*, § 1145). In such case, the genuineness of the additional certificate bearing a purporting seal of that officer will always be assumed, under the present Rule.

Illustration. (1) Where a purporting foreign notary's certificate of execution of a deed is offered, the present Rule determines whether the seal is assumed genuine. If not, Rule 148 C determines that an American consul's certificate of genuineness is admissible; and the present Rule then declares the Consul's purporting seal to be presumed genuine.

(2) Where a certified copy of a judicial record in another State is offered, and the clerk's certificate is admissible for the purpose under Rule 148 C, the genuineness of the clerk's certificate (*a*) will in some States be presumed from the purporting seal of court, but (*b*) under the Federal statute, it will not be assumed, and the judge's certificate of genuineness must be furnished, but this will be assumed genuine.

1637 *Par.* (*c*). Wherever under the present Rule the purporting seal is not sufficient evidence of its genuineness,

testimony to its genuineness may be given *on the stand* by a qualified person.

1638 ART. 2. *Seal of State.* The purporting seal of State, of either a domestic or a foreign State or of a United States Territory or Dependency, is assumed genuine. — (W. § 2163.)

1639 ART. 3. *Seal of Court.* The purporting seal of the following courts will be assumed genuine:

(1) a court of record within the jurisdiction;

(2) a court of record in another State, Territory, or Dependency of the United States;

[(3) a court not of record, within the county;]

(4) any Federal court.[1] — (W. § 2164.)

Distinguish the requirement of Rule 148 C, Art. 7 (*ante*, § 1160), under the Federal statute, that both the clerk and the judge must make certificates for a copy of the record; the seal of the court is assumed genuine.

1640 ART. 4. *Seal of Notary.* The purporting seal of a notary, foreign or domestic, is assumed genuine, wherever his certificate is offered for the purpose of evidencing the fact of dishonor of commercial paper [or any other fact for which it is admissible under Rule 148 C, Art. 1 (*ante*, § 1146).][2] —(W. § 2165.)

1641 ART. 5. *Seal of Sundry Officers.* The purporting seal of the following other officers will be assumed genuine: — (W. § 2166.)

(1) a Federal officer;

(2) a domestic State officer;

(3) a domestic county officer [within the county];

[(4) an officer of another State, Territory, or Dependency of the United States;][3]

(5) a municipal corporation.

[1] The statutes vary. Substantially all Courts and statutes agree on the above, except as to (3).

[2] Some Courts decline to accept the bracketed clause, but without sufficient grounds.

[3] This is covered by numerous statutes.

ART. 6. *Official Signature.* The purporting signature of an
1642 official is not assumed genuine.[1]

ART. 7. *Seal of a Corporation.* (1) The purporting seal of
1643 a private corporation is [not] assumed genuine.

(2) When the genuineness of the seal is evidenced, the due consent and authority of the corporation to affix the seal is [not] thereby assumed.[2] — (W. § 2169.)

[1] There are numerous local exceptions by statute for specific officers.

[2] There is authority for the bracketed words in each of these clauses.

PART III:

RULES OF EXTRINSIC POLICY

RULE 194. *Definition and Classification.* The third group
1650 of rules of Admissibility, as defined and classified in Rule 12 (*ante*, § 37), comprises those rules which allow certain extrinsic policies, important to the community in general, to override temporarily the purpose of ascertaining the truth, and therefore to exclude certain facts irrespective of their probative value.

Such rules are either *absolute* or *optional.*

The absolute rules depend on a fixed general policy, and are enforced by the judge on application of the party like other rules of evidence.

The optional rules depend on a policy protecting the interest of particular classes of persons only, and are enforced only on demand by such person. The personal option granted by these rules is termed a Privilege. — (W. § 2175.)

TITLE I: RULES OF ABSOLUTE EXCLUSION

RULE 195. *Evidence involving Public Indecency.* Wherever
1652 the introduction of evidence would cause under the circumstances undue pruriency in bystanders or undue embarrassment and shame in a witness, the trial judge may exclude it, having regard to the slight relative value of the evidence and the impracticability of otherwise ascertaining the truth.[1] — (W. § 2180.)

Cross-reference. For the application of this policy to the specific process of autoptic proference, see Rule 123, Art. 2 (*ante*, § 732).

RULE 196. *Evidence involving Public Inconvenience.*
1654 Whenever the production of documents from public records would involve danger to the integrity of the records or

[1] Some such rule as this is presumably now law.

inconvenience to the public or to public officers in using the records, the production of the originals may be forbidden by the judge.[1] — (W. § 2182.)

Cross-reference. (1) For the privilege as to *non-attendance*, see Rule 200 (*post*, § 1689). (2) For the privilege as to *official secrets*, see Rule 210, Art. 2 (*post*, § 1845).

RULE 197. *Evidence involving Illegality.* An evidential fact,
1656 otherwise admissible, is not excluded

(1) because it has been obtained by means of some violation of law;

(2) nor because its existence is attended with some violation of law;

unless expressly so provided by the statute defining the violation of law. — (W. §§ 2183, 2184.)

Illustrations. (1) A gambling implement, obtained by a search illegally made on the defendant's premises. Testimony by a coroner, who has made an unauthorized autopsy.

(2) A document required by tax-law to be stamped, but lacking the stamp.

Cross-references. (1) For the rule excluding *documents* obtained in consequence of a breach of the *privilege against self-crimination*, see Rule 203, Art. 5 (*post*, § 1746).

(2) For the rule as to *documents* illegally removed, see also Rule 196 (*ante*, § 1654).

[1] All Courts seem to recognize this rule, but it is not always enforced. The discretionary form, as above, seems the safest. Some statutes improperly give the option to the custodian himself.

TITLE II:

RULES OF OPTIONAL EXCLUSION (PRIVILEGE)

SUB-TITLE I:

TESTIMONIAL DUTY AND PRIVILEGE IN GENERAL

RULE 198. *General Principle.* Inasmuch as every member
1660 of the community has a general and public duty to attend in court and to disclose all matters known to him, to the end that truth may be established in litigation, any rule of privilege herein recognized as paramount to testimonial duty is an exception to the general rule. — (W. § 2192.)

ART. 1. *Scope of Duty as to Attendance and Disclosure.*
1661 The testimonial duty is

1. to *attend* court as a witness, *i. e.* for the purpose of testifying; and

2. to *disclose*, by any feasible mode of communication, the evidential facts in the witness' control.

A privilege derogating from the first part of the duty is a *Viatorial* Privilege.

A privilege derogating from the second part of the duty is *Testimonial* Privilege.

ART. 2. *Scope of Duty as to Documents, Chattels, etc.* The
1662 duty as to disclosure includes all matters within the control of the witness and capable of communication or exhibition; in particular,

1. documents;
2. chattels;
3. premises;
4. corporal features. — (W. §§ 2193, 2194.)

ART. 3. *Process to Enforce Duty; Subpœna.* The duty is
1663 enforceable by summons notifying a person to attend and give testimony. — (W. §§ 2199, 2200.)

1664 *Par.* (*a*). The summons must be in *writing* (*subpœna*), unless the witness is already in court.

1665 *Par.* (*b*). The service must be
(1) by leaving a *copy* with the person
(2) or, [by reading or showing the original to him] in the manner prescribed for service of other process.

1666 *Par.* (*c*). The service must be made a reasonable time before the day specified for attendance.

1667 *Par.* (*d*). The production into court of *documents*, if desired, must be stated in the summons, with such precision that the witness can conveniently find and bring them.

But the production into court must comprise all the described documents; and any question of irrelevancy or privilege will be ruled upon by the judge at the time of any offer to use them in evidence.

Cross-reference. (1) For the privilege as to documents *inconvenient to remove* see Rule 200, Art. 3 (*post*, § 1691).

(2) For the mode of obtaining *discovery* of documents *before trial*, see Rule 161 Art. 4 (*ante*, § 1335).

1669 *Par.* (*e*). The duty as to production of documents comprises documents within the person's control.

1670 ART. 4. *Constitutional Right to Process.* A party defendant in a criminal case has a right to such process, and cannot, under the Constitution, be deprived of it by law. — (W. § 2191.)

1671 ART. 5. *Officers having power to Compel, etc.* The rules concerning the following matters are not included in this Code: — (W. § 2195.)

The *classes* of judicial *officers* who have power to *compel* performance of testimonial duty;

The witness' *immunity from other legal process* while performing testimonial duty;

The party's *right of civil action* against a person who fails to perform testimonial duty.

1672 ART. 6. *Kinds of Privilege.* There are two kinds of privilege, *Viatorial* and *Testimonial.*

The *viatorial* privilege exempts the person from *travelling to attend* before a court or deputy judicial officer, and allows him to give his testimony in his place of residence or in his house, before an officer appointed to take it.

The *testimonial* privilege is of two classes. The first class comprises privileged *topics*, *i. e.* facts, or subjects of fact, upon which the person concerned is privileged not to make disclosure. The second class comprises privileged *communications*, *i. e.* a communication made between particular persons, which one or both of them is privileged not to disclose. — (W. § 2197.)

ART. 7. *Privilege Personal to Witness.* Since a privilege
1673 is designed to protect some interest of the class of persons represented in the witness, by giving an option not to disclose, the privilege is personal to the witness. — (W. § 2196.)

Therefore,

Par. (*a*). The *claim* of privilege can be made solely by
1674 the person entitled to it, and not by a party to the cause as such.

Par. (*b*). A judicial ruling, erroneously made, can be
1675 *excepted to* by a party ruled against

(1) if it *affirms* the privilege and thus excludes admissible evidence useful to the party;

(2) [but not] if it *denies* the privilege and thus receives admissible evidence contrary only to the rights of the witness.[1]

ART. 8. *Privilege may be Waived.* Every privilege, being
1676 an option conceded to a particular class of persons to decline to disclose or to attend, and not an inherent defect in the evidence, may be waived, *i. e.* not claimed. Therefore when the privileged person exercises his option to attend or to disclose, no further objection lies to the admission of his testimony, by reason of the rules in this present Part III of this Book.[2]

[1] The clause in brackets represents the correct rule; but some Courts deny it in theory, and most ignore it in practice.

[2] This is usually ignored by Courts, especially in the rules for privileged communications.

Par. (*a*). This privilege of non-attendance at court leaves the person still liable to the duty to ***testify by deposition*** given at the place of his residence.

ART. 1. *Illness.* Serious illness of self or family may
1686 excuse from attendance. — (W. § 2205.)

ART. 2. *Personal Status.* The following classes of persons
1687 are privileged from attendance:

Par. (*a*). *Domestic Officials.* — (W. §§ 2371–2373.)

1688 (1) The Chief *Executive;*

[(2) A *judge* of a superior court;]

[(3) A *custodian* of public records, for the purpose of bringing the records, and so far as the records themselves are irremovable under Rule 196 (*ante*, § 1654).]

Cross-reference. For the privilege *not to disclose* official matters by testifying at all, see Rule 210 (*post*, § 1842).

Par. (*b*). *Foreign Officials.* — (W. § 2372.)

1689 (1) An ambassador or minister;

[(2) A consul.]

Par. (*c*). *Private persons.* — (W. § 2206.)

1690 [(1) A practising physician.][1]

[(2) A woman.][1]

ART. 3. *Inconvenience* (*Distance*, etc.). The following
1691 circumstances privilege from attendance:

[*Par.* (*a*). Risk of serious and disproportionate injury to livelihood

(1) either by personal absence therefrom,

(2) or by removal of commercial books.][2] — (W. §§ 2205, 2206.)

Par. (*b*). Residence at a distance from the place of

[1] A few States recognize these privileges, but not wisely.

[2] Sometimes such a rule has been recognized; but the case ought to be extreme and rare.

1692 trial [[such as to impose disproportionate hardship;]] [namely, out of the county.] [1] — (W. § 2207.)

SUB-TITLE III: TESTIMONIAL PRIVILEGE

Topic A: Privileged Topics

RULE 201. *Sundry Privileged Topics.* For miscellaneous
1693 topics privileged not to be disclosed, the following rules apply:

Art. 1. *Irrelevant Matters.* There is no privilege for
1694 matters irrelevant or otherwise inadmissible.[2] — (W. § 2210.)

Distinguish (1) the lack of *power* in a deposition-*officer* to compel answers and therefore to rule upon relevancy;

(2) the party's right to refuse *discovery* before trial on immaterial matters, under Rule 161, Art. 3 (*ante*, § 1332).

Art. 2. *Documents of Title.* There is no privilege for
1695 documents of title;[3] except where a person holding a lien on a document might substantially lose the benefit of his lien if compelled to produce the document at the instance of the lienee. — (W. § 2211.)

Art. 3. *Trade Secrets.* Any fact important to the existence
1696 of a particular industry or business, and habitually kept in the private knowledge of the persons occupied therein, is privileged; unless the trial judge deems

(1) that the privilege if conceded to a party opponent in a suit based on fraudulent competition will not be *bona fide* exercised and may serve to conceal fraud;

(2) or, in any other case, that the privilege, if conceded, will substantially prevent the ascertainment of the truth, and may thereby cause more harm than the disclosure would cause.[4] — (W. § 2212.)

[1] A statute always fixes a specific limit. But such a rule works arbitrarily, and ought to have flexibility, as provided in the double-bracketed clause.

[2] A few Codes do concede such a privilege, but this is unsound both theoretically and practically.

[3] But in England there was.

[4] Some such privilege, with unfixed limits, is recognized in all courts.

1697 [*Par.* (*a*). The trial judge may in any case prescribe a disclosure limited to himself or his appointee.] [1]

1698 ART. 4. *Official Secrets.* A fact confidentially preserved in the knowledge of officers of State, and for the public welfare necessarily kept secret, is privileged; subject to the qualifications of Rule 210 (*post*, § 1842.)[2] — (W. § 2213.)

1699 ART. 5. *Theological Belief.* A person's belief in matters of theology is privileged. — (W. § 2214.)

Cross-reference. For the mode of ascertaining theological belief for the purpose of administering an *oath*, see Rule 157, Art. 3 (*ante*, § 1292).

1700 ART. 6. *Political Vote.* The tenor of a person's vote lawfully cast at any government election is privileged. — (W. § 2215.)

Distinguish the privilege against *self-crimination*, Rule 203 (*post*, § 1730), which would protect the fact of illegal voting from self-disclosure.

1701 [ART. 7. *Disgrace or Infamy.* A fact involving public disgrace or infamy, and not material to the issue, though relevant, is privileged.] [3] — (W. §§ 984, 986, 987, 2216.)

Illustration. Whether a person has stolen from his employer is a fact of crimination; but whether he has been convicted of such stealing is a fact of infamy.

Cross-reference. For the *trial Court's discretion* in checking cross-examination to disgracing facts (which in most States takes the place of this privilege), see Rule 105, Art. 2 (*ante*, § 552).

1702 ART. 8. *Party-Opponent in Civil Suit.* The party-opponent in a civil case is not, as such, privileged to withhold any facts.[4] — (W. §§ 2217, 2218.)

[1] This paragraph would remove much of the risk of harm done by refusing such a privilege.

[2] The distinction betwen a *topic* and a *communication* is here difficult to make and is seldom made; hence the rules can best be stated in one place.

[3] This privilege may be surviving in some States.

[4] This is everywhere covered by statute.

Distinguish the opponent's liability to *make discovery before trial*, under Rule 161, Art. 3 (*ante*, § 1332), for which the rules are variant; at trial no privilege would exist, though before trial the discovery might not be demandable.

1703 *Par.* (*a*). This rule includes the *production of documents*, upon reasonable notice by subpœna *duces tecum*, or on motion, or otherwise as prescribed by rules of Court. — (W. § 2219.)

1704 *Par.* (*b*). This rule includes the *inspection of* the opponent's *body*, by the jury or by witnesses, under conditions prescribed by order of the trial judge or by standing rules of Court, and in all issues where some fact concerning the person's body is relevant; — (W. § 2220)

in particular, in an issue

(1) of inheritance, *de ventre inspiciendo;*

(2) of divorce, to ascertain *impotency;*

(3) of insanity, to ascertain *mental condition;*

[(4) of crime, of inheritance, of insurance, or otherwise, to ascertain the *identity* of a buried body;]

[(5) of personal injuries, in crime or tort, to ascertain the nature of the injuries.] [1]

Distinguish the privilege of an *accused* not to disclose criminating facts, under Rule 203, Art. 2 (*post*, § 1737).

1705 [*Par.* (*c*). This rule includes the *inspection of chattels or premises* in the opponent's control, by the jury or by witnesses, under conditions prescribed by order of the trial judge or by standing rules of Court, and in all issues where some fact concerning such chattels or premises is relevant.] [2] — (W. § 2221.)

1706 [[*Par.* (*d*). This rule also includes the *doing* of any simple *act*, not dangerous or excessively inconvenient, which would be needed or useful

(1) for making one of the foregoing disclosures;

(2) for furnishing some other evidential fact.]] [3]

[1] Some Courts still concede a privilege here.

[2] In some States there is common law authority for a privilege here.

[3] This is probably not yet law, but might well be.

Illustrations. (1) Supplying a key to a door, or running the machinery of a mine.
(2) Writing a sample signature.

ART. 9. *Civil Liability.* A fact involving a civil liability
1707 on a claim other than the one in suit at bar is not privileged. — (W. § 2223.)

Distinguish the foregoing Art. 8, which denies to the party-opponent in the suit as such any privilege to withhold the facts relating to that liability in suit; the present Article further denies any privilege whether to party-opponent or to ordinary witness, for facts affecting any other civil liability whatever. The privilege denied in this Article never existed; the privilege denied in Art. 8 existed, but is everywhere abolished; the privilege of Rule 11 (crimination) still exists.

RULE 202. *Anti-Marital Facts.* A fact against the interest
1710 of the witness' husband or wife is privileged; subject to the following exceptions and distinctions: — (W. §§ 2227, 2228.)

(*Reason and Policy.* This privilege rests upon sentimental grounds, — the sentiment of repugnance to forcing a husband or wife to become the means of injuring the other; there is a double harshness in making the one do injury to the other, and the other suffer injury from the one. Nevertheless, such feelings frequently do not exist, *i. e.* where a mutual hostility has already preceded litigation. Moreover, where they do exist, the administration of justice cannot be carried on without some harshness to natural feelings. Hence many deny the propriety of recognizing this privilege.)

ART. 1. *Valid Subsisting Marriage; Death or Divorce.*
1711 The privilege applies only as between the spouses of a valid subsisting marriage. — (W. §§ 2230, 2231.)

Illustration. On a charge of bigamy in first marrying A and then B, the defendant disputing the second marriage, the privilege covers A's testimony, when called for the prosecution, but not B's.

Par. (*a*). The privilege does [not] apply where the
1712 marriage has been terminated by *death* or by *divorce.*[1] — (W. § 2237.)

ART. 2. *Form of Testimony.* The privilege applies to any
1713 form of testimonial utterance or act of one spouse offered

[1] Here a few Courts recognize the privilege.

against the other, whether by deposition, by admission, by hearsay exception, by production of documents, or otherwise. — (W. §§ 2232, 2233.)

Par. (*a*). But the privilege does not cover

1714 (1) admissions made by a spouse acting as *agent*, *grantor*, etc., according to Rule 121, Arts 2–5 (*ante*, §§ 687–692);

(2) admissions made by a spouse in *assenting*, *by silence*, to statements made by the other spouse, according to Rule 119, Art. 2 (*ante*, § 668).

ART. 3. *Subject of Testimony.* The privilege covers facts 1715 disfavoring the legal interests of the other spouse in the suit at bar, and no others.[1] — (W. §§ 2234, 2235.)

Illustrations. (1) Action by an indorsee against an acceptor; plea, a forged alteration by the drawer; the wife of the drawer is admissible to testify to the alteration.

(2) Replevin by a wife against the husband's vendee; the husband being warrantor, the privilege covers the wife's testimony for herself against the vendee, as well as the husband's testimony for the vendee.

In particular,

Par. (*a*). In a suit involving *adultery*, the testimony of 1716 the spouse of the person, not a party, with whom a party's adultery is charged, is [not] privileged.[2]

Par. (*b*). The privilege covers the testimony of the wife 1717 of a *co-defendant on trial* in the same proceeding;
but not that of the wife
of a co-defendant whose interest has been removed by acquittal or otherwise
or of a co-indictee separately tried
or of an accomplice separately indicted.[3]
— (W. § 2236.)

ART. 4. *Issues.* The privilege does not apply in the follow- 1718 ing classes of issues:

[1] There is here much variance in applying this rule. The limitation to *legal* interests is not universally observed.
[2] Courts are here in opposition.
[3] These distinctions should correspond to those of Rule 84, Art. 1 (*ante*, § 389).

1719 [*Par.* (*a*). In all *civil* issues.] [1] — (W. § 2245.)

1720 [*Par.* (*b*). In all *criminal* issues.] [2] — (W. § 2245.)

[*Par.* (*c*). In all issues as to the wife's *separate* estate.] [3] —
1721 (W. § 2240.)

[*Par.* (*d*). In issues where the one has acted as *agent*
1722 for the other.] [4] — (W. § 2240.)

Par. (*e*). In issues involving a tort by one against the
1723 other or a crime based on a moral wrong by one against the other: [5] — (W. § 2239.)

in particular, in issues of
(1) *Corporal injury;*
[(2) *Desertion*, failure to support;] [6]
[(3) *Adultery*, incest, and bigamy;] [7]
[(4) *Divorce* on any ground.] [8]

ART. 5. *Waiver of the Privilege.* The privilege belongs
1724 both to the spouse called as witness and to the party-spouse disfavored by the testimony; therefore a waiver of the privilege must be made by both.[9] — (W. § 2241.)

Cross-reference. That this privilege, like others, is essentially waivable has been already declared in Rule 198, Art. 8 (*ante*, § 1676).

Par. (*a*). The waiver may be
1725 (1) *expressed* in words; or
(2) *implied* in conduct, as by a spouse calling the spouse for direct examination [or by the party-spouse taking the stand.] [10] — (W. § 2242.)

[1] Several statutes have gone this far.
[2] A few statutes have taken this step.
[3] Many statutes so provide.
[4] This is a frequent statute.
[5] This is a broad re-statement of the common-law exception and a frequent statutory exception, but is somewhat more generalized than any existing law.
[6] A few statutes and decisions do this.
[7] Here there are variant rules.
[8] Statutes frequently make express provision.
[9] A few rulings take a different view.
[10] Some Codes expressly so provide.

ART. 6. *Inference from Claim of Privilege.* No inference
1726 ought to be drawn, as to the facts not disclosed, when a claim of privilege is made. — (W. § 2243.)

Distinguish the inference from *not calling* a qualified witness, under Rule 118, Art. 6 (*ante*, § 658); if the wife were disqualified to testify *for* the husband, his failure to call her would on that ground also not be open to inference, irrespective of his privilege not to let her testify *against* him.

RULE 203. *Self-Criminating Facts.* A fact tending to
1730 incriminate the person himself is privileged;

subject to the following distinctions and qualifications: — (W. §§ 2251, 2252.)

(*Reason and Policy.* The policy of the privilege is in part to protect guilty persons because of a sentimental respect for their feelings at being obliged to become the means of their own conviction. But this alone would be ill-judged and insufficient. The substantial basis of policy is to prevent the officers of prosecution from relying habitually on the accused's compulsory confession as a chief source of proof, and thus to induce a thorough search for evidence and to avoid the oppressive and brutal abuses of power which are likely to attend such compulsion.)

ART. 1. *Proceedings and Persons.* The privilege applies
1731 to

(1) all kinds of *proceedings* of investigation, whether before a petty jury, a grand jury, the Legislature, a deposition-officer, a coroner, or otherwise; and to

(2) all kinds of *issues*, whether civil or criminal; and

(3) all kinds of *persons*, whether an ordinary witness or a party-witness. — (W. § 2252.)

ART. 2. *Kind of Facts protected from Disclosure.* The
1732 privilege covers facts involving liability of the person to repressive punishment by the State, as contrasted with liability to a civil claim for redress. — (W. §§ 2254.)

Illustrations. (1) A forfeiture of office, as a penalty for treason or peculation, is within the privilege; but not a forfeiture of tenancy for breach of condition in a deed.

(2) A penalty payable to the government treasury for the offence of rate-discrimination is within the privilege; but not a liability in treble damages to the shipper for such discrimination.

1733 *Par.* (*a*). A fact criminating the person by law of a *foreign State* is not as such privileged, [unless there is ground for believing that the prosecution is instituted principally for the purpose of using the answer as evidence in that State.][1] — (W. § 2258.)

1734 *Par.* (*b*). A fact criminating *another person* is not as such privileged. — (W. § 2259.)

Illustration. An officer of a corporation has no privilege as to facts criminating the corporation, unless they also criminate himself, as where he is asked to produce corporate books of entries made by himself.

1735 *Par.* (*c*). A fact criminating a *corporation* is [not] privileged for the corporation.[2] — (W. § 2259.)

1736 *Par.* (*d*). A fact tending to criminate, in the sense of the privilege, is

(1) a fact forming a separate but essential *part of a criminal act* by the person asked; — (W. § 2260.)

[(2) or, a fact *capable of furnishing* to prosecuting officers *a clue* to criminating evidence against the person asked.][3] — (W. § 2261.)

Illustrations. (1) On a trial for keeping an illegal gaming house, a witness to the gambling is asked, 'Tell who took part in the game, not naming yourself.' This is not privileged, under Clause (1), because the answer need not furnish any fact involving a criminal act or part of an act by the witness. But it is privileged, under Clause (2), because the disclosure of the name of Doe as a person who took part would enable the prosecution to find Doe, and Doe could then testify that the present witness took part (if he did), on a subsequent trial of the present witness for illegal gaming.

(2) On a charge of forgery of a bank-note, a witness to the defendant's alibi is asked whether he had ever had the bank-note in his possession; this may be privileged, because the offence of possessing a counterfeit note with intent to utter may be otherwise evidenced as to the facts of (a) its counterfeit nature, (b) an intent to utter, and thus the remaining element of the crime, (c) possession, would be furnished by the answer sought from the witness.

[1] There are here opposed rulings. The bracketed clause is a compromise that may be law in some courts.

[2] There is little authority yet.

[3] This clause is accepted as law in almost all States, though it is unsound.

ART. 3. *Form of Disclosure protected.* The privilege
1737 covers any form of testimonial disclosure, *i. e.* a disclosure sought to be obtained from the person through some act of volition on his part, under compulsory legal process against him as a witness. — (W. § 2263.)

In particular:

Par. (*a*). The person's *production* of a *document* or of a
1738 *chattel* upon subpœna or motion is within the privilege; but not the obtaining of a document or a chattel from the person's possession by an officer searching or seizing under legal process.[1] — (W. § 2264.)

Illustrations. (1) The defendant was arrested on a warrant for assault with intent to kill; on resisting, he was confined and searched, and a pistol was found by the officer. The obtaining of this pistol is not within the privilege.

(2) Charge of evading customs dues by fraudulent invoices; on a motion that the defendant be ordered to produce the invoices for inspection in court, the privilege applies.

Par. (*b*). The person's *bodily condition* is within the
1739 privilege, in so far as he is asked to disclose it by his own volition for the sole purpose of furnishing evidence; but the privilege does not prevent its disclosure by forcible handling reasonably done by officers of the law.[2] — (W. § 2265.)

Illustrations. (1) To require a person to use his voice for identification, or to write a sample of handwriting, is within the privilege.

(2) For an officer to take off a person's boot and to fit it into boot-tracks is not within the privilege.

Distinction. The voluntary *waiver* of the privilege, under Art. 6 (*post*, § 1749), may suffice, here as elsewhere. Most cases where an accused is told to stand up in court for identification, or to take off his coat preliminary to a measurement or inspection, should be treated as waivers of the privilege, made voluntarily by the accused to save the inconvenience of bringing the witness nearer or of being handled by the officers, — alternatives which otherwise could be employed with like result to the accused.

[1] At one time this second clause was denied in a few jurisdictions, but now no longer anywhere, presumably.

[2] This detail of the rule is hard to phrase, and no generally accepted phrasing is in vogue.

ART. 4. *Mode of Claiming the Privilege.* The privilege,
1740 being an option to refuse disclosure of a fact otherwise admissible (Rule 198, *ante*, § 1660), must be claimed by the witness, in so far as any effect is desired to be given to it as a rule of evidence; but the judge, as the enforcer of all rules of evidence (Rule 229, *post*, § 2100), determines its applicability; subject to the following details and qualifications: — (W. § 2268.)

Par. (*a*). In so far as the fact desired to be asked about
1741 is not open to objection on other grounds of admissibility dealt with in Parts I and II of this Book, the person may be *interrogated;*

except when he is the accused in a criminal case. — (W. § 2268.)

Par. (*b*). The *judge* may but need not *notify* the witness
1742 that the fact asked about is subject to a privilege not to answer.[1] — (W. § 2269.)

Par. (*c*). The *witness alone*, and not the party nor the
1743 party's counsel as such, may make the claim, pursuant to Rule 198, Art. 7 (*ante*, § 1673). — (W. § 2270.)

Par. (*d*). An *erroneous ruling* sanctioning the privilege
1744 may be excepted to by a party to the suit; but not an erroneous ruling denying the privilege. — (W. § 2270.)

Cross-reference. For this general principle as applicable to all privileges, see Rule 198, Art. 7 (*ante*, § 1673).

Par. (*e*). The *judge determines* whether the fact claimed
1745 as privileged is one which would tend to criminate, and he is to sanction the claim if under all the circumstances of the case any direct and true answer may with reasonable possibility tend to criminate.[2] — (W. § 2271.)

ART. 5. *Effect of Claiming the Privilege.* No inference as
1746 to the truth of a criminating fact ought to be drawn, by judge, jury, or counsel, from the circumstance

[1] The practice has differed; but no rule obliges the judge to give notice.

[2] This phrasing consolidates the orthodox phrasings of Justices Cockburn, Marshall, and Mitchell.

that a claim of privilege is made by an ordinary witness or by a party-witness

or that an accused party fails to testify as witness for himself.[1] — (W. § 2272.)

1747 *Par.* (*a*). Where counsel has violated this rule by commenting to the jury upon an accused's failure to testify, a new trial is [not] necessarily to be granted after a verdict of guilt.[2] — (W. § 2272, n. 5.)

1748 *Par.* (*b*). The rule does not apply to any inferences that may be permissible, under Rule 118, Art. 6 (*ante*, § 658), from a party's failure

(1) to *cause to be introduced* a witness or a document, or other evidence;

(2) to deny or explain, by his *own testimony*, the evidence against him, after he has waived the privilege by taking the stand in his own behalf. — (W. § 2273.)

ART. 6. *Waiver of the Privilege.*

1749 The privilege may be waived by voluntary abandonment of it made in advance of the time when it could otherwise be claimed.

1750 *Par.* (*a*). A *contract*, made before trial, not to claim the privilege, takes away the privilege. — (W. § 2275.)

1751 *Par.* (*b*). An *ordinary witness*, by testifying, does not waive the privilege;

except that if he testifies to any part of a matter known to him to be criminating, he may not afterwards during that trial claim the privilege for any other part of the same matter.[3] — (W. § 2276.)

Illustration. In an action by a parent for seduction and loss of service, the plaintiff's daughter testifies to the defendant's intercourse. On cross-examination, questions as to her in-

[1] A few statutes or Courts require an instruction to the jury; but this is futile.

[2] A few States by statute omit the "not"; but this is an extreme and fatuous measure. Suspending the prosecuting attorney would soon secure habitual obedience.

[3] This is the rule everywhere except in England and one or two States. But the phrasing of the excepted clause differs widely. The essential thing is that the rule for an ordinary witness differs from the rule for an accused.

tercourse with other men about the same time are not within the privilege.

1752 *Par.* (*c*). An *accused* in a criminal case, by testifying at all, waives the privilege

[(1) as to all matters whatever, including facts merely affecting his character as a credible witness;] [1]

[(2) as to all matters relevant to any part of the issues, but not as to facts merely affecting his credibility as a witness;] [2]

[(3) like any other witness;] [3]

[(4) as to all matters already dealt with in his direct examination;] [4]

[(5) as to the criminal act charged, and nothing else.] [5]

— (W. § 2276.)

Illustrations. (1) On a charge of homicide in a brawl on June 17, the accused takes the stand and testifies that he stabbed in self-defence. On cross-examination, he is asked as to his having assaulted the deceased on June 15, with a view to showing malice and a plan to kill. The privilege would not here apply, under Clause 1 or Clause 2; but it might apply under Clause 3 and Clause 4, and it certainly would apply under Clause 5.

(2) On the same trial, the accused is cross-examined as to having kept a gaming-house in that town for some months past, with a view to impeaching his moral credit as a witness. The privilege would not apply under Clause 1, nor possibly under Clause 4; but it would apply under Clause 2.

Distinctions. (1) The rule as to the admissibility of *particular misconduct affecting moral character* as a witness on cross-examination (Rule 105, Art. 2, *ante*, § 552), may here be involved. Under that rule, it is constantly ruled that certain discreditable facts may be asked about for that purpose; but a ruling to that effect is not necessarily a ruling that the witness could not claim his privilege; the objection should be specifically put on that ground.

(2) The rule of many States confining the scope of the cross-examination to *topics dealt with in the direct examination* (Rule 164, Art. 4, *ante*, § 1376), will usually be applied to allow a liberal scope to the questions asked of an accused;

[1] One or two States accept this.

[2] This is the soundest rule, accepted in most States.

[3] This is a frequent statutory form, not clear in scope.

[4] This is an occasional statutory form, and is originally directed only to cover Rule 164, Art. 4 (*ante*, § 1376).

[5] A few statutes so enact.

and a ruling to that effect is not always distinguishable from a ruling under the present rule as to the waiver of privilege.

1753 ART. 7. *Expurgation of Criminality, by Pardon, Legislative Immunity, or otherwise.* Where the criminality of an act is eliminated, so that the answer to a question about it would cease to involve a criminating fact, the privilege ceases, and the answer is compellable.

Such elimination of criminality may take place

(1) by *conviction*, by *acquittal*, or by other jeopardy discharging from further liability to prosecution. — (W. § 2279.)

(2) by *lapse of time*, barring prosecution.

(3) by *executive pardon*. — (W. § 2280.)

(4) by *legislative amnesty* or *immunity*.

1754 *Par.* (*a*). The privilege ceases wherever a statute provides that if a person makes disclosure before an officer empowered to take testimony

(1) the person shall thereafter be *exempt from prosecution* for any criminal fact to which the disclosure relates;[1] — (W. § 2281.)

[(2) or, the *testimony* thus given shall *not be used against* the person in any criminal proceeding.][2] — (W. § 2282.)

1755 [*Par.* (*b*). In order that a disclosure thus made may secure *immunity* from prosecution,

there must be

(1) an explicit claim of the privilege by the witness;

(2) and, a ruling of the officer directing answer;

but there need not be

(3) a service of subpœna;

(4) nor, an imposition of the oath.][3] — (W. § 2281*a*.)

[1] This is now universally conceded.

[2] This is also sound, on the theory of Art. 2, Par. (*d*) (*ante*, § 1736), but is probably no longer law except in one or two jurisdictions.

[3] The subject of this Paragraph has as yet been little considered by the Courts, and the above phrasing is tentative only.

Topic B: Privileged Communications

Sub-Topic I: Confidential Communications in General

RULE 204. *General Principle.* [[A privilege exists, for
1760 persons making or receiving a communication, not to disclose the communication, whenever

(1) the communication originated in a mutual *confidence* that it would not be disclosed; and

(2) the *confidentiality* of such communications, by securing freedom of consultation, is *essential* to the efficient maintenance of some intimate relation between those persons; and

(3) the *relation* is one deemed by the community to require to be thus indirectly *fostered;* and

(4) the *injury* to that relation, caused by risk of the disclosure of the communication, would be more serious than the injury to justice caused by the option of its suppression.]] [1] — (W. § 2285.)

Art. 1. *Privileges Limited in Number.* No privilege for
1761 such communications is recognized, except as expressly provided in Rules 205–212 (*post*, §§ 1765–1870.)

Art. 2. *Confidential Communications in general not Privileged.*
1762 In particular, there is no privilege for a communication merely because it was made with a promise or a request, express or implied, that it should be kept in confidence, wholly or partly, by the person receiving it. — (W. § 2286.)

Illustrations. A communication is not privileged because made in confidence to a *clerk*, a *trustee*, a *banker*, a *commercial agency*, a *journalist*.

Art. 3. *Telegrams.* A communication is not privileged
1763 merely by reason of the method of transmission; in particular,

[1] No such broad principle has been yet recognized in terms by the Courts, but it underlies the ensuing Rules.

(1) by post;
(2) by telegraph;
(3) by telephone. — (W. § 2287.)

RULE 205. *Attorney-and-Client Communications.* (1)
1765 Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications (4) relating to that purpose, (5) made in confidence (6) by the client, (7) are at his instance permanently protected (8) from disclosure by himself or by the legal adviser, (9) except the protection be waived;

subject to the following details and qualifications.[1] — (W. § 2292.)

(*Reason and Policy.* The relation of attorney and client, and the communications between them, satisfy amply all four of the elements required by Rule 204 for a communications-privilege.)

ART. 1. "(1) *Where legal advice of any kind is sought.*"
1766 The privilege covers communications made in seeking any kind of legal advice. Hence:

Par. (*a*). It is immaterial whether the advice relates
1767 to the present litigation, or to any other litigation either begun or contemplated at the time of the communication. — (W. § 2294.)

Illustration. An employer consults an attorney for an opinion on a form of contract offered to the employer by an employer's liability insurance company, desiring to know whether its clauses sufficiently cover the possible kinds of liability on his part to his various classes of employees; this consultation is privileged.

[*Par.* (*b*). A consultation of an *official prosecuting*
1768 *attorney*, solely with a view to complaining of a public offence and to urging or enabling a public prosecution, is not privileged.][2] — (W. § 2296.)

Distinguish the communication of an *informer* to any government officer, which is protected by a separate privilege (Rule 209, Art. 2, *post*, § 1837).

[1] In a number of States there are statutory definitions, which however seldom conflict with the above clauses.
[2] There is little authority; the above is tentative.

1769 *Par.* (*c*). The consultation must have in view primarily the attorney's knowledge or skill in *the law* upon some aspect of the affair submitted, and not primarily some other class of knowledge or skill which the attorney happens to possess.[1] — (W. § 2296.)

Illustration. Bill by a judgment creditor against the debtor and a mortgagee, the latter being an attorney. The debtor's consultations with the attorney when seeking a party to make the loan would not be privileged. But the mortgagee-assignee's consultation with the attorney, when seeking how to avoid the claim made by the judgment creditor, would be privileged.

1770 *Par.* (*d*). Consultation in the course of a transaction of *conveyance of property* is privileged in so far as the application of legal skill or knowledge is impliedly or expressly the primary reason for consulting the particular person.[2] — (W. § 2297.)

Illustration. (1) An attorney employed by a title-guarantee company as an abstracter of title was told, by a grantee bringing a deed to be added to the abstract, the amount of the actual consideration paid; this would not be privileged.

(2) The vice-president of a manufacturing corporation is an attorney; his customary duty in the corporation is to sign its promissory notes and other contracts; the treasurer consults him as to the advisability of renewing a certain note; this is not privileged.

Cross-references. (1) Whether the privilege covers the *contents* and *execution* of a deed, as seen by the attorney, and not merely the client's communications about the deed, falls under Art. 3, Par. (*c*) (*post*, § 1782).

(2) Whether a *testator's communications* made for the drafting of a will should for other reasons fall without the privilege, involves Art. 5, Par. (*g*) (*post*, § 1794).

1772 *Par.* (*e*). The privilege does not cover a consultation seeking by the aid of the attorney's legal skill to *effect knowingly an unlawful act*, in the nature

either of a future crime

or of a future civil wrong involving moral turpitude.[3] — (W. § 2298.)

[1] This phrasing attempts to be concrete; but the subject is elusive.

[2] There is here much apparent divergence of ruling, and no one phrasing has been generally accepted.

[3] The general notion is universally conceded; but no accepted phrasing has yet come into vogue.

Illustrations. (1) The client's nephew has begun a suit in ejectment, claiming as heir of the common ancestor; the nephew having shot lately a man in another State, the client consults an attorney in that State and instructs him to further in all ways a prosecution for murder, saying, "I would spend ten thousand dollars to put him in the penitentiary"; this is not privileged.

(2) The client is president of a corporation whose contract for a stock-voting trust with another corporation has just been pronounced invalid by the Supreme Court; the client requests the attorney to obtain such agreements from the largest stockholders of the other corporation as will effect, if legally possible, the same result, with respect to control, that was contemplated by the void contract; this consultation is presumably privileged, first, in that it seeks to act by lawful means only, and, secondly, in so far as the proposed act, even if the means are unlawful, is not one of moral turpitude.

ART. 2. "(2) *From a professional legal adviser in his*
1773 *capacity as such.*" The privilege covers only a consultation with a professional legal adviser in his capacity as such. Hence:

Par. (*a*). The privilege does not cover a consultation
1774 with a person who has legal knowledge but is *not admitted to the bar* as a practitioner. — (W. § 2300.)

Par. (*b*). The privilege covers a consultation with any
1775 *clerk or other agent* acting on behalf of the attorney, in so far as a consultation with the attorney himself would have been privileged. — (W. § 2301.)

[*Par.* (*c*). The privilege depends on the client's *intent*
1776 and *reasonable belief* as to the status of the person consulted, under Par. (*a*) and Par. (*b*) above.][1] — (W. § 2302.)

Par. (*d*). The consultation must contemplate the
1777 attorney as a *professional legal adviser*, and not merely as a friend, a public officer, or otherwise; and for this purpose the circumstance that the advice is given *without charge* is evidential only, and not decisive. — (W. § 2303.)

Cross-reference. For consultation with the *opponent's attorney*, see Art. 5, Par. (*c*) (*post*, § 1790).

[1] Here some Courts dissent, but not soundly.

1778 *Par.* (*e*). A consultation, not otherwise privileged, is not privileged because the relation of attorney and client *afterwards* was formed or *formerly* had existed.

But a consultation *preliminary to a retainer* of the attorney is privileged even though the attorney finally declines the retainer. — (W. § 2304.)

1779 ART. 3. "(3) *The communications.*" The privileged covers all matters disclosed by the client with a view to the advice. Hence:

1780 *Par.* (*a*). All matters disclosed by words oral or written are within the privilege. [Matters of *personal conduct or condition* and other matters observable by the attorney without express disclosure from the client are not within the privilege, except so far as they appear to have been made the subject of an express disclosure.[1]] — (W. § 2306.)

Illustration. A client consults the attorney in regard to a separation from his wife. Afterwards, on an application for committal of the client to an asylum, the privilege does not cover the attorney's testimony to the sane or insane behavioyr of the client in his presence. Otherwise, if the client had applied to the attorney in the committal proceedings with a view expressly to protecting him against them.

1781 *Par.* (*b*). The privilege covers the attorney's *knowledge* of the *contents of a document which comes into existence merely as a communication* to the attorney. — (W. § 2307.)

Illustration. The attorney's knowledge of the contents of the client's letter stating that he cannot pay his commercial debts and requesting the attorney to procure a friendly creditor to attach is privileged.

1782 *Par.* (*c*). The privilege covers the attorney's *knowledge* of the *contents* of a *document independently pre-existing*, so far as it has been confidentially disclosed to the attorney by showing, delivering, reading, or otherwise. — (W. § 2308.)

Illustration. A client consults the attorney as to bringing suit on some promissory notes, and shows him the notes.

[1] There is here some conflict in the judicial phrasings; the above clause attempts to draw the essential distinction reconciling most of the precedents.

Whether the notes at that time bore certain endorsements is within the privilege, in so far as by his testimony it is sought to ascertain what he observed on the notes. Otherwise, if he had merely seen the notes at the bank when his client was publicly receiving them from the maker or the indorser.

1783 *Par.* (*d*). The privilege does not cover the attorney's *knowledge* of the *existence, execution, handwriting,* or *place of custody* of a document *independently pre-existing;* unless such fact was made the subject of a confidential disclosure to him by the client, and this will not be presumed.[1] — (W. § 2309.)

Illustration. A client, having obtained a bond, took the bond to his attorney and indorsed it in his presence. The attorney's testimony to the handwriting and the act of signing is presumably not within the privilege; though his testimony to the client's request for advice would be.

Cross-reference. Where the attorney is also an *attesting-witness* to the execution, Art. 5, Par. (*h*) (*post,* § 1795) here applies.

1784 *Par.* (*e*). The privilege covers only the attorney's testimony arising from his *knowledge of the contents* of documents disclosed, and not the attorney's *physical possession* of the document as delivered to him by the client; the attorney in the latter case being merely the agent of the client for its custody.

Hence,

(1) A document of the sort dealt with in Par. (*c*) and Par. (*d*) above, viz. a document *independently pre-existing,* is compellable or not to be produced on process against the attorney, in so far as it would be compellable or not to be produced on some other ground than the present privilege, by the client himself. — (W. § 2307.)

Illustration. A husband's letters to his wife are delivered by the wife to her attorney; in a suit against the wife for divorce, the attorney is not compellable to produce them, if the wife would be privileged to withhold them as marital communications; otherwise, the attorney is compellable.

But

1785 (2) A document of the sort dealt with in Par. (*b*)

[1] This is the net result of the precedents, though their grounds are not always clear.

above, viz. a document which *comes into existence merely as a communication* to the attorney, is intrinsically nothing but a communication under the present privilege, and therefore is not compellable to be disclosed, either by the attorney's production or otherwise. — (W. §§ 2307, 2319.)

Illustration. An employer in whose factory an employee has been injured obtains (1) the foreman's report on the injury, (2) the card of instructions furnished to the employee when he first entered the employment, and sends these to the attorney, together with (3) a letter of his own stating the circumstances of the injury. On a motion to compel the attorney's production of these, the second is clearly without the privilege, the third is clearly within it, and the first may or may not be within it.

Distinctions. In applying the above Clause (2), two other principles may often come into play, if the document desired was prepared by a third person:

(1) If an *agent* of the client made the document as a communication *to and for the attorney*, it is equally protected, under Art. 6 (*post*, § 1796), though not if it was made to and for the client; *e. g.* in the above Illustration, the foreman's report could be privileged if made primarily to inform the attorney concerning a possible claim, but not privileged if made primarily to the employer in the routine of factory duty.

(2) If a prospective *witness'* testimony is written out or reported before trial, either to client or to attorney, the opponent's right to *discovery before trial*, under Rule 161, Art. 3 (*ante*, § 1332), does not extend to learning the names of the witnesses and their prospective testimony; *e. g.* in the above Illustration, the foreman's report might not be subject to discovery before trial, even though not privileged at trial.

1786 ART. 4. "(4) *Relating to that purpose.*" The privilege covers all disclosures made as a part of the purpose of the client to obtain legal advice, [whether or not any specific matter be deemed actually necessary or material or relevant thereto].[1] — (W. § 2310.)

1787 ART. 5. "(5) *Made in confidence.*" The privilege does not cover communications not made in confidence;

subject to the following details and qualifications: — (W. § 2311.)

[1] Different phrasings are here found, varying mainly as to the bracketed clause.

1788 *Par.* (*a*). The mere fact of a communication between attorney and client does not raise a *presumption* of confidentiality. — (W. § 2311.)

1789 *Par.* (*b*). A communication made in the *presence of a third person* is not confidential, whether made to the attorney or to the third person. — (W. § 2311.)

1790 *Par.* (*c*). A communication to the *opposing party's attorney* is not ordinarily confidential. — (W. § 2312.)

1791 *Par.* (*d*). A communication to a *joint attorney* is confidential only as to other persons than those employing the attorney in common. — (W. § 2312.)

1792 *Par.* (*e*). The *circumstances of the case* are to determine whether the communication was in its nature confidential.[1] — (W. § 2312.)

Cross-reference. For the rule as to *offers to compromise*, irrespective of the present privilege, see Rule 118, Art. 1 (*ante*, § 642).

1793 *Par.* (*f*). The *identity* of the client, the authority of the attorney, or the name of the real party in interest in the litigation, can never be confidential.

But the nature of the party's title or interest, and the motive of the suit, may be confidential.[2] — (W. § 2313.)

1794 *Par.* (*g*). The confidence may be *temporary* or limited in its nature.

(1) Hence, the privilege does not apply to the testimony of an attorney *drafting a will*, when he is called on, after the testator's death, to disclose any circumstance affecting the execution or the contents of the will, [including matters tending to show insanity or undue influence.][3] — (W. § 2314.)

[1] There are many precedents for which no rule of thumb can be used.

[2] There are here numerous precedents; the above phrasing seeks to draw a fair distinction.

[3] On the bracketed clause, a few Courts unsoundly take the opposite view.

Cross-reference. Whether one or another of the representatives may *waive* the privilege is dealt with in Art. 9, Par. (*b*) (*post*, § 1807).

1795 *Par.* (*h*). The *attestation* of a *deed* or a *will* by the attorney at the request of the grantor or testator negatives confidentiality for the purpose of his testifying as to the execution or the contents of the document. — (W. § 2315.)

Cross-reference. For the *waiver* of privilege by a testator's representatives after death, see Art. 9, Par. (*b*) (*post*, § 1807).

1796 ART. 6. "(6) *By the client.*" The privilege applies only to communications between the client and the attorney, and not to communications from *third persons*.

But it includes communications by any form of *agency* used by the client, whether the agent be an interpreter, messenger, or clerk, and whether he communicate to the attorney directly or through the client for the attorney, and whether he be employed by the client himself or by the attorney for the client. — (W. § 2317.)

1797 *Par.* (*a*). In the use of the present rule in connection with that for producing *documents constituting a communication* (Art. 3, Par. (*e*), *ante*, § 1784) and with the principle of *discovery before trial* (Rule 161, Art. 4, *ante*, § 1335), the following distinctions are to be applied: — (W. §§ 2318–2319.)

(1) Where production of a document is opposed on the ground of the present *privilege* for *agent's communications* to the attorney, the document must be one made primarily for some use by the attorney in giving legal advice for a specific case, and not primarily in the course of the client's usual business. But if the document is privileged, the privilege applies as well to *production at the trial* as to discovery on motion before trial.

(2) Where the production of a document is opposed on the ground of its containing the names or testimony of prospective witnesses, and therefore not being subject to *discovery before trial*, the document must be one made primarily for the sake of recording useful information for a litigation, and not primarily in the course of the client's usual business. But in any case the exemption

from discovery applies only to motions for *production or inspection before trial.*

Illustrations. Upon the occurrence of a personal injury by an explosion in a factory, the foreman sends for a physician, and then records the circumstances on a form-sheet used for reports of daily occurrences. Afterwards, a claim for damages is made and resisted. The client forwards to the attorney (1) the foreman's report. The attorney (2) obtains a supplementary written report from the foreman, (3) makes notes of the physician's oral statement, and (4) also by other inquiry secures a list of the names and addresses of two bystanders with notes of their accounts. (*a*) Before trial, on a motion for discovery, the production of (4), and perhaps also of (3) and of (2) could be resisted on general grounds of discovery. But on the ground of the present privilege, (4), (3), and (2) could plainly be withheld. (*b*) At trial, on a motion to produce, the present privilege would cover (4), (3), and (2), but not (1).

ART. 7. "(7) *Are at his instance permanently protected.*"

1798 The privilege, being intended for the protection of the client, is to be exercised for his protection only.

Par. (*a*). The *attorney*, when called as witness, may

1799 and must claim the privilege in the interest of the client, until it appears that the client waives it. — (W. § 2321.)

Par. (*b*). The *party* to the cause, or his attorney,

1800 cannot as such make claim to the privilege; but an erroneous sanction to a privilege may be ground of exception to the party, on the general principle of Rule 198, Art. 7 (*ante*, § 1673). — (W. § 2321.)

Par. (*c*). No *inference* ought to be drawn, from the

1801 act of claiming privilege, as to the tenor of the communication withheld. — (W. § 2322.)

Par. (*d*). The privilege, being intended to secure a

1802 confidence on the client's part that no disclosure will be made, is *not limited in time*, and therefore does not cease

(1) upon the ending of the relation of attorney and client;

(2) nor, upon the death of the client;

(3) nor, upon the death of the attorney.

Cross-reference. Where the confidence was originally intended to be *temporary* only, Art. 4, Par. (g) applies (*ante*, § 1794).

ART. 8. "(8) *From disclosure by himself or by the legal*
1803 *adviser.*" The privilege protects from disclosure by either the attorney or the client himself, or their agents for making the communication, but by no one else. — (W. § 2324.)

Par. (*a*). Where by *involuntary disclosure* of attorney
1804 or client the communication comes to the knowledge of a *third person*, the privilege does not cover the testimony of the third person.[1] — (W. §§ 2325, 2326.)

Illustrations. (1) The attorney and the client discuss in his private office; upon using loud tones, they are overheard by the tenant of the next room, through a thin partition door; the privilege cannot be invoked for the tenant's testimony.

(2) A memorandum of the foregoing conversation is stolen from the attorney's coat-pocket in a street-car; a person obtaining it from the thief can use it on the trial.

ART. 9. "(9) *Except the protection be waived.*" The
1805 protection of the privilege may be waived, expressly or impliedly, by the client or by some one acting on his behalf.

Par. (*a*). The *attorney* may waive on behalf of the
1806 client, in so far as in good faith he deems it necessary to make disclosures in the course of litigation.[2] — (W. § 2325.)

Illustration. In an action on a renewed note, the attorney while seeking a settlement from the debtor before suit begun, shows the debtor a letter from the client concerning the consideration originally given for the note. On trial, the debtor may testify to the contents of the letter thus shown.

Par. (*b*). The *successor in interest* may waive, including
1807 the executor, administrator, heir, next of kin, and legatee.[3] — (W. §§ 2328, 2329.)

[*Par.* (*c*). The *client himself* may waive by implication;
1808 the following rules apply:

[1] Some Courts are opposed, in cases like Illust. (2).
[2] The precedents do not all speak so broadly.
[3] There is here an occasional dissent.

(1) the testimony of himself or of the attorney, as to a *part of any communication* privileged, is a waiver as to the remainder;

(2) the testimony of himself or of the attorney, as to a *specific communication*, is a waiver as to all other communications on the same matter;

(3) the testimony of *himself* in the *cause at large* is *not* a waiver for any purpose;

(4) the testimony of the *attorney* in the *cause at large* is not a waiver so far as his testimonial knowledge has been acquired casually, *i. e.*, independently of his relation to the client; but otherwise it is.

(5) the testimony of the client or of the attorney as to *specific facts* communicated to the attorney is a waiver or not, according to the same rules as Clause (3) and (4) above.][1] — (W. § 2327.)

1812 RULE 206. *Husband-and-Wife Communications.* A confidential communication by one spouse to the other is protected permanently from disclosure by either, except the protection be waived;

subject to the following details and qualifications:[2] — (W. §§ 2332–2334.)

(*Reason and Policy.* The relation of husband and wife, and the confidential communications between them, satisfy amply all four of the elements required by Rule 204 (*ante*, § 1760) for a communications-privilege.)

1813 ART. 1. "(1) *A confidential communication by one spouse to the other.*" The privilege covers all communications [whether or not] intended to be confidential.[3] — (W. § 2336.)

1814 *Par.* (*a*). Marital communications are *presumed* confidential, until the contrary appears.[4] — (W. § 2336.)

1815 *Par.* (*b*). A communication is presumed not confidential

[1] Here the precedents afford no clear rules. The above paragraph attempts to work out the principle.

[2] Statutory phrasings vary.

[3] A few statutes and Courts improperly recognise the bracketed clause.

[4] No more detailed rule is feasible for the various situations.

(1) when made in the *presence* of a *third* person; or
(2) when intended for *transmission* to a *third person*.[1]
— (W. § 2336.)

Illustration. A husband, starting on a journey, charges his wife with the task of trying to obtain a purchaser for some real estate; the information so given is not confidential, so far as it was to be told to others.

Distinguish (1) the rule for a *third person overhearing* (Art. 2, Par. (*a*), *post*, 1819);
(2) the rule for *admissions by silence* when statements are made in husband's or wife's presence (Rule 119, Art. 2, *ante*, § 668); this presupposes that the privilege is held not to apply.

Par. (*c*). The privilege covers
1816 (1) *words* of communication, oral or written; and
(2) *conduct* known to the spouse by virtue of the marital relation [when intended as the subject of confidential knowledge.][2] — (W. § 2337.)

Illustration. A husband comes home with a valise, and tells the wife, "I am going tonight to New York; this valise contains bonds from the office; I leave it in the closet; and no one is to know what it contains or where it is." Here all his conduct and the facts are confidential. Otherwise, if he had merely brought home the valise and put it in the closet and she had opened it and seen the bonds.

Par. (*d*). The privilege does not extend to the following
1817 excepted cases: — (W. § 2338.)
[(1) proceedings based on *injuries done by one to the other;*[3] including]
(2) proceedings for divorce or damages based on *criminal conversation* or *alienation of affections*. — (W. §§ 1730, 2338.)

Cross-reference. For the admissibility of a *wife's correspondence*, under the hearsay exception, see Rule 153, Art. 2, (*ante*, § 1207).

ART. 2. "(2) *Is protected permanently from disclosure by*
1818 *either*." The privilege, being intended to secure freedom

[1] This sums up the general attitude of Courts.
[2] A number of Courts unsoundly ignore the bracketed clause.
[3] A few statutes expressly so provide.

of confidential communication between the spouses, protects themselves only from disclosure,

but protects them permanently.

1819 *Par.* (*a*). Where by *involuntary disclosure* of either the communication comes to the knowledge of a *third person*, the privilege does not cover the testimony of the third person.[1] — (W. § 2339.)

Illustrations. (1) and (2); see the Illustrations for attorney and client (Rule 205, Art. 8, *ante*, § 1804), which equally apply here.

Distinguish the making of a communication in the known presence of a third person; there no confidence exists, therefore no privilege arises (Art. 1, Par. (*b*), *ante*, § 1815).

1820 *Par.* (*b*). The privilege remains even after the marriage has been *dissolved*, for communications made during marriage; *i. e.*

(1) after *death* of one or the other; and

(2) after *divorce*. — (W. § 2341.)

1821 *Par.* (*c*). The privilege ceases for communications *made after the marriage relation ceases de facto or de jure*. — (W. § 2341.)

1822 ART. 3. "(3) *Except the protection be waived.*" The privilege, being intended to secure mutual exchange of knowledge confidentially, may be waived [by both, and not] by either alone.[2] — (W. § 2340.)

Distinguish the rule *disqualifying* a spouse, by interest, to testify *for* the other as a party (Rule 85. Art. 1, *ante*, § 396); that disqualification cannot be waived.[3]

1823 *Par.* (*a*). The *party* to the cause cannot as such make claim or waiver of the privilege; but an erroneous sanction of the privilege may be ground of exception to the party, on the general principle of Rule 198, Art. 7 (*ante*, § 1673).

[1] The rulings are not harmonious on the subject of Illust. (2).

[2] Courts differ as to the bracketed clause. To accept it seems sounder.

[3] Some statutes and courts ignore this distinction, by not recognizing a waiver of the privilege.

Distinguish the privilege for one spouse not to testify to facts *against the other as a party* (Rule 202, *ante*, § 1710); the present privilege applies to married persons in general, regardless of their being parties.

RULE 207. *Communications between Petit Jurors.* A com-
1825 munication of one petit juror to another, during retirement of the jury (including a vote cast), is privileged from disclosure. — (W. § 2346.)

(*Reason and Policy.* All four considerations of policy named in Rule 204 (*ante*, § 1760) as the foundation of privileges are plainly here applicable.)

ART. 1. *Whose is the Privilege.* The privilege may be waived
1826 only by all the jurors, with consent of court.[1]

ART. 2. *Third Persons Overhearing.* A third person over-
1827 hearing or intercepting the communication is not prohibited from disclosure.[2]

ART. 3. *Exception for Setting aside or Correcting the Verdict.*
1828 The privilege does not apply where a juror's conduct or utterance is allowed to be proved for the purpose of setting aside or correcting the verdict under Rule 219 (*post*, § 1947).

Distinctions. That part of the parol-evidence rule which concerns the correcting or setting aside of a verdict on the ground of misconduct, bias, error, etc., of jurors, by their affidavits or otherwise, comes into conflict with the present privilege at certain points, and to that extent may override it; the main points of difference are:

(1) The *privilege* applies in any proceeding and for any purpose; the *parol-evidence rule* applies only where the verdict is sought to be nullified or corrected in a proceeding for that purpose.

(2) The *privilege* may be waived by consent of all the jurors (and perhaps of the one communicating); the *parol-evidence rule* either permits or prohibits the use of the communication to affect the verdict, but in either case independently of the juror's consent.

[1] There appears to be no direct authority, but the analogies of the other privileges lead to this.

[2] This follows the analogies of other privileges; and it is implied in all authorities under Rule 219 (*post*, § 1947).

RULE 208. *Communications between Grand Jurors.* A com-
1830 munication of one grand juror to another, during retirement of the jury (including a vote cast), is privileged from disclosure. — (W. § 2361.)

(*Reason and Policy.* All four considerations of policy named in Rule 204 (*ante*, §1760) as the foundation of privileges are plainly here applicable.)

ART. 1. *Whose is the Privilege.* The privilege may be
1831 waived only by all the jurors, with consent of court.[1]

ART. 2. *Exception for Testimony of Witnesses and for*
1832 *Quashing Indictment.* The privilege does not apply

(1) where by Rule 209, Art. 1 (*post*, § 1834) the testimony of *witnesses* to the grand jurors, and the questions of jurors therein involved, are allowed to be disclosed;

(2) nor, where by Rule 219, (*post*, § 1947) the *indictment* is allowed to be quashed for misconduct, error, or otherwise.

Distinctions. These other two rules form the main part of the rules applicable to grand jurors, but are distinct in their policies and details; they are conceded to override the present privilege whenever at any point they conflict.

RULE 209. *Witnesses and Informers' Communications to*
1833 *Grand Juries and Public Prosecutors.* A communication by a witness, as complainant or otherwise, made to a grand jury, and a communication by a witness or informer, made to a public prosecutor, and in either case with a view to the investigation of a matter within the duties of such officers, is privileged from disclosure by any person;

subject to the following qualifications and distinctions: — (W. §§ 2360, 2374.)

(*Reason and Policy.* All four considerations of policy named in Rule 204 (*ante*, §1760) as the foundation of privileges are here plainly applicable. The only special features here are that the second element, the necessity of confidentiality, requires only a temporary secrecy; and that the interests of the prosecution extend also to keeping the information from indicted persons, so that the prosecution may succeed in apprehending them.)

[1] There is no direct authority, but this seems sound.

ART. 1. *Testimony before Grand Jurors.* Testimony given
1834 before a grand jury is privileged from disclosure by any person, whether a juror, a public prosecutor, the witness himself, or one who is lawfully or unlawfully present, until the necessity for secrecy ceases.[1] — (W. §§ 2360, 2361.)

Par. (*a*). The necessity ceases ordinarily when the
1835 grand jury has completed its investigation by returning *a finding* upon the subject affected by the testimony and the public prosecutor has filed it in court.[2]

Par. (*b*). The testimony may thereafter be disclosed,
1836 when material and relevant, in any proceeding; — (W. § 2363.)

in particular;

(1) in any proceeding in which the witness is to be discredited by such testimony, as *witness* or as *party;*

(2) or, in a prosecution for *perjury* committed in such testimony;

(3) or, in an action for *defamation* or *malicious prosecution* based on such testimony.

ART. 2. *Information to Public Prosecutor.* A communica-
1837 tion made to a public prosecutor, purporting to disclose matters concerning a public offence, is privileged from disclosure as to the identity of a person so informing or advising the informer.[3] — (W. § 2374.)

Distinguish the privilege for communications between *client and attorney* (Rule 205, Art. 2, *ante*, § 1773).

Par. (*a*). The Court may in case of necessity require
1838 disclosure.

[*Par.* (*b*). The privilege does not apply where the
1839 identity of the person is *already otherwise disclosed.*][4]

[1] Statutes here usually state the rule, but not satisfactorily.

[2] This represents the implied effect of the decisions and statutes.

[3] No accepted form of phrasing is found; the above represents the essential feature.

[4] This is perhaps not accepted by some Courts.

Par. (*c*). The privilege does not apply to the *contents* 1840 of the information thus given.

RULE 210. *State Secrets and Official Communications.* A 1842 communication on official matters by one official to another, or a matter of official action known to an official, is privileged from disclosure;

subject to the following qualifications and distinctions: — (W. § 2375.)

(*Reason and Policy.* The four considerations named in Rule 204 (*ante*, § 1760) as the foundation of privileges apply here to that part only of the rule which is covered by Art. 2, Par. (*a*) and (*b*), below. Any larger scope lacks usually the first and always the second and the fourth of those considerations.)

ART. 1. *Whose is the Privilege.* The disclosure may be 1843 made,

Par. (*a*). Wherever the privilege is waived by the chief officer of the government department concerned. — (W. § 2376.)

[*Par.* (*b*). Or, wherever the Court deems the disclosure 1844 essential for doing justice and not relatively harmful to other interests of the State.] [1]

ART. 2: *Scope of the Privilege.* The privilege applies to 1845 the following classes of matters:

Par. (*a*). To matters affecting the State's *international* relations, including *military affairs* when they affect such relations.

[*Par.* (*b*). To measures of *political policy* contemplated 1846 by the responsible officers of government.] [2]

[1] This is not law in England; in the United States little direct authority is found, except Chief Justice Marshall's which accords. But no other rule is tolerable.

[2] No Court has yet phrased this; it is here named to keep it distinct from the ensuing Paragraph.

[*Par.* (*c*). To any matter of confidential *official action*,
1847 including any *document* in official custody.] [1]

Illustrations. (1) A confidential letter from the land-office commissioner to an agent of the land-office directing him not to file a land-patent just transmitted, and stating that it had been obtained by fraud, would be privileged.

(2) A record of a receipt for internal revenue taxes, paid for a license to sell liquor, kept in the office of the Federal collector of internal revenue, would be privileged under a regulation of the Treasury making such records confidential.

[ART. 3. *Privilege not applicable to Published Matters.*
1848 The privilege is not applicable where the matter has already otherwise become published, so that no interest of State can be served by enforcing a privilege.] [2]

Illustration. In a prosecution for selling liquor contrary to State law, after testimony that a purporting Federal tax-receipt was publicly posted in the defendant's shop, the privilege does not apply to the disclosure of the official original record of the receipt.

[ART. 4. *Privilege not applicable in lieu of Immunity from*
1849 *Civil or Criminal Liability.* The privilege is not applicable where the issue is whether a defendant is by civil or criminal law exempt from liability for his official acts and the only purpose of claiming a privilege could be to obtain thereby such exemption from liability.] [3] — (W. § 2368.)

Illustration. (1) In an action against the defendant for illegal imprisonment, the defendant being a military officer in Manila and the plaintiff being a journalist who was there imprisoned, the plaintiff seeks to prove that the defendant was the person who issued the order for his arrest, and calls for the record of such orders; there is no privilege; for either the defendant is exempt, in which case the ruling can be made on demurrer on that ground and the order is immaterial, or the defendant is not exempt, in which case the privilege should not be used as an evasion of his liability.

(2) Slander for speaking and voting in the Senate against the plaintiff, a nominee for office; the senator's utterance being immune, no testimonial privilege is needed.

[1] This is accepted in England, a few States, and some inferior Federal Courts. It is an intolerable doctrine, and should not be extended.

[2] It is not certain that this distinction is accepted.

[3] In England this is not law; in the United States the question is open. Plainly the above rule is sound.

ART. 5. *Other Principles distinguished.* The following
1850 matters are dealt with by other parts of the law:

(1) The exemption of the Chief Executive, of diplomatic agents, and of other officers, from *attendance in court* as witness during term of office, under Rule 200 (*ante*, § 1685). — (W. §§ 2371, 2372.)

(2) The exemption of *public records* from removal for production in court as evidence, under Rule 196 (*ante*, § 1654). — (W. § 2373.)

(3) The exemption of the Chief Executive, by constitutional status, from obedience to *judicial process* of any kind. — (W. § 2369.)

[RULE 211. *Patient-and-Physician Communications.* A con-
1855 fidential communication by a patient to a physician, when consulting for medical advice, is privileged from disclosure; subject to the following qualifications and distinctions:][1] — (W. § 2380.)

(*Reason and Policy.* Of the four considerations named in Rule 204 (*ante*, § 1760) as forming the foundation of privileges, the second and the fourth are not here fulfilled, and usually not the first. The privilege is without reason for recognition, and has been generally abused where recognized.)

[ART. 1. *Confidentiality.* A confidentiality of the com-
1856 munication is implied wherever the relation of patient and physician exists.][2] — (W. § 2381.)

[ART. 2. *Professional Consultation.* The consultation must
1857 be with a professional physician for the purpose of seeking his professional aid.] — (W. § 2382.)

Illustration. A person arrested on a charge of rape is examined by a physician sent to the jail by the public prosecutor to obtain information to aid the officer's discretion; the privilege does not cover information so obtained.

[ART. 3. *Necessary Information only.* The privilege covers
1858 only such communications as may be appropriate to enable the physician to supply aid.][3] — (W. § 2383.)

[1] This rule is recognized by statute only, in about one half of the jurisdictions.

[2] This is generally accepted, but is unsound.

[3] The statutes usually contain the word "necessary;" but this is obviously too narrow, and is never adhered to.

Illustration. On consulting a physician for a sprained ankle, the patient explains that the injury was received by a fall caused by the starting of the car while the patient was standing on the platform. The latter part of the communication would be privileged, by a liberal construction, but not privileged, by a strict construction.

[ART. 4. *Information.* The privilege covers all matters
1859 brought to the physician's knowledge by voluntary act of the patient, whether in express words or in submission for observation.] — (W. § 2384.)

Illustrations. The condition of the heart, as learned by the physician's auscultation, or of a bone, as revealed by a radiograph, is privileged.

[ART. 5. *Exceptions for Crimes and Torts.* The privilege
1860 cannot be used to prevent disclosure where the physician
(1) Is a party or an accomplice in a *crime;*
(2) or, Is a defendant in an action for *malpractice;*
(3) or, Was consulted by the *victim* of a crime.][1] — (W. § 2385.)

[ART. 6. *Whose is the Privilege.* The privilege is that of
1861 the patient. — (W. § 2386.)

[*Par.* (*a*). No *inference* ought to be drawn from a claim
1862 of privilege.]

[*Par.* (*b*). The *death* of the patient does not terminate
1863 the privilege.] — (W. § 2387.)

[ART. 7. *Waiver.* The privilege may be waived, ex-
1864 pressly or impliedly.] — (W. § 2388.)

[*Par.* (*a*). An express waiver may be made by *contract*
1865 before litigation begun.][2]

[*Par.* (*b*). An implied waiver is made in the following
1866 cases, among others: — (W. §§ 2389, 2390.)

[1] No one of these clauses has much authority yet; but all three seem necessary to prevent abuses.
[2] Statute prevents this in New York.

(1) The *bringing of an action* in which a main part of the issue is the existence of a physical ailment is a waiver for communications to any physician as to that ailment.[1]

(2) The *patient's* own voluntary giving of *testimony* as to physical condition is a waiver for communications to any physician consulted as to that condition.[2]

(3) The *patient's* calling of a physician to testify is a waiver as to all communications *to him* on the subject testified to;[3]

and also as to all communications *to other physicians* on that subject.][4]

[*Par.* (*c*). The waiver may be made, after death of the
1867 patient, by any *successor in interest*.][5] — (W. § 2391.)

RULE 212. *Penitent-and-Priest Communications.* A con-
1870 fession of sin, made to a professional minister of religion in the course of discipline enjoined by their church-body, is privileged.[6] — (W. § 2395.)

(*Reason and Policy.* Of the four considerations of policy named in Rule 204 (*ante*, § 1760) as the foundation of privileges, all apply here.)

[1] No Court recognizing the privilege concedes this, except for cases of malpractice.

[2] This is generally not conceded by Courts; but a few statutes do so.

[3] This is generally conceded.

[4] This is generally not conceded.

[5] A few Courts deny this.

[6] This is law by statute in a majority of jurisdictions; it would probably be enforced by the trial Court in most others.

PART IV: PAROL EVIDENCE RULES

(LEGAL ACTS)

RULE 213. *General Principle.* For the purpose of giving
1871 legal effect to a transaction, the rules of substantive law declare what conduct or utterances shall be necessary and sufficient to constitute the transaction. No other conduct or utterance is material; therefore, under Rule 3 (*ante*, § 3), no evidence to prove such other conduct or utterance will be admitted.[1] — (W. § 2400.)

ART. 1. *Nature of Legal Acts in general.* In so far as legal
1872 relations, other than crime and tort, are affected by voluntary action of persons, the effect in the law is determined by some conduct or utterance which by outward expression defines the effect willed by the person.

Conduct or utterance, so regarded, is termed a *legal act.* — (W. § 2401.)

The rules for a legal act may be *specific* or *general.*

A *specific* rule determines what is necessary or sufficient for a *specific class of legal relations; i. e.* for the formation of a contract, the transfer of an easement, the release of a reversionary interest.

A *general* rule determines what is necessary or sufficient for a *legal act in general* in order to have effect in any legal relation.

The general rules alone are here concerned.

The ensuing rules apply equally to oral and to written utterances, in so far as they purport to be legal acts, and not exclusively to writings.

[1] The ensuing rules are of course not rules of Evidence. Nevertheless tradition requires them to be grouped with rules of Evidence, until a separate treatment is accepted as orthodox.

In view of the numerous rules of substantive law here involved, the present summary of this Part is more or less tentative, in respect to the law of a particular jurisdiction.

ART. 2. *Subdivisions in the Constitution of Legal Acts.*
1873 For the purpose of giving legal effect to any act, it is considered in four stages or subdivisions:

A, its *creation*, or enaction;

B, its *integration*, or embodiment in a single memorial of expression;

C, its *solemnization*, or fulfilment of required formalities; and

D, its *interpretation*, or application to external objects.

The ensuing rules govern these four stages of a legal act.

ART. 3. *Writings and Legal Acts.* A writing, as such, when
1874 offered for legal purposes, has intrinsically no effect; that is, it must first be tested by these general rules to ascertain whether it is to have legal effect.

Therefore, in dealing with a writing offered as having legal effect, all facts may be considered, for and against it, which by the ensuing rules would be material to determine whether the writing was enacted at all, whether it integrates the transaction, whether it was solemnized as required, and how it shall be interpreted.

TITLE I:

CREATION, OR ENACTION, OF A LEGAL ACT

RULE 214. *General Principle.* Every act must be
1877 (1) legal in its *subject*,
(2) defined in its *terms*, and
(3) final in its *expression;*
and, as to subject and terms and expression, there must have been conscious *volition;*
with the ensuing qualifications and distinctions: — (W. § 2404.)

ART. 1. *Subject must be Legal.* The subject of an act must
1878 be legal, *i. e.* must concern the relations of persons in law. — (W. § 2406.)

Par. (*a*). An act understood by the parties as con-
1879 cerning only their *friendly* relations or their *moral* relations has no legal effect.

Illustration. A husband, on separating from his wife for a long voyage in search of health, makes a memorandum as to some money to be given to the husband's brother in case of need; the fact that this memorandum represented merely a domestic understanding, and not a legal claim, is material, and deprives it of legal effect.

Par. (*b*). An act apparently for legal effect but actually
1880 made as a *sham* to deceive other persons, [is equally void; unless the deception was unlawful under Par. (*c*).][1]

Illustration. (1) To deceive a bank-examiner, a depositor who is also a stockholder, makes a note to the cashier, and places it in the bank's assets; the note is valid, because the deception was unlawful.

(2) To placate jealous relatives, a son gives to his father a mortgage-document for money given to the son as compensation for expenses in support of a bedridden mother. The fact that father and son do this solely to allay jealousy

[1] It is doubtful here what the law is.

of others is material, and deprives the document of legal effect as between them.

Cross-reference. (1) For the rule that if a document is intended to be valid at all, a separate *condition subsequent* is invalid, see Rule 215, Art. 2 (*post*, § 1931).

(2) For the rule that a *condition precedent* to validity is material, see Art. 4 (*post*, § 1888).

1881 *Par.* (*c*). An act made for a legal effect *prohibited* by law is void.

Illustration. Contracts to give a bribe, to cease public prosecution, etc.

1882 ART. 2. *Terms must be Definite.* The terms in which the act is expressed must be so intelligible as to enable a definite legal effect to be enforced. — (W. § 2407.)

Illustrations. (1) A will gives land to "J. D. and J. S. and the heirs"; this is void for uncertainty; "patent ambiguity" is a traditional term for it.

(2) A deed transfers land in "Wilson's subdivision"; no such subdivision can be found; the deed is ineffective.

1883 ART. 3. *Expression must be Final.* The outward expression must indicate a final decision to will the effects specified. But no particular conduct or utterance is an invariable mark of such finality. Certain conduct may raise a presumption of finality.

1884 *Par.* (*a*). *Making a writing* is not final, but raises a presumption.[1]

1885 *Par.* (*b*). *Signing* or *sealing a writing* is not final, but raises a presumption.

1886 *Par.* (*c*). Causing a document to be publicly *recorded* or *registered* is not final, but raises a presumption. — (W. § 2408, n. 14.)

1887 *Par.* (*d*). Manual *retention* of a document by the *maker* may nevertheless be final. — (W. § 2408, n. 4.)

Illustration. An insurer signs a policy of fire insurance on the house of M, just as M is leaving by train for a long journey. The insurer promises to forward the policy to M's

[1] Perhaps this is too broad.

agent, but fails to do so. The house burns. The policy is valid.

ART. 4. *Same: Delivery.* Manual delivery of a document
1888 by the maker to another person, whether the beneficiary or a third person, is not an invariable mark of finality; but raises a presumption;

subject to the following distinctions: — (W. § 2408.)

Par. (*a*). Manual delivery of a *document of conveyance*
1889 to a *third person depositary*, who promises to hand it to the grantee on *performance of a condition*, is not final; so that the handing of it by the depositary to the grantee without performance of the condition has no legal effect. This is termed an *escrow* (or, conditional draft).

Par. (*b*). But the act is final as to every purpose but
1890 the performance of the condition; hence

(1) On performance of the condition, the grantee is entitled to compel the handing over of the document.

[(2) Before performance of the condition, the maker's withdrawal of the document has no legal effect to prevent performance of the condition.][1]

Par. (*c*). Manual delivery of a document of conveyance
1891 to the *grantee himself* on such a condition is [not] final; so that without performance of the condition the document has [no] legal effect.[2]

Illustration. A deed of conveyance is made, pursuant to an agreement that the grantee shall take it to the bank and on the credit of it obtain the purchase-money and otherwise return it to the grantor. The grantee shows it to the bank and is refused money. He then records it and claims title. By the rule with bracketed words he has not title.

Cross-reference. For the effect as to *purchasers without notice* of the condition, see Art. 8 (*post*, § 1908).

Par. (*d*). For a *negotiable instrument*, no particular
1892 conduct, whether writing, signing, or manual delivery, is an invariable mark of finality, for either a making, a

[1] There is variance of authority on this point.

[2] The bracketed words are in most States not law, but they are sound on principle.

drawing, an acceptance, or an indorsement. — (W. § 2409.)

[In particular,

(1) A *manual delivery* to the *obligee on a condition* to be first performed has no legal effect.][1]

Par. (*e*). For *other kinds of transactions*, including
1893 *contracts* in general, no particular conduct is an invariable mark of finality. — (W. § 2410.)

Illustrations. (1) A contract was proposed by A for the sale of B's corporate stock. B's agent at Milltown was already negotiating for a sale or hypothecation to another person, but could not be communicated with. The document of contract was drawn between B and A, signed, and handed to A, with the understanding that A was to go to Milltown with the document, and if on his arrival the agent should notify A that no conflicting disposition had been made, the contract between A and B should stand. In an action on the alleged contract, this understanding is material, and the fact of such notice by the agent to A would prevent the document from having legal effect.

(2) M and N sign a contract for the sale and purchase of two of three houses; the description of one is left blank until N shall have seen and selected; meantime all three are burned down just as N arrives on the scene with the contract in his pocket; whether it had legal effect depends on the understanding as to the blank.

Par. (*f*). For a *will*, the *attestation* is an invariable mark
1894 of finality. — (W. § 2411.)

ART. 5. *Intent and Mistake, in general.* In a legal act, as
1895 defined in Rule 213, Art. 1 (*ante*, § 1872), neither the outward expression alone, nor the inward will alone, determines invariably whether legal effect is to be given.

The act as legally effective will be determined, in respect to subject, to terms, and to finality of utterance, by that outward purport which results to the other person, if any in the transaction, as the reasonable consequence, under the circumstances, of the actor's volition. — (W. § 2413.)

ART. 6. *Intent as to Subject.* Where one party has so
1896 expressed himself that the reasonable purport is a legal

[1] Some jurisdictions deny this.

transaction, it has legal effect, and his actual intention not to have legal effect is immaterial. — (W. § 2414.)

Illustration. M offers to perform a ceremony of marriage with N, who *bona fide* wishes to become his wife; M obtains a pretended parson who performs the ceremony; M intended not to become husband of N. But the marriage is valid; provided by the law of the jurisdiction a formal ceremony by clergyman or public officer is not essential under Rule 220 (*post*, § 1950).

ART. 7. *Intent as to Terms.* Where the words of a document
1897 do not correspond to the actual volition of the maker, and the terms of the legal act are to be determined, under Art. 5 above, by the reasonable purport to the other party, the following distinctions may arise:

Between a document *complete* when signed and a document *incomplete* or capable of alteration;

Between *individual* mistake of one party and *mutual* mistake of both parties;

Between *different kinds of transactions; e. g.* negotiable instruments, policies of insurance, etc.

Par. (*a*). *Complete Document signed by Mistake unknown*
1898 *to Other Party.* The terms of a specific and complete document are legally effective, as against a person who does an outward act of apparent assent to it while not actually intending assent to some term thereof, and in favor of a party unaware of that actual intent;

subject to the following distinctions: — (W. § 2415.)

Illustration. This is the ordinary rule for the case of a person signing a document without reading it.

(1) A person unable by *illiteracy*, *alienage*, *blindness*,
1899 or *disease*, to read the document for himself is chargeable with the terms *signed*, in favor of a person who, being either a party to the document or one acquiring a negotiable interest thereunder, is unaware of the signer's actual intent,

unless the signer took such measures as should reasonably have sufficed to avoid mistake or deception.[1]

[1] This summarises the principle generally accepted but seldom broadly stated.

road is entitled to have the tickets cancelled, in so far as they have not been sold to *bona fide* purchasers.

1905 (3) A term is not valid in favor of a party who has *induced* the error, though unwittingly.

Illustration. An insurance agent and B agree on a policy-contract, B securing the agent's assent to the insertion of several special clauses; the agent transmits to the home office the contract, but in preparing the policy one of the clauses is inadvertently omitted; the policy is sent to the agent, who sends it to B, neither of them reading it over. Whether the omitted clause is effective depends on whether the insurer be regarded as having induced B's erroneous assent.

1906 *Par.* (*c*). *Completed Document signed by Mutual Mistake.* The terms of a specific and complete document are not legally effective for either of the parties, though an outward act of apparent assent has been done, in so far as the terms as written vary from the terms already agreed to be written and the error as to this variance is common to both parties. — (W. §§ 2417, 2418.)

(1) The terms are valid in favor of a person acquiring a transferable right as stated in Cl. (1), Par. (*a*) above.

(2) Whether a particular remedy shall be granted, and whether the error may be corrected by insertion or by cancellation of terms, is for the rules of chancery procedure to determine.

Distinguish the question whether a mutual mistake as to a *fact external to the document* and forming a motive for the transaction is ground for avoiding the transaction or refusing a specific remedy.

Illustration. A and B are devisees of an estate consisting of Blackacre and Whiteacre, given by will to the brothers A, B and C equally. C being dead, A and B make a deed readjusting their shares. By mistake of the conveyancer, Blackacre is not described in the deed. Later, C is discovered to be alive. The mutual mistake as to Blackacre is covered by the present rule. The mutual mistake as to C's death, the motive for the transaction, does not concern the present rule.

1907 *Par.* (*d*). *Document with Blanks or Alterations.* The terms of a specific document which contains a blank, or is so written as to be capable of an alteration not obvious, are legally effective as against a person who does an outward

act of apparent assent to it while not actually intending assent to a term as filled in or altered without authority, and in favor of a person taking the document without knowledge of the lack of assent, if in the circumstances the signer so acted as reasonably to be responsible for the apparent terms;

subject to the following distinctions: — (W. § 2419.)

(1) If the document was voluntarily *handed away* to another person by the signer, the signer is responsible for any term filled in blank in a space ordinarily filled.[1]

(2) If the document was *retained* by the signer in his own custody and subsequently was taken without consent, the circumstances of each case control.

ART. 8. *Intent as to Delivery.* Where the finality of an
1908 act, by delivery of a document or otherwise, is not actually intended by the person doing it, nevertheless it is final and legally effective in favor of a person not aware of the lack of actual intent, if under the circumstances the conduct of the actor produced, as a consequence reasonably to be expected, the appearance of finality;

subject to the following distinctions: — (W. § 2420.)

Par. (*a*). For a *negotiable instrument*, the act of handing
1909 it away to any person raises a presumption of finality.

Par. (*b*). For a *deed of conveyance*, the act of handing it
1910 in *escrow* to a third person is always final, in favor of a person unaware of the condition or of its non-performance.[2]

[*Par.* (*c*). For a *deed of conveyance*, the act of handing it in *escrow* to the *grantee* is always final, in favor of a person unaware of the condition or of its non-performance.[3]]

ART. 9. *Unilateral Acts; Intent as to Wills.* The terms of
1911 a testamentary document signed by a testator are not legally

[1] There seems to be some such rule of thumb.
[2] This rule of thumb is accepted by most courts.
[3] This rule is not needed in Courts which hold such a deed very intrinsically final under Art. 4, Par. (*c*) (*ante*, § 1891).

effective, unless he did actually intend assent to the terms thereof;

subject to the following specific rules: — (W. § 2421.)

Par. (*a*). If the contents were so *misstated* to him that he was in error as to some term, there is no assent as to that term, even though he signed.

Par. (*b*). If the contents were brought expressly and correctly to his notice, by *reading aloud* or otherwise, and he then *signed*, there is assent.

Par. (*c*). If he *signed*, and no express notice by reading or otherwise appears to have been given, assent is presumed.[1]

Par. (*d*). If a *term* intended by him to be in the will
1912 is by mistake omitted, it can [not] be inserted by the Court.[2]

ART. 10. *Voidable Acts.* Where an act has satisfied the fore-
1913 going requirements, it may still be voidable, *i. e.* liable to be annulled or confirmed at the option of one of the parties.

An act is voidable when the *motive* which has caused the parties to enact it is in law regarded as justly giving such an option.

The grounds of voidability, namely, (1) an unfulfilled condition reserved in the terms of the act itself, (2) or, an error or a compulsion preceding the act, and (3) or, a mental state of the actor, such as infancy or lunacy, are not here involved. — (W. § 2423.)

[1] These phrasings attempt to sum up the general attitude of Courts.

[2] The bracketed word represents the usual rule.

TITLE II:

INTEGRATION OF LEGAL ACTS

RULE 215. *General Principle.* If and as soon as the conduct
1915 or utterance forming a specific legal act has been embodied in a single memorial, all conduct or utterance on the subject of that act but exterior to that memorial, is without legal effect as part of the terms of that specific act, and is therefore immaterial for the purpose of determining or enforcing the terms of the act. — (W. § 2425.)

ART. 1. *Varieties of Integration.* The varieties of acts
1916 integrated may be distinguished according as they are

Acts of *private parties*
or of *public officers;*
Acts integrated by *voluntary intent*
or by *compulsion of law;*
Acts *unilateral*
or *bilateral.*

RULE 216. *Voluntary Integration of Unilateral Acts.* Where
1917 the person doing a unilateral act has embodied it in a single memorial, his other conduct or utterance on the subject of that specific act is immaterial.[1] — (W. § 2427.)

Illustration. A note of M is due at a bank; M goes to pay it, and a discussion ensues as to the amount of interest due; the banker and M end by disagreeing; M writes a note, offering to pay, encloses a check, and hands it to the banker. Afterwards, in an action against the indorser, the conversation of M with the banker is immaterial for the purpose of determining what were the terms of M's offer of payment.

Distinction. Whether an act, *e. g.* a notice to quit or a demand for payment, *must* be done in *writing* and otherwise is void, is a question of formalities (Rule 220, *post*, § 1950).

[1] Few questions arise under this head.

RULE 217. *Voluntary Integration of Bilateral Acts.* Where
1920 the parties to a specific bilateral act have by mutual intent embodied it in a single memorial, all their conduct or utterance on the subject of that act, preceding or accompanying the execution of the memorial, is supplanted by the memorial, and is immaterial as a part of the terms of that specific act. — (W. § 2430.)

ART. 1. *Mutual Intent as to the Specific Act.* The scope of
1921 the integration, as supplanting the other conduct or utterance, is determined by the mutual intent of the parties as to the subject of the memorial. Hence, conduct or utterance, forming a legal act, but not intended to be part of the subject of the memorial, is not supplanted and is still legally effective, and may be enforced in any appropriate proceeding. — (W. § 2430.)

Illustration. A real estate dealer and a banker, who have had several transactions under correspondence, meet to settle them before leaving on a journey. The dealer wants a loan for floating the sale of a parcel of land owned by him; a client of his wants to pay a mortgage owned by the bank; the banker wants him to renew a note coming due; they finally agree on certain terms, sign certain documents, and part. At a subsequent trial, a signed document providing for a secured loan on the parcel of land is offered by the banker; presumably for the relations affected by this document, the terms of conversations or writings concerning the client's mortgage or the dealer's note would be immaterial, and *vice versa*, because the three matters are separate subjects of transaction, and presumably would not be integrated in a document covering a specific one of them.

Par. (*a*). Since the intent of the parties determines the
1922 scope of their memorial, that *intent* is to be *ascertained from their conduct and utterances* preceding and accompanying the execution of the memorial, pursuant to Rule 60 (*ante*, § 271), governing evidence of intent; but when that intent is thus ascertained, the conduct or utterances on subjects falling within the scope of the memorial are not to be given legal effect.

Illustration. In the preceding illustration, the dealer's prior letter, offering to renew the note for double the amount as a consideration for the new loan, and the banker's oral refusal, may all be considered evidentially; but in no way can such letter or such refusal be given legal effect, as to the

document of loan, when it once appears that the loan was treated as the sole subject of disposal in the document.

1923 *Par.* (*b*). The test of intent, for the above purpose, is not to depend merely on whether the conduct or utterance *varies in terms* from the writing; and even when no such variance appears, the memorial may be treated as supplanting the conduct or utterance.[1] — (W. § 2431.)

Illustration. In the foregoing illustration, the document of loan provides that payment is to be made by notes given Jan. 1, July 1, etc. The dealer maintains that by oral agreement a renewal-note of the pre-existing note for the prior transaction was to be accepted by the banker; this agreement will not be given effect, because the document specifies the mode of payment, and its terms alone can be given effect.

1924 *Par.* (*c*). The evidential sources of intent, for the above purpose, are *not exclusively the words of the document*, but include the conduct and utterances exterior to the document.[2] — (W. § 2431.)

1925 *Par.* (*d*). The parties' intent is found in the *circumstances of each transaction;* there is therefore no single and invariable rule for any class of documents for determining the scope of the integration and the immateriality of conduct or utterances exterior to the document.

1926 ART. 2. *Application of the Rule to Specific Kinds of Documents.* Subject to the inferences of intent in any particular transaction, as determinative under Art. 1 above, the following provisional rules apply:

1927 *Par.* (*a*). A document acknowledging the *receipt* of value, and not being a release or a contract, is a mere admission, evidential under Rule 115 (*ante*, § 630), but is not presumed an exclusive memorial. — (W. § 2432.)

In particular,

1928 (1) A *bill of lading*, in its recital of goods received, is [not] presumed an exclusive memorial.

[1] This paragraph is needed, to avoid the improper use of the phrase "varying the writing" as a mere rule of thumb.

[2] A few Courts unsoundly *say* that the document is the "sole criterion" of intent; but no Court observes this.

(2) A *deed of conveyance*, in its recital of *consideration*
1929 received, is not presumed an exclusive memorial. — (W. § 2433.)

Par. (*b*). A document of *warranty* is presumed an
1930 exclusive memorial. — (W. § 2434.)

Par. (*c*). Any document is presumed an exclusive
1931 memorial with reference to any appurtenant *agreement not to sue*, or *not to enforce the claim*, or to enforce it *on a condition only*. — (W. § 2435.)

Distinguish (1) an understanding that the document shall be a *friendly* memorandum only, and not a legal act, under Rule 214, Art. 1 (*ante*, § 1878).

(2) An agreement made *subsequently* to the execution of the document, valid under Art. 5 (*post*, § 1938).

(3) An understanding that the document shall not represent a legal act at all until some event shall have occurred as a *condition precedent*, under Rule 214, Art. 4 (*ante*, § 1888).

Illustrations. (1) A street contractor negotiating with a city official signs a bond, on the understanding that it is not to be enforced but is to be used merely to satisfy the rules for bidders and to deceive an auditing committee; the understanding would be legally ineffective under the present rule; but it might deprive the bond of validity under Rule 214, Art. 1.

(2) A bond having been executed in a sum found later to be insufficient, a new bond is later given for the same transaction, on the understanding that the old bond, now mislaid, shall be cancelled when found; it is then found, but not cancelled. In a suit upon it, the understanding is material and effective, though, as a matter of procedure, there may be a difference between chancery and common law.

(3) In Illust. (1) above, the contractor signs a bond absolute and files it with his bid, on the understanding that it is not to become binding if the bid is not accepted by the city; this understanding is effective to defeat an action on the bond, in so far as it can be regarded as a condition precedent under Rule 214, Art. 4.

Cross-reference. For *negotiable instruments*, see Par. (*g*), (*post*, § 1934*a*).

Par. (*d*). Any document is presumed an exclusive
1932 memorial with reference to any appurtenant agreement

(1) as to *time* or *mode of payment;*
but not
(2) as to *counter-claim, set-off,* or *renewal.*[1] — (W. § 2436.)

1933 *Par.* (*e*). A document of conveyance is not presumed an exclusive memorial as to an appurtenant agreement that the grantee shall hold the property
(1) as a *security* only,
(2) or, as a *trust* only. — (W. § 2437.)

1934 *Par.* (*f*). A document is [not] presumed an exclusive memorial with reference to an appurtenant agreement that the right or the obligation shall be available, for one of the parties,
(1) as *surety* only,
(2) or, as *agent* only. — (W. § 2438.)

1934*a* *Par.* (*g*). *Negotiable instruments.*[2] — (W. §§ 2444, 2445.)

1935 *Par.* (*h*). Other than as here specified, there is no presumption, the circumstances of each case being the source of decision.[3] — (W. § 2442.)

1936 ART. 3. *Fraud.* Where a party's fraudulent intent is material, and not merely the fact of making a warranty or representation, the reduction to an exclusive memorial does not prevent the voidability of the act on the ground of a fraudulent intent. — (W. § 2439.)

1937 ART. 4. *Usage of Trade or Locality.* Where a *usage* or *custom* of *trade* or *locality* would ordinarily be implied as a term of a transaction, the reduction of some transaction to a single memorial does or does not prevent giving effect to the usage or custom, according as the parties do or do not intend to cover by their memorial the subject of the usage or custom, pursuant to the usual rules of Art. 2 above. — (W. § 2440.)

[1] Here the presumption is not of much practical value.
[2] It is useless here to deal with these.
[3] This seems the best way to deal with the mass of the cases.

Illustration. A contract is made by an expert in factory machinery to work on the installation of new machinery from Jan. 1 to June 1. His failure to work on Sundays is made the ground of a refusal to pay. An agreement that Sundays should be excepted as non-workdays may be effective, and depends on the scope of the memorial, but equally whether agreed expressly in conversation or impliedly in trade usage.

1938 ART. 5. *Subsequent Agreements; Novation, Alteration, and Waiver.* The parties' reduction to a single memorial embodies only the legal act as then completed; hence, any subsequent act, oral or written, whose purport is to novate, alter, or waive the preceding act in whole or in part, is legally effective so far as the present rule is concerned; though it may be intrinsically invalid for lack of written formalities (under Rule 220, *post*, § 1950) or for reasons of procedure. — (W. § 2441.)

Illustrations. (1) The plaintiff signed shipping articles as a seaman; then, on boarding the vessel, he found a sail unseaworthy; he had then the right to abandon the voyage; an agreement then made by the ship not to use the sail was a new contract, which could be availed of, regardless of the shipping-articles.

(2) A house is leased, and the lessee enters; the land not proving extensive enough, he orally leases an adjacent piece from the same lessor without increase of rental; if this later agreement is by law required to be in writing, it is void; if not, it is effective to alter the original lease as to the area.

(3) The performance of a contract to erect buildings is interfered with by a financial panic; the contractor for a consideration obtains a promise from the obligee not to sue for five years; this is legally effective, and could be sued upon if the obligee should within the five years bring a suit; but whether it could be pleaded in defence or be used to obtain an injunction would depend on rules of procedure.

1939 ART. 6. *Effect limited to Parties.* The exclusive memorial supplants the parties' conduct and utterances, exterior to the document, so far only as to take away their effect as a legal act for the same purpose as the document, but leaves unimpaired their legal effect for any other purpose. Hence such other conduct and utterances may be given legal effect

(1) as to the *same parties*, in other legal relations;

(2) and, as to *other parties*, in any legal relation not controlled by the document. — (W. § 2446.)

Illustrations. (1) A passes over B's land; a deed by B to A has granted A a right of way for five years, but the period has elapsed. A's claim of a right of way, under an oral agreement for ten years, not five, would be disposed of by the terms of the deed. But A's defence of leave and license, in an action of trespass, could be supported by the oral license of B, except so far as B may have revoked it.

(2) A landlord grants the premises to M; afterwards he sues the tenant for rent due since the transfer. If an oral agreement between the landlord and M, reserving for six months the right to collect rentals, can be effective between those two persons, then it can be effective against the tenant in the landlord's action for rent; but if the deed of grant would exclude the oral agreement as between the former, then it does also between the latter; for the right to collect the rents is a single right, and if the landlord has parted with it to M, he no longer has it against the tenant.

ART. 7. *Burden of Proof.* In ascertaining whether a par-
1941 ticular document has by intent been made the exclusive memorial, so as to take away legal effect from certain other conduct or utterances, the burden of proof as to producing the writing is as follows: — (W. § 2447.)

Par. (*a*). The *party objecting* to such conduct or utterance as immaterial, on the ground that there is an exclusive memorial, must so persuade the judge; and has the duty of introducing some evidence thereof, if he does not produce the writing for inspection.

Par. (*b*). If some evidence thereof is introduced, *i. e.* that some writing was made at the time concerning the general subject of that transaction, the duty of producing evidence that such writing did not cover the conduct or utterance in question *shifts to the offering party*, *i. e.* until he produces the writing, from his own custody or that of a third person, the writing is presumed to be exclusive.

Par. (*c*). For the purpose of Par. (*b*), *i. e.* of introducing some evidence as to the writing, the evidence suffices if it is obtained by the direct examination of the offering party's witnesses [or by their cross-examination by the objecting party].[1]

[1] The bracketed clause is denied by some, but not with reason.

RULE 218. *Compulsory Integration of Private Parties' Acts.*

1944 Where by legal policy or by statute the acts of private parties, to be valid, are required to be embodied in a single memorial, other acts and utterances, whether oral or written, are immaterial, pursuant to the foregoing principles of Rule 217, after the memorial has been made; and, further, they are of no legal effect even though no such memorial is made.

Distinguish a rule merely requiring writing as a formality, under Rule 220 (*post*, § 1950); in such case the writings may be numerous and conflicting in terms; *e. g.*, wills of personalty had formerly to be in writing, but any number of pieces of writing, fragmentary and inconsistent, might satisfy that formality; now, however, the writing must be a single document containing all the terms; this is a requirement of compulsory integration.

ART. 1. *Kinds of Documents.* No general rule requires the

1945 acts of private parties in general to be reduced to a single memorial. Any rule so requiring is limited to some specific class of transactions, and therefore is a specific rule in the law of that subject, as defined in Rule 213, Art. 1 (*ante*, § 1872).[1] — (W. §§ 2451, 2452.)

They are as follows:[2]

(1) Wills;
(2) Ballots;
[(3) Insurance policies;]
(4) Negotiable instruments;
[(5) Corporate acts;]
[(6) Corporate proceedings.]

RULE 219. *Compulsory Integration of Public Officers' Acts.*

1946 Where by legal policy or by statute the act of a public officer, to be valid, is required to be embodied in a single memorial, other acts and utterances are immaterial and without legal effect, in the same way as provided for the acts of private parties in Rule 218. — (W. §§ 2450, 2453.)

ART. 1. *Kinds of Documents.* No general rule requires the

1947 acts of public officers to be reduced to a single memorial. Any rule so requiring is limited to some specific class of acts,

[1] These of course cannot be here stated in detail.
[2] The first three by statute; the last three by common law.

and is therefore a specific rule in the law of that subject, as defined in Rule 213, Art. 1 (*ante*, § 1872).[1]

They are as follows:

(1) A judge's judicial act;
(2) A petit jury's verdict;
(3) A grand jury's indictment;
(4) A legislature's vote;
(5) Sundry officers' acts.

Distinguish the principle of testimonial conclusiveness, under Rule 133, as applied to a *magistrate's report of testimony* (Art. 2, *ante*, § 902), to a state secretary's *certificate of enrollment of a statute* (Art. 3, *ante*, § 903), and to sundry official *certificates* (Art. 5, *ante*, § 905).

Illustrations. (1) A sheriff's calendar records his orders, doings, and appointments. A record of appointment of a deputy is an act of his, and under the present principle the question arises whether it supplants as an exclusive memorial his oral appointment. But his entry of the date of arrival or of escape of a prisoner is a statement by him as to an external occurrence, and the question arises under the principle of testimonial conclusiveness whether the actual date can be shown by other testimony in contradiction of the sheriff's entry.

(2) A magistrate's order holding an accused to the grand jury is a judicial act of his, and the record-entry supersedes his oral utterance, under the present principle. But his written report of a witness' testimony on the hearing is merely his statement as to the witness' utterance, and under the other principle the question arises whether his statement is conclusive or can be shown to be erroneous by others who heard the witness' words.

[1] No attempt can be made to include these here.

TITLE III: SOLEMNIZATION OF LEGAL ACTS

1950 RULE 220. *General Principle.* A legal act, though enacted according to Rule 214, and integrated according to Rules 215–219, may still fail to be given legal effect, if it lacks a formality required for validity. A formality is some attendant circumstance over and above the expression and volition required by Rule 214.

1951 ART. 1. *Kinds of Formalities.* No general rule requires for legal acts in general any formality. Any rule so requiring is limited to some specific class of acts, and is therefore a specific rule in the law of that subject, as defined in Rule 213, Art. 1 (*ante*, § 1872).[1]

They are of the following sorts:

(1) Writing; or signature;
(2) Seal; or stamp;
(3) Public registration;
(4) Attestation by witnesses.

[1] It would be of course out of place here to include these.

TITLE IV: INTERPRETATION OF LEGAL ACTS

RULE 221. *General Principle.* For the purpose of giving
1953 effect to a legal act, by enforcing upon the external objects the legal consequences provided in its terms, the objects in the external world which are to be affected by those terms must be ascertained. The process of thus ascertaining and applying its terms to external objects is called Interpretation.

For this purpose the terms of the act are regarded as marks or symbols, used by the actor to signify, to the officers of the law, those external objects to be thus affected. The object of the process of Interpretation is therefore to ascertain the external significance of those marks or symbols as used by the actor. — (W. § 2458.)

ART. 1. *Stages of Interpretation.* The process of interpre-
1954 tation has two parts or stages.

The first determines the *standard* of usage, *i. e.* among the various classes of *persons* whose customary use of words makes known the significance of words, it selects that person or class whose usage shall or shall not control.

The second determines the *sources* of interpretation, *i. e.* among the various *forms of conduct and utterance* which exhibit usage of words, it determines those which may or may not be used to ascertain it.

ART. 2. *"Meaning," "Intention," "Sense," "Volition."*
1955 The words "meaning" and "intention" being ambiguous, the following words are herein used in their stead:

(1) "Sense" signifies the fixed association between the uttered word in the legal act and some external object.

(2) "Volition" signifies the will to utter a specific word as a term of the legal act. — (W. § 2459.)

Par (*a*). In the present rule, the *sense* of the words
1956 found in a legal act is the constant object to attain. But

the actor's *volition* to put those words into the act is here *immaterial;* its legal effect is governed solely by Rule 214 (*ante*, § 1877). Therefore, the present process of interpreting the sense of the words must avoid a violation of Rule 214, in so far as that rule declares void and immaterial the volition to utter words different from those actually expressed.

Illustration. A street-contractor signs a bond, providing for faithful performance, and naming as obligee "the mayor of Townville." Whether his mistake in intending to make his bond, as called for in the bid, to the superintendent of public works, not the mayor, is material, depends on Rule 214; but whether "the mayor" is to be applied to the individual then mayor or to any successor in office, depends on the present rule.

SUB-TITLE I: STANDARD OF INTERPRETATION

1958 RULE 222. *General Principles.* The ultimate standard of interpretation is the sense employed by the party or parties doing the legal act.

1959 *Par.* A. In ascertaining this ultimate standard, the usage of some class of persons which includes the party to the act may be employed as a *provisional standard.*

For this purpose the species of usage are classified as follows:

(1) *General usage, i. e.* that of the *community* in general in which the tribunal sits;

(2) *Special* usage, *i. e.* that of any *group* of persons having peculiar habits of speech, as, a trade, art, or profession, a locality, an alien colony, a dialect;

(3) *Personal usage, i. e.* that of *specific persons;* which may be either

mutual, i. e. that of both parties to a bilateral act; or,

individual, i. e. that of one party, whether in a bilateral or a unilateral act.

1960 *Par.* B. In resorting to these species of usage, the following cardinal principles apply: — (W. § 2461.)

(*a*). The resort to either *general* or *special* usage ((1) and (2) above) is always *provisional* only, and serves

as a means of attaining (not of supplanting or of competing against) the ultimate standard, namely, the sense actually used by the party or parties to the act.

(*b*). In every case, the *general* usage is first taken as the provisional standard.

(*c*). *Before adopting any sense variant* from that of general usage, the Court must be persuaded

(1) that such sense exists in some special or personal species of usage, and

(2) that the party was employing that other species of usage.

(*d*). In a *bilateral* act, the mutual standard of usage controls as against the individual standard.

ART. 1. *Rule as to Disturbing a Plain Meaning.* In 1961 applying the rule of Par. Ba above, the sense supplied by general usage, and provisionally adopted, must be rejected, as soon as it is made to appear that there exists some other sense in a special or a personal usage which was followed by the party or parties in the particular case;

(1) [unless the terms of the document have a meaning so plain as to need apparently no other than the general usage for their correct interpretation.]

(2) [unless the terms of the document are free from any doubt or ambiguity, either in themselves or in application to external objects.[1]] — (W. §§ 2462, 2463.)

Illustrations. (1) A will bequeathed a legacy to "Samuel Powell, son of Samuel Powell of Philadelphia, carpenter." There were two sons of S. P., one going by the name of Samuel, the other by the name of William. The former was by a second wife, and was unknown to the testator; the latter was by a first wife, the testator's daughter, and was always called "Samuel" by the testator. The bequest goes to the son called "Samuel" by the testator, regardless of the general usage to apply that name to the other.

[1] The main article represents the sound rule; the bracketed clauses representing varying phrasings of an unsound limitation. This limitation is accepted, nominally at least, in many or most Courts, for some classes of documents, particularly for wills. But no Court accepts it to the extent of refusing to recognize a special usage of a trade or locality.

(2) A testator bequeathed "all my personal estate" to M; in several schedules of property drawn up by him from time to time, he regularly included certain leaseholds and certain interests in his wife's estate, under the heading "personal estate," while another heading itemized his "real estate;" this personal usage controls, regardless of the general or technical sense of "personal estate."

(3) A contract of mining for asphaltum provided a scale of payment for "each ton of asphaltum"; in the former transactions of these parties, as contained in bills and letters, "ton" signifies 2240 pounds; this sense will be applied in the contract, regardless of any definition given for general usage in dictionaries or statutes.

(4) A contract called for delivery of a quantity of "white arsenic"; the substance offered to be delivered was black in color, the hue being produced by lamp-black mixed in the course of manufacture; but by trade usage the term "white arsenic" is employed for that mixture; the contract is therefore satisfied by delivery of it.

(5) A broker wires a contract to buy "steel"; by cipher code with his correspondent, "steel" means "wheat;" the contract will be interpreted as "wheat."

ART. 2. *Special Usage.* In applying the rule of Par. Bc 1962 (*ante*, § 1960), by taking the special usage of a group of persons having peculiar habits of speech, it must appear

(a) that such a definite usage of a class of persons exists;

(b) and, that the party or parties presumably employed it (1) either because of belonging in that group of persons, (2) or because of knowing the usage and considering it appropriate in the transaction in question. — (W. § 2464.)

Illustrations. (1) Under a policy of insurance for a voyage to "any port in the Baltic," the ship was lost in the gulf of Finland; the ordinary maps of geographers mark the gulf and the sea as separate; but the sea may be taken to include the gulf, if it appears that the nautical and marine insurance trade has a definite custom of so treating it in trade discourse and conduct.

(2) In a policy of insurance issued in New York, the cargo of "coal" is limited to a certain quantity; at Cardiff where the coal was loaded, a kind of coal-dust briquette is by usage not included in "coal"; the Cardiff usage will apply if the parties are all Englishmen dealing on English tradal methods, or if they are Americans customarily employing Cardiff tradal phrases in similar transactions.

Distinguish (1) the question whether a usage which supplies an *implied term of the contract* must be rejected under Rule

217, Art. 4 (*ante*, § 1937) because the document, as the sole memorial of the transaction, has already covered the subject of the usage.

(2) the rule that a usage must be proved by a sufficient *number of witnesses* (Rule 179, Art. 6, *ante*, § 1514).

1964 *Par.* (*a*). If the special usage was known *to one party only* in a bilateral act, and not to the other, Art. 4, Par. (*b*), below, applies.

1965 *Par.* (*b*). If the special usage varies from the *plain meaning* in general usage, Art. 1, above, applies.

1966 ART. 3. *Mutual Usage.* In applying the rule of Par. Bc (*ante*, § 1961), by taking the personal mutual sense of the parties to a bilateral act,

1967 *Par.* (*a*). If one party seeks to enforce, as the mutual sense, a *special usage*, peculiar to a group of persons, but *not known to the other* party, Art. 4, Par. (*b*) below, applies.

1968 *Par.* (*b*). If the mutual usage varies from the *plain meaning* in general usage, Art. 1, above, applies.

1969 *Par.* (*c*). If the mutual sense is sought in the parties' *conduct and utterances* expressing their intent as *to the particular transaction*, Rule 223, Art. 1 (*post*, § 1976), applies.

1970 ART. 4. *Individual Usage.* In applying the rule of Par. Bc (*ante*, § 1960), by taking the personal individual usage of one of the parties to an act, the following rules apply: — (W. §§ 2466, 2467.)

1971 *Par.* (*a*). For a *unilateral* act, the individual sense of the actor alone controls; [subject to the rule of Art. 1, above, where the individual sense varies from the plain meaning in the general usage.]

1972 *Par.* (*b*). For a *bilateral* act, the consequence of Par. Bd, Art. 1, above, making the mutual standard to control, is that the sense to be enforced is determined as follows:

(1) First, the sense *actually employed by both parties* is taken, if identical.

(2) But if *variant senses* are employed, that sense is

taken which, being actually employed by one party, *should also have been supposed by the other party*, under all the circumstances as known to him, to be employed by the first party.

(3) And, if *neither sense* satisfies Clause (2) above, *i. e.* if neither sense, as actually employed, is the one which the other party should reasonably have supposed to be employed, then [the act is void, if the term to be interpreted is an essential part of the transaction; but otherwise[1]] each party is chargeable with the sense actually employed by him, and with no other.

Illustrations. (1) In a cipher cablegram, the word "gloves" occurs; both sender and receiver have lost their copies of the private code, but by memory the receiver interprets this to mean "send purchases of silk by next steamer;" this also was the sense attached in the cipher code as remembered by the sender. The actual sense being identical, it is enforced, regardless of what the printed or written code contained; though in case of dispute of fact as to the actual sense of each party, it might have been difficult to ascertain the actual sense.

(2) An insurance policy covers "the premises at 160 Mott St."; there are two buildings at that number, one in front, the other in the rear, both owned by the insured; the insurer does not know that there are two buildings, and supposes that there is only one; both are burned. The insured's sense, as actually employed for the word "premises," will control, as against the insurer's sense, if under all the circumstances the insurer should have supposed that "premises" included all structures not specifically described.

(2*a*) An illiterate purchaser sends the following order: "Please ship me one rite steel weel for a drill two square feeting shafts 4 ten hoe drills;" the manufacturer ships four ten-hoe drills; the buyer signified actually "two sq. ft. shafts *for* ten-hoe drills." The seller's sense controls, if it is deemed reasonable for the illiterate buyer to be charged with the sense which a literate seller in the trade would put on that order.

(3) The plaintiff sells cotton in London to the defendant, "to arrive ex Peerless from Bombay;" there are two ships Peerless sailing from Bombay, one in December, the other in October; each party knows of one ship only; each is chargeable only with the sense actually employed by him, and hence the plaintiff is not liable for refusal to accept delivery of cotton from the ship not signified by him. Perhaps also the contract is void, so that he cannot even demand delivery of cotton from the other ship if he so elects.

[1] Presumably some Courts go this far.

ART. 5. *Specific Rules for Specific Words.* For any class of
1973 transactions, specific rules of law may adopt specific senses for specific words, which senses are to be presumed to have been employed until some other sense appears to have been employed by the party or parties in a particular case.[1]

Illustrations. "To A and his heirs" in a will; "river" in a farm-deed; "street" in city-deed; etc.

SUB-TITLE II: SOURCES OF INTERPRETATION

RULE 223. *General Principle.* For the purpose of ascer-
1975 taining the actual sense of terms, in any kind of document whatever, any and every circumstance may be considered, whether things or persons, conduct or utterances, words in the document or external to it, provided only the circumstance is likely in some way to disclose the association between the words as used in the document and the persons or things to which those words may by possibility be applicable;

subject to the following qualifications: — (W. § 2470.)

ART. 1. *Statements of Intent, excluded.* In searching to
1976 ascertain the sense employed in the terms of a document, the present Rule yields whenever there is a substantial risk of violation of Rule 214, Arts. 7, 9 (*ante*, §§ 1897, 1911), declaring immaterial the party's mistake as to inserting certain terms, or of Rule 217, Art. 1 (*ante*, § 1921), declaring immaterial all conduct and utterances on the same subject and not reduced to writing in the document. Therefore,

No consideration is to be given, as a source for interpretation, to the party's *direct statement* of his own volition or intent as to the terms of a specific act or of the sense of the words as used by him therein. — (W. § 2471.)

Illustrations. (1) A will devises property "in the county of Limerick"; no property is found there; in fact, however, the testator owned property in the county of Clare, and the draft will, as drawn up by him and sent to the attorney, read "counties of Limerick and of Clare," and by a mistake of the attorney the phrase was changed; the change was apparently not noticed by the testator when the will was read over to him. This mistake may or may not avail, under Rule 214, to set aside or to correct the terms of the will. But if it does not, and the terms of the will are to be taken definitely

[1] This is the place where the various rules of thumb belong.

as "county of Limerick," then in interpreting these words the draft will, expressing the intention of the testator as to this transaction, cannot be considered.

(2) A contract for constructing a building specified "all sewer-connections with city-sewers." In drafting, the builder refused to accept this clause, and wrote a letter stating that in view of the high price of iron pipe he did not care to include that in his contract; by mistake he signed the contract with that clause still in it. Afterwards, a dispute arising as to the amount of a deduction to be made from the price, for failure to build the sewer-connections, the sense of the term "sewer-connections" comes in issue. For the purpose of interpretation, his letter refusing to insert the clause cannot be considered.

1977 *Par.* (*a*). Nevertheless, for the purpose of interpretation, and in particular of *identifying a person or thing described* in some term of the document, the conduct and utterances of the party or parties relating to the subject of the particular transaction may be considered, in so far as the foregoing Article is not substantially violated.[1] — (W. §§ 2466, 2468.)

Illustrations. (1) A will devises to children "two residences now occupied by my two children;" in fact there were two buildings, but they had been subdivided into three apartments each, and one apartment was occupied by each child. The testator's letters and conversations relating to the buildings may be used as exhibiting his usage of the word "residence" for those buildings, but not a letter specifically declaring his intent to devise the whole buildings to the children.

(2) A contract provides for the sake of "your wool"; the parties' conversations at the time of contracting may be used as applying the term "your wool" to specific lots of wool and to no other.

(3) A deed conveyed land "with the appurtenances"; there was a pasture, separated from the lot sold, but heretofore used in connection with it; the advertisement of sale had expressly excluded the pasture from the offer, and the buyer at the sale had said that he was not bidding for it; whether the pasture shall be regarded as included in the sale depends on whether we regard these external utterances as merely an interpretation of the term "appurtenances" or as virtually a limitation of the written description.

(4) A contract for advertising provides that the payment shall be made "as convenient"; the advertiser desires

[1] This distinction is generally recognised, though rulings vary in the emphasis put on one or the other rule.

to interpret this by letters of the parties, written at the time, stating their understanding that payment shall be made "as soon as sales are made through the circulation of the advertisement"; this is improper, because it involves not strictly an interpretation of the terms "as convenient," but a substitution of other terms.

ART. 2. *Same; Exception for Equivocation, or Latent Ambiguity.* Direct utterances of intent, as defined in Art. 1 above, are admissible to interpret an equivocation, *i. e.* a term which, on application to a person or thing, is found to fit equally two or more. — (W. § 2472.)

1978

Illustrations. (1) A will to "my nephew Joseph"; on application of this to the testator's nephews, there appear two bearing the name Joseph; any statement of the testator's intent may here be considered and given effect.

(2) A deed conveys the "Adams House"; there are two hotels in the city bearing that name; the parties' mutual intent, as exhibited in any statement of theirs, may be considered and enforced; but under Rule 222, Art. 3, Par. (c) (*ante*, § 1969) a statement of the individual intent of one of the parties could usually not be considered.

Par. (*a*). A *blank space* in a document is not an equivocation, under the present rule, if it appears to represent, not the party's chosen mode of indicating his ignorance of the precise description, but his abstention from making a final expression of volition. — (W. § 2473.)

1979

Illustration. A bequest of money to "my nephew's betrothed, Ella ——" would be of the former sort; but a bequest to "my old friend ——" would be of the latter sort.

Par. (*b*). A term which is intrinsically *uncertain* or *repugnant* is not an equivocation.

1980

Illustration. A devise of "one of my seven houses" may be void for uncertainty, or may permit an election; but it is not an equivocation.

ART. 3. *Same: Exception for Misdescription.* Where a term of description, when applied to a person or thing, appears to fit no one exactly, but to fit one in one part and another in another part, the party's direct utterances of intent, as defined in Art. 1, above, may [not] be considered

1981

for the purpose of interpreting the description.[1] — (W. § 2474.)

Illustration. A will devises property to "my well-beloved grand-nephews John and William"; the testator had two grand-nephews John and William, but they were personally unknown to him; he had also two grandsons John and William, of whom he was very fond; the testator's instructions to the attorney drafting the will may be considered.

1982 ART. 4. *Same: Exception for Rebutting a Presumption of Law.* Wherever by some rule of law a legal effect is made to attach to certain provisions in a document, and the rule purports to presume the intent of the party for lack of an expression of such intent, the party's utterances of intent, exterior to the document, may be considered; unless the rule by statute expressly so forbids.[2] — (W. § 2475.)

Illustration. A rule declares that a child not mentioned in his parent's will shall nevertheless receive his share as next of kin unless it appears that he was intentionally omitted from the will's provisions; the parent's oral statements of intent may be considered.

1983 ART. 5. *Misdescription in general.* Wherever a term in a document, when applied to possible persons or things, is found not to fit any one exactly in every item of the descriptive term, the term may be applied and enforced nevertheless, on considering all proper sources of interpretation, to such person or thing as is fitted by part of the items of description, provided those items

(1) appear to be the essential features of the description,

(2) and are sufficiently definite to be enforced.[3] — (W. § 2476.)

Illustrations. (1) A deed carries a boundary to a "chestnut tree at the S. E. corner of George Williams' lot"; there is no such tree at the S. E. corner, but there is one at the N. E. corner; if the circumstances justify, the description may be applied to the tree as it is, ignoring the item "S. E."

(2) A will devises property to "my niece Sarah, now living with my sister Jane"; there is a sister Sarah, who used to live with sister Jane but does so no longer; there is also a sister Susan, who does live with sister Jane; the circum-

[1] Most Courts insert the "not"; but this is unsound.
[2] Not all Courts accept this in every application.
[3] For wills, some Courts perhaps do not accept this.

stances will show which item of the description is the essential one.

Distinctions. (1) Where a description applies *exactly* in every item to one person or thing, and only in part to another, the rule against disturbing a clear meaning (Rule 222, Art. 1, *ante*, § 1961) may be deemed to stand in the way.

(2) Whether the misdescription occurred by *mistake in drafting* (as in Illust. (1) above) or by change of circumstances in lapse of time (as in Illust. (2) above), does not matter under the present rule. But an attempt to show the mistake in drafting would be ineffectual, under Art. 1 above; so that the interpretative result allowable under the present Article would be defeated if sought to be attained by the other and improper method.

(3) Whether, in interpreting the misdescription, the party's direct *statement of intent* can be considered, depends on Art. 3 (*supra*, § 1891).

1984 *Par.* (*a*). In applying the present Article to a devise of property in a will, the testator's description of property may [not] be taken in the sense of his own property, [unless express words of ownership are used in the description.][1]

[1] Some Courts accept the bracketed phrases, but too strictly.

BOOK II:

BURDEN OF PROOF, AND PRESUMPTIONS

(BY WHOM EVIDENCE MUST OR MAY BE PRESENTED)

TITLE I: GENERAL PRINCIPLES

1990 RULE 224. *Judge or Parties may adduce Evidence.* (1) The procuring and presenting of evidence is ordinarily to be done by the parties to litigation (or their representatives) and there is no *duty* on the judge to act for that purpose, except to issue suitable orders of compulsion on request by the parties.

(2) But the judge is *entitled* to act of his own motion and to cause any evidence to be obtained and presented, and in particular, such evidence as appears to him to be available and desirable to supplement the evidence presented by the parties. — (W. §§ 2483, 2484.)

Illustrations. The judge may order the calling of a witness not called by either party; or may himself put additional questions to a witness called and examined by a party.

Cross-reference. For the rule as to a *judge's questions*, see Rule 92, Art. 6 (*ante*, § 474).

Distinguish the rule that a judge may not comment to the jury *on the credibility of testimony* (Rule 5, Art. 5, *ante*, § 16), which serves to restrict the judge's free use of questions.

1991 [ART. 1. *Judge may summon Expert Witnesses.* In any case where a witness of special experience is admissible under Rule 83 (*ante*, § 377), the judge may summon as such witness one or more persons selected by himself, with or without the prior nomination of the parties, and such witnesses shall be notified to the jury as having been summoned by the judge; but their testimony shall be subject to cross-examination

and impeachment by either party pursuant to Rule 96 (*ante*, § 500) and Rule 134 (*ante*, § 910).][1] — (W. § 562.)

1992 [*Par.* (*a*). Such witnesses shall be entitled to an opportunity to *inspect* any person, place, or thing of which inspection could be demanded by the opponent *before trial* under Rule 161 (*ante*, § 1325), and may be ordered by the judge to inspect and report at the trial about any person, place, or thing of which a *view by the jury* could be ordered under Rule 123 (*ante*, § 730).][2]

Cross-references. (1) For the provision that the *number of expert witnesses* examined by the parties may be *limited* by the judge, see Rule 167 (*ante*, §1400).

(2) For the *fees* of expert witnesses, see Rule 199 (*ante*, § 1680).

1994 RULE 225. *Parties' Burden of Proof; General Principle.* Since the judge is empowered, under Rule 229 (*post*, § 2100), to decide upon the sufficiency of evidence to the extent of withdrawing from the jury's deliberations the case of a party upon any issue not sufficiently evidenced to be worth submission to the jury, and since the jury is empowered to determine the issues when submitted to it by the judge, there are to be apportioned to the parties two kinds of burden or liability in respect to adequacy of evidence upon a given issue; namely,

(1) the duty of *passing the judge* by *introducing such evidence* on a given issue as shall be *ruled by the judge* to be sufficient for submission to the jury (Rule 226);

(2) and, the risk of *not persuading the jury*, so as to remove doubt, by such evidence as shall be so submitted to it (Rule 227). — (W. §§ 2485, 2487.)

1995 ART. 1. *Difference in Legal Effect of the Two Burdens.* (1) The effect of the *duty of passing the judge* is that the party having it and not fulfilling it is by a *ruling of law from the judge*

[1] This Article is as yet law in two States only; it represents a broader re-casting of a statutory innovation in those States, which promises to solve the problem of the abuses of expert partisanship.

[2] This Paragraph is only partly represented in the above-named statutes.

then and there precluded from further contention of that issue.

(2) The effect of the *risk of jury-doubt* is not that the party having it is precluded from contention of that issue, but that after the evidence is closed he has the *risk, if any in fact,* that the rule of law fixing a standard of persuasion for the *jury* may result in an adverse finding, *i. e.* the rule that the jury, if not fully persuaded by either party but remaining in doubt on the evidence submitted by both parties as to that issue, must find adversely to his contention, and not adversely to the other party's contention.

Illustrations. (1) In an action on a promissory note, with a plea of non assumpsit, the plaintiff introduces the note, with a letter purporting to admit its execution and to promise payment, and with testimony to the handwriting of the defendant. The judge rules that this is sufficient evidence to justify submission to the jury, and thus the duty of passing the judge is fulfilled. The risk of jury-doubt is then on the plaintiff; the actual risk for the plaintiff that such doubt will result is small, if the defendant introduces no evidence, and is great for the defendant; but if the defendant introduces testimony that the handwriting of the note is not his and that the letter referred to another note, and if in consequence of this the jury feel unable to determine which contention is correct, the rule of law requires them to decide against the plaintiff.

(2) On a plea of payment, in an action for money loaned, the defendant has the duty of passing the judge and also the risk of jury-doubt. He testifies that he enclosed paper-money in a registered envelope and sent it to the plaintiff; this may suffice to fulfil the duty of passing the judge. The plaintiff then testifies that he received such an envelope but it contained no money. If the jury cannot make up their minds whether the money was ever sent or ever arrived, they find against the defendant on the plea of payment; the risk of this result of the rule of law for doubt being on the defendant, although each party had the actual risk of the jury fully believing the other party.

RULE 226. *Duty of Passing the Judge.* (1) The duty of 1997 passing the judge is a duty to introduce evidence, on a particular issue, which makes a case at least plausible enough to be worth submission to the jury. This duty, in being satisfied, may leave both parties without any duty.

(2) But the evidence then or later introduced may also be of such probative value as to create the duty anew for the

opponent. If then also satisfied, both parties may again be without such duty.

(3) If by either party, when he has the duty, it is left unsatisfied, the judge by ruling of law precludes further contention of that issue on his part, by making such order or giving such direction to the jury as is appropriate, in favor of the other party.

(4) The duty is therefore on one party only at one time, but after fulfilment by either it may shift to the other party, or may cease; and if unfulfilled by either, the issue is closed as matter of law. — (W. § 2487.)

1998 ART. 1. *Primary Incidence of the Duty.* The duty falls in the first instance on the party who by the pleadings and by Rule 227 (*post*, § 2022) has the risk of jury-doubt.

Illustrations. In an action for personal injuries caused by negligence, with a plea of not guilty, the plaintiff has by the pleadings the risk of jury-doubt on that plea; he therefore also has the duty of passing the judge. But in an action for money loaned, with a plea of release, the defendant by the pleadings has the risk of jury-doubt on that issue, and has therefore also the duty of passing the judge, by adducing some evidence as to the release.

1999 ART. 2. *Modes of Satisfying the Duty; Sufficiency and Decisiveness.* The duty may be discharged

(1) by merely satisfying it;

(2) or by satisfying it and at the same time shifting it to the opponent.

(1) Evidence which merely satisfies it is said to be *sufficient* (to go to the jury).

(2) Evidence which is so persuasive that it ought not only to be considered by the jury but to control their verdict for that party is said to be *decisive*,[1] and shifts the duty to the opponent.

In both cases the judge's ruling may be made

(*a*) either under a *general rule*,

(*b*) or, on the *particular evidence* in that case.

The four kinds of rulings are therefore as follows:

[1] There is in practice no such term. But the process must have a term, if there is to be any intelligible discussion or legislation.

(1) (*a*) If some *general rule of law* as to the sufficiency of a specific class of evidence is applied, there is said to be a *sufficiency by rule of law*.[1]

(1) (*b*) If in the evidence in the *particular case*, regarded as a whole, a sufficiency is found, there is said to be a *sufficiency by ruling on the case*.[1]

(2) (*c*) If some *general rule of law* as to the conclusive effect of a specific class of evidence is applied, there is said to be a *presumption of law*.

(2) (*b*) If in the evidence in the *particular case*, regarded as a whole, a conclusive effect is found, there is said to be a *decisiveness of evidence on the case*.[1] [2]

Illustrations. (1) (*a*) In an action for injuries from the bite of a vicious dog knowingly kept, evidence of a single former instance of biting, known to the defendant, may be a *sufficiency by rule of law* to evidence the viciousness and the knowledge of it. In an action of ejectment, the plaintiff's title resting on a grant in 1864, the appearance of a document purporting to be a deed of that date, found in his grandfather's garret, may be a *sufficiency by rule of law* to evidence the genuineness of the deed, without other evidence.

(1) (*b*) In the action for injury by the bite of a dog, the plaintiff's evidence may be that the dog bit him, and that he complained to a policeman, and nothing more; and as to the *scienter* the judge may here find that there is not a *sufficiency by ruling on the case*.

(2) (*a*) In the action of ejectment, the recorded deed of an ancestor being offered, without evidence of its delivery, the judge may rule that there is a *presumption* of delivery, from the fact of recording; this will shift the duty to the opponent to pass the judge by some evidence of non-delivery, and for lack of such evidence the jury must conclude there was a delivery.

(2) (*b*) In an action of ejectment, where the plaintiff claims under an ancestor Jeroboam Castro, of Carterville, and introduces a deed of 1864 to Jeroboam Castro of Carterville, and the defendant, maintaining that the said C. was dead at the time, introduces merely a register of the Confederate Army, in 1863, with an entry of the death of one Jeroboam Castro of Champaign, the judge may on this and the rest of the evidence find that there is a *decisiveness of evidence on the case* in favor of the plaintiff on this issue.

[1] These phrases are not technically so used in practice; but some conventional phrases must be adopted.

[2] Some Courts ignore this kind of ruling, Art. 5, Par. (*b*), *infra*, § 2009).

ART. 3. *General Test for Sufficiency and Decisiveness by*
2002 *Ruling on the Case.* The tests to be used by the judge in rulings on the case are as follows:

Par. (*a*). The test for *sufficiency by ruling on the case* is whether the *proponent's* evidence

[is so slight that a favorable verdict based upon that evidence alone would appear incomprehensible as a matter of reasoning.]

[is more than a scintilla in value.]

[is so weak that a favorable verdict based on it would necessarily be attributable to passion or partiality.]

[is such as might conceivably justify men of ordinary reason and fairness in finding for the proponent.]

[is so slight that a favorable verdict would afterwards require to be set aside for lack of appreciable evidence to sustain it.][1] — (W. § 2494.)

Par. (*b*). The test for *decisiveness by ruling on the*
2003 *case* is the same as for sufficiency, except that it is applied to the *opponent's* case.[2]

ART. 4. *Specific Rules of Law for Sufficiency.* The rules of
2004 law for *sufficiency* in specific classes of issues are found

(1) In the provisions of Rules 178–189 (*ante*, §§ 1500–1643); wherever therein a certain kind or quantity of evidence is declared necessary on a particular issue, it is also sufficient to go to the jury.

(2) In the provisions of Rule 228 (*post*, § 2035); wherever therein a certain class of facts is declared to raise a presumption, it also imports a sufficiency; and where it does not raise a presumption, it may nevertheless there be declared to be a sufficiency.[3]

[1] Courts vary in their phrasings. The first bracketed clause above is novel, but attempts to reconcile and improve the current phrasings.

[2] But where the last form in Par. (*a*) is in vogue, the phrase "against the overwhelming weight of evidence" should here be substituted.

[3] For Code purposes the rules of presumption and of sufficiency must be placed together, classified according to the kind of issue.

ART. 5. *Specific Rules of Law for Presumptions.* The tests
2005 for *presumption of law* in specific issues are placed under Rule 228 (*post*, § 2035), classified according to the kind of issue.

ART. 6. *Assuming Credibility of Testimony in Rulings*
2006 *upon Sufficiency or Decisiveness.* In making rulings upon sufficiency or decisiveness, whether on the case or by rule of law, since the judge must avoid exercising the jury's functions of determining the credibility of testimony, the ruling must *assume such credibility in favor of the party against whom the ruling is made.* — (W. § 2495.)

In particular,

Par. (*a*). In a ruling on the proponent's *sufficiency* of
2007 evidence, whether on the case or by rule of law,

(1) the credibility of the *proponent's* testimony *must* be assumed;

(2) the credibility of the *opponent's* testimony *may* be assumed

1. in *every case*, for the purpose of declaring, as against him, that the evidence is *sufficient*.

2. or, so far only as *undisputed*, for the purpose of declaring, in his favor, that the evidence is *insufficient*.

Illustration. (1) In an action for injuries caused by negligently starting a car before the plaintiff had alighted, the plaintiff's testimony is (1) that he had not alighted when the car was started; this the conductor denies; the conductor further testifies (2) that the bell was rung before the car started, and (3) that he had told the plaintiff to hurry, before the bell was rung; on the former point the plaintiff agrees. On a ruling as to sufficiency, the judge must assume the truth of the plaintiff's testimony as to (1); the judge may also assume the truth of (2), if he rules for insufficiency; he may assume the truth of (3), if he decides for sufficiency on the facts.

(2) On an issue of delivery of a deed by the deceased, the proponent's testimony stating that the deed was in the deceased's handwriting and was found in the grantee's bank-box, the truth of this testimony must be assumed, in applying any rules as to sufficiency by rule of law.

Par. (*b*). In a ruling on the proponent's *decisiveness*
2008 of evidence, whether on the case or by presumption of law,

(1) the credibility of the *opponent's* testimony ***must*** be assumed;

(2) the credibility of the *proponent's* testimony ***may*** be assumed

1. in *every case*, for the purpose of declaring, as against him, that the evidence is *not decisive;*

2. or, so far only as *undisputed*, for the purpose of declaring, in his favor, that the evidence is *decisive.*

Illustration. (1) In an action for injury caused by the derailment of a car, the defect of the axle is conceded, and the sole contention is that the defendant's agents had used due care in inspecting it and could detect nothing; the car inspector testifies to a record of inspection of axles 4417–4427, including the car 4419, the one in question, and admits that there was no inspection of car 4497; by undisputed testimony the plaintiff then shows that car 4497 was the one derailed and had been in the car-house unused for six months until that day. The judge may rule that the evidence of lack of inspection of car 4497 is decisive on the case.

(2) On an issue of death, the proponent's testimony being that the person left home ten years before and has since not been heard from by any one, a ruling applying the presumption of law must not assume the truth of this testimony, and must therefore instruct the jury to apply the rule if they believe the facts as testified to for the proponent.

2009 ART. 7. *Form and Effect of Ruling upon Sufficiency or Decisiveness.* A ruling upon sufficiency or decisiveness may have the *effect*

(1) of precluding further contention in *that case only*, — under the term " nonsuit " or otherwise;

(2) or, of precluding further contention *in any proceeding*, — under the term of " direction of a verdict " or otherwise.

A ruling may in *form* be

(1) an *order entered* by the judge,

(2) or, an *instruction* or a *direction* by the judge to the jury. — (W. § 2495.)

2010 *Par.* (*a*). A ruling upon the proponent's ***sufficiency*** of evidence, whether on the case or by rule of law,

(1) If *against him*, [may direct a *verdict for the opponent*, or] may direct a nonsuit, or may strike out a plea.[1]

(2) If in *his favor*, enables him to pass the judge and

[1] A few Courts deny the bracketed clause, but unsoundly.

ask the jury's verdict; subject only to the renewal of the motion as provided in Art. 8 below.

2011 *Par* (*b*) A ruling upon the proponent's *decisiveness of evidence on the case,*

(1) If in his favor, in a civil case, may *direct a verdict for the proponent;* [1] but in a *criminal* case it may not direct a verdict for the prosecution.

(2) If *against* him, leaves him entitled to ask the jury's verdict.

Illustration. In an action for negligent injury, with affirmative plea of contributory negligence, the defendant being the proponent on that plea, a verdict may be directed for the defendant, on the conclusiveness of the evidence of contributory negligence; always observing the rule of Art. 6, Par. (*b*) (*ante*, § 2008), that the credibility of the opponent's testimony, *i. e.* the plaintiff's, must be assumed.

2012 *Par.* (*c*). A ruling upon the proponent's *decisiveness by presumption of law* may, if in his favor, [in a civil case, but not in a criminal case in favor of the prosecution [2]]

instruct the jury, in reaching the verdict, to find as true the fact presumed by law from the fact evidenced,

or, if that presumed fact is the sole fact in the issue, *direct a verdict*

(subject to the rule of Art. 6, Par. (*b*) (*ante*, § 2008) as to assuming the credibility of testimony). — (W. §§ 2490, 2491.)

Illustration. (1) In an action of ejectment, B claiming as heir of M now deceased, the title of the plaintiff depends on three main facts (1) M's title, (2) B's heirship, (3) M's death. If the plaintiff's testimony is that M has been absent for ten years unheard from, the judge will instruct the jury that in reaching their verdict they *must* take M to be deceased, *if* they believe that testimony. Nevertheless, the judge cannot direct a verdict, because the other two facts essential to B's title may be found against him, even though M is found to be deceased. If the sole issue were the fact of M's death, the judge might direct them to return a verdict for B, if they believe the testimony as to M. If that testimony were undisputed, and no other fact were in issue, the judge might direct a verdict for B.

[1] Some Courts deny this, but not soundly.

[2] Most Courts enforce the bracketed limitation.

2013 *Par.* (*d*). A *presumption of law* being only a ruling of the judge declaring that the duty of passing the judge has shifted to the opponent (Art. 2, *ante*, § 1999), the opponent is still entitled to fulfil that duty by introducing sufficient contrary evidence to pass the judge.

Therefore,

(1) In ruling upon a presumption of law *before the close* of the case, the judge must state that the presumption is subject to be so removed.

(2) In ruling upon evidence introduced *before the close* of the case for that purpose of *removing the presumption*, the judge must observe the rule of Art 6, Par. (*b*) (*ante*. §2008) as to assuming the truth of the testimony.

(3) In ruling upon a presumption *after the close* of the case, the judge must *instruct the jury* that the rule of presumption does not control them if they believe the testimony of the opponent denying the facts which would create the rule of presumption, or adding new opposed facts.

[(4) If the jury, after such instruction, find on testimony believed by them that the facts are not precisely those which create the presumption as a rule of law controlling them, they are *no longer to observe it as a rule of law*, but only as a maxim of experience, and are to weigh all the facts on both sides, subject only to the rules as to jury-doubt in Rule 227 (*post*, § 2022).][1]

Illustration. (1) On the issue of the death of M, in Illust. (1), Par. (*c*) above, the proponent introduces his testimony to M's absence, and rests. The judge rules that by presumption of law M is dead, if that testimony be believed. The opponent then introduces a letter from M in Australia, dated a year ago, and telling of his prosperity; this letter the proponent maintains to be a forgery. The judge would rule the letter to be sufficient to remove the rule of presumption, but he cannot assume its genuineness as against the proponent. The case is submitted to the jury, with instructions to find

[1] This is the orthodox rule; but some Courts give a vague extra force to the presumption.

There is here much room for vain quibbling; it would be an improvement if Courts would avoid trying to enforce the theory of presumptions in the actual handling of cases. The rules should never be allowed to become the masters, but should be merely servants to help in solving real doubts and cutting short futile speculations.

the fact of death, by presumption of law, if they believe the letter not genuine; and if they believe it genuine, to weigh all the facts and reach their belief controlled by no rule except that the risk of jury-doubt is on the proponent B, who claims title through M's death.

2014 *Par.* (*e*). In applying the foregoing rules, a *counter-presumption* may by rule of law shift back to the proponent again the duty of passing the judge. — (W. § 2493.)

Illustration. In an action for injury caused by derailment of a car, the plaintiff's undisputed testimony shows the derailment to have been caused by a broken axle. The judge may rule this to raise by rule of law a presumption of negligence. The defendant may introduce some evidence of malicious track-obstruction by a third person, which the judge may rule to be sufficient for leaving the matter to the jury again. But further the defendant may introduce testimony to the system of daily inspection of each axle, and of careful purchase of rolling-stock. The judge may then rule that if the jury believe this testimony, a presumption of due care arises by rule of law. This presumption would then control, unless before closing the plaintiff introduced testimony that the particular axle was seen to be cracked at the station before the derailment; in which event the judge would leave the issue again open to the jury.

2015 ART. 8. *Time of Motion for Ruling of Sufficiency or Decisiveness.* A ruling on a motion to direct a verdict for insufficiency or decisiveness, made by an opponent, is only *discretional* and *provisional* if made *before* the opponent has closed his case by introducing such evidence as he wishes;[1] after that time, it is *mandatory* and *final*. — (W. § 2496.)

Hence,

2016 *Par.* (*a*). A motion so made at the close of the proponent's evidence alone, and *without* a declaration by the *opponent closing his case*, need not be ruled upon.[1]

2017 *Par.* (*b*). If it is then made, and is ruled upon *against* the opponent, he may proceed to introduce his own evidence,[1] and may thereupon *renew* the motion.

[1] On a demurrer to evidence, the opposite is the rule; hence some Courts perhaps still follow the practice for demurrers to evidence, where that form takes the place of a motion to direct a verdict.

2018 *Par.* (*c*). If the opponent does *not then renew* it, he *waives an error* in the provisional and discretionary ruling against him.

2019 *Par.* (*d*). If the opponent does then renew it, and the ruling is then made against him *correctly*, an *error* in the provisional and discretionary ruling against him is *cured*.

2022 RULE 227. *Risk of Jury-Doubt; Measure of Persuasion for Jury; and Rules of Risk for Parties.* The jury's state of persuasion as to the truth of an issue may be (1) either that they believe one or the other side of the issue (2) or that they are in doubt without believing.

(1) If the jury reach a belief, as determined by the standard defined in Arts. 1 and 2 below, they must render a verdict on that issue for the party whose contention they believe.

(2) If they do not reach such a belief for either party, they must render a verdict on that issue for the party who has the risk of doubt, as determined by Art. 3, below, and Rule 228 (*post*, § 2035).

2023 ART. 1. *Measure of Persuasion in Criminal Cases.* The belief of the jury in a criminal case is measured by the following standards: — (W. § 2497.)

Par. (*a*). Wherever the issues are such that the risk of doubt is *exclusively on the prosecution* (as determined by the rules of pleading and of the parties' risk of doubt), their belief must amount to a sense of *being morally certain beyond any reasonable doubt*, *i. e.* in favor of the prosecution's contention on that issue.

2024 [*Par.* (*b*). In so far as there is also an issue in which the risk of doubt is *on the defendant*, as determined by Rule 228 (*post*, § 2035) their belief must reach only the measure appropriate to *civil cases*.] [1]

2025 [[*Par.* (*c*). The definition of such belief is not to be made by the trial judge to the jury in any other form of

[1] In some Courts an issue *e. g.* of insanity places the risk of doubt on the defendant.

words as matter of law; but he may illustrate to them his own idea of this definition, without review on appeal.[1]]

2026 [*Par.* (*d*). The belief thus defined is a belief upon the issue *as a whole*, and not a belief as to separate facts forming part of the issue.[2]]

2027 ART. 2. *Measure of Persuasion in Civil Cases.* The belief of the jury in a civil case may amount to

(1) a sense of *seeing a preponderance of all the evidence*,

or (2) a sense of being *safely and surely convinced*,[3]

or (3) a sense of being *morally certain beyond any reasonable doubt*, as in criminal cases. — (W. § 2498.)

The application of these measures is determined in the ensuing paragraphs.

2028 *Par.* (*a*). The first above measure, a sense of *seeing a preponderance of all the evidence*, applies in all issues in civil cases not expressly excepted below.

2029 *Par.* (*b*). The second above measure, a sense of being *safely and surely convinced*, applies in the following issues:

(1) *Fraud.*

(2) Existence and contents of a *lost will.*

(3) *Mutual mistake* as a ground for *reformation of a document.*[4]

2030 *Par.* (*c*). The third above measure, identical with that applied in criminal cases, applies in the following issues:

[(1) In *defamation*, on a plea of the truth of an assertion of *crime*;] [5]

[(2) In *insurance* actions, on a plea of *arson* by the insured:] [6]

[(3) In *disbarment* proceedings.]

[1] Of course this is not law, but it ought to be.

[2] Some Courts practically deny this.

[3] This phrase is a substitute for "clear and convincing proof," as used for several civil issues; it better expresses the medium between the other two standards.

[4] On a few other issues, such phrases are sometimes used.

[5] A few Courts accept this, or used to.

[6] This is occasionally found.

[*Par.* (*d*). The rules of Par. (*c*) and Par. (*d*) in Art.
2031 1, above, apply here also.]

ART. 3. *Rules of Risk of Doubt, for Parties.* The rules
2032 allotting the risk of jury-doubt to the respective parties are given in Rule 228 (*post*, § 2033), together with the rules for allotting the duty of passing the judge, classified according the various subjects of issues.

TITLE II:

PRESUMPTIONS AND BURDENS IN SPECIFIC ISSUES

RULE 228. *Rules for Specific Issues.* (1) The rules for
2033 allotment of the *risk of jury-doubt* in a given subject of litigation depend ultimately upon the same general considerations as the allotment of pleadings, *i. e.* that party has the risk of doubt who in view of general experience in that class of litigation can in fairness be expected to adduce the evidence with most fullness and least hardship.

(2) The rules for allotment of the *duty of passing the judge* on a given issue depend ultimately on general experience as to the usual occurrence of the fact evidenced as making probable the fact to be proved, and as to the respective facility of proof for the parties. Where these combine in a high degree, a rule of presumption may arise; where in lesser degree, a rule of sufficiency.

Par. (*a*). *Presumptions and Rules of Admissibility.*
2034 Every rule of presumption is based on experience in the probative value of some one fact or set of facts inducing belief of the other fact; hence,

every presumption makes use of some evidential process recognized in the ordinary logic of proof; and,

any presumption may have some corresponding rule of admissibility as classified in Part I of this Code.

The difference is that the rule of admissibility merely presupposes the one fact to have some appreciable probative value towards the other fact; while the rule of presumption presupposes the probative value to be so strong that the latter fact may immediately be taken to be true, unless some other contrary evidence appears.

Illustrations. (1) To show a person's death, his departure from home in a ship, the loss of the ship, and the absence of news since that time, are evidential, on the principle of

negative traces retrospectantly evidencing an act (Rule 41. Art. 9. *ante*, § 295). But a rule of presumption may also be found on these and other facts together (Art. 23, *post*, § 2084).

(2) To evidence the doing of an act, a person's habit or system of doing it is in general evidential, as a prospectant circumstance evidencing an act (Rule 36, *ante*, § 170). But a particular habit or custom, viz. that of the government postal service in delivering letters, may be of such probative value as to raise a presumption (Art. 18, *post*, § 2068).

(3) The testimony of a qualified official, given by extra-judicial certificate or entry, may be admissible under Rule 148 A, Art. 5 (*ante*, § 1110) to evidence the contents of a deed recorded by him as duly executed. But the usual correctness of such testimony in experience be so notable that a rule of presumption may be founded on it (Art. 18, *post*, § 2068).

(4) The experiential qualifications of a witness depend on a variety of circumstances, and for each witness these circumstances are ascertained and passed upon before admitting his testimony (Rule 83, Art. 3, *ante*, § 381). But if, conceivably, experience could show that the diploma of certain technical schools or boards was with fair regularity so granted as to signify competence in specific subjects, continuing to the time of trial, then a rule of presumption might be made applicable, on production of such diplomas.

(5) By Rule 73, Art. 4 (*ante*, § 352) the breaking of a rope in a factory may be admitted as a piece of evidence to show the defective condition of the machinery. But if in experience a certain class of such occurrences is due generally to defective materials whose defects could with due care have been discovered, then a rule of sufficiency or even a rule of presumption (Art. 11, *post*, § 2062) might be applied to that evidential fact.

ART. 1. *General Tests for Risk or Duty.* There is no general
2035 test for the incidence of the risk of jury-doubt, nor for the rules of presumption or of sufficiency for passing the judge. — (W. § 2486.)

In particular,

Par. (*a*). That the party having as a part of his case
2036 an allegation *affirmative in form* has the risk or duty is not a general test.

Par. (*b*). That the party who apparently has *peculiar*
2037 *accessibility* to the facts has the risk or duty is not a general test.

2038 *Par.* (*c*). The incidence of the risk or duty is determined by rules separately applicable to each ***kind of fact in issue.***

2039 *Par.* (*d*). For the *risk of jury-doubt*, the rules of pleading supply in the first instance the specific rules for risk of jury-doubt, *i. e.* the party who must plead a fact in order to make it available in law has the risk of jury-doubt on that fact when in issue. Where no rule of pleading obtains, the risk may further be subdivided on the facts belonging under a single issue of pleading.

2040 *Par.* (*e*). The duty of *passing the judge* falls in each instance first upon the party having the risk of jury-doubt, pursuant to Rule 226, Art. 1 (*ante*, § 1998).

2041 ART. 2. *Sanity in Civil Cases.* In civil cases, the risk of jury-doubt as to sanity is on the party affirming the doing of a legal act in which sanity is an element of validity. — (W. § 2500.)

Par. (*a*). In a *testamentary* cause, the fact of the testator's sanity is presumed from the fact of his formal execution of the will, [with additionally some evidence specifically of sanity.] [1]

Cross-reference. Where some evidence specifically of sanity is required, the rule for putting in the entire testimony on the case in chief, and not waiting until rebuttal (Rule 163, Art. 5, *ante*, § 1365), becomes important, and often creates an unfair dilemma.

2042 *Par.* (*b*). For title by *deed*, the risk of jury-doubt is [on the party disputing the deed.]
[on the party claiming under the deed, but the formal execution raises a presumption of sanity.]

2043 *Par.* (*c*). For an *insurance* policy not payable on death by sane suicide, the risk of jury-doubt as to sane suicide is [on the insurer], and the fact of suicide raises [no] presumption of insanity.

[1] Courts differ on the bracketed clause.

ART. 3. *Sanity in Criminal Cases.* The risk of jury-
2045 doubt as to the sanity of the accused is

[on the prosecution, but the doing of the criminal act raises a presumption of sanity.]

[on the accused, subject to the measure of belief specified in Rule 227, Art. 1, Par. (*b*) (*ante*, § 2024).] — (W. § 2501.)

ART. 4. *Undue Influence or Fraud in Wills.* The risk of
2046 jury-doubt as to undue influence and fraud in testamentary causes is

[on the party propounding the will.]

[on the party disputing the will,

subject to the same rule of presumption as in Art. 5.] — (W. § 2502.)

ART. 5. *Undue Influence or Fraud by Beneficiary Grantees.*
2047 The risk of jury-doubt as to undue influence or fraud by the beneficiary is on the party disputing the deed; and the confidential relation of a beneficiary who has drafted or advised the terms in his own favor may by a ruling on the case be deemed decisive of fraud or undue influence.[1] — (W. § 2503.)

ART. 6. *Conveyances Fraudulent against Creditors.* In a
2048 conveyance disputed on the ground of fraud against creditors, the risk of jury-doubt is on the party disputing the conveyance. — (W. § 2504.)

But there are presumptions as follows:

Par. (*a*). Of *fraud*, from the fact of the debtor's *reten-*
2049 *tion of possession;*

Par. (*b*). Of *good faith*, from the grantee's payment of
2054 value.

Cross-reference. For the presumption of grantee's *title* from his *possession*, see Art. 16 (*post*, § 2067).

ART. 7. *Marriage Consent, from Cohabitation or Ceremony.*
2055 The risk of jury-doubt as to the fact of marriage-consent is

[1] Such rulings are frequent, but there is hardly a general rule of presumption.

on the party affirming the marriage. But there are presumptions as follows: — (W. § 2505.)

2056 *Par.* (*a*). Cohabitation [and repute] raise a presumption of consent.

2057 *Par.* (*b*). Continued cohabitation after removal of an initial impediment raises a presumption of consent.[1]

2058 *Par.* (*c*). Performance of a ceremony raises a presumption of all facts essential to its validity.

2059 ART. 8. *Marriage Capacity.* Where the lawfulness of a later marriage depends upon a party being capable, and that party appears already by ceremony or cohabitation to have been married to another person so as to lack capacity for the second marriage, [the second marriage raises a presumption of capacity existing by reason of termination of the former status or by reason of the first marriage's invalidity or otherwise; but if this presumption is removed by some evidence to the contrary additional to the mere fact of the prior marriage, then the case is open to the jury on all the evidence];[2] the risk of jury-doubt being on the party affirming the lawfulness of the second marriage, unless the pleadings otherwise require.

2060 ART. 9. *Negligence Contributory by a Plaintiff.* The risk of jury-doubt on the fact of contributory negligence of a plaintiff in an action of tort for damage to person or property is [on the plaintiff.]

[on the defendant; but by presumption of law or by ruling on the case, based on the plaintiff's conduct, the duty of passing the judge may be shifted to the plaintiff.][3] — (W. § 2507.)

[1] There are here variant details in different Courts.

[2] The precedents are hopelessly opposed; the above rule seems simple, and avoids the artificial logic often found in the opinions.

[3] Most Courts accept the second bracketed clause; the detailed rules based on the plaintiff's conduct are bound up with the rules of substantive law as to negligence *per se*.

2061 ART. 10. *Negligence of Bailee.* In an action against a bailee for the non-return of goods delivered to him,

[(1) the risk of jury-doubt as to facts creating liability is on the bailor;

(2) but the duty of passing the judge is shifted by presumption of law to the bailee if the goods were destroyed or lost or refused;

except where by Art. 29 (*post*, § 2093) governing express contracts, a different rule is provided.][1] — (W. § 2508.)

2062 ART. 11. *Negligence in Defective Machines and Apparatus.* In an action for injury to goods or person caused by means of machines, vehicles, place, or apparatus,

[(1) the risk of jury-doubt is on the plaintiff;

(2) but the duty of passing the judge is shifted by presumption of law to the defendant if

1. The party charged was in control of the injurious thing at the time,

2. And the thing is ordinarily not injurious except for lack of proper construction, inspection, or user,

3. And the injury occurred without voluntary action by the injured person.][2] — (W. § 2509.)

Distinguish the rules of substantive law as to negligence *per se*, *e. g.* for fire set by railroad locomotives, animals killed on a railroad track.

2063 ART. 12. *Cause of Death.* Where a person dies, and it is material in law whether his own intent or negligence, or that of a third person, caused his death,

[(1) the risk of jury-doubt is determined by the nature of the issue under other rules;

(2) if the risk of jury-doubt is on a plaintiff basing some right upon the death, the duty of passing the judge is shifted by presumption of law that the death was not self-caused with intent or negligence.][3] — (W. § 2510.)

Illustrations. (1) In a life-insurance policy, the risk of jury-doubt for the plaintiff extends only to the fact of death (by

[1] There is here great variety of rule on all details.

[2] There are here various other tests; some of them are limited to particular classes of apparatus.

[3] Here a variety of forms of rule is found.

the contract-rule), and for suicide the insurer has the risk of jury-doubt from the start; hence no presumption is needed. But if in accident-insurance accident is a part of the plaintiff's case, and the risk of jury-doubt as to accident is therefore on the plaintiff, then the presumption would enter to help him.

(2) In an action for death at a railway crossing, if by Art. 9 the risk of jury-doubt as to contributory negligence is already on the plaintiff, then the presumption of the deceased's care (where the body is found by the track, and no eye-witnesses appear) will assist the plaintiff. But if the risk of jury-doubt is on the defendant at the outset, no presumption is needed; and of course no Court maintains in such cases a presumption of lack of care.

2064 ART. 13. *Criminal Intent.* Where a specific mental state — knowledge, intent, or the like — is material to a penal liability,

(1) the risk of jury-doubt is on the prosecution;

(2) but the duty of passing the judge may be shifted to the defendant, by presumption of law, in particular issues by particular conduct of the defendant.[1] — (W. § 2511.)

Illustration. The possession of intoxicating liquor in a shop, may raise a presumption of intent to sell.

Distinction. The common-law "presumptions," so-called, here are usually rules of substantive law, *e. g.* that of malice from the use of a deadly weapon.

2065 ART. 14. *Criminal Capacity.* Where a penal liability depends on a particular mental or moral capacity,

(1) the risk of jury-doubt is on the prosecution;

(2) the duty of passing the judge is shifted to the defendant by presumption of law in the following cases: — (W. § 2514.)

Par. (*a*). In every case, where *intoxication* is brought into issue in mitigation.

Par. (*b*). Where *age* is brought into issue in mitigation, if the defendant is over fourteen years of age.[2]

[1] At common law, few Courts have acknowledged any real presumptions against the defendant in a criminal case; but hundreds of statutes have made rules of "*prima facie* evidence," which apparently means a rule of presumption.

[2] Under juvenile court laws, this figure is higher.

Par. (*c*). Where *sanity* is brought into issue, as provided in Art. 3 above.

Par. (*d*). Where *coercion* of a wife by a husband is brought into issue, if the husband was present when the wife acted as charged.

2066 ART. 15. *Criminal Acts.* In all criminal issues as to the doing of the act charged.

(1) the risk of jury-doubt is on the prosecution;

(2) the duty of passing the judge does not shift to the defendant by any presumption of law;

except as follows:[1] — (W. §§ 2512, 2513.)

[*Par.* (*a*). The grant of a *license* to do an act; here the risk of jury-doubt is on the defendant.]

[*Par.* (*b*). *Self-defence,* on a charge of corporal violence; here the risk of jury-doubt remains on the prosecution, but the duty of passing the judge is on the defendant.]

[*Par.* (*c*). *Larceny* and other forms of criminal taking from another's possession; here the risk of jury-doubt remains on the prosecution; but the duty of passing the judge is shifted to the defendant, if the defendant was found in exclusive possession of the goods recently after their loss; and this duty is satisfied by some evidence in explanation.]

2067 ART. 16. *Ownership, from Possession.* Where ownership of property by a particular person is material,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge is shifted to the opponent, by presumption of law, if the person in question was in possession of the property at the time. — (W. §§ 2515, 2516.)

This rule applies

Par. (*a*) to *real property;*

Par. (*b*) to *chattels;*

[1] In all these enumerated acts, there is variance of rule.

Par. (*c*) to *negotiable instruments.*[1]

ART. 17. *Payment.* Where the payment of an obligation
2068 of contract is in issue,

(1) the risk of jury-doubt is on the party claiming discharge by payment;

(2) the duty of passing the judge is shifted to the opponent by presumption of law in the following cases: — (W. §§ 2517, 2518.)

Par. (*a*). By *lapse of time,* depending on a ruling on the case;

[*Par.* (*b*). By a written *receipt* in full;]

[*Par.* (*c*). By the obligor's *possession of the instrument* of obligation after maturity.]

ART. 18. *Documents; Execution, Delivery, Revocation,*
2069 *Spoliation, Alteration.* Where the execution or the delivery of a document is material,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge is shifted to the opponent by presumption of law in the following cases: — (W. §§ 2519–2525.)

Par. (*a*). As to the *authorship* of a *letter* or *telegram,*
2069*a* its arrival in due course of reply to another already sent to the purporting author, is by rule of law a sufficiency, but not a presumption.

Cross-reference. For admissibility on this point, see Rule 191, Arts. 3, 4 (*ante,* §§ 1625–6).

Par. (*b*). As to *execution* of a *deed,* the *public lawful*
2070 *recording* raises a presumption.

Par. (*c*). As to *delivery* of a *deed,* the *grantee's possession*
2071 raises a presumption.

Par. (*d*). As to *date* of a document's *signature,* the

[1] Here several variant forms are recognised.

2072 *purporting date* raises a presumption; except in the case covered by Rule 139, Art. 3 (*ante*, § 973).

Par. (*e*). As to *execution* of an *official document*, the
2073 purporting seal of a purporting officer raises a presumption wherever it furnishes a sufficiency under Rule 193 (*ante*, § 1633).

Par. (*f*). As to *execution* of an *ancient* document, its
2074 age, custody, and appearance furnish a sufficiency as provided in Rule 190 (*ante*, § 1608), [and also a presumption].

Par. (*g*). As to *execution*, *contents*, and *loss* of a *deed*
2075 *of grant*, the long-continued *possession* of the land may raise a presumption.[1]

Par. (*h*). As to the *execution* of a will, the *attesting*
2076 *signatures* furnish a sufficiency, as provided in Rule 130, Art. 9 (*ante*, § 886) [and also raises a presumption].

Par. (*i*). As to *revocation* of a *will* by *destruction*, the
2077 disappearance after the testator's death of a will once executed may furnish a sufficiency by ruling on the case [and also a presumption].

Par. (*j*). As to the *contents* of a document, the *spoliation*
2078 or *suppression* of it by its possessor may furnish a sufficiency by ruling on the case, pursuant to Rule 118, Art. 4 (*ante*, § 654), that its contents are as alleged by his opponent, [and also a presumption].

Par. (*k*). As to the *alteration* of a document having
2079 been made upon it *before* or *after execution*,

[(1) The risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge may be shifted to the opponent by ruling on the case.]

ART. 19. *Legitimacy.* Where the fact of parentage of a
2080 husband is material in an issue of *legitimacy*,

[1] This is virtually a rule of substantive law, as often applied, and depends somewhat on local statutes.

(1) the risk of doubt is determined by the nature of the action;

[(2) the duty of passing the judge is shifted by presumption of law, if the child was born after marriage of the mother and husband;

(3) if there was cohabitation as husband and wife, no further fact need in law be established.] — (W. § 2527.)

ART. 20. *Chastity.* Where the fact of chastity is material,
2081 (1) the risk of doubt is determined by the nature of the action;

[(2) the duty of passing the judge is not shifted to the opponent by any presumption of chastity.] — (W. § 2528.)

ART. 21. *Identity of Person.* Where the identity of two
2082 personages as one being is material,

(1) the risk of jury-doubt is on the party to whose case identity is necessary;

(2) the duty of passing the judge may be satisfied by a ruling on the case as to sufficiency [and may be shifted to the opponent by ruling on the case,] if the two personages are substantially identical in name and other circumstances co-exist. — (W. § 2529.)

ART. 22. *Continuity of Ownership, Possession, Residence,*
2083 etc. Where the fact of ownership, possession, residence, or other human relation to things or places is material in point of time,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge may be satisfied by a ruling on the case as to sufficiency [and may also be shifted to the opponent by a ruling on the case], if the ownership or other relation existed at a time before or after and was likely to be continuous. — (W. § 2530.)

ART. 23. *Continuity of Life; Death; Survivorship.* Where
2084 the fact of a person's being alive at a certain time is material,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge may be satisfied or shifted as follows: — (W. §§ 2531, 2532.)

Par. (*a*). For a party having the risk of jury-doubt as to one's *being alive*, the duty may be satisfied by ruling on the case as to sufficiency or decisiveness, if the person was alive at a time before or after and the life was likely to have been continuous.

Par. (*b*). For a party having the risk of jury-doubt as
2085 to one's being *not alive* (deceased),

(1) the duty may be satisfied by a ruling on the case as to sufficiency;

(2) and is shifted to the opponent by presumption of law if the person alleged as deceased has been (a) absent from his home (b) unheard from (c) during seven years before the time at which death is material;

(3) and may also be shifted by ruling of decisiveness on the facts, if a period of natural life has elapsed since his last known time of being alive.

Par. (*c*). For a party having the risk of jury-doubt
2086 as to one person being alive after another had died,

(1) the duty may be satisfied by ruling of sufficiency on the case [and may be shifted by presumption of law based on specific circumstances where both persons died in a common calamity].

[[(2) In every case, where such deceased persons have made testamentary provisions substantially identical, the survivorship becomes immaterial, and such testamentary provisions shall be deemed applicable, whether or not the risk of jury-doubt or the duty of passing the judge is fulfilled.]] [1]

ART. 24. *Seaworthiness.* Where the seaworthiness of a
2087 vessel is material,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge may be satisfied by ruling of sufficiency on the case, or may be shifted to the opponent by presumption of law, according to the circumstances of the vessel's loss. — (W. § 2533.)

[1] This is probably not law anywhere, but is needed to prevent the unendurable botch of justice which is likely otherwise to occur in such cases.

2088 ART. 25. *Performance of Official Duty; Regularity of Proceedings.* Where an official act is material, whether as a separate act or as a part of a series of procedural acts,

(1) the risk of jury-doubt is determined by the nature of the action;

[(2) the duty of passing the judge may be satisfied or shifted by ruling on the case, according to the kind of act in question.] — (W. § 2534.)

2089 ART. 26. *Title to Public Office.* Where a person's title to public office is material,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge may be shifted by presumption of law, if the person has publicly acted in that office without contrary repute. — (W. § 2535.)

Distinguish (1) the rule exempting from *production* of the document of *appointment* (Rule 126, Art. 1, *ante*, 806);

(2) the rule of substantive law that the acting as officer *de facto* suffices as against third persons.

2090 ART. 27. *Incorporation.* Where the fact of due incorporation is material,

(1) the risk of jury-doubt is determined by the nature of the action;

(2) the duty of passing the judge is shifted to the opponent by presumption of law, [or by ruling on the case, if there has been a course of action as a corporation].[1] — (W. § 2535.)

Distinguish (1) the admissibility of *reputation* to evidence incorporation (Rule 147, Art. 5, *ante*, § 1084).

(2) the rule of substantive law that a *de facto* corporation is sufficient.

2091 ART. 28. *Foreign Law.* Where the tenor of a rule of foreign law is material,

(1) the risk of jury-doubt is determined by the nature of the action;

[(2) the duty of passing the judge is shifted to the opponent by a presumption of law that the foreign law is identical with

[1] Some such facile mode of raising a presumption is here needed.

the common law of the forum, if the foreign State has accepted the English common law as the foundation of its system, or if a rule of the common law merchant is involved; and also by a presumption that the foreign State has a statute identical with that of the forum, if the statute of the forum is of a class commonly enacted in such States.] [1] — (W. § 2536.)

2092 [[*Par.* (*a*). Where either party demands, the Court must order one or the other to produce evidence of the tenor of the foreign law, and will stay judgment until this is done.]] [2]

Distinguish the doctrine of *judicial notice* of foreign law (Rule 230, Art. 3, *post*, § 2132).

2093 ART. 29. *Contracts.* For facts material in an action on a contract, the risk of jury-doubt is determined by the nature of the contract and the rules of pleading; and the duty of passing the judge is determined by the Articles herein applicable to different kinds of facts.

2094 ART. 30. *Statute of Limitations.* Where the lapse of a time of limitation barring a cause of action is material,

(1) the risk of jury-doubt is [on the party to whose case the bar is essential;

(2) the duty of passing the judge is shifted to the opponent, by presumption of law or ruling on the case, where the latter by his pleading or otherwise has admitted facts which suffice, if unexplained, for that purpose.] — (W. § 2538.)

2095 ART. 31. *Malicious Prosecution.* In an action for malicious prosecution,

(1) the risk of jury-doubt as to all three of the essential facts, namely, favorable termination of the prior proceeding, lack of probable cause, and malice, is on the plaintiff;

(2) the duty of passing the judge may be satisfied or shifted

[1] There is here great looseness and confusion of rulings and the above rule attempts to reconcile them.

[2] No such rule yet exists. But is it not senseless to waste energy and risk mistake on a rule of presumption, inasmuch as the foreign law, in these days, can practically always be ascertained with a little trouble?

by ruling on the case, or by rule of law as follows: — (W. § 2539.)

Par. (*a*). For lack of probable cause, the plaintiff may establish a sufficiency of evidence [or, a presumption of law] by the fact of the magistrate's dismissal of the prior cause.

Par. (*b*). For lack of probable cause, the defendant may establish a counter-presumption, shifting the duty to the plaintiff, by the fact of advice given by counsel on full disclosure of the evidence.

BOOK III:

LAW AND FACT; JUDGE AND JURY.

(TO WHOM EVIDENCE MUST BE PRESENTED)

RULE 229. *General Principle.* As between the trial judge
2100 and the jury, the authority to determine the various issues that may arise in the litigation is allotted as follows: To the jury, the issues of fact; to the judge, the issues of law; except as follows: — (W. § 2449.)

ART. 1. *Facts preliminary to Admissibility of Evidence.*
2101 The judge determines any fact which becomes material to a ruling upon the admissibility of evidence. — (W. § 2550.)

Illustrations. Whether a witness is qualified as an expert; whether a documentary original is lost, so that a copy is admissible; whether a deponent is deceased, so that his deposition is admissible.

Par. (*a*). The judge's finding and ruling have effect
2102 for the purpose of *admissibility* only, but are *conclusive for that purpose.* Hence, when a judge has ruled upon a fact which is by law preliminary to admissibility, and has determined the fact to exist so that the evidence is admitted, the jury does not re-determine or re-consider the fact for the purpose of rejecting the admitted evidence, as being inadmissible by law, if they should find contrary to the judge. The jury may believe or not believe, as they see fit, the preliminary fact; but they are in every case to give the admitted evidence such value as it seems to merit intrinsically, irrespective of any rule of law as to admissibility;

[1] [*except* in the following classes of evidence:

(1) Confessions (Rule 122, Art. 10, *ante*, § 724).

(2) Dying declarations (Rule 138, Art. 6, *ante*, § 964).

Illustrations. (1) A confession is objected to because made under the influence of threats of a police-officer. The judge

[1] A few Courts improperly acknowledge these exceptions.

finds that it was not made under the influence of threats, although threats were used; and admits the confession. The jury are now to consider the confession with the threats, and give to it such great or little weight as they see fit; but they are not to reject it as a matter of law because they may conclude, contrary to the judge, that the threats did influence the confession.

(2) A dying declaration is objected to on the ground that the declarant did not expect a speedy death. The judge finds that he did, and admits the declaration. The jury may then give it such credence as they see fit under all the circumstances; but they are not to reject it, as matter of law, merely because they believe, contrary to the judge, that the declarant did not expect death speedily.

2103 *Par.* (*b*). The judge may for this purpose hear evidence on both sides; and he may meanwhile cause the jury to withdraw.

2104 ART. 2. *Negligence.* The jury determines an issue of negligent conduct, subject to the judge's instructions on rules of law. — (W. § 2552.)

2105 *Par.* (*a*). The jury must observe the rules of law, if any, which not merely define the legal tests of negligent conduct in the abstract, but make specific conduct to be negligence *per se;* in such case the jury have no issue of negligence in general to determine.

Illustration. In an action for injury done by a motor-car running over a foot-passenger, the judge may state to the jury the definition of negligence or due care, and then they will apply it to the facts as found by them. But if there is a specific rule of law that the driving of a car at a greater speed than twenty miles an hour is *per se* negligent, the jury can no longer deliberate on the quality of negligence, but must find for the plaintiff if in fact the car-speed was exceeding the limit. This is not an exception to their function of deciding on the facts; rather, the issue has ceased to be one of fact.

2106 [*Par.* (*b*). Where the facts are *undisputed* [and fair-minded men could draw but one inference from them], the question of negligence is for the judge.] [1]

[1] Many Courts use this phrasing, with some variations. But it is really not an exception under the present rule; it is merely another way of stating the judge's function of ruling on sufficiency of evidence, under Rule 226, Art. 3 (*ante*, § 2002).

Illustration. In an action for injury by a train at a street-crossing, the plaintiff testifies that he looked and saw the train coming and supposed that he had plenty of time to cross the track safely. As matter of law, this may be not contributory negligence *per se* (under Par. (*a*) above), and remains a question of fact. But since the judge may assume, as against the plaintiff, the truth of his own testimony, he may take the fact to be as stated by the plaintiff, and may then, by a ruling of conclusiveness on the case (under Rule 226, Art. 3, *ante*, § 2002), find contributory negligence and direct a verdict for the defendant on that issue. By Par. (*b*) above, this would be an instance of the issue of negligence determined by the judge; but it is equally and better explainable as a ruling under Rule 226.

2107 ART. 3. *Reasonableness.* The jury determines an issue of reasonableness, subject to the judge's instructions on rules of law.[1] — (W. §§ 2553, 2554.)

2108 *Par.* (*a*). The jury must observe the *rules of law* which make specific conduct to be reasonable or unreasonable *per se*.

Illustrations. A payee's notice to an indorser of non-payment of a note, mailed on the Monday after the Friday of non-payment, may by law not have been sent within a reasonable time, if there is a specific rule for cities that twenty-four hours is the maximum reasonable time.

2109 *Par.* (*b*). The judge may make a ruling of sufficiency or of *conclusiveness*, here as in other issues, pursuant to Rule 226, Art. 3 (*ante*, § 2002).

Illustration. In an action against the owner of a store abutting on the highway, for obstructing the highway an unreasonable time by the delivery of goods, the undisputed testimony may show that the obstruction continued for half an hour only and was caused by a broken truck-wagon. The judge may, by ruling on the case, hold that there is not sufficient evidence of unreasonableness to go to the jury.

2110 ART. 4. *Documents.* The existence, execution, contents, and meaning of a document are determined by the jury; the construction of its terms in their legal effect is for the judge;

[1] The rulings in which reasonableness is determined by the judge are mostly explainable under Par. (*a*) or Par. (*b*). But there is in some jurisdictions early authority for leaving reasonableness in general to the judge.

subject to the following details and qualifications: — (W. § 2556.)

2111 *Par.* (*a*). The judge determines the existence and tenor of a *domestic judicial record*, including that of any court in the dominion of the United States; [[and also of any official document foreign or domestic.]] [1]

2112 *Par.* (*b*). The sense of the parties' words in the document, [in so far only as extrinsic circumstances are in any way resorted to for aid in showing that sense, or in so far as oral utterances also form part of the transaction with the document,] is for the jury; but the legal effect which is by rule of law attached to any terms in the document is determined by the judge and stated by him in instructions to the jury.[2]

Illustrations. (1) In an action on a contract for sale of goods, the buyer agrees that "no delivery of a subsequent instalment shall be called for until prior instalments are paid for." It appears that this clause was printed on the foot of a form-blank and was cancelled in red ink. One prior payment had been made by a note for 30 days, and another had been paid for by certified check, but the amount due was in dispute. The judge will here determine (1) the legal effect of the condition as to exempting the seller from an action for breach of contract by rescinding *in toto* on a single default, (2) the legal validity of the cancelled clause, as having been struck out by the buyer on signing after the seller, (3) and perhaps the legal effect of a certified check as payment; but the jury will determine (4) whether under all the circumstances the amount paid was the amount due and payable, and (5) perhaps whether by trade usage and mutual circumstances the term "paid" signified payment in cash or otherwise.

(2) In a will devising land described by metes and bounds "to M and his heirs if any," the judge will determine the effect of the *habendum* clause, and the jury will determine the application of the description to specific land.

2113 ART. 5. *Criminal Intent.* The intent in an act charged as a crime is determined by the judge, so far as it is a matter of substantive law or of rules of presumption under Rule 228,

[1] This clause ought to be law, but is not.

[2] The judicial phrasings are here more or less inconsistent. The bracketed clause is apparently law in some Courts; but on principle its limitation is unsound, in view of the principles of interpretation noticed in Rule 222 (*ante*, § 1958).

Art. 13 (*ante*, § 2064); but by the jury, so far as it is a matter of fact. — (W. § 2557.)

Par. (*a*). In criminal *libel*, the intent is matter of
2114 fact.

Art. 6. *Law.* The existence and tenor of any rule of law,
2115 and its force as applying to any given state of facts, is determined by the judge; except as follows:

[*Par.* (*a*). A rule of *foreign* law is determined by the jury].[1] — (W. § 2558.)

[*Par.* (*b*). A rule of *local* law may in *criminal* cases be
2116 determined by the jury, in so far that the jury are entitled to disregard the judge's instructions if they believe them not to be correct in statement.][2] — (W. § 2559.)

[1] Most Courts so hold, but it is unsound in principle and in policy.

[2] This absurd and subversive doctrine obtains in a few States.

BOOK IV:

OF WHAT PROPOSITIONS NO EVIDENCE NEED BE PRESENTED

TITLE I: JUDICIAL NOTICE

RULE 230. *General Principle.* The judge is authorised
2120 to dispense with the introduction of evidence on a proposition to be proved which can safely be assumed by him to be true, until disputed by contrary evidence. — (W. §§ 2565, 2566.)

(*Reason and Policy.* The object of this rule is to save time, labor, and expense in securing and introducing evidence on matters which are not ordinarily capable of dispute and are actually not *bona fide* disputed, and the tenor of which can safely be assumed from the tribunal's general knowledge or from slight research on its part. The foundation of the rule is that the opponent does not actually or *bona fide* dispute the fact, and that therefore the introduction of evidence would be a burdensome formality. Hence, on the one hand, the scope of the rule can afford to be very broad, in the absence of real dispute; and on the other hand, it must never be used to prevent the demonstration of the actual incorrectness of the assumption, if by evidence the opponent is *bona fide* ready to attempt to do so. It thus becomes a useful expedient for speeding trials and curing informalities.)

Distinguish (1) the question whether a fact capable of being judicially noticed *need not be alleged in a pleading*, or may be *corrected if erroneously alleged;* this is a further question of the law of pleading, and its decision may not be the same, though it often is.

(2) The question whether a judge must *accept the determination of another constitutional body*, such as a legislature declaring war or an executive recognising a foreign State.

Par. (*a*). The judicial notice of a fact is only a pro-
2121 visional ruling, which becomes conclusive if not *bona fide* disputed; the party disfavored by the fact may therefore *introduce evidence to the contrary.* — (W. § 2567.)

2122 *Par.* (*b*). If the matter is one of a class falling within the jury's function to determine under Rule 229 (*ante*, § 2100), the *jury must take the fact* as noticed by the judge; [unless evidence to the contrary is introduced, in which case the jury determine the fact for themselves.][1] — (W. § 2567.)

2123 *Par.* (*c*). If the matter is one of a class falling within the judge's province to determine, the rule of Par. (*a*) applies correspondingly.

2124 *Par.* (*d*). The judge is not bound, either at the trial or on appeal, to notice a fact in every instance, solely because it falls within a class described in the ensuing articles; those rules define the classes of facts which he is *authorized to notice*, but leave him free to decline to notice any particular fact where under the circumstances he deems it safer to require the introduction of evidence.[2] — (W. § 2568.)

2125 *Par.* (*e*). The judge may *investigate* or refresh his memory with any sources of information, for the purpose of ruling whether a fact is suitable and safe to be noticed; and, as a means therefor, may consult materials furnished by the parties themselves.

Illustrations. The judge may look at the statute-book, an almanac, a map, a dictionary, or the records of the court; and it is immaterial whether he finds the documents himself or looks at one supplied by a party publicly in court; the theory being that the fact may be one inherently not capable of serious dispute, and yet its precise tenor may not be present in his mind until reference is had to some source of information, *e. g.* whether last July 4 fell on Sunday or Monday.

2126 *Par.* (*f*). In determining that a fact should be judicially noticed the judge is not to consider any *information* acquired *from sources personal and private to his own experience* and not common to the parties and the public

[1] Some Courts and Codes apparently are *contra* to this clause, but principle and policy require it.

[2] This is orthodox in theory, and highly salutary; but in practice many or most judges ignore it. It makes possible the broadest use of the rule, by authorizing notice freely while not compelling it in any case.

at large; such personal information can be availed of only by his taking the stand as a witness, pursuant to Rule 156, Art. 2 (*ante*, § 1270) and Rule 167, Art. 2 (*ante*, § 1404). — (W. § 2569.)

Illustration. A statute forbade an appearance by professional attorney in a justice' court unless the party was prevented from personal attendance by sickness or by absence from the county. The judge may not notice that the party is absent from the county because he is a brother of the party and saw him yesterday depart on the train. The judge may notice that a particular person appearing is an attorney, because it is a matter of court record.

2127 *Par.* (*g*). The judge may authorize the *jury also* to notice any fact, of a class described in the ensuing articles, which they from general experience may believe to be safely assumable as a fact usually plain without evidence formally introduced, even though the judge is himself not prepared to state as matter of law the precise tenor of such fact to be noticed; subject to the foregoing limitations (*Par.* (*f*)) as to not using their private sources of information, and (*Par.* (*b*)) as to considering contrary evidence.[1] — (W. § 2570.)

Illustrations. Whether in general a person in danger will try to save himself by calling for help; whether a game played with bone-counters is usually played for money.

2130 ART. 1. *Classes of Facts authorized to be Noticed.* The classes of matters which are authorized to be judicially noticed are as follows:

A. Matters which are necessary for exercising the judicial functions and are therefore likely to be already known to the judge by virtue of his office;

B. Matters which are actually so notorious in the community that evidence would be unnecessary;

[C. Matters which are not either necessary for the judge to know nor actually notorious, but are capable of such positive and exact proof, if demanded, that no party would be likely to impose upon the tribunal a false statement in the presence of an intelligent adversary.][2] — (W. § 2565.)

[1] This rule has seldom been given by judges a general phrasing; but the above seems justified.

[2] This class has not been so defined in general, but is represented by numerous precedents.

[[*Par.* (*a*). In exercising the authority to notice judicially, in accordance with the classes of facts above enumerated,

(1) the judge is to regard the enumeration merely as a *guide to his actual belief* that the fact in question can safely be noticed, and not as a rule of compulsion, nor as implying that any fact falling within these classes should be noticed irrespective of the circumstances of the case in hand;

(2) the judge may notice a fact which partly satisfies two or more classes defined without fully satisfying any one, or which as a class should not be noticed, if in the circumstances it may safely be noticed.]] [1]

Illustrations. (1) In an action for fees wrongfully collected in office, the defendant and the plaintiff being rival candidates at an election for Secretary of State, the judge would not notice that one or the other was elected to that office, the title being actually in dispute; yet otherwise he would notice the name of the undisputed incumbent.

(2) In an action for arrest, the Court may notice that in the particular village there is only one justice of the peace and his name is William Sykes, although in general it might not be wise to hold that the names of incumbents of that office would be noticed.

(3) That a certain wharf did not abut from a certain public park might safely be noticed, although the fact could perhaps not be classed strictly as matter of law nor as matter of notoriety.

ART. 2. *Domestic Law.* A rule of law of the forum, contained
2131 in judicial decision or in legislative enactment, is authorised to be judicially noticed; — (W. § 2572.)
and this includes

Par. (*a*). a *public* or general statute;

Par. (*b*). a statute of *municipal incorporation;*

Par. (*c*). a statute of *incorporation* for private companies or public service companies by *general provisions;*

Par. (*d*). a *judgment* declaring a *principle* of law;
but does not include

[1] This paragraph is probably not yet law anywhere in this form; but it represents the spirit of many precedents.

Par. (*e*). a statute of *incorporation* by *special charter;*

Par. (*f*). a *private act;*

Par. (*g*). an ordinance of a *local* governmental office;

[*Par.* (*h*). a regulation of a *Federal* or *State executive* department.]

ART. 3. *Foreign Law.* A rule of law in another forum,
2132 contained in judicial decision or in legislative enactment, is authorized to be judicially noticed in the following cases:— (W. § 2573.)

[[*Par.* (*a*). in a State or Territorial court, the law of another State or Territory or Dependency of the United States.]] [1]

Distinguish the *presumption* as to foreign law (Rule 228, Art. 28, *ante*, § 2091).

Par. (*b*). in a State or Territorial court, the Federal law.

Par. (*c*). in a Federal court, the law of a State or Territory or Dependency of the United States so far as such law is involved in the issue.[2]

Par. (*d*). in any court, the law of any foreign State in so far as by former political connection it furnished a source of legal rules for the system of law in the forum.

[[*Par.* (*e*). in any court, the law of all British dominions.]] [3]

Par. (*f*). in any court, international law, public and private, including maritime and commercial.

ART. 4. *Political Organization and Action.* A fact of
2133 political organization or action is authorized to be judicially noticed as follows:— (W. §§ 2574–2578.)

[1] This is not law (except by statute for the Municipal Court of Chicago), but ought to be.
[2] There is here some narrowness of rule.
[3] This is perhaps not law, but ought to be; and is the rule in practice.

Par. (*a*). the *political action* of a *foreign State*, if internationally notorious.

Par. (*b*). the *open political action* of the (domestic) State, in its *international* relations.

Par. (*c*). the *terms* of description for the *domestic political organization*, as contained in the law defining the powers and methods of government and the duties of officers (provided the law is of a class authorized to be noticed), and the *application* of *such terms*

(1) to a specific *place*

(2) or, to a specific *person*,

in so far as the circumstances may justify.

Illustration. (1) That a State survey has divided a township into blocks would be noticed; but probably not that a given block in the survey includes a specific street; yet the latter location, if actually notorious, ought equally to be noticed.

(2) That a town named Ross is or is not within a county named Earlton might or might not be noticed.

(3) That a circuit court for four counties had by law but one sheriff for each county would be noticed; and that the incumbent of that office is Perry might also be noticed.

Par. (*d*). the *acts* of *public officers*, so far as the circumstances may justify.

Illustrations. The Federal or State census; an executive proclamation; an election of general interest; but not a sheriff's levy, nor a pound-keeper's capture of a stray dog.

ART. 5. *Courts and Judicial Proceedings.* A fact concerning
2134 the organization, incumbency, or proceedings of a court of law is authorized to be judicially noticed as follows (in addition to the rules of law mentioned in Arts. 2 and 3 above): — (W. §§ 2578, 2579.)

Par. (*a*). the *jurisdiction*, organization, terms, and other details contained in legislative enactments;

Par. (*b*). the *rules* of practice [in superior Courts];

Par. (*c*). the *incumbents* of judicial office, their sheriffs, attorneys, and other officers;[1]

[1] Here, of course, by Art. 1, above, notice will not invariably be taken.

cont.

Par. (*d*). the *records* of proceedings in the same litigation or a related one.[1]

Cross-reference. (1) By Art. 2, above, the *principle* of law in any judgment in any specific case will be noticed.

(2) By Rule 126, Art. 8 (*ante*, § 778) and Rule 148C. Art. 7 (*ante*, § 1160), rules of evidence for such records are provided, and these are usually required to be resorted to.

ART. 6. *Notorious Matters of Commerce, Industry, History,*
2135 *Language, Science, etc.* A fact may be judicially noticed which, in view of the state of commerce, industry, history, language, science, or other human activity, is so notorious in the community that the introduction of evidence would be unnecessary. — (W. §§ 2580–2582.)

Illustrations. That July 4 is the anniversary of the Declaration of Independence; that extreme cold is apt to be experienced in railway transportation in January but not in June; that the distance between Chicago and New York is nearly 1000 miles; that a liquor termed "brandy" signifies an alcoholic liquor; that a certain J. S. is the political chief in control of local politics in the city of Rand.

[[ART. 7. *Mixed Matters, presumably not Disputable.* A
2136 fact may be noticed which, does not fall within the foregoing classes, but appears (pursuant to Clause C, Art. 1, above), to be so capable of positive and exact proof, if demanded, that no imposition is likely and that notice may safely be taken.]][2]

Illustrations. That the Monday after July 1, 1899, was July 5; that Confederate government notes were never made legal tender by the Confederate government; that in 1884 trolley-cars had not superseded horse-cars in metropolitan streets; that a certain railroad had installed the block system for train-dispatching.

[1] Here again the authority is broader than is usually exercised.

[2] See note to § 2130.

TITLE II: JUDICIAL ADMISSIONS
(WAIVER BY STIPULATION)

RULE 231. *General Principle.* A requirement for evidence
2140 ceases to apply where the opponent, by express stipulation made with the proponent for the purpose of the trial, has
conceded the truth of a fact,
or, assented to a specific mode of evidencing it,
or, waived the introduction of a specific piece of evidence,
or, waived the prohibition or the limited conditions of a specific rule of evidence.

Such a waiver or admission is termed a waiver by stipulation.[1] — (W. §§ 2588, 2589.)

Distinguish (1) the ordinary informal or *extra-judicial admission* (Rule 115, *ante*, § 630), which differs essentially, in not being conclusive;

(2) the party's *pleading*, which limits the issues open to controversy in the case; a waiver by stipulation assumes that the issues have been already formed by the pleadings.

(3) an *estoppel* in substantive law, which is a permanent alteration of the parties' rights, not merely a waiver relative to the particular litigation, and is further not an express mutual agreement.

ART. 1. *Effect as Conclusive of Controversy.* A waiver by
2141 stipulation permits the fact to be taken for granted, by the judge, the jury, and the other party, for the purposes of the litigation in hand, and thus precludes controverting it either by evidence or by argument; with the following distinctions and qualifications:

Par. (*a*). For the party *adversely* affected by a fact
2142 included in a waiver by stipulation, no evidence may be introduced to dispute the fact waived or a fact relevant thereto.

[1] Sometimes also traditionally termed a judicial admission or solemn admission. But the term " admission " is ambiguous.

2143 *Par.* (*b*). For the party *benefited* by a fact included in waiver by stipulation, [no] evidence may be introduced to prove the fact waived or a fact relevant thereto.[1] — (W. § 2591.)

2144 *Par.* (*c*). The waiver may relate to any *kind of fact* or mode of evidencing a fact or to any *rule of evidence;* — (W. § 2592.)

[in particular,

(1) to a relevant or material fact otherwise inadmissible;

(2) or, to a fact otherwise judicially noticeable as not true;

(3) or, to a rule of evidence constitutionally sanctioned for the benefit of the party waiving;][2]

provided that no rule of public policy be involved which in the Court's estimation must be enforced irrespective of the parties' consent.

2145 *Par.* (*d*). The waiver is not *revocable;* but the Court by ruling may in the circumstances of the case cancel the stipulation and relieve a party from it. — (W. § 2590.)

2146 *Par.* (*e*). The *duration* of the waiver depends on the terms of the stipulation as made by the parties; but it must be given effect for all *subsequent stages* of the same litigation, including a new trial, unless and so far as the parties have expressly signified in their stipulation a more limited effect.[3] — (W. § 2593.)

2147 *Par.* (*f*). The stipulation has no effect upon a *party not joining* in it.

2148 ART. 2. *Form and Authority.* The waiver need not be made by any form of words; but it must be in substance an express

[1] Some Courts insert the "no."

[2] Some Courts treat these three classes as subject to exceptions; but that is unnecessary; the proviso sufficiently protects justice from impositions or abuses.

[3] Courts differ here, but chiefly as to making the opposite presumption in the absence of an expressed intent as to limitation.

dispensation from evidence of a particular fact or from observance of a particular rule, and not merely an omission or withdrawal of an objection to a fact or a violation of a rule. — (W. § 2594.)

2149 *Par.* (*a*). The waiver need not be in *writing*, except when made out of the Court's presence.

2150 *Par.* (*b*). An authority to an attorney or counsel to conduct litigation *during trial* is an authority to make a waiver by stipulation.

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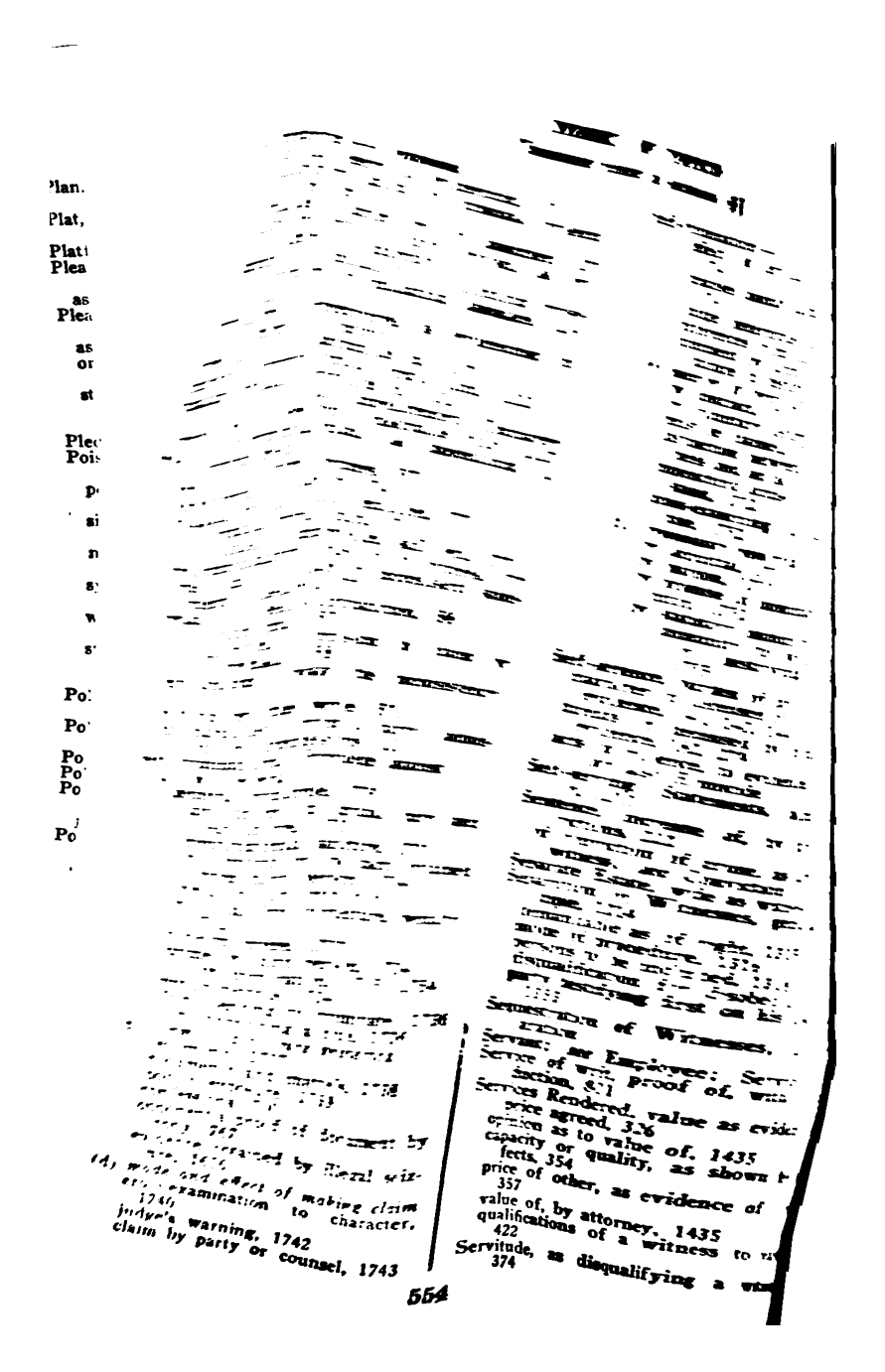

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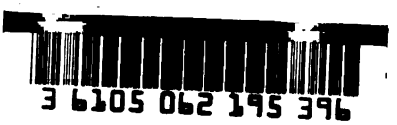
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