CHAPTER VIII.

OF DECLARATIONS AGAINST INTEREST.

§ 147. A *third exception* to the rule, rejecting hearsay evidence, is allowed in the case of *declarations and entries made by persons since deceased and against the interest of the persons making them*, at the time when they were made. We have already seen,[1] that declarations of third persons, admitted in evidence, are of two classes; one of which consists of written entries, made in the course of official duty, or of professional employment; where the entry is one of a number of facts, which are ordinarily and usually connected with each other, so that the proof of one affords a presumption, that the others have taken place; and therefore a fair and regular entry, such as usually accompanies facts similar to those of which it speaks, and apparently contemporaneous with them, is received as original presumptive evidence of those facts. And the entry itself being original evidence, it is of no importance, as regards its admissibility, whether the person making it be yet living or dead. But declarations of the other class, of which we are now to speak, are *secondary* evidence, and are received only in consequence of the death of the person making them. This class embraces not only entries in books, but all other declarations, or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared, or at a subsequent day.[2] But

[1] Ante, § 115, 116, and cases there cited.

[2] Ivatt *v.* Finch, 1 Taunt. 141; Doe *v.* Jones, 1 Campb. 367; Davies *v.* Pierce, 2 T. R. 53, and Hollaway *v.* Raikes, there cited; Doe *v.* Williams, Cowp. 621; Peaceable *v.* Watson, 4 Taunt. 16; Stanley *v.* White, 14 East, 332, 341, per Ld. Ellenborough; Haddow *v.* Parry, 3 Taunt. 303; Goss *v.* Watlington, 3 Brod. & Bing. 132; Strode *v.* Winchester, 1 Dick. 397; Barker *v.* Ray, 2 Russ. 63, 76, and cases in p. 67, note; Warren *v.* Greenville, 2 Stra. 1129; 2 Burr. 1071, 1072, S. C.; Doe *v.* Turford, 3 B. & Ad. 898, per Parke, J.; Harrison *v.* Blades, 3 Campb. 457; Manning *v.* Lechmere, 1 Atk. 453.

to render them admissible, it must appear that the declarant is deceased; that he possessed competent knowledge of the facts, or that it was his duty to know them; and that the declarations were at variance with his interest.[1] When these circumstances concur, the evidence is received, leaving its weight and value to be determined by other considerations.

§ 148. The *ground* upon which this evidence is received, is the *extreme improbability of its falsehood.* The regard which men usually pay to their own interest, is deemed a sufficient security, both that the declarations were not made under any

[1] Short *v.* Lee, 2 Jac. & Walk. 464, 488, per Sir Thomas Plumer, M. R.; Doe *v.* Robson, 15 East, 32, 34; Higham *v.* Ridgway, 10 East, 109, per Ld. Ellenborough; Middleton *v.* Melton, 10 B. & C. 317, 327, per Parke, J.; Regina *v.* Worth, 4 Ad. & El. N. S. 137, per Ld. Denman; 2 Smith's Leading Cases, 193, note, and cases there cited; Spargo *v.* Brown, 9 B. & C. 935. The interest, with which the declarations were at variance, must be of a *pecuniary* nature. Davis *v.* Lloyd, 1 Car. & P. 276. The apprehension of possible danger of a prosecution is not sufficient. The Sussex Peerage case, 11 Clark & Fin. 85. In Holladay *v.* Littlepage, 2 Munf. 316, the joint declarations of a deceased shipmaster and the living owner, that the defendant's passage-money had been paid by the plaintiff, were held admissible as parts of the *res gestæ*, being contemporaneous with the time of sailing. This case, therefore, is not opposed to the others cited. Neither is Sherman *v.* Crosby, 11 Johns. 70, where a receipt of payment of a judgment, recovered by a third person against the defendant, was held admissible in an action for the money so paid, by the party paying it, he having had authority to *adjust* the demand, and the receipt being a documentary fact in the adjustment; though the attorney who signed the receipt was not produced, nor proved to be dead. In auditing the accounts of guardians, administrators, &c., the course is to admit receipts as *primâ facie* sufficient vouchers. Shearman *v.* Akins, 4 Pick. 283; Nichols *v.* Webb, 8 Wheat. 326; Welsh *v.* Barrett, 15 Mass. 380; Wilbur *v.* Selden, 6 Cowen, 162; Farmers' Bank *v.* Whitehill, 16 S. & R. 89, 90; Stokes *v.* Stokes, 6 Martin, N. S. 351; Cowen & Hill's notes 479, 480, 489, to 1 Phil. Evid. 256, 257, 265.

mistake of fact, or want of information on the part of the declarant, if he had the requisite means of knowledge, and that the matter declared is true. The apprehension of fraud in the statement is rendered still more improbable, from the circumstance, that it is not receivable in evidence until after the death of the declarant; and that it is always competent for the party, against whom such declarations are adduced, to point out any sinister motive for making them. It is true, that the ordinary and highest tests of the fidelity, accuracy, and completeness of judicial evidence, are here wanting; but their place is, in some measure, supplied by the circumstances of the declarant; and the inconveniences resulting from the exclusion of evidence, having such guaranties for its accuracy in fact, and from its freedom from fraud, are deemed much greater, in general, than any which would probably be experienced from its admission.[1]

§ 149. In some cases, the Courts seem to have admitted this evidence, without requiring *proof of adverse interest in the declarant;* while in others, stress is laid on the fact that such interest had already appeared, *aliunde*, in the course of the trial. In one case it was argued, upon the authorities cited, that it was not material that the declarant ever had any actual interest, contrary to his declaration; but this position was not sustained by the Court.[2] In many other cases, where

[1] Phil. & Am. on Evid. 307, 308; 1 Phil. Evid. 293, 294; Gresley on Evid. 221.

[2] Barker *v.* Ray, 2 Russ. 63, 67, 68, cases cited in note; Id. p. 76. Upon this point, Eldon Lord Chancellor, said; — "The cases satisfy me, that evidence is admissible of declarations made by persons, who have a competent knowledge of the subject, to which such declarations refer, and where their interest is concerned; and the only doubt I have entertained was as to the position, that you are to receive evidence of declarations where there is no interest. At a certain period of my professional life, I should have said, that this doctrine was quite new to me. I do not mean to say more than that I still doubt concerning it. When I have occasion to express my opinion judicially upon it, I will do so; but I desire not to be considered as bound by that, as a rule of evidence." The objection arising from the rejection of such evidence, in the case, was disposed of in another manner.

the evidence consisted of entries in books of account, and the like, they seem to have been clearly admissible as entries made in the ordinary course of business or duty, or parts of the *res gestæ*, and therefore as original, and not secondary evidence; though the fact, that they were made against the interest of the person making them was also adverted to.[1] But in regard to declarations in general, not being entries or acts of the last mentioned character, and which are admissible only on the ground of having been made contrary to the interest of the declarant, the weight of authority, as well as the principle of the exception we are considering, seem plainly to require that such adverse interest should appear, either in the nature of the case, or from extraneous proof.[2] And it seems not to be sufficient, that, in one or more points of view, a declaration may be against interest, if it appears, upon the whole, that the interest of the declarant would be rather promoted than impaired by the declaration.[3]

§ 150. Though the exception we are now considering is, as we have just seen, extended to declarations of any kind, yet it is much more frequently exemplified in documentary evidence, and particularly in entries in books of account. Where these are books of collectors of taxes, stewards, bailiffs, or receivers, subject to the inspection of others, and in which the first entry is generally of money received, charging the party making it, they are doubtless within the principle of the

[1] It has been questioned, whether there is any difference, in the principle of admissibility, between a written entry and an oral declaration of an agent, concerning his having received money for his principal. See Ante, § 113, note; Furdson *v.* Clogg, 10 M. & W. 572; Post, § 152, note.

[2] Higham *v.* Ridgway, 10 East, 109; Warren *v.* Greenville, 2 Stra. 1129, expounded by Ld. Mansfield, in 2 Burr. 1071, 1072; Gleadow *v.* Atkin, 3 Tyrwh. 302, 303; 1 Crompt. & Mees. 423, 424; Short *v.* Lee, 2 Jac. & W. 489; Marks *v.* Lahee, 3 Bing. N. C. 408, 420, per Park, J.; Barker *v.* Ray, 2 Russ. 63, 76; Ante, § 147, and cases in notes.

[3] Phil. & Am. on Evid. 320; 1 Phil Evid. 305, 306; Short *v.* Lee, 2 Jac. & W. 464.

exception.[1] But it has been extended still farther, to include *entries in private books*, also, though retained within the custody of their owners; their liability to be produced, on notice, in trials, being deemed sufficient security against fraud; and the entry not being admissible, unless it *charges the party making it* with the receipt of money on account of a third person, *or acknowledges the payment of money* due to himself; in either of which cases it would be evidence against him, and therefore is considered as sufficiently against his interest to bring it within this exception.[2] The entry of a mere *memorandum of an agreement*, is not sufficient. Thus, where the settlement of a pauper was attempted to be proved, by showing a contract of hiring and service; the books of his deceased master, containing minutes of his contracts with his servants, entered at the time of contracting with them, and of subsequent payments of their wages, were held inadmissible; for the entries were not made against the writer's interest, for he would not be liable unless the service were performed, nor were they made in the course of his duty or employment.[3]

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[1] Barry *v.* Bebbington, 4 T. R. 514; Goss *v.* Watlington, 3 Brod. & Bing. 132; Middleton *v.* Melton, 10 B. & C. 317; Stead *v.* Heaton, 4 T. R. 669; Short *v.* Lee, 2 Jac. & W. 464; Whitnash *v.* George, 8 B. & C. 556; Dean, &c. of Ely *v.* Caldecott, 7 Bing. 433; Marks *v.* Lahee, 3 Bing. 408; Wynne *v.* Tyrwhitt, 4 B. & Ald. 376; De Rutzen *v.* Farr, 4 Ad. & El. 53; 2 Smith's Leading Cas. 193, note; Plaxton *v.* Dare, 10 B. & C. 17, 19; Doe *v.* Cartwright, Ry. & M. 62. An entry by a steward in his books, in his own favor, unconnected with other entries against him, is held not admissible to prove the facts stated in such entry. Knight *v.* Marq. of Waterford, 4 Y. & C. 284. But where the entry goes to show a general balance in his own favor, it has been ruled not to affect the admissibility of a particular entry charging himself. Williams *v.* Geaves, 8 C. & P. 592.

[2] Warren *v.* Greenville, 2 Stra. 1029; 2 Burr. 1071, 1072, S. C.; Higham *v.* Ridgway, 10 East, 109; Middleton *v.* Melton, 10 Barn. & Cres. 317. In those States of the Union, in which the original entries of the party, in his own account books, may be evidence for him; and where, therefore, a false entry may sometimes amount to the crime of forgery, there is much stronger reason for admitting the entries in evidence against third persons. See also Hoare *v.* Coryton, 4 Taunt. 560.

[3] Regina *v.* Worth, 4 Ad. & El. N. S. 132.

§ 151. Where the *entry is itself the only evidence of the charge*, of which it shows the subsequent liquidation, its admission has been strongly opposed, on the ground, that, taken together, it is no longer a declaration of the party against his interest, and may be a declaration ultimately in his own favor. This point was raised in the cases of *Higham* v. *Ridgway*, where an entry was simply marked as *paid*, in the margin; and of *Rowe* v. *Brenton*, which was a debtor and creditor account, in a toller's books, of the money received for tolls, and paid over. But in neither of these cases was the objection sustained. In the former, indeed, there was evidence *aliunde*, that the service charged had been performed; but Lord Ellenborough, though he afterwards adverted to this fact, as a corroborating circumstance, first laid down the general doctrine, that "the evidence was properly admitted, upon the broad principle on which receivers' books have been admitted." But in the latter case there was no such proof; and Lord Tenterden observed, that almost all the accounts which were produced, were accounts on both sides; and that the objection would go to the very root of that sort of evidence. Upon these authorities, the admissibility of such entries may perhaps be considered as established.[1] And it is observable, in corroboration of their admissibility, that in most, if not all the cases, they appear to have been made in the ordinary course of business or of duty, and therefore were parts of the *res gestæ*.[2]

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[1] Higham *v.* Ridgway, 10 East, 109; Rowe *v.* Brenton, 3 Man. & R. 267; 2 Smith's Leading Cas. 196, note. In Williams *v.* Geaves, 8 C. & P. 592, the entries in a deceased steward's account were admitted, though the balance of the account was in his favor. See also Doe *v.* Tyler, 4 M. & P. 377, there cited.

[2] In Doe *v.* Vowles, 1 M. & Rob. 261, the evidence offered was merely a trademan's bill, receipted in full; which was properly rejected by Littledale, J., as it had not the merit of an original entry; for though the receipt of payment was against the party's interest, yet the main fact to be established was the performance of the services charged in the bill, the appearance of which denoted that better evidence existed, in the original entry in the tradesman's book. The same objection, indeed, was taken here, by the learned counsel

§ 152. It has also been questioned, whether the entry is to be received in evidence of *matters*, which, though forming *part of the declaration*, were *not in themselves against the interest of the declarant.* This objection goes not only to collateral and independent facts, but to the class of entries mentioned in the preceding section; and would seem to be overruled by those decisions. But the point was solemnly argued in a later case, where it was adjudged, that though, if the point were now for the first time to be decided, it would seem more reasonable to hold, that the memorandum of a receipt of payment was admissible only to the extent of proving, that a payment had been made, and the account on which it had been made, giving it the effect only of verbal proof of the same payment; yet, that the authorities had gone beyond that limit, and the entry of a payment, against the interest of the party making it, had been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it. Accordingly, in that case, where three persons made a joint and several promissory note, and a partial payment was made by one, which was indorsed upon the note in these terms, — "Received of W. D. the sum of £280, on account of the within note, *the* £300" (which was the amount of the note) "*having been originally advanced to E. H.*," — for which payment an action was brought by the party paying, as surety, against E. H., as the principal debtor; it was held, upon the authority of *Higham* v. *Ridgway*, and of *Doe* v. *Robson*, that the indorsement, the creditor being dead, was admissible in evidence of the whole statement contained in it; and consequently, that it was *primâ facie* proof not only of the payment of the

for the defendant, as in the cases of Higham *v.* Ridgway, and of Rowe *v.* Brenton, namely, that the proof, as to interest, was on both sides, and neutralized itself; but the objection was not particularly noticed by Littledale, J, before whom it was tried; though the same learned Judge afterwards intimated his opinion, by observing, in reply to an objection similar in principle, in Rowe *v.* Brenton, that "a man is not likely to charge himself, for the purpose of getting a discharge." See also § 152.

money, but of the person who was the principal debtor, for whose account it was paid; leaving its effect to be determined by the Jury.[1]

§ 153. In order to render *declarations against interest* admissible, it is *not necessary that the declarant should have been competent*, if living, to testify to the facts contained in the declaration; the evidence being admitted on the broad ground, that the declaration was against the interest of the party making it, in the nature of a confession, and, on that account so probably true as to justify its reception.[2] For the

[1] Davies *v.* Humphreys, 6 Mees. & Welsb. 153, 166. See also Stead *v.* Heaton, 4 T. R. 669; Roe *v.* Rawlings, 7 East, 279; Marks *v.* Lahee, 3 Bing. N. C. 408. The case of Chambers *v.* Bernasconi, 1 Cr. & Jer. 451, 1 Tyrwh. 335, which may seem opposed to these decisions, turned on a different principle. That case involved the effect of an under sheriff's return, and the extent of the circumstances which the sheriff's return ought to include, and as to which it would be conclusive evidence. It seems to have been considered, that the return could properly narrate only those things, which it was the officer's duty to do; and therefore, though evidence of the fact of the arrest, it was held to be no evidence of the place where the arrest was made, though this was stated in the return. The learned counsel also endeavored to maintain the admissibility of the under sheriff's return, in proof of the place of arrest, as a written declaration, by a deceased person, of a fact against his interest; but the Court held, that it did not belong to that class of cases. 1 Tyrwh. 333, per Bayley, B. Afterwards this judgment was affirmed in the Exchequer Chamber, 4 Tyrwh. 531; 1 Cr. Mees. & Ros. 347, 368; the Court being "all of opinion, that whatever effect may be due to an entry, made in the course of any office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances." See also Thompson *v.* Stevens, 2 Nott & McC. 493; Sherman *v.* Crosby, 11 Johns. 70. Whether a verbal declaration of a deceased agent or officer, made while he was paying over money to his principal or superior, and designating the person from whom he received a particular sum entered by him in his books, is admissible in evidence against that person; *quære;* and see Furdson *v.* Clogg, 10 M. & W. 572.

[2] Doe *v.* Robson, 15 East, 32; Short *v.* Lee, 2 Jac. & W. 464, 489; Gleadow *v.* Atkin, 1 Cr. & Mees. 410; Middleton *v.* Melton, 10 B. & C. 317, 326; Bosworth *v.* Crotchett, Ph. & Am. on Evid. 348, n.

same reason it does not seem necessary that the fact should have been stated on the personal knowledge of the declarant.[1] Neither is it material whether the same fact is or is not provable by other witnesses who are still living.[2] Whether their testimony, if produced, might be more satisfactory, or its nonproduction, if attainable, might go to diminish the weight of the declarations, are considerations for the Jury, and do not affect the rule of law.

§ 154. But where the evidence consists of entries made by persons acting for others, in the capacity of *agents*, *stewards*, or *receivers*, some proof of such agency is generally required, previous to their admission. The handwriting after thirty years need not be proved.[3] In regard to the proof of official character, a distinction has been taken between public and private offices, to the effect, that, where the office is public, and must exist, it may always be presumed that a person who acts in it has been regularly appointed; but that where it is merely private, some preliminary evidence must be adduced of the existence of the office and of the appointment of the agent or incumbent.[4] Where the entry by an agent charges himself, in the first instance, that fact has been deemed sufficient proof of his agency;[5] but where it was made by one styling himself clerk to a steward, that alone was considered not sufficient to prove the receipt, by either of them, of the money therein mentioned.[6] Yet where ancient books contain strong internal evidence of their actually being receivers' or agents' books, they may on that ground alone be submitted to the Jury.[7] Upon the general question, how far mere antiquity

[1] Crease *v.* Barrett, 1 Cr. Mees. & R. 919.

[2] Middleton *v.* Melton, 10 B. & C. 327, per Parke, J.; Barry *v.* Bebbington, 4 T. R. 514.

[3] Wynne *v.* Tyrwhitt, 4 B. & Ald. 376.

[4] Short *v.* Lee, 2 Jac. & W. 464, 468.

[5] Doe *v.* Stacy, 6 Car. & P. 139.

[6] De Rutzen *v.* Farr, 4 Ad. & El. 53.

[7] Doe *v.* Ld. Geo. Thynne, 10 East, 206, 210.

in the entry will avail, as preliminary proof of the character of the declarant, or party making the entry; and how far the circumstances, which are necessary to make a document evidence, must be proved *aliunde*, and cannot be gathered from the document itself, the law does not seem perfectly settled.[1] But where the transaction is ancient, and the document charging the party with the receipt of money is apparently genuine and fair, and comes from the proper repository, it seems admissible, upon the general principles already discussed in treating of this exception.[2]

§ 155. There is another class of entries, admissible in evidence, which sometimes has been regarded as anomalous, and at others has been deemed to fall within the principle of the present exception to the general rule; namely, the private *books of a deceased rector or vicar*, or of an ecclesiastical corporation aggregate, containing entries of the receipt of ecclesiastical dues, when admitted in favor of their successors, or

[1] In one case, where the point in issue was the existence of a custom for the exclusion of foreign cordwainers from a certain town; an entry in the corporation books, signed by one acknowledging himself not a freeman, or free of the corporation, and promising to pay a fine assessed on him for breach of the custom; and another entry, signed by two others, stating that they had distrained and appraised nine pairs of shoes, from another person for a similar offence, were severally held inadmissible, without previously offering some evidence to show by whom the entries were subscribed, and in what situation the several parties actually stood; although the latest of the entries was more than a hundred years old. Davies *v.* Morgan, 1 Cr. & Jer. 587, 590, 593, per Lord Lyndhurst, C. B. In another case, which was a bill for tithes, against which a *modus* was alleged in defence, a receipt of more than fifty years old was offered to prove a money payment therein mentioned to have been received for a prescription rent in lieu of tithes; but it was held inadmissible, without also showing who the parties were, and in what character they stood. Manby *v.* Curtis, 1 Price, 225, per Thompson, C. B.; Graham, B., and Richards, B.; Wood, B. dissentiente.

[2] See Phil. & Am. on Evid. 331, n. (2); 1 Phil. Evid. 316, n. (6), and cases there cited; Fenwick *v.* Read, 6 Madd. 8, per Sir J. Leach, Vice Ch.; Bertie *v.* Beaumont, 2 Price, 307; Bp. of Meath *v.* Marquis of Winchester, 3 Bing. N. C. 183, 203.

of parties claiming the same interest as the maker of the entries. Sir Thomas Plumer, in a case before him,[1] said; — "It is admitted, that the entries of a rector or vicar are evidence for or against his successors. It is too late to argue upon that rule, or upon what gave rise to it; whether it was the *cursus Scaccarii*, the protection of the clergy, or the peculiar nature of property in tithes. It is now the settled law of the land. *It is not to be presumed that a person, having a temporary interest only, will insert a falsehood in his book, from which he can derive no advantage.* Lord Kenyon has said, that the rule is an exception; and it is so; for no other proprietor can make evidence for those who claim under him, or for those who claim in the same right and stand in the same predicament. But it has been the settled law as to tithes, as far back as our research can reach. We must, therefore, set out from this as a datum; and we must not make comparisons between this and other corporations. No corporation sole, except a rector or vicar, can make evidence for his successor." But the strong presumption that a person, having a temporary interest only, will not insert in his books a falsehood, from which he can derive no advantage, which evidently and justly had so much weight in the mind of that learned Judge, would seem to bring these books within the principle on which entries, made either in the course of duty, or against interest, are admitted. And it has been accordingly remarked, by a writer of the first authority in this branch of the law, that after it has been determined that evidence may be admitted of receipts of payment, entered in private books, by persons who are neither obliged to keep such books, nor to account to others for the money received, it does not seem any infringement of principle to admit these books of rectors and vicars. For the entries cannot be used by those who made them; and there is no legal privity between them and their successors. The strong leaning on their part in favor of the church is nothing more, in legal consideration, than the leaning of every declarant in favor of his own interest, affecting the weight of

[1] Short *v.* Lee, 2 Jac. & W. 177, 178.

the evidence, but not its admissibility. General observations have occasionally been made respecting these books, which may seem to authorize the admission of any kind of statement contained in them. But such books are not admissible, except where the entries contain receipts of money or ecclesiastical dues, or are otherwise apparently prejudicial to the interests of the makers, in the manner in which entries are so considered in analogous cases.[1] And proof will be required, as in other cases, that the writer had authority to receive the money stated, and is actually dead; and that the document came out of the proper custody.[2]

[1] Phil. & Am. on Evid. 322, 323, and cases in notes (2) and (3); 1 Phil. Evid. 308, n. (1), (2); Ward *v.* Pomfret, 5 Sim. 475.

[2] Gresley on Evid. 223, 224; Carrington *v.* Jones, 2 Sim. &. Stu. 135, 140; Perigal *v.* Nicholson, 1 Wightw. 63.