with some of the legal formalities, it seems it may still be treated as a dying declaration, if made *in extremis*.[1]

§ 162. Though these declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances, in respect of which the deceased was not likely to have been mistaken, are entitled to great weight, if precisely identified; yet it is always to be recollected, that the accused has not the *power of cross-examination*, — a power quite as essential, to the eliciting of all the truth, as the obligation of an oath can be; — and that where the witness has not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger, and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements; especially as the salutary and restraining fear of punishment for perjury is in such cases withdrawn. And it is further to be considered, that the particulars of the violence, to which the deceased has spoken, were in general likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed; and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative.[2]

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[1] Rex *v.* Woodcock, 2 Leach, Cr. Cas. 563; Rex *v.* Callaghan, McNally's Evid 385.

[2] Phil. & Am. on Evid. 305, 306; 1 Phil. Evid. 292; 2 Johns 35, 36, per Livingston, J. See also Mr. Evans's observations on the great caution to be observed in the use of this kind of evidence, in 2 Poth. Obl. 255, (293); 2 Stark. Ev. 263. See also Rex *v.* Ashton, 2 Lewin's Cr. Cas. 147, per Alderson, B.

CHAPTER X.

OF THE TESTIMONY OF WITNESSES SUBSEQUENTLY DEAD, ABSENT, OR DISQUALIFIED.

§ 163. In the *fifth class* of exceptions to the rule rejecting hearsay evidence, may be included *the testimony of deceased witnesses, given in a former action, between the same parties;* though this might, perhaps, with equal propriety, be considered under the rule itself. This testimony may have been given either orally, in Court, or in written depositions, taken out of Court. The latter will be more particularly considered hereafter, among the Instruments of Evidence. But at present we shall state some principles applicable to the testimony, however given. The chief reasons for the exclusion of hearsay evidence, are the want of the sanction of an oath, and of any opportunity to cross-examine the witness. But where the testimony was given under oath, in a judicial proceeding, in which the adverse litigant was a party, and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any subsequent suit between the same parties.[1] It is also received, if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick and unable to testify, or has been summoned, but appears to have been kept away by the adverse party.[2] But testimony thus offered is open to all the

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[1] Bull. N. P. 239, 242; Mayor of Doncaster *v.* Day, 3 Taunt. 262; Glass *v.* Beach, 5 Verm. 172; Lightner *v.* Wike, 4 S. & R. 203.

[2] Bull. N. P. 239, 243; 1 Stark. Evid. 264; 12 Vin. Abr. 107, A. b. 31; Godb. 326; Rex *v.* Eriswell, 3 T. R. 707, 721, per Ld. Kenyon. As to the effect of interest subsequently acquired, see post, § 167. Upon the question, whether this kind of evidence is admissible in any other contingency, except the death of the witness, there is some discrepancy among the

objections which might be taken, if the witness were personally present.[1] And if the witness gave a written deposition

American authorities. It has been refused, where the witness had subsequently become interested, but was living and within reach; Chess *v.* Chess, 17 S. & R. 409; Irwin *v.* Reed, 4 Yeates, 512; — where he was not to be found within the jurisdiction, but was reported to have gone to an adjoining State; Wilbur *v.* Selden, 6 Cowen, 162; — where, since the former trial, he had become incompetent by being convicted of an infamous crime; Le Baron *v.* Crombie, 14 Mass. 234; — where, though present, he had forgotten the facts to which he had formerly testified; Drayton *v.* Wells, 1 Nott & McCord, 409; — and where he was proved to have left the State, after being summoned to attend at the trial; Finn's case, 5 Rand. 701. In this last case it was held, that this sort of testimony was not admissible in any criminal case whatever. In the cases of Le Baron *v.* Crombie, Wilbur *v.* Selden, and also in Crary *v.* Sprague, 12 Wend. 41, it was said, that such testimony was not admissible in any case, except where the witness was shown to be dead; but this point was not in either of those cases directly in judgment; and in some of them it does not appear to have been fully considered. On the other hand, in Drayton *v.* Wells, it was held by Cheves, J. to be admissible in four cases; — 1st, where the witness is dead, — 2d, insane, — 3d, beyond seas, — and 4th, where he has been kept away by contrivance of the other party. See also Moore *v.* Pearson, 6 Watts & Serg. 51. In Magill *v.* Kauffman, 4 S. & R. 317, and in Carpenter *v.* Groff, 5 S. & R. 162, it was admitted on proof that the witness had removed from Pennsylvania to Ohio; — it was also admitted, where the witness was unable to testify, by reason of sickness, in Miller *v.* Russell, 7 Martin, 266, N. S.; — and even where he, being a sheriff, was absent on official duty. Noble *v.* Martin, 7 Martin, 282, N. S. See 1 Phil. Ev. 231, note 441, by Cowen & Hill. But if it appears that the witness was not fully examined at the former trial, his testimony cannot be given in evidence. Noble *v.* McClintock, 6 Watts & Serg. 58. If the witness is gone, no one knows whither, and his place of abode cannot be ascertained by diligent inquiry, the case can hardly be distinguished in principle from that of his death; and it would seem that his former testimony ought to be admitted. If he is merely out of the jurisdiction, but the place is known, and his testimony can be taken under a commission, it is a proper case for the Judge to decide, in his discretion, and upon all the circumstances, whether the purposes of justice will be best served by issuing such commission, or by admitting the proof of what he formerly testified.

[1] Wright *v.* Tatham, 2 Ad. & El. 3, 21. Thus, where the witness at the former trial was called by the defendant, but was interested on the side of the plaintiff, and the latter, at the second trial, offers to prove his former testimony, the defendant may object to the competency of the evidence, on the ground of interest. Crary *v.* Sprague, 12 Wend. 41.

in the cause, but afterwards testified orally in Court, parol evidence may be given of what he testified *vivâ voce*, notwithstanding the existence of the deposition.[1]

§ 164. The admissibility of this evidence seems to *turn* rather *on the right to cross-examine*, than upon the precise nominal identity of all the parties. Therefore, where the witness testified in a suit, in which A. and several others were plaintiffs, against B. alone, his testimony was held admissible, after his death, in a subsequent suit relating to the same matter, brought by B. against A. alone.[2] And though the two trials were not between the same parties, yet if the second trial is between those who represent the parties to the first, by privity in blood, in law, or in estate, the evidence is admissible. And if, in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point or fact in another action between the same parties or their privies, though the last suit be for other lands.[3] The principle on which, chiefly, this evidence is admitted, namely, the right of cross-examination, requires that its admission be carefully restricted to the extent of that right; and that where the witness incidentally stated matter, as to which the party was not permitted by the law of trials to cross-examine him, his statement as to that matter ought not afterwards to be received in evidence against such party. Where, therefore, the point in issue in both actions was not the same, the issue in the former action having been upon a common or free fishery, and in the latter, it being upon a

[1] Tod *v.* E. of Winchelsea, 3 C. & P. 387.

[2] Wright *v.* Tatham, 1 Ad. & El. 3.

[3] Outram *v.* Morewood, 3 East, 346, 354, 355, per Ld. Ellenborough; Peake's Evid. (3d Ed.) p. 37; Bull. N. P. 232; Doe *v.* Derby, 1 Ad. & El. 783; Doe *v.* Foster, Ib. 791, note; Lewis *v* Clerges, 3 Bac. Abr. 614; Shelton *v.* Barbour, 2 Wash. 64; Rushford *v.* Countess of Pembroke, Hard. 472; Jackson *v.* Lawson, 15 Johns. 544; Jackson *v.* Baily, 2 Johns. 17; Powell *v.* Waters, 17 Johns. 176.

several fishery, evidence of what a witness, since deceased, swore upon the former trial, was held inadmissible.[1]

§ 165. It was formerly held that the person, called to prove what a deceased witness testified on a former trial must be required to repeat his *precise words*, and that testimony merely to the effect of them was inadmissible.[2] But this strictness

[1] Melvin *v.* Whiting, 7 Pick. 79. See also Jackson *v.* Winchester, 4 Dall. 206.

[2] 4 T. R. 290, said per Ld. Kenyon, to have been so "agreed on all hands," upon an offer to prove what Ld. Palmerston had testified. So held, also, by Washington, J. in United States *v.* Wood, 3 Wash. 440; 1 Phil. Evid. 200, [215] 3d ed.; Foster *v.* Shaw, 7 Serg. & R. 163, per Duncan, J.; Wilbur *v.* Selden, 6 Cowen, 165. The same rule is applied to the proof of dying declarations. Montgomery *v.* Ohio, 11 Ohio R. 424. In New Jersey it has been held, that if a witness testifies that he has a distinct recollection, independent of his notes, of the fact that the deceased was sworn as a witness at the former trial, of what he was produced to prove, and of the substance of what he then stated; he may rely on his notes for the language, if he believes them to be correct. Sloan *v.* Somers, 1 Spencer, R. 66. In Massachusetts, in The Commonwealth *v.* Richards, 18 Pick. 434, the witnesses did not state the exact words used by the deceased witness, but only the substance of them, from recollection, aided by notes taken at the time; and one of the witnesses testified that he was confident that he stated substantives and verbs correctly, but was not certain as to the prepositions and conjunctions. Yet the Court held this insufficient, and required that the testimony of the deceased witness be stated in his own language, *ipsissimis verbis*. The point was afterwards raised in Warren *v.* Nichols, 6 Metc. 261; where the witness stated that he could give the substance of the testimony of the deceased witness, but not the precise language; and the Court held it insufficient; Hubbard, J. *dissentiente*. The rule, however, as laid down by the Court in the latter case, seems to recognise a distinction between giving the substance of the deceased witness's testimony, and the substance of his language; and to require only that his language be stated substantially, and in all material particulars, and not *ipsissimis verbis*. The learned Chief Justice stated the doctrine as follows: — "The rule upon which evidence may be given of what a deceased witness testified on a former trial between the same parties, in a case where the same question was in issue, seems now well established in this Commonwealth by authorities. It was fully considered in the case of Commonwealth *v.* Richards, 18 Pick. 434. The principle on which this rule rests was accurately stated, the cases in support of it were referred to, and with the decision of

is not now insisted upon, in proof of the crime of perjury;[1] and it has been well remarked, that to insist upon it in other

which we see no cause to be dissatisfied. The general rule is, that one person cannot be heard to testify as to what another person has declared, in relation to a fact within his knowledge, and bearing upon the issue. It is the familiar rule which excludes hearsay. The reasons are obvious, and they are two. First, because the averment of fact does not come to the Jury sanctioned by the oath of the party on whose knowledge it is supposed to rest; and secondly, because the party upon whose interests it is brought to bear, has no opportunity to cross-examine him on whose supposed knowledge and veracity the truth of the fact depends. Now the rule, which admits evidence of what another said on a former trial, must effectually exclude both of these reasons. It must have been *testimony*, that is, the affirmation of some matter of fact, under oath, it must have been in a suit between the same parties in interest, so as to make it sure that the party, against whom it is now offered, had an opportunity to cross-examine; and it must have been upon the same subject matter, to show that his attention was drawn to points now deemed important. It must be the same testimony which the former witness gave, because it comes to the Jury under the sanction of his oath, and the Jury are to weigh the testimony and judge of it, as he gave it. The witness, therefore, must be able to state the language in which the testimony was given, substantially and in all material particulars, because that is the vehicle, by which the testimony of the witness is transmitted, of which the Jury are to judge. If it were otherwise, the statement of the witness, which is offered, would not be of the testimony of the former witness; that is, of the ideas conveyed by the former witness in the language in which he embodied them; but it would be a statement of the present witness's understanding and comprehension of those ideas, expressed in language of his own. Those ideas may have been misunderstood, modified, perverted, or colored, by passing through the mind of the witness, by his knowledge or ignorance of the subject, or the language in which the testimony was given, or by his own prejudices, predilections, or habits of thought or reasoning. To illustrate this distinction, as we understand it to be fixed by the cases: If a witness, remarkable for his knowledge of law, and his intelligence on all other subjects, of great quickness of apprehension and power of discrimination, should declare that he could give the substance and effect of a former witness's testimony, but could not recollect his language, we suppose he would be excluded by the rule. But if one of those remarkable men should happen to have been present, of great stolidity of mind, upon most subjects, but of extraordinary tenacity of memory for language, and who would say that he recollected and could repeat all the

[1] Rex *v.* Rowley, 1 Mood. Cr. Cas. 111.

cases, goes in effect to exclude this sort of evidence altogether; or to admit it only where, in most cases, the particularity and minuteness of the witness's narrative, and the exactness with which he undertakes to repeat every word of the deceased's testimony, ought to excite just doubts of his own honesty, and of the truth of his evidence. It seems, therefore, to be generally considered sufficient, if the witness is able to state the substance of what was sworn on the former trial.[1] But he must state, in substance the whole of what

words uttered by the witness; although it should be very manifest that he himself did not understand them, yet his testimony would be admissible. The witness called to prove former testimony must be able to satisfy one other condition, namely, that he is able to state all that the witness testified on the former trial, as well upon the direct as the cross-examination. The reason is obvious. One part of his statement may be qualified, softened, or colored by another. And it would be of no avail to the party against whom the witness is called to state the testimony of the former witness, that he has had the right and opportunity to cross-examine that former witness with a view of diminishing the weight or impairing the force of that testimony against him, if the whole and entire result of that cross-examination does not accompany the testimony. It may perhaps be said, that, with these restrictions, the rule is of little value. It is no doubt true, that in most cases of complicated and extended testimony, the loss of evidence by the decease of a witness cannot be avoided. But the same result follows, in most cases, from the decease of a witness, whose testimony has not been preserved in some of the modes provided by law. But there are some cases, in which the rule can be usefully applied, as in case of testimony embraced in a few words — such as proof of demand or notice on notes or bills — cases in which large amounts are often involved. If it can be used in a few cases, consistently with the true and sound principles of the law of evidence, there is no reason for rejecting it altogether. At the same time, care should be taken so to apply and restrain it, that it may not, under a plea of necessity, and in order to avoid hard cases, be so used as to violate those principles. It is to be recollected, that it is an exception to a general rule of evidence supposed to be extremely important and necessary; and unless a case is brought fully within the reasons of such exception, the general rule must prevail." See 6 Metc. 264–266.

[1] See Cornell *v.* Green, 10 Serg. & R. 14, 16, where this point is briefly but powerfully discussed, by Mr. Justice Gibson. See also Miles *v.* O'Hara, 4 Binn. 108; Caton *v.* Lenox, 5 Randolph, 31, 36; 1 Phil. Evid. 338; Rex *v.* Rowley, 1 Mood. Cr. C. 111; Chess *v.* Chess, 17 Serg. & R. 409, 411, 412; Jackson *v.* Bailey, 2 Johns. 17; 2 Russ. on Crimes, 638, [683] (3d Am. ed); Cowen & Hill's note 441, to 1 Phil. Evid. 231; Sloan *v.* Somers, 1 Spencer's R. 66; Garrott *v.* Johnson, 11 G. & J. 28; Canney's case, 9 Law Reporter, 408; The State *v.* Hooker, 2 Washb. 658; Gildersleeve *v.* Caraway, 10 Alab. R. 260.

was said on the particular subject which he is called to prove. If he can state only what was said on that subject by the deceased on his examination in chief, without also giving the substance of what he said upon it in his cross-examination, it is inadmissible.[1]

§ 166. What the deceased witness testified may be *proved by any person*, who will swear from his own memory; or by notes taken by any person, who will swear to their accuracy;[2] or, perhaps, from the necessity of the case, by the *Judge's own notes*, where both actions are tried before the same Judge; for in such case, it seems, the Judge, from his position, as well as from other considerations, cannot be a witness.[3] But, except in this case of necessity, if it be admitted as such, the better opinion is, that the Judge's notes are not legal evidence of what a witness testified before him; for they are no part of the record, nor is it his official duty to take them, nor have they the sanction of his oath to their accuracy or completeness.[4] But in chancery, when a new trial is ordered of an

[1] Wolf *v.* Wyeth, 11 Serg. & R. 149; Gildersleeve *v.* Caraway, 10 Alab. R. 260.

[2] Mayor of Doncaster *v.* Day, 3 Taunt. 267; Chess *v.* Chess, 17 Serg. & R. 409. The witness, as has been stated in a preceding note, must be able to testify, from his recollection alone, that the deceased was sworn as a witness, the matter or thing which he was called to prove, and the substance of what he stated; after which his notes may be admitted. Sloan *v.* Somers, 1 Spencer, N. J. R. 66; Ante, § 165, note (2).

[3] Glassford on Evid. 602; Tait on Evid. 432; Regina *v.* Garard, 8 C. & P. 595; Post, § 249.

[4] Miles *v.* O'Hara, 4 Binn. 108; Foster *v.* Shaw, 7 Serg. & R. 156; Ex parte Learmouth, 6 Madd. R. 113; Reg. *v.* Plummer, 8 Jur. 922, per Gurney, B.; Livingston *v.* Cox, 8 Watts & Serg. 61. Courts expressly disclaim any power to compel the production of a Judge's notes. Scougull *v.* Campbell, 1 Chitty, R. 283; Graham *v.* Bowham, Ib. 284, note. And

issue sent out of Chancery to a Court of Common Law, and it is suggested that some of the witnesses in the former trial are of advanced age, an order may be made that, in the event of their death or inability to attend, their testimony may be read from the Judge's notes.[1]

§ 167. The effect of an *interest, subsequently acquired* by the witness, as laying a foundation for the admission of proof of his former testimony, remains to be considered. It is in general true, that if a person, who has knowledge of any fact, but is under no obligation to become a witness to testify to it, should afterwards become interested in the subject-matter, in which that fact is involved, and his interest should be on the side of the party calling him, he would not be a competent witness, until the interest is removed. If it is releasable by the party, he must release it. If not, the objection remains; for neither is the witness, nor a third person, compellable to give a release; though the witness may be compelled to receive one. And the rule is the same in regard to a subscribing witness, if his interest was created by the act of the party calling him. Thus, if the charterer of a ship should afterwards communicate to the subscribing witness of the charter-party an interest in the adventure, he cannot call the witness to prove the execution of the charter-party; nor will proof of his handwriting be received; for it was the party's

if an application is made to amend a verdict by the Judge's notes, it can be made only to the Judge himself, before whom the trial was had. Ibid. 2 Tidd's Pr. 770, 933. Where a party, on a new trial being granted, procured, at great expense, copies of a shorthand writer's notes of the evidence given at the former trial, for the amount of which he claimed allowance in the final taxation of costs; the claim was disallowed, except for so much as would have been the expense of waiting on the Judge, or his clerk, for a copy of his notes; on the ground that the latter would have sufficed. Crease *v.* Barrett, 1 Tyrw. & Grang. 112. But this decision is not conceived to affect the question, whether the Judge's notes would have been admissible before another Judge, if objected to.

[1] Hargrave *v.* Hargrave, 10 Jur. 957.

own act, to destroy the evidence.[1] It is, however, laid down, that a witness cannot, by the subsequent voluntary creation of an interest, without the concurrence or assent of the party, deprive him of the benefit of his testimony.[2] But this rule admits of a qualification, turning upon the manner in which the interest was acquired. If it were acquired wantonly, as by a wager, or fraudulently, for the purpose of taking off his testimony, of which the participation of the adverse party would generally be proof, it would not disqualify him. But "the pendency of a suit cannot prevent third persons from transacting business, *bonâ fide*, with one of the parties; and, if an interest in the event of the suit is thereby acquired, the common consequence of law must follow, that the person so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage."[3] Therefore, where, in an action against one of several underwriters on policy of insurance, it appeared that a subsequent underwriter had paid, upon the plaintiff's promise to refund the money, if the defendant in the suit should prevail; it was held, that he was not a competent witness for the defendant to prove a fraudulent concealment of facts by the plaintiff, it

[1] Hovill *v.* Stephenson, 5 Bing. 493; Hamilton *v.* Williams, 1 Hayw. 139; Johnson *v.* Knight, 1 N. Car. Law Rep. 93; 1 Murph. 293; Bennett *v.* Robinson, 3 Stew. & Port. 227, 237; Schall *v.* Miller, 5 Whart. 156.

[2] 1 Stark. Evid. 118; Barlow *v.* Vowell, Skin. 586; George *v.* Pierce, cited by Buller, J. in 3 T. R. 37; Rex *v.* Fox, 1 Str. 652; Long *v.* Baillie, 4 Serg. & R. 222; Burgess *v.* Lane, 3 Greenl. 165; Jackson *v.* Rumsey, 3 Johns. Cas. 234, 237; Post, § 418.

[3] 3 Campb. 381, per Ld. Ellenborough. The case of Bent *v.* Baker, 3 T. R. 27, seems to have been determined on a similar principle, as applied to the opposite state of facts; the subsequent interest acquired by the broker, being regarded as affected with bad faith on the part of the assured, who objected to his admission. The distinction taken by Lord Ellenborough was before the Supreme Court of the United States in Winship *v.* The Bank of the U. States, 5 Peters, 529, 541, 542, 545, 546, 552, but no decision was had upon the question, the Court being equally divided. But the same doctrine was afterwards discussed and recognised, as "founded on the plainest reasons," in Eastman *v.* Winship, 14 Pick. 44; 10 Wend. 162, 164, acc.

being merely a payment by anticipation, of his own debt, in good faith, upon a reasonable condition of repayment.[1] And as the interest which one party acquires in the testimony of another, is liable to the contingency of being defeated by a subsequent interest of the witness in the subject-matter, created *bonâ fide*, in the usual and lawful course of business; the same principle would seem to apply to an interest arising by operation of law, upon the happening of an uncertain event, such as the death of an ancestor, or the like. But though the interest which a party thus acquires in the testimony of another, is liable to be affected by the ordinary course of human affairs, and of natural events, the witness being under no obligation, on that account, either to change the course of his business, or to abstain from any ordinary and lawful act or employment; yet it is a right of which neither the witness, nor any other person, can, by voluntary act and design, deprive him. Wherever, therefore, the subsequent interest of the witness has been created either wantonly, or in bad faith, it does not exclude him; and doubtless the participation of the adverse party in the creation of such interest would, if not explained by other circumstances, be very strong *primâ facie* evidence of bad faith; as an act of the witness, uncalled for, and out of the ordinary course of business, would be regarded as wanton.[2]

§ 168. If, in cases of disqualifying interest, the witness has

[1] Forrester *v.* Pigou, 3 Campb. 380; 1 M. & S. 9, S. C.; Phelps *v.* Riley, 6 Conn. 266. In Burgess *v.* Lane, 3 Greenl. 165, the witness had voluntarily entered into an agreement with the defendant, against whom he had an action pending in another Court, that that action should abide the event of the other, in which he was now called as a witness for the plaintiff; and the Court held, that it did not lie with the defendant, who was party to that agreement, to object to his admissibility. But it is observable, that that agreement was not made in discharge of any real or supposed obligation, as in Forrester *v.* Pigou; but was on a new subject, was uncalled for, and purely voluntary; and therefore subjected the adverse party to the imputation of bad faith in making it.

[2] See post, § 418, where this subject is again considered.

previously given a deposition in the cause, the deposition may be read in Chancery, as if he were since deceased, or insane, or otherwise incapacitated. It may also be read in the trial, at law, of an issue out of Chancery. In other trials at law, no express authority has been found for reading the deposition; and it has been said, that the course of practice is otherwise; but no reason is given, and the analogies of the law are altogether in favor of admitting the evidence.[1] And as it is hardly possible to conceive a reason for the admission of prior testimony given in one form, which does not apply to the same testimony given in any other form, it would seem clearly to result, that, where the witness is subsequently rendered incompetent by interest, lawfully acquired, in good faith, evidence may be given of what he formerly testified orally, in the same manner as if he were dead; and the same principle will lead us farther to conclude that, in all cases where the party has, without his own fault or concurrence, irrecoverably lost the power of producing the witness again, whether from physical or legal causes, he may offer the secondary evidence of what he testified in the former trial. If the lips of the witness are sealed, it can make no difference in principle, whether it be by the finger of death, or the finger of the law. The interest of the witness, however, is no excuse for not producing him in Court; for perhaps the adverse party will waive any objection on that account. It is only when the objection is taken and allowed, that a case is made for the introduction of secondary evidence.

[1] This is now the established practice in Chancery; Gresley on Evid. 267; — and in Chess *v.* Chess, 17 Serg. & R. 412, it was conceded by Tod, J., that the reason and principle of the rule applied with equal force, in trials at law; though it was deemed in that case to have been settled otherwise, by the course of decisions in Pennsylvania. See also 1 Stark. Evid. 264, 265; 1 Smith's Chan. Pr. 344; Gosse *v.* Tracy, 1 P. W. 287; 2 Vern. 699, S. C.; Andrews *v.* Palmer, 1 Ves. & B. 21; Luttrell *v.* Reynell, 1 Mod. 284; Jones *v.* Jones *v.* Jones, 1 Cox, 184; Union Bank *v.* Knapp, 3 Pick. 108, 109, per Putnam, J.; Wafer *v.* Hemken, 9 Rob. 203.