case,[1] before Lord Kenyon, which was an action of trover for a watch, where the question was, whether the defendant had delivered it to a third person, as the plaintiff had directed; an entry of the fact by the defendant himself in his shop-book, kept for that purpose, with proof that such was the usual mode, was held admissible in evidence. One of the shopmen had sworn to the delivery, and his entry was offered to corroborate his testimony; but it was admitted as competent original evidence in the cause. So, in another case, where the question was upon the precise day of a person's birth, the account book of the surgeon, who attended his mother upon that occasion, and in which his professional services and fees were charged, was held admissible, in proof of the day of the birth.[2] So, where the question was, whether a notice to quit had been served upon the tenant, the indorsement of service upon a copy of the notice, by the attorney, who served it, it being shown to be the course of business in his office to preserve copies of such notices, and to indorse the service thereon, was held admissible in proof of the fact

the doctrine of this case any farther. 11 M. & W. 775, 776. Therefore, where the coals, sold at a mine, were reported daily by one of the workmen, to the foreman, who, not being able to write, employed another person to enter the sales in a book; it was held, the foreman and the workman who reported the sale, being both dead, that the book was not admissible in evidence, in an action for the price of the coals. Brain *v.* Preece, 11 M. & W. 773.

[1] Digby *v.* Stedman, 1 Esp. 328.

[2] Higham *v.* Ridgway, 10 East, 109. See also 2 Smith's Leading Cases, 183–197, note, and the comments of Bayley, B. and of Vaughan, B. on this case, in Gleadow *v.* Atkin, 1 Crompt. & Mees. 410, 423, 424, 427, and of Professor Parke, in the London Legal Observer for June, 1832, p. 229. It will be seen in that case, that the fact of the surgeon's performance of the service charged was abundantly proved by other testimony in the cause; and that nothing remained but to prove the precise time of performance; a fact in which the surgeon had no sort of interest. But if it were not so, it is not perceived what difference it could have made, the principle of admissibility being the contemporaneous character of the entry, as part of the *res gestæ*. See also Herbert *v.* Tuckal, T. Raym. 84; Augusta *v.* Windsor, 1 Appleton, R. 317.

of service.[1] Upon the same ground of the contemporaneous character of an entry made in the ordinary course of business, the books of the messenger of a bank, and of a notary public, to prove demand of payment from the maker, and notice to the indorser of a promissory note, have also been held admissible.[2] The letter-book of a merchant, party in the cause, is also admitted as *primâ facie* evidence of the contents of a letter addressed by him to the other party, after notice to such party to produce the original; it being the habit of merchants to keep such a book.[3] And generally, contemporaneous entries, made by third persons, in their own books, in the ordinary course of business, the matter being within the peculiar knowledge of the party making the entry, and there being no apparent and particular motive to pervert the fact, are received as original evidence;[4] though the person who made the entry has no recollection of the fact at the time of testifying; provided he swears that he should not have made it, if it were

[1] Doe *v.* Turford, 3 Barnw. & Ad. 890; Champneys *v.* Peck, 1 Stark. R. 326; Rex *v.* Cope, 7 C. & P. 720.

[2] Nichols *v.* Webb, 8 Wheat. 326; Welch *v.* Barrett, 15 Mass. Rep. 380; Poole *v.* Dicas, 1 Bing. N. C. 649; Halliday *v.* Martinett, 20 Johns. 168; Butler *v.* Wright, 2 Wend. 369; Hart *v.* Williams, Ib. 513; Nichols *v.* Goldsmith, 7 Wend. 160; New Haven Co. Bank *v.* Mitchell, 15 Conn. 206; Sheldon *v.* Benham, 4 Hill, N. Y. Rep. 123.

[3] Pritt *v.* Fairclough, 3 Campb. 305; Hagedorn *v.* Reid, Ib. 377. The letter-book is also evidence that the letters copied into it have been sent. But it is not evidence of any other letters in it, than those which the adverse party has been required to produce. Sturge *v.* Buchanan, 2 P. & D. 573.

[4] Doe *v.* Turford, 3 B. & Ad. 890, per Parke, J.; Doe *v.* Robson, 15 East, 32; Goss *v.* Watlington, 3 Br. & B. 132; Middleton *v.* Melton, 10 B. & Cr. 317; Marks *v* Lahee, 3 Bing. N. C. 408, 420, per Park, J.; Poole *v.* Dicas, 1 Bing. N. C. 649, 653, 654. In Doe *v.* Vowles, 1 M. & Ro. 216, the tradesman's bill, which was rejected, was not contemporaneous with the fact done. Haddow *v.* Parry, 3 Taunt. 303; Whitnash *v.* George, 8 B. & Cr. 556; Barker *v.* Ray, 2 Russ. 63, 76; Patton *v.* Craig, 7 S. & R. 116, 126; Farmers Bank *v.* Whitehill, 16 S. & R. 89; Nourse *v.* McCay, 2 Rawle, 70; Clark *v.* Magruder, 2 H. & J. 77; Richardson *v.* Carey, 2 Rand. 87; Clark *v.* Wilmot, 1 Y. & Col. N. S. 53.

not true.[1] The same principle has also been applied to receipts, and other acts contemporaneous with the payment, or fact attested.[2]

§ 117. The admission of the party's own *shop-books*, in proof of the delivery of goods therein charged, the entries having been made by his clerk, stands upon the same principle, which we are now considering. The books must have been kept for the purpose; and the entries must have been made contemporaneous with the delivery of the goods, and by the person, whose duty it was, for the time being, to make them. In such cases the books are held admissible, as evidence of the delivery of the goods therein charged, where the nature of the subject is such as not to render better evidence attainable.[3]

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[1] Bunker *v.* Shed, 8 Met. 150.

[2] Sherman *v.* Crosby, 11 Johns. 70; Holladay *v.* Littlepage, 2 Munf. 316; Prather *v.* Johnson, 3 H. & J. 487; Sherman *v.* Atkins, 4 Pick. 283; Carroll *v.* Tyler, 2 H. & G. 54; Cluggage *v.* Swan, 4 Binn. 150, 154. But the letter of a third person, acknowledging the receipt of merchandise of the plaintiff, was rejected, in an action against the party, who had recommended him as trustworthy, in Longenecker *v.* Hyde, 6 Binn. 1; and the receipts of living persons were rejected, in Warner *v.* Price, 3 Wend. 397; Cutbush *v.* Gilbert, 4 S. & R. 551; Spargo *v.* Brown, 9 B. & C. 935. See post, § 120.

[3] Pitman *v.* Maddox, 2 Salk. 690; Ld. Raym. 732, S. C.; Lefebure *v.* Worden, 2 Ves. sen. 54, 55; Glynn *v.* The Bank of England, Ib. 40; Sterrett *v.* Bull, 1 Binn. 234. See also Tait on Evid. p. 276. An interval of one day, between the transaction and the entry of it in the book, has been deemed a valid objection to the admissibility of the book in evidence. Walter *v.* Bollman, 8 Watts, 544. But the law fixes no precise rule as to the moment when the entry ought to be made. It is enough if it be made "at or near the time of the transaction." Curren *v.* Crawford, 4 S. & R. 3, 5. Therefore, where the goods were delivered by a servant during the day, and the entries were made by the master at night, or on the following morning, from the memorandums made by the servant, it was held sufficient. Ingraham *v.* Bockius, 9 S. & R. 285. But such entries, made later than the succeeding day, have been rejected. Cook *v.* Ashmead, 2 Miles, R. 268. Whether entries transcribed from a slate, or card, into the book, are to be deemed original entries, is not universally agreed. In Massachusetts they are admitted. Faxon *v.* Hollis, 13 Mass. 427. In Pennsylvania they were rejected, in Ogden *v.* Miller, 1 Browne, 147; but have since been admitted, where they were transcribed forthwith into the book; Ingraham *v.* Bockius, 9 S. & R. 285; Patton *v.* Ryan, 4 Rawle, 408; Jones *v.* Long, 3 Watts, 325; and not later, in the case of a mechanic's charges for his work, than the evening of the second day. Hartley *v.* Brooks, 6 Whart. 189. But where several intermediate days elapsed before they were thus transcribed, the entries have been rejected. Forsythe *v.* Norcross, 5 Watts, 432.

§ 118. In the *United States*, this principle has been carried farther, and extended to *entries made by the party himself*, in his own shop-books.[1] Though this evidence has sometimes been said to be admitted contrary to the rules of the Common Law, yet in general its admission will be found in perfect harmony with those rules, the entry being admitted only where it was evidently contemporaneous with the fact, and part of the *res gestæ*. Being the act of the party himself, it is received with greater caution; but still it may be seen and weighed by the Jury.[2]

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[1] In the following States the admission of the party's own books, and his own entries, has been either expressly permitted, or recognised and regulated, by Statute; viz. *Vermont*, (1 Tolman's Dig. 185); *Connecticut*, (Rev. Code, 1821, 93, Tit. 9, § 1); *Delaware*, (St. 25 Geo. 2, Rev. Code, 1829, p. 89); *Maryland*, as to sums under ten pounds in a year, (1 Dorsey's Laws of Maryland, 73, 203); *Virginia*, (Stat. 1819, 1 Rev. Code, ch. 128, § 7, 8, 9); *North Carolina*, (Stat. 1756, ch. 57, § 2, 1 Rev. Code, 1836, ch. 15); *South Carolina*, (Stat. 1721, Sept. 20. See Statutes at Large, Vol. 3, p. 799, Cooper's ed. 1 Bay, 43); *Tennessee*, (Statutes of Tennessee, by Carruthers and Nicholson, p. 131). In *Louisiana*, and in *Maryland*, (except as above,) entries made by the party himself are not admitted. Civil Code of Louisiana, Art. 2244, 2245; Johnson *v.* Breedlove, 2 Martin, N. S. 508; Herring *v.* Levy, 4 Martin, N. S. 383; Cavelier *v.* Collins, 3 Martin, 188; Martinstein *v.* Creditors, 8 Rob. 6; Owings *v.* Henderson, 5 Gill & Johns. 134, 142. In all the other States they are admitted at Common Law, under various degrees of restriction. See Cogswell *v.* Dolliver, 2 Mass. 217; Poultney *v.* Ross, 1 Dall. 239; Lynch *v.* McHugo, 1 Bay, 33; Foster *v.* Sinkler, Ib. 40; Slade *v.* Teasdale, 2 Bay, 173; Lamb *v.* Hart, Ib. 362; Thomas *v.* Dyott, 1 Nott & McC. 186; Burnham *v.* Adams, 5 Verm. 313; Story on Confl. Laws, 526, 527; Cowen & Hill's note, 491, to 1 Phil. Evid. 266.

[2] The rules of the several States in regard to the admission of this evidence are not perfectly uniform; but in what is about to be stated, it is believed

§ 119. But, if the American rule of admitting the party's own entries in evidence for him, under the limitations men-

that they concur. Before the books of the party can be admitted in evidence, they are to be submitted to the inspection of the Court, and if they do not appear to be a register of the daily business of the party, and to have been honestly and fairly kept, they are excluded. If they appear manifestly erased and altered, in a material part, they will not be admitted until the alteration is explained Churchman *v.* Smith, 6 Whart. 106. The form of keeeping them, whether it be that of a journal or ledger, does not affect their admissibility, however it may go to their credit with the Jury. Cogswell *v.* Dolliver, 2 Mass. 217; Prince *v.* Smith, 4 Mass. 455, 457; Faxon *v.* Hollis, 13 Mass. 427; Rodman *v.* Hoops, 1 Dall. 85; Lynch *v.* McHugo, 1 Bay, 33; Foster *v.* Sinkler, ib. 40; Slade *v.* Teasdale, 2 Bay, 173; Thomas *v.* Dyott, 1 Nott & McC. 186; Wilson *v.* Wilson, 1 Halst. 95; Swing *v.* Sparks, 2 Halst. 59; Jones *v.* DeKay, Pennington, R. 695; Cole *v.* Anderson, 3 Halst. 68; Mathes *v.* Robinson, 8 Met. 269. If the books appear free from fraudulent practices, and proper to be laid before the Jury, the party himself is then required to make oath, in open Court, that they are the books in which the accounts of his ordinary business transactions are usually kept. Frye *v.* Barker, 2 Pick. 65; Taylor *v.* Tucker, 1 Kelly, R. 233. An affidavit to an account or bill of particulars is not admissible. Waggoner *v.* Richmond, Wright, R. 173. Whether, if the party is abroad, or is unable to attend, the Court will take his oath under a commission, is not perfectly clear. The opinion of Parker, C. J. in Pick. 67, was against it; and so is Nicholson *v.* Withers, 2 McCord, 428; but in Spence *v.* Saunders, 1 Bay, 119, even his affidavit was deemed sufficient, upon a writ of inquiry, the defendant having suffered judgment by default. See also Douglas *v.* Hart, 4 McCord, 257; Furman *v.* Peay, 2 Bail. 394. He must also swear that the articles therein charged were actually delivered, and the labor and services actually performed; that the entries were made at or about the time of the transactions, and are the original entries thereof; and that the sums charged and claimed have not been paid. 3 Dane's Abr. ch. 81, art. 4, § 1, 2; Cogswell *v.* Dolliver, 2 Mass. 217; Ives *v.* Niles, 5 Watts, 324. If the party is dead, his books, though rendered of much less weight as evidence, may still be offered by the executor or administrator, he making oath that they came to his hands as the genuine and only books of account of the deceased; that to the best of his knowledge and belief the entries are original and contemporaneous with the fact, and the debt unpaid; with proof of the party's handwriting. Bentley *v.* Hollenback, Wright, Rep. 169; McLellan *v.* Crofton, 6 Greenl. 307; Prince *v.* Smith, 4 Mass. 455; Odell *v.* Culbert, 9 W. & S. 66. The book itself must be the registry of business actually done, and not of orders, executory contracts, and things to be done subsequent to the entry.

tioned below, were not in accordance with the principles of the Common Law, yet it is in conformity with those of other

Fairchild *v.* Dennison, 4 Watts, 258; Wilson *v.* Wilson, 1 Halst. 95; Bradley *v.* Goodyear, 1 Day, 104, 106; Terill *v.* Beecher, 9 Conn. 344, 348, 349; and the entry must have been made for the purpose of charging the debtor with the debt; a mere memorandum, for any other purpose, not being sufficient. Thus, an invoice book, and the memorandums in the margin of a blank check-book, showing the date and tenor of the checks drawn and cut from the book, have been rejected. Cooper *v.* Morrell, 4 Yeates, 341; Wilson *v.* Goodin, Wright. Rep. 219. But the time-book of a day laborer, though kept in a tabular form, is admissible; the entries being made for the apparent purpose of charging the person for whom the work was done. Mathes *v.* Robinson, 8 Met. 269. If the book contains marks, showing that the items have been transferred to a journal or ledger, these books also must be produced. Prince *v.* Swett, 2 Mass. 569. The entries also must be made contemporaneously with the fact entered, as has been already stated in regard to entries made by a clerk. Ante, § 117, and note (1). Entries thus made are not, however, received in all cases as satisfactory proof of the charges; but only as proof of things which, from their nature, are not generally susceptible of better evidence. Watts *v.* Howard, 7 Met. 478. They are satisfactory proof of goods sold and delivered from a shop, and of labor and services personally performed; Case *v.* Potter, 8 Johns. 211; Vosburg *v.* Thayer, 12 Johns. 261; Wilmer *v.* Israel, 1 Browne, 257; Ducoign *v.* Schreppel, 1 Yeates, 347; Spence *v.* Saunders, 1 Bay, 119; Charlton *v.* Lawry, Martin, N. Car. Rep. 26; Mitchell *v.* Clark, Ib. 25; Easby *v.* Aiken, Cooke, R. 388; and, in some States, of small sums of money. Cogswell *v.* Dolliver, 2 Mass. 217; Prince *v.* Smith, 4 Mass. 455; 3 Dane's Abr. ch. 81, art. 4, § 1, 2; Craven *v.* Shaird, 2 Halst. 345. The amount, in Massachusetts and Maine, is restricted to forty shillings. Dunn *v.* Whitney, 1 Fairf. 9; Burns *v.* Fay, 14 Pick. 8; Union Bank *v.* Knapp, 3 Pick. 109. But they have been refused admission to prove the fact of advertising in a newspaper; Richards *v.* Howard, 2 Nott & McC. 474; Thomas *v.* Dyott, 1 Nott & McC. 186; of a charge of dockage of a vessel; Wilmer *v.* Israel, 1 Browne, 257; commissions on the sale of a vessel; Winsor *v.* Dillaway, 4 Met. 221; labor of servants; Wright *v.* Sharp, 1 Browne, 344; goods delivered to a third person; Kerr *v.* Love, 1 Wash. 172; Tenbrook *v.* Johnson, Coxe, 288; Townley *v.* Woolley, Ib. 377; or, to the party, if under a previous contract for their delivery at different periods; Lonergan *v.* Whitehead, 10 Watts, 249; general damages or value; Swing *v.* Sparks, 2 Halst. 59; Terill *v.* Beecher, 9 Conn. 348, 349; settlement of accounts; Prest *v.* Mercereau, 4 Halst. 268; money paid and not applied to the purpose directed; Bradley *v.* Goodyear, 1 Day, 104; a special agreement; Pritchard

systems of jurisprudence. In the administration of the Roman Law, the production of a merchant's or tradesman's book of accounts, regularly and fairly kept, in the usual manner, has been deemed presumptive evidence (*semiplena probatio*[1]) of

v. McOwen, 1 Nott & McC. 131, note ; Dunn *v.* Whitney, 1 Fairf. 9 ; Green *v.* Pratt, 11 Conn. 205 ; or, a delivery of goods under such agreement ; Nickle *v.* Baldwin, 4 Watts & Serg. 290 ; an article omitted by mistake in a prior settlement ; Punderson *v.* Shaw, Kirby, 150 ; the use and occupation of real estate ; and the like. Beach *v.* Mills, 5 Conn. 493. See also Newton *v.* Higgins, 2 Verm. 366 ; Dunn *v.* Whitney, 1 Fairf. 9. But after the order to deliver goods to a third person is proved by competent evidence *aliundè* the delivery itself may be proved by the books and suppletory oath of the plaintiff, in any case where such delivery to the defendant in person might be so proved. Mitchell *v.* Belknap, 10 Shepl. 475. The charges, moreover, must be specific and particular ; a general charge for professional services, or for work and labor by a mechanic, without any specification but that of time, cannot be supported by this kind of evidence. Lynch *v.* Petrie, 1 Nott & McC. 130 ; Hughes *v.* Hampton, 2 Const. Rep. 476. And regularly the prices ought to be specified ; in which case the entry is *primâ facie* evidence of the value. Hagaman *v.* Case, 1 South. 370 ; Ducoign *v.* Schreppel, 1 Yeates, 347. But whatever be the nature of the subject, the transaction, to be susceptible of this kind of proof, must have been directly between the original debtor and the creditor ; the book not being admissible to establish a collateral fact. Mifflin *v.* Bingham, 1 Dall. 276, per McKean, C. J. ; Kerr *v.* Love, 1 Wash. 172 ; Deas *v.* Darby, 1 Nott & McC. 436 ; Poulteney *v.* Ross, 1 Dall. 238. Though books, such as have been described, are admitted to be given in evidence, with the suppletory oath of the party ; yet his testimony is still to be weighed by the Jury, like that of any other witness in the cause ; and his reputation for truth is equally open to be questioned. Kitchen *v.* Tyson, 2 Murph. 314 ; Elder *v.* Warfield, 7 Harr. & Johns. 391. In some States, the books, thus admitted, are only those of shopkeepers, mechanics, and tradesmen ; those of other persons, such as planters, scriveners, schoolmasters, &c., being rejected. Geter *v.* Martin, 2 Bay, 173 ; Pelzer *v.* Cranston, 2 McC. 328 ; Boyd *v.* Ladson, 4 McC. 76. The subject of the admission of the party's own entries, with his suppletory oath, in the several American States, is very elaborately and fully treated in a note to the American edition of Smith's Leading Cases, Vol. 1, p. 142, in 43 Law Lib. p. 223 – 245.

[1] This degree of proof is thus defined by Mascardus ; — "Non est ignorandum, probationem semiplenam eam esse, per quam rei gestæ *fides aliqua* fit judici ; non tamen tanta ut jure debeat in pronuncianda sententia eam sequi." De Prob. Vol. 1, Quæst. 11, n. 1, 4.

the justice of his claim ; and in such cases, the suppletory oath of the party (*juramentum suppletivum*) was admitted to make up the *plena probatio* necessary to a decree in his favor.[1] By the law of *France*, too, the books of merchants and tradesmen, regularly kept, and written from day to day, without any blank, when the tradesman has the reputation of probity, constitute a semi-proof, and with his suppletory oath, are received as full proof to establish his demand.[2] The same doctrine is familiar in the law of *Scotland*, by which the books of merchants and others, kept with a certain reasonable degree of regularity, satisfactory to the Court, may be received in evidence, the party being allowed to give his own "oath in supplement" of such imperfect proof. It seems, however, that a course of dealing, or other "pregnant circumstances," must in

[1] "Juramentum (suppletivum) defertur ubicunque actor habet pro se — aliquas conjecturas, per quas judex inducatur ad suspicionem vel ad opinandum pro parte actoris." Mascardus, De Prob. Vol. 3, Concl. 1230, n. 17. The civilians, however they may differ as to the degree of credit to be given to books of account, concur in opinion, that they are entitled to consideration at the discretion of the Judge. They furnish at least the *conjecturæ* mentioned by Mascardus ; and their admission in evidence, with the suppletory oath of the party, is thus defended by Paul Voet, De Statutis, § 5, cap. 2, n. 9. "An ut credatur libris rationem, seu registris uti loquuntur, mercatorum et artificum, licet probationibus testium non juventur ? Respondeo, quamvis exemplo pernitiosum esse videatur, quemque sibi privata testatione, sive adnotatione facere debitorem. Quia tamen hæc est mercatorum cura et opera, ut debiti et crediti rationes diligenter conficiant. Etiam in eorum foro et causis, ex æquo et bono est judicandum. Insuper non admisso aliquo litium accelerandarum remedio, commerciorum ordo et usus evertitur. Neque enim omnes præsenti pecunia merces sibi comparant, neque cujusque rei venditioni testes adhiberi, qui pretia mercium noverint, aut expedit, aut congruum est. Non iniquum videbitur illud statutum, quo domesticis talibus instrumentis additur fides, modo aliquibus adminiculus juventur." See also Hertius, De Collisione Legum, § 4, n. 68 ; Strykius, Tom. 7, Semiplena Probat. Disp. 1, Cap. 4, § 5 ; Menochius, De Presump. lib. 2, Presump. 57, n. 20, and lib. 3, Presump. 63, n. 12.

[2] 1 Pothier on Obl. Part iv. ch. 1, art. 2, § 4. By the Code Napoleon, merchants' books are required to be kept in a particular manner therein prescribed, and none others are admitted in evidence. Code de Commerce, Liv. 1, tit. 2, art. 8 – 12.

general be first shown by evidence *aliunde*, before the proof can be regarded as amounting to the degree of *semiplena probatio*, to be rendered complete by the oath of the party.[1]

§ 120. Returning now to the admission of entries made by clerks and third persons, it may be remarked, that in most, if not all the reported cases, the clerk or person who made the entries was *dead;* and the entries were received upon proof of his handwriting. But it is conceived, that the fact of his death is not material to the admissibility of this kind of evidence. There are two classes of admissible entries, between which there is a clear distinction, in regard to the principle on which they are received in evidence. The one class consists of entries made against the interests of the party making them; and these derive their admissibility from this circumstance alone. It is, therefore, not material when they were made. The testimony of the party who made them, would be the best evidence of the fact; but, if he is dead, the entry of the fact, made by him in the ordinary course of his business, and against his interest, is received as secondary evidence, in a controversy between third persons.[2] The other class of entries consists of those, which constitute parts of a chain or combination of transactions between the parties, the proof of one raising a presumption, that another has taken place. Here, the value of the entry, as evidence, lies in this, that it was *contemporaneous with the principal fact done*, forming a link in the chain of events, and being *part of the res gestæ*. It is not merely the declaration of the party, but it is a verbal contemporaneous act, belonging, not necessarily,

1 Tait on Evidence, p. 273 – 277. This degree of proof is there defined as "not merely a suspicion, — but such evidence as produces a reasonable belief, though not complete evidence." See also Glassford on Evid. p. 550; Bell's Digest of Laws of Scotland, p. 378, 898.

2 Warren *v.* Greenville, 2 Str. 1129; Middleton *v.* Melton, 10 B. & C. 317; Thompson *v.* Stevens, 2 Nott & McC. 493; Chase *v.* Smith, 5 Verm. 556; Spiers *v.* Morris, 9 Bing. 687; Alston *v.* Taylor, 1 Hayw. 381, 395.

indeed, but ordinarily and naturally to the principal thing. It is on this ground, that this latter class of entries is admitted; and therefore it can make no difference, as to the admissibility, whether the party who made them be living or dead, nor whether he was or was not interested in making them; his interest going only to affect the credibility, or weight of the evidence when received.[1]

§ 121. The evidence of indebtment, afforded by the *indorsement* of the payment of interest, or a *partial payment* of the principal, on the back of a bond or other security, seems to fall within the principle we are now considering, more naturally than any other; though it is generally classed with entries made against the interest of the party. The main fact to be proved in the cases, where this evidence has been admitted, was the continued existence of the debt, notwithstanding the lapse of time since its creation was such as either to raise the presumption of payment, or to bring the case within the operation of the statute of limitations. This fact was sought to be proved by the acknowledgment of the debt by the debtor himself; and this acknowledgment was proved, by his having actually paid part of the money due. It is the usual, ordinary, and well known course of business, that partial payments are forthwith indorsed on the back of the security, the indorsement thus becoming part of the *res gestæ*. Wherever, therefore, an indorsement is shown to have been made at the time it bears date, (which will be

1 This distinction was taken, and clearly expounded by Mr. Justice Parke, in Doe, d. Patteshall *v.* Turford, 3 B. & Ad. 890; cited and approved in Poole *v.* Dicas, 1 Bing. N. C. 654. See also Ante, § 115, 116; Cluggage *v.* Swan, 4 Binn. 154; Sherman *v.* Crosby, 11 Johns. 70; Holladay *v.* Littlepage, 2 Munf. 316; Prather *v.* Johnson, 3 H. & J. 487; Sherman *v.* Atkins, 4 Pick. 283; Carroll *v.* Tyler, 2 H. & G. 54; James *v.* Wharton, 3 McLean, 492. In several cases, however, letters and receipts of third persons living, and within the reach of process, have been rejected. Longenecker *v.* Hyde, 6 Binn. 1; Spargo *v.* Brown, 9 B. & C. 935; Warner *v.* Price, 3 Wend. 397; Cutbush *v.* Gilbert, 4 S. & R. 551.

inferred from its face, in the absence of opposing circumstances,[1]) the presumption naturally arising is, that the money mentioned in it was paid at that time. If the date is at a period after the demand became stale, or affected by the statute of limitations, the interest of the creditor to fabricate it would be so strong, as to countervail the presumption of payment, and require the aid of some other proof; and the case would be the same, if the indorsement bore a date within that period, the instrument itself being otherwise subject to the bar arising from lapse of time.[2] Hence the inquiry, which is usually made in such cases, namely, whether the indorsement, when made, was against the interest of the party making it, that is, of the creditor; which, in other language, is only inquiring, whether it was made while his remedy was not yet impaired by lapse of time. The time when the indorsement was made is a fact to be settled by the Jury; and to this end the writing must be laid before them. If there is no evidence to the contrary, the presumption is, that the indorsement was made at the time it purports to bear date; and the burden of proving the date to be false lies on the other party.[3] If the indorsement does not purport to be made contemporaneously with the receipt of the money, it is inadmissible, as part of the *res gestæ*.

§ 122. This doctrine has been very much considered in the discussions, which have repeatedly been had upon the case of *Searle* v. *Lord Barrington*.[4] In that case the bond was given

[1] Smith *v.* Battens, 1 M. & Rob. 341. See also Nichols *v.* Webb, 8 Wheat. 326; 12 S. & R. 49, 87; 16 S. & R. 89, 91.

[2] Turner *v.* Crisp, 2 Stra. 827; Rose *v.* Bryant, 2 Campb. 321; Glynn *v.* The Bank of England, 2 Ves. sen. 38, 43. See also Whitney *v.* Bigelow, 4 Pick. 110; Roseboom *v.* Billington, 17 Johns. 182; Gibson *v.* Peebles, 2 McCord, 418.

[3] Per Taunton, J. in Smith *v.* Battens, 1 M. & Rob. 343. See also Hunt *v.* Massey, 5 B. & Adolph. 902; Baker *v.* Milburn, 2 Mees. & W. 853; Sinclair *v.* Baggaley, 4 Mees. & W. 312; Anderson *v.* Weston, 6 Bing. N. C. 296.

[4] There were two successive actions on the same bond, between these parties. The first is reported in 2 Stra. 826, 8 Mod. 278, and 2 Ld. Raym. 1370; and was tried before Pratt, C. J., who refused to admit the indorsement, and nonsuited the plaintiff; but on a motion to set the nonsuit aside, the three other Judges were of opinion, that the evidence ought to have been left to the Jury, the indorsement in such cases being according to the usual course of business, and perhaps in this case made with the privity of the obligor; but on another ground the motion was denied. Afterwards another action was brought, which was tried before Lord Raymond, C. J., who admitted the evidence of the indorsement; to which the defendant filed a bill of exceptions. This judgment was affirmed, on error in the Exchequer Chamber, and again in the House of Lords. See 2 Stra. 827; 3 Bro. P. C. 593. The first case is most fully reported in 8 Mod. 278.

in 1697, and was not sued until after the death of the obligee, upon whose estate administration was granted in 1723. The obligor died in 1710; the obligee probably survived him, but it did not appear how long. To repel the presumption of payment, arising from lapse of time, the plaintiff offered in evidence two indorsements, made upon the bond by the obligee himself, bearing date in 1699, and in 1707, and purporting that the interest due at those respective dates had been then paid by the obligor. And it appears that other evidence was also offered, showing the time when the indorsements were actually made.[1] The indorsements, thus proved to have been made at the times they purported to have been made, were, upon solemn argument, held admissible evidence both by the Judges in the Exchequer Chamber and by the House of Lords. The grounds of these decisions are not stated in any

[1] This fact was stated by Bayley, B. as the result of his own research. See 1 Crompt. & Mees. 421. So it was understood to be, and so stated, by Lord Hardwicke, in 2 Ves. sen. 43. It may have constituted the "other circumstantial evidence," mentioned in Mr. Brown's report, 3 Bro. P. C. 594; which he literally transcribed from the case as drawn up by Messrs. Lutwyche and Fazakerley, of counsel for the original plaintiff, for argument in the House of Lords. See a folio volume of original printed briefs, marked Cases in Parliament, 1728 to 1731, p 529, in the Law Library of Harvard University, in which this case is stated more at large than in any book of Reports. By Stat. 9, Geo 4, c. 14, it is enacted, that no indorsement of partial payment, made by or on behalf of the creditor, shall be deemed sufficient proof to take the case out of the statute of limitations. The same enactment is found in the Laws of some of the United States.