§ 140. It is further to be observed, that reputation is evidence as well *against a public right*, as in its favor. Accordingly, where the question was, whether a landing place was public or private property, reputation, from the declarations of ancient deceased persons, that it was the private landing place of the party and his ancestors, was held admissible; the learned Judge remarking, that there was no distinction between the evidence of reputation to establish, and to disparage, a public right.[1]

[1] Drinkwater *v.* Porter, 7 C. & P. 181; R. *v.* Sutton, 3 N. & P. 569.

CHAPTER VII.

OF ANCIENT POSSESSIONS.

§ 141. A *second exception* to the rule, rejecting hearsay evidence, is allowed in cases of *ancient possession*, and in favor of the admission of ancient documents in support of it. In matters of private right, not affecting any public or general interest, hearsay is generally inadmissible. But the admission of ancient documents, purporting to constitute *part of the transactions* themselves, to which, as acts of ownership or of the exercise of right, the party against whom they are produced is not privy, stands on a different principle. It is true, on the one hand, that the documents in question consist of evidence which is not *proved* to be part of any *res gestæ*, because the only proof the transaction consists in the documents themselves; and these may have been fabricated, or, if genuine, may never have been acted upon. And their effect, if admitted in evidence, is to benefit persons connected in interest with the original parties to the documents, and from whose custody they have been produced. But, on the other hand, such documents always accompany, and form a part of every legal transfer of title and possession by act of the parties; and there is, also, some presumption against their fabrication, where they refer to coexisting subjects by which their truth might be examined.[1] On this ground, therefore, as well as because such is generally the only attainable evidence of ancient possession, this proof is admitted, under the qualifications, which will be stated.

§ 142. As the value of these documents depends mainly on

[1] 1 Phil. Evid. 273; 1 Stark. Evid. 66, 67; Clarkson *v.* Woodhouse, 5 T. R. 413, n., per Ld. Mansfield.

their having been contemporaneous, at least, with the act of transfer, if not part of it, care is *first* taken to *ascertain their genuineness;* and this may be shown *primâ facie*, by proof that the document comes from the *proper custody;* or by otherwise accounting for it. Documents found in a place, in which, and under the care of persons, with whom such papers might naturally and reasonably be expected to be found, are in precisely the custody which gives authenticity to documents found within it.[1] "For it is not necessary," observed Tindal, C. J., "that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question, as to their authenticity; but it is when documents are found in other than their proper place of deposit, that the investigation commences, whether it is reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the

[1] Per Tindal, C. J. in Bishop of Meath *v.* Marq. of Winchester, 2 Bing. N. C. 183, 200, 201, expounded and confirmed by Parke, B. in Croughton *v.* Blake, 12 M. & W. 205, 208; and in Doe d. Jacobs *v.* Phillips, 10 Jur. 34; 8 Ad. & El. 158, N. S. See also Lygon *v.* Strutt, 2 Anstr. 601; Swinnerton *v.* Marq. of Stafford, 3 Taunt. 91; Bullen *v.* Michel, 4 Dow, 297; Earl *v.* Lewis, 4 Esp. 1; Randolph *v.* Gordon, 5 Price, 312; Manby *v.* Curtis, 1 Price, 225, 232, per Wood, B.; Bertie *v.* Beaumont, 2 Price, 303, 307; Barr *v.* Gratz, 4 Wheat. 213, 221; Winn *v.* Patterson, 9 Peters, 663-675; Clarke *v.* Courtney, 5 Peters, 319, 344; Jackson *v.* Laroway, 3 Johns. Cas. 383, approved in Jackson *v.* Luquere, 5 Cowen, 221, 225; Hewlett *v.* Cock, 7 Wend. 371, 374; Duncan *v.* Beard, 2 Nott & McC. 400; Middleton *v.* Mass, 2 Nott & McC. 55; Doe *v.* Beynon, 4 P. & D. 193; Post, § 570; Doe *v.* Pearce, 2 M. & Rob. 240. An ancient extent of Crown lands, found in the office of the Land Revenue Records, it being the proper repository, and purporting to have been made by the proper officer, has been held good evidence of the title of the Crown to lands therein stated to have been purchased by the Crown from a subject. Doe d. Wm. 4, *v.* Roberts, 13 M. & W. 520.

proposition to be determined is, whether the actual custody is so reasonably and probably accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases."

§ 143. It is further requisite, where the nature of the case will admit it, that proof be given of *some act done* in reference to the documents offered in evidence, as a further assurance of their genuineness, and of the claiming of title under them. If the document bears date *post litem motam*, however ancient, some evidence of correspondent acting is always scrupulously required, even in cases where traditionary evidence is receivable.[1] But, in other cases, where the transaction is very ancient, so that proof of contemporaneous acting, such as possession, or the like, is not probably to be obtained, its production is not required.[2] But where unexceptionable evidence of enjoyment, referable to the document, may reasonably be expected to be found, it must be produced.[3] If such evidence, referable to the document, is not to be expected, still it is requisite to prove some acts of modern enjoyment, with reference to similar documents, or that modern possession or user should be shown, corroborative of the ancient documents.[4]

§ 144. Under these qualifications, *ancient documents*, purporting to be a *part of the transactions, to which they relate*, and not a mere narrative of them, are receivable as evidence, that those transactions actually occurred. And though they

[1] 1 Phil. Evid. 277; Brett *v.* Beales, 1 Mood. & M. 416.

[2] Clarkson *v.* Woodhouse, 5 T. R. 412, 413, n., per Ld. Mansfield; Ante, § 130, and cases there cited.

[3] 1 Phil. Evid. 277; Plaxton *v.* Dare, 10 B. & C. 17.

[4] Rogers *v.* Allen, 1 Campb. 309, 311; Clarkson *v.* Woodhouse, 5 T. R. 412, n. See the cases collected in note to § 144, post.

are spoken of, as hearsay evidence of ancient possession, and as such are said to be admitted in exception to the general rule; yet they seem rather to be parts of the *res gestæ*, and therefore admissible as original evidence, on the principle already discussed. An ancient deed, by which is meant one more than thirty years old, having nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead; and, if it is found in the proper custody, and is corroborated by evidence of ancient or modern corresponding enjoyment,[1] or by other equivalent or explana-

[1] It has been made a question, whether the document may be read in evidence, before the proof of possession or other equivalent corroborative proof is offered; but it is now settled that the document, if otherwise apparently genuine, may be first read; for the question, whether there has been a corresponding possession, can hardly be raised till the Court is made acquainted with the tenor of the instrument. Doe *v.* Passingham, 2 C. & P. 440. A graver question has been, whether the proof of possession is indispensable; or whether its absence may be supplied by other satisfactory corroborative evidence. In Jackson d. Lewis *v.* Laroway, 3 Johns. Cas. 283, it was held by Kent, J. against the opinion of the other Judges, that it was indispensable; on the authority of Fleta, lib. 6, cap. 34; Co. Lit. 6, b.; Isack *v.* Clarke, 1 Roll. R. 132; James *v.* Trollop, Skin. 239; 2 Mod. 323; Forbes *v.* Wale, 1 W. Bl. R. 532; and the same doctrine was again asserted by him, in delivering the judgment of the Court, in Jackson d. Burnhams *v.* Blanshan, 3 Johns. 292, 298. See also Thompson *v.* Bullock, 1 Bay, 364; Middleton *v.* Mass, 2 Nott & McC. 55; Carroll *v.* Norwood, 1 Har. & J. 174, 175; Shaller *v.* Brand, 6 Binn. 439; Doe *v.* Phelps, 9 Johns. 169, 171. But the weight of authority at present seems clearly the other way; and it is now agreed that, where proof of possession cannot be had, the deed may be read, if its genuineness is satisfactorily established by other circumstances. See Ld. Rancliffe *v.* Parkins, 6 Dow, 202, per Ld. Eldon; McKenire *v.* Frazer, 9 Ves. 5; Doe *v.* Passingham, 2 C. & P. 440; Barr *v.* Gratz, 4 Wheat. 213, 221; Jackson d. Lewis *v.* Laroway, 3 Johns. Cas. 283, 287; Jackson d. Hunt *v.* Luquere, 5 Cowen, 221, 225; Jackson d. Wilkins *v.* Lamb, 7 Cowen, 431; Hewlett *v.* Cock, 7 Wend. 371, 373, 374. See also the cases collected in Cowen & Hill's note 903, to 1 Phil. Evid. 477. Where an ancient document, purporting to be an exemplification, is produced from the proper place of deposit, having the usual slip of parchment to which the great seal is appended, but no appearance that any seal was ever affixed, it is still to be presumed, that the seal was once there and has been accidentally removed, and it may be read in evidence as an exemplification. Mayor, &c. of Beverley *v.* Craven, 2 M. & Rob. 140.

tory proof, it is to be presumed that the deed constituted part of the actual transfer of property therein mentioned; because this is the usual and ordinary course of such transactions among men. The residue of the transaction may be as unerringly inferred from the existence of genuine ancient documents, as the remainder of a statue may be made out from an existing *torso*, or a perfect skeleton from the fossil remains of a part.

§ 145. Under this head may be mentioned the case of *ancient boundaries;* in proof of which, it has sometimes been said, that traditionary evidence is admissible from the nature and necessity of the case. But, if the principles already discussed in regard to the admission of hearsay are sound, it will be difficult to sustain an exception in favor of such evidence merely as applying to boundary, where the fact is particular, and not of public or general interest. Accordingly, though evidence of reputation is received, in regard to the boundaries of parishes, manors, and the like, which are of public interest, and generally of remote antiquity, yet, by the weight of authority and upon better reason, such evidence is held to be inadmissible for the purpose of proving the boundary of a private estate, when such boundary is not identical with another of a public or *quasi* public nature.[1]

[1] Ph. & Am. on Evid. 255, 256; Ante, § 139, note (2); Thomas *v.* Jenkins, 1 N. & P. 588; Reed *v.* Jackson, 1 East, 355, 357, per Ld. Kenyon; Doe *v.* Thomas, 14 East, 323; Morewood *v.* Wood, Id. 327, note; Outram *v.* Morewood, 5 T. R. 121, 123, per Ld. Kenyon; Nichols *v.* Parker, and Clothier *v.* Chapman, in 14 East. 331, note; Weeks *v.* Sparke, 1 M. & S. 688, 689; Cherry *v.* Boyd, Littell's Selected Cases, 8, 9; 1 Phil. Evid. 182, (3d Lond. Ed.), cited and approved by Tilghman, C. J. in Buchanan *v.* Moore, 10 S. & R. 281. In the passage thus cited, the learned author limits the admissibility of this kind of evidence to questions of a public or general nature; including a right of common by custom; which, he observes, "is, strictly speaking, a private right; but it is a *general* right, and *therefore*, (so far as regards the admissibility of this species of evidence,) has been *considered as public, because it affects a large number of occupiers within a district.*" Ante, § 128, 138; Gresley on Evid. 220, 221. The

Where the question is of such general nature, whether it be of boundary, or right of common by custom, or the like,

admission of traditionary evidence, in cases of boundary, occurs more frequently in the United States than in England. By far the greatest portion of our territory was originally surveyed in large masses or tracts, owned either by the State, or by the United States, or by one or a company of proprietors; under whose authority these tracts were again surveyed and divided into lots suitable for single farms, by lines crossing the whole tract, and serving as the common boundary of very many farm lots, lying on each side of it. So that it is hardly possible, in such cases, to prove the original boundaries of one farm, without affecting the common boundary of many; and thus, in trials of this sort, the question is similar, in principle, to that of the boundaries of a manor, and therefore traditionary evidence is freely admitted. Such was the case of Boardman *v.* Reed, 6 Peters, 328, where the premises in question, being a tract of eight thousand acres, were part of a large connexion of surveys, made together, and containing between fifty and one hundred thousand acres of land; and it is to such tracts, interesting to very many persons, that the remarks of Mr. Justice M'Lean, in that case, (p. 341,) are to be applied. In Conn et al. *v.* Penn et al. 1 Pet. C. C. Rep. 496, the tract whose boundaries were in controversy, was called the manor of Springetsbury, and contained seventy thousand acres; in which a great number of individuals had severally become interested. In Doe d. Taylor *v.* Roe et al., 4 Hawks, 116, traditionary evidence was admitted in regard to Earl Granville's line, which was of many miles in extent, and afterwards constituted the boundary between counties, as well as private estates. In Ralston *v.* Miller, 3 Randolph, 44, the question was upon the boundaries of a street in the city of Richmond; concerning which kind of boundaries it was said, that ancient reputation and possession were entitled to infinitely more respect, in deciding upon the boundaries of the lots, than any experimental surveys. In several American cases, which have sometimes been cited in favor of the admissibility of traditionary evidence of boundary, even though it consisted of particular facts, and in cases of merely private concern, the evidence was clearly admissible on other grounds, either as part of the original *res gestæ*, or as the declaration of a party in possession, explanatory of the nature and extent of his claim. In this class may be ranked the cases of Caufman *v.* The Congregation of Cedar Spring, 6 Binn. 59; Sturgeon *v.* Waugh, 2 Yeates, 476; Jackson d. McDonald *v.* McCall, 10 Johns. 377; Hamilton *v.* Menor, 2 S. & R. 70; Higley *v.* Bidwell, 9 Conn. 447; Hall *v.* Gittings, 2 Harr. & Johns. 112; Redding *v.* McCubbin, 1 Harr. & McHen. 84. In Wooster *v.* Butler, 13 Conn. R. 309, it was said by Church, J. that traditionary evidence was receivable, in Connecticut, to prove the boundaries of land between individual proprietors. But this dictum was not called for in

evidence of reputation is admitted only under the qualifications already stated, requiring competent knowledge in the

the case; for the question was, whether there had anciently been a *highway* over a certain tract of upland; which, being a subject of common and general interest, was clearly within the rule. In Den d. Tate *v.* Southard, 1 Hawks, 45, the question was, whether the lines of the surrounding tracts of land, if made for those tracts alone, and not for the tract in dispute, might be shown, *by reputation*, to be the "*known and visible boundaries*" of the latter tract, within the fair meaning of those words in the statute of North Carolina, of 1791, ch. 15. It was objected, that the boundaries mentioned in the act were those only, which had been expressly recognised as the bounds of the particular tract in question, by some grant or mesne conveyance thereof; but the objection was overruled. But in a subsequent case, (Den d. Sasser *v.* Herring, 3 Dever. Law Rep. 340,) the learned Chief Justice admits, that, in that State, the rules of the Common Law, in questions of private boundary, have been broken in upon. "We have," he remarks, "in questions of boundary, given to the single declarations of a deceased individual, as to a line or corner, the weight of common reputation, and permitted such declarations to be proven; under the rule, that, in questions of boundary, hearsay is evidence. Whether this is within the spirit and reason of the rule, it is now too late to inquire. It is the well established law of this State. And if the propriety of the rule was now *res integra*, perhaps the necessity of the case, arising from the situation of our country, and the want of self-evident *termini* of our lands, would require its adoption. For although it sometimes leads to falsehood, it more often tends to the establishment of truth. From necessity, we have, in this instance, sacrificed the principles upon which the rules of evidence are founded." A similar course has been adopted in Tennessee. Beard *v.* Talbot, 1 Cooke, 142. In South Carolina, the declarations of a deceased surveyor, who originally surveyed the land, are admissible, on a question as to its location. Speer *v.* Coate, 3 McCord, 227; Blythe *v.* Sutherland, Id. 258. In Kentucky, the latter practice seems similar to that in North Carolina. Smith *v.* Nowells, 2 Littel, Rep. 159; Smith *v.* Prewitt, 2 A. K. Marsh. 155, 158. In New Hampshire, the like evidence has in one case been held admissible, upon the alleged authority of the rule of the Common Law, in 1 Phil. Evid. 182; but in the citation of the passage by the learned Chief Justice, it is plain, from the omission of part of the text, that the restriction of the rule to subjects of public or general interest was not under his consideration. Shepherd *v.* Thompson, 4 N. Hamp. Rep. 213, 214. Subject to these exceptions, the general practice in this country, in the admission of traditionary evidence as to boundaries, seems to agree with the doctrine of the Common Law, as stated in the text. In Weems *v.* Disney, 4 Harr. & McHen. 156, the depositions admitted were annexed to a return of

declarants, or persons from whom the information is derived, and that they be persons free from particular and direct interest at the time, and are since deceased.[1]

§ 146. In this connexion may be mentioned the subject of *perambulations*. The writ *de perambulatione faciendâ* lies at Common Law, when two lords are in doubt as to the limits of their lordships, vills, &c., and by consent appear in chancery, and agree that a perambulation be made between them. Their consent being enrolled in chancery, a writ is directed to the sheriff to make the perambulation, by the oaths of a Jury of twelve knights, and to set up the bounds and limits, in certainty, between the parties.[2] These proceedings and the return are evidence against the parties and all others in privity with them, on grounds hereafter to be considered. But the perambulation consists not only of this higher written evidence, but also of the acts of the persons making it, and their assistants, such as marking boundaries, setting up monuments, and the like, including their declarations respecting such acts, made during the transactions. Evidence of what these persons were heard to say upon such occasions, is always received; not, however, as hearsay, and under any supposed exception in favor of questions of ancient boundary, but as part of the *res gestæ*, and explanatory of the acts themselves, done in the course of the ambit.[3] Indeed, in the

commissioners, appointed under a statute of Maryland "for marking and bounding lands," and would seem therefore to have been admissible as part of the return, which expressly referred to them; but no final decision was had upon the point, the suit having been compromised. In Buchanan *v.* Moore, 10 S. & R. 275, the point was, whether traditionary evidence was admissible while the declarant was *living*. By the Roman law, traditionary evidence of common fame seems to have been deemed admissible, even in matters of private boundary. Mascard. De Probat. Vol. 1, p. 391, Concl. 396.

[1] Ante, § 128, 129, 130, 135, 136, 137.

[2] 5 Com. Dig. 732, Pleader, 3 G; F. N. B. [133] D; 1 Story on Eq. Jurisp. § 611. See also St. 13 G. 3, c. 81, § 14; St. 41 G. 3, c. 81, § 14; St. 58 G. 3, c. 45, § 16.

[3] Weeks *v.* Sparke, 1 M. & S. 687, per Ld. Ellenborough; Ante, § 108; Elliott *v.* Pearl, 1 McLean, 211.

case of such extensive domains as lordships, they being matters of general interest, traditionary evidence of common fame seems also admissible, on the other grounds, which have been previously discussed.[1]

[1] Ante, § 128–137. The writ *de perambulatione faciendâ* is not known to have been adopted, in practice, in the United States; but in several of the States, remedies somewhat similar in principle have been provided by statutes. In some of the States, provision is only made for a periodical perambulation of the boundaries of towns, by the selectmen; LL. Maine, Rev. 1840, ch. 5; LL. N. Hamp. 1830, Tit. 95; Mass. Rev. Statutes, ch. 15; LL. Connecticut, Rev. 1821, Tit. 10; — or, for a definite settlement of controversies respecting them, by the public surveyor, as in New York, Rev. Code, Part 1, ch. 8, T. 6. In others, the remedy is extended to the boundaries of private estates. See Elmer's Digest, LL. New Jersey, p. 98, 99, 315, 316; Virginia Rev. Code, 1819, Vol. 1, p. 358, 359. A very complete summary remedy, in all cases of disputed boundary, is provided in the statutes of Delaware, Revision of 1819, p. 80, 81, Tit. Boundaries, III. To perambulations made under any of these statutes, the principles stated in the text, it is conceived, will apply.