without producing the accounts.[1] And, where the question is upon the solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner.[2]

§ 94. Under this head may be mentioned the case of *inscriptions* on walls and fixed tables, *mural monuments*, *gravestones*, *surveyors' marks* on boundary trees, &c., which, as they cannot conveniently be produced in Court, may be proved by secondary evidence.[3]

§ 95. Another exception is made, in the examination of a witness on the *voir dire*, and in *preliminary* inquiries of the same nature. If, upon such examination, the witness discloses the existence of a written instrument affecting his competency, he may also be interrogated as to its contents. To a case of this kind, the general rule requiring the production of the instrument, or notice to produce it, does not apply; for the objecting party may have been ignorant of its existence, until it was disclosed by the witness; nor could he be supposed to know that such a witness would be produced. So, for the like reason, if the witness, on the *voir dire*, admits any other fact going to render him incompetent, the effect of which has been subsequently removed by a written document, or even a record, he may speak to the contents of such writing, without producing it; the rule being, that where the objection arises on the *voir dire*, it may be removed on the

[1] Roberts *v.* Doxon, Peake's Cas. 83. But not as to particular facts appearing on the books, or deducible from the entries. Dupuy *v.* Truman, 2 Y. & C. 341.

[2] Meyer *v.* Sefton, 2 Stark. R. 274.

[3] Doe *v.* Coyle, 6 C. & P. 360; Rex *v.* Fursey, Id. 81. But if they can conveniently be brought into Court, their actual production is required. Thus, where it was proposed to show the contents of a printed notice, hung up in the office of the party, who was a carrier, parol evidence of its contents was rejected, it not being affixed to the freehold. Jones *v.* Tarleton, 1 D. P. C. (N. S.) 625.

voir dire.[1] If, however, the witness produces the writing, it must be read, being the best evidence.[2]

§ 96. It may be proper, in this place, to consider the question, whether a *verbal admission of the contents of a writing*, by the party himself, will supersede the necessity of giving notice to produce it; or, in other words, whether such admission, being made against the party's own interest, can be used as primary evidence of the contents of the writing, against him and those claiming under him. Upon this question, there appears some discrepancy in the authorities at *nisi prius*.[3] But it is to be observed, that there is a material difference between proving the execution of an attested instrument, when produced, and proving the party's admission, that by a written instrument, which is not produced, a certain act was done. In the former case, the law is well settled, as we shall hereafter show, that when an attested instrument is in Court, and its execution is to be proved against a hostile party, an admission on his part, unless made with a view to the trial of that cause, is not sufficient. This rule is founded on reasons peculiar to the class of cases to which it is applied. A distinction is also to be observed between a *confessio juris*, and a

[1] Phil. & Am. on Evid. 149; 1 Phil. Evid. 154, 155; Butcher's Co. *v.* Jones, 1 Esp. 160; Botham *v.* Swingler, Ib. 164; Rex *v.* Gisburn, 15 East, 57; Carlisle *v.* Eady, 1 C. & P. 234, note; Miller *v.* Mariner's Church, 7 Greenl. 51; Sewell *v.* Stubbs, 1 C. & P. 73.

[2] Butler *v.* Carver, 2 Stark. R. 433. A distinction has been taken between cases, where the incompetency appears from the examination of the witness, and those where it is already apparent from the record, without his examination; and it has been held, that the latter case falls within the rule, and not within the exception, and that the writing which restores the competency must be produced. See *acc.* Goodhay *v.* Hendry, 1 M. & M. 319, per Best, C. J., and Id. 321, n., per Tindal, C. J. But see Carlisle *v.* Eady, 1 C. & P. 234, per Park, J.; Wandless *v.* Cawthorne, 1 M. & M. 321, n. per Parke, J. *contra*. See 1 Phil. Evid. 154, 155.

[3] Phil. & Am. on Evid. 363, 364; 1 Phil. Evid. 346, 347. See the Monthly Law Magazine, Vol. 5, p. 175–187, where this point is distinctly treated.

confessio facti. If the admission is of the former nature, it falls within the rule already considered, and is not received;[1] for the party may not know the legal effect of the instrument, and his admission of its nature and effect may be exceedingly erroneous. But where the existence, and not the formal execution of a writing is the subject of inquiry, or where the writing is collateral to the principal facts, and it is on these facts that the claim is founded, the better opinion seems to be, that the confession of the party, precisely identified, is admissible, as primary evidence of the facts recited in the writing; though it is less satisfactory than the writing itself.[2] Very great weight ought not to be attached to evidence of what a party has been supposed to have said; as it frequently happens, not only that the witness has misunderstood what the party said, but that, by unintentionally altering a few of the expressions really used, he gives an effect to the statement, completely at variance with what the party actually did say.[3] Upon this distinction the adjudged cases seem chiefly to turn. Thus, where, in an action by the assignees of a bankrupt, for infringing a patent right standing in his name, the defendant proposed to prove the oral declaration of the bankrupt, that by certain deeds an interest in the patent right had been conveyed by him to a stranger, the evidence was properly rejected; for it involved an opinion of the party upon the legal effect of the deeds.[4] On the other hand, it has been held, that the fact of the tenancy of an estate, or that one person, at a certain time, occupied it as the tenant of a certain

[1] Ante, § 86; Moore *v.* Hitchcock, 4 Wend. 262, 298, 299; Paine *v.* Tucker, 8 Shepl. 138.

[2] Howard *v.* Smith, 3 Scott, N. R. 574.

[3] Per Parke, J. in Earle *v.* Picken, 5 C. & P. 542, note. See also 1 Stark. Evid. 35, 36; 2 Stark. Evid. 17; Post, § 200, 203; Ph. & Am. on Evid. 391, 392; 1 Phil. Evid. 372.

[4] Bloxam *v.* Elsee, 1 C. & P. 558; Ry. & M. 187, S. C. See to the same point, Rex *v.* Hube, Peake's Cas. 132; Thomas *v.* Ansley, 6 Esp. 80; Scott *v.* Clare, 3 Campb. 236; Rex *v.* Careinion, 8 East, 77; Harrison *v.* More, Phil. & Am. on Evid. 365, n.; 1 Phil. Evid. 347, n.; Rex *v.* Inhabitants of Castle Morton, 3 B. & A. 588.

other person, may be proved by oral testimony. But if the terms of the contract are in controversy, and they are contained in a writing, the instrument itself must be produced.[1]

§ 97. There is a class of cases, which seem to be *exceptions* to this rule, and to favor the doctrine, that oral declarations of a party to an instrument, as to its contents or effect, may be shown as a substitute for direct proof by the writing itself. But these cases stand on a different principle, namely, that where the admission *involves the material fact in pais, as well as a matter of law*, the latter shall not operate to exclude evidence of the fact from the Jury. It is merely placed in the same predicament with mixed questions of law and fact, which are always left to the Jury, under the advice and instructions of the Court.[2] Thus, where the plaintiff, in ejectment, had verbally declared that he had "sold the lease," under which he claimed title, to a stranger, evidence of this declaration was admitted against him.[3] It involved the fact of the making of an instrument called an assignment of the lease, and of the delivery of it to the assignee, as well as the legal effect of the writing. So, also, similar proof has been received, that the party was "possessed of a leasehold,"[4] — "held a note,"[5] — "had dissolved a partnership," which was created by deed,[6] — and, that the indorser of a dishonored bill of exchange admitted, that it has been "duly protested."[7] What the party has stated in his answer in Chancery, is

[1] Brewer *v.* Palmer, 3 Esp. 213; Rex *v.* Inhabitants of Holy Trinity, 7 B. & C. 611; 1 Man. & Ry. 444, S. C.; Strother *v.* Barr et al. 5 Bing. 136; Ramsbottom *v.* Tunbridge, 2 M. & S. 434.

[2] United States *v.* Battiste, 2 Sumn. 240.

[3] Doe d. Lowden *v.* Watson, 2 Stark. R. 230.

[4] Digby *v.* Steele, 3 Campb. 115.

[5] Sewell *v.* Stubbs, 1 C. & P. 73.

[6] Doe d. Waithman *v.* Miles, 1 Stark. R. 181; 4 Campb. 375.

[7] Gibbons *v.* Coggon, 2 Campb. 188. Whether an admission of the counterfeit character of a bank note which the party had passed, is sufficient evidence of the fact, without producing the note, *quære;* and see Commonwealth *v.* Bigelow, 8 Met. 235.

admissible on other grounds, namely, that it is a solemn declaration under oath in a judicial proceeding, and that the legal effect of the instrument is stated under the advice of counsel learned in the law. So, also, where both the existence and the legal effect of one deed are recited in another, the solemnity of the act, and the usual aid of counsel, take the case out of the reason of the general rule, and justify the admission of such recital, as satisfactory evidence of the legal effect of the instrument, as well as conclusive proof of its execution.[1] There are other cases, which may seem, at first view, to constitute exceptions to the present rule, but in which the declarations of the party were admissible, either as contemporaneous with an act done, and expounding its character, thus being part of the *res gestæ;* or, as establishing a collateral fact, independent of the written instrument. Of this sort, was the declaration of a bankrupt, upon his return to his house, that he had been absent in order to avoid a writ issued against him;[2] the oral acknowledgment of a debt, for which an unstamped note had been given;[3] and the oral admission of the party, that he was in fact a member of a society created by deed, and had done certain acts in that capacity.[4]

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[1] Ashmore *v.* Hardy, 7 C. & P. 501; Digby *v.* Steele, 3 Campb. 115; Burleigh *v.* Stibbs, 4 T. R. 465; West *v.* Davis, 7 East, 363; Paul *v.* Meek, 2 Y. & J. 116; Breton *v.* Cope, Peake's Cas. 30.

[2] Newman *v.* Stretch, 1 M. & M. 338.

[3] Singleton *v.* Barrett, 2 C. & J. 368.

[4] Alderson *v.* Clay, 1 Stark. R. 405; Harvey *v.* Kay, 9 B. & C. 356.

CHAPTER V.

OF HEARSAY.

§ 98. The first degree of moral evidence, and that which is most satisfactory to the mind, is afforded by our own senses; this being direct evidence, of the highest nature. Where this cannot be had, as is generally the case in the proof of facts by oral testimony, the law requires the next best evidence, namely, the testimony of those who can speak from their own personal knowledge. It is not requisite that the witness should have personal knowledge of the main fact in controversy; for this may not be provable by direct testimony, but only by inference from other facts shown to exist. But it is requisite that, whatever facts the witness may speak to, he should be confined to those lying in his own knowledge, whether they be things said or done, and should not testify from information given by others, however worthy of credit they may be. For it is found indispensable, as a test of truth, and to the proper administration of justice, that every living witness should, if possible, be subjected to the ordeal of a cross examination, that it may appear, what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth. But testimony from the relation of third persons, even where the informant is known, cannot be subjected to this test; nor is it often possible to ascertain through whom, or how many persons, the narrative has been transmitted, from the original witness of the fact. It is this, which constitutes that sort of second-hand evidence, termed hearsay.

§ 99. The term *hearsay*, is used with reference to that which is written, as well as to that which is spoken; and, in its legal sense, it denotes that kind of evidence, which does