CHAPTER XI.

OF ADMISSIONS.

§ 169. Under the head of exceptions to the rule rejecting hearsay evidence, it has been usual to treat of *admissions and confessions* by the party; considering them as declarations against his interest, and therefore probably true. But in regard to many admissions, and especially those implied from conduct and assumed character, it cannot be supposed that the party, at the time of the principal declaration or act done, believed himself to be speaking or acting against his own interest; but often the contrary. Such evidence seems, therefore, more properly admissible as a *substitute* for the ordinary and legal proof; either in virtue of the direct consent and waiver of the party, as in the case of explicit and solemn admissions, or on grounds of public policy and convenience, as in the case of those implied from assumed character, acquiescence, or conduct.[1] It is in this light that confessions and admissions are regarded by the Roman law, as is stated by Mascardus. *Illud igitur in primis, ut hinc potissimum exordiar, non est ignorandum, quod etsi confessioni inter probationum species locum in præsentia tribuerimus; cuncti tamen fere Dd. unanimes sunt arbitrati, ipsam potius esse ab onere probandi relevationem, quam proprie probationem.*[2] Many admissions, however, being made by third persons, are

[1] See Ante, § 27.

[2] Mascard. De Probat. Vol. 1, Quæst. 7, n. 1, 10, 11; Menochius, De Præsump. lib. 1, Quæst. 61, n. 6; Alciatus, De Præsump. Pars. 2, n. 4. The Roman law distinguishes, with great clearness and precision, between confessions *extra judicium*, and confessions *in judicio;* treating the former as of very little and often of no weight, unless corroborated, and the latter as generally, if not always, conclusive, even to the overthrow of the *præsumptio juris et de jure;* thus constituting an exception to the conclusiveness

receivable on mixed grounds; partly as belonging to the *res gestæ*, partly as made against the interest of the person making them, and partly because of some privity with him against whom they are offered in evidence. The whole subject, therefore, properly falls under consideration in this connexion.

§ 170. In our law, the term *admission* is usually applied to *civil transactions*, and to those matters of fact, in criminal cases, which do not involve criminal intent; the term *confession* being generally restricted to *acknowledgments of guilt.* We shall therefore treat them separately, beginning with admissions. The rules of evidence are in both cases the same. Thus, in the trial of Lord Melville, charged, among other things, with criminal misapplication of moneys received from the Exchequer, the admission of his agent and authorized receiver was held sufficient proof of the fact of his receiving the public money; but not admissible to establish the charge of any criminal misapplication of it. The law was thus stated by Lord Chancellor Erskine. "This first step in the proof," (namely, the receipt of the money,) "must advance by evidence applicable alike to civil, as to criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal, as distinguished from civil justice, how the noble person now on trial may be affected by the fact, when so established. The receipt by the paymaster would in itself involve him civilly, but could by no possibility convict him of a crime." [1]

of this class of presumptions. But to give a confession this effect, certain things are essential, which Mascardus cites, out of Tancred; —

Major, spontè, sciens, contra se, ubi jus fit;
Nec natura, favor, lis, jusve repugnet, et hostis.

Mascard. ub. supr. n. 15. Vid. Dig. lib. 42, tit. 2, de confessis. Cod. lib. 7, tit. 59; Van Leeuwen's Comm. Book v. ch. 21.

[1] 29 Howell's State Trials, col. 764.

§ 171. We shall first consider the person, whose admissions may be received. And here the general doctrine is, that the declarations of a *party to the record*, or of one *identified in interest with him*, are, as against such party, admissible in evidence.[1] If they proceed from a stranger, and cannot be brought home to the party, they are inadmissible, unless upon some of the other grounds already considered.[2] Thus, the admissions of a payee of a negotiable promissory note, not over due when negotiated, cannot be received in an action by the indorsee against the maker, to impeach the consideration, there being no identity of interest between him and the plaintiff.[3]

§ 172. This general rule, admitting the declarations of a party to the record in evidence, applies to all cases where the party has *any interest* in the suit, whether others are *joint parties* on the same side with him, or not, and howsoever the interest may appear, and whatever may be its relative amount.[4] But where the party sues alone, and has no

[1] Spargo *v.* Brown, 9 B. & C. 935, per Bayley, J.; Post, § 180, 203. In the Court of Chancery in England, evidence is not received of admissions or declarations of the parties, which are not put in issue by the pleadings, and which there was not, therefore, any opportunity of explaining or disproving. Copland *v.* Toulmin, 7 Clark & Fin. 350, 373; Austin *v.* Chambers, 6 Clark & Fin. 1; Atwood *v.* Small, Ib. 234. But in the United States this rule has not been adopted; and it is deemed sufficient if the proposition to be established is stated in the bill, without stating the particular kind of evidence by which it is to be proved. See Smith *v.* Burnham, 2 Sumn. 612; Brandon *v.* Cabiness, 10 Alab. R. 156; Story, Equity Plead. § 265 *a*, and note (1), where this subject is fully discussed. And in England, the rule has recently been qualified, so far as to admit a written admission by the defendant of his liability to the plaintiff, in the matter of the pending suit. Malcolm *v.* Scott, 3 Hare, 63; McMahon *v.* Burchell, 1 Coop. Cas. temp. Cottenham, 475; 7 Law Rev. 209. See the cases collected by Mr. Cooper in his note appended to that case.

[2] Ante, § 128, 141, 147, 156.

[3] Barough *v.* White, 4 B. & C. 325; Bristol *v.* Dan, 12 Wend. 142.

[4] Bauerman *v.* Radenius, 7 T. R. 663; 2 Esp. 653, S. C. In this case the consignees brought an action in the name of the consignor, against the shipmaster, for damage to the goods, occasioned by his negligence; and without supposing some interest to remain in the consignor, the action could not be maintained. It was on this ground that Lawrence, J. placed the decision. See also Norden *v.* Williamson, 1 Taunt. 378; Mandeville *v.* Welch, 5 Wheat. 283, 286; Dan et al. *v.* Brown, 4 Cowen, 483, 492.

interest in the matter, his name being used of necessity, by one, to whom he has assigned all his interest in the subject of the suit, though it is agreed that he cannot be permitted, by his acts or admissions, to disparage the title of his innocent assignee or vendee, yet the books are not so clearly agreed in the mode of restraining him. That Chancery will always protect the assignee, either by injunction or otherwise, is very certain; and formerly this was the course uniformly pursued; the admissions of a party to the record, at Common Law, being received against him in all cases. But in later times, the interests of an assignee, suing in the name of his assignor, have also, to a considerable extent, been protected in the Courts of Common Law, against the effect of any acts or admissions of the latter to his prejudice. A familiar example of this sort is that of a receipt in full, given by the assignor, being nominal plaintiff, to the debtor, after the assignment; which the assignee is permitted to impeach and avoid, in an suit at law, by showing the previous assignment.[1]

§ 173. But a *distinction* has been taken between such admissions as these, which are given in evidence to the Jury, under the general issue, and are, therefore, open to explanation, and controlling proof; and those in *more solemn form*, such as releases, which are specially pleaded, and operate by way of estoppel; in which latter cases it has been held, that, if the release of the nominal plaintiff is pleaded in bar, the

[1] Henderson et al. *v.* Wild, 2 Campb. 561. Lord Ellenborough, in a previous case of the same kind, thought himself not at liberty, sitting at *nisi prius*, to overrule the defence. Alner *v.* George, 1 Campb. 392; Frear *v.* Evertson, 20 Johns. 142. See also Payne *v.* Rogers, Doug. 407; Winch *v.* Keeley, 1 T. R. 619; Cockshott *v.* Bennett, 2 T. R. 763; Lane *v.* Chandler, 3 Smith, R. 77, 83; Skaife *v.* Jackson, 3 B. & C. 421; Appleton *v.* Boyd, 7 Mass. 131; Tiernan *v.* Jackson, 5 Peters, 580.

Courts of law, sitting in bank, will administer equitable relief by setting aside the plea, on motion; but that, if issue is taken on the matter pleaded, such act or admission of the nominal plaintiff must be allowed its effect at law, to the same extent as if he were the real plaintiff in the suit.[1] The American Courts however, do not recognise this distinction; but where a release from the nominal plaintiff is pleaded in bar, a prior assignment of the cause of action, with notice thereof to the defendant, and an averment that the suit is prosecuted by the assignee for his own benefit, is held a good replication.[2] Nor is the nominal plaintiff permitted, by the entry of a *retraxit*, or in any other manner, injuriously to affect the rights of his assignee, in a suit at law.[3]

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[1] Alner *v.* George, 1 Campb. 392, per Ld. Ellenborough; Gibson *v.* Winter, 5 B. & A. 96; Craib *v.* D'Aeth, 7 T. R. 670, note (b); Legh *v.* Legh, 1 B. & P. 447; Anon. 1 Salk. 260; Payne *v.* Rogers, Doug. 407; Skaife *v.* Jackson, 3 B. & C. 421.

[2] Mandeville *v.* Welch, 5 Wheat. 277, 283; Andrews *v.* Beecker, 1 Johns. Cas. 411; Raymond *v.* Squire, 11 Johns. 47; Littlefield *v.* Story, 3 Johns. 425; Dawson *v.* Coles, 16 Johns. 51; Kimball *v.* Huntington, 10 Wend. 675; Owings *v.* Low, 5 Gill & Johns. 134.

[3] Welch *v.* Mandeville, 1 Wheat. 233. "By the Common Law, *choses in action* were not assignable, except to the crown. The civil law considers them as, strictly speaking, not assignable; but, by the invention of a fiction, the Roman jurisconsults contrived to attain this object. The creditor, who wished to transfer his right of action to another person, constituted him his attorney, or *procurator in rem suam*, as it was called; and it was stipulated, that the action should be brought in the name of the assignor, but for the benefit and at the expense of the assignee. Pothier de Vente, No. 550. After notice to the debtor, this assignment operated a complete cession of the debt, and invalidated a payment to any other person than the assignee, or a release from any other person than him. Ib. 110, 554; Code Napoleon, liv. 3, tit. 6; De la Vente, c. 8, s. 1690. The Court of Chancery, imitating, in its usual spirit, the civil law in this particular, disregarded the rigid strictness of the Common Law, and protected the rights of the assignee of choses in action. This liberality was at last adoptod by the Courts of Common Law, who now consider an assignment of a chose in action as substantially valid, only preserving, in certain cases, the form of an action commenced in the name of the assignor, the beneficial interest and control of the suit being, however, considered as completely vested in the assignee as *procurator in rem suam*. See Master *v.* Miller, 4 T. R. 340; Andrews *v.* Beecker, 1 Johns. Cas. 411; Bates *v.* New York Insurance Company, 3 Johns. Cas. 242; Wardell *v.* Eden, 1 Johns. 532, in notis; Carver *v.* Tracy, 3 Johns. 426; Raymond *v.* Squire, 11 Johns. 47; Van Vechten *v.* Greves, 4 Johns. 406; Weston *v.* Barker, 12 Johns. 276." See the Reporter's note to 1 Wheat. 237. The American cases on the subject of the text are collected in Cowen & Hill's note 172, to 1 Phil. Evid. 90. But where the nominal plaintiff was constituted, by the party in interest, his agent for negotiating the contract, and it is expressly made with him alone, he is treated, in an action upon such contract, in all respects as a party to the cause; and any defence against him is a defence, in that action, against the *cestui que trust*, suing in his name. Therefore, where a broker, in whose name a policy of insurance under seal was effected, brought an action of covenant thereon, to which payment was pleaded; it was held that payment of the amount of loss to the broker, by allowing him credit in account for that sum, against a balance for premiums due from him to the defendants, was a good payment, as between the plaintiff on the record and the defendants, and, therefore, an answer to the action. Gibson *v.* Winter et al. 5 B. & Ad. 96. This case, however, may, with equal and perhaps greater propriety, be referred to the law of agency. See Richardson *v.* Anderson, 1 Campb. 43, note; Story on Agency, § 413, 429–434.

§ 174. Though the admissions of a party to the record are generally receivable in evidence against him, yet where there are *several parties on the same side*, the admissions of one are not permitted to affect the others, who may happen to be joined with him, unless there is some joint interest, or privity in design between them;[1] although the admissions may, in proper cases, be received against the person who made them. Thus, in an action against joint makers of a note, if one suffers judgment by default, his signature must still be proved, against the other.[2] And even where there is a joint interest, a release executed by one of several plaintiffs will, in a clear case of fraud, be set aside in a Court of law.[3]

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[1] See Ante, § 111, 112; Dan et al. *v.* Brown, 4 Cowen, 483, 492; Rex *v.* Hardwick, 11 East, 578, 589, per Le Blanc, J.; Whitcomb *v.* Whiting, 2 Doug. 652.

[2] Gray *v.* Palmer, 1 Esp. 135. See also Sheriff *v.* Wilks, 1 East, 48.

[3] Jones et al. *v.* Herbert, 7 Taunt. 421; Loring et al. *v.* Brackett, 3 Pick. 403; Skaife et al. *v.* Jackson, 3 B. & C. 421; Henderson et al. *v.* Wild, 2 Campb. 561.

But in the absence of fraud, if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is, in general, evidence against all.[1] They stand to each other, in this respect, in a relation similar to that of existing copartners. Thus, also,

[1] Such was the doctrine laid down by Ld. Mansfield in Whitcomb *v.* Whiting, 2 Doug. 652. Its propriety, and the extent of its application, have been much discussed, and sometimes questioned; but it seems now to be clearly established. See Perham *v.* Laynal, 2 Bing. 306; Burleigh *v.* Stott, 8 B. & C. 36; Wyatt *v.* Hodson, 8 Bing. 309; Brandram *v.* Wharton, 1 B. & A. 467; Holme *v.* Green, 1 Stark. R. 488. See also, accordingly, White *v.* Hale, 3 Pick. 291; Martin *v.* Root, 17 Mass. 222; Hunt *v.* Brigham, 2 Pick. 581; Frye *v.* Barker, 4 Pick. 382; Beitz *v.* Fuller, 1 McCord, 541; Johnson *v.* Beardslee, 1 Johns. 3; Bound *v.* Lathrop, 4 Conn. 336; Coit *v.* Tracy, 8 Conn. 268, 276, 277; Getchell *v.* Heald, 7 Greenl. 26; Owings *v.* Low, 5 Gill & Johns. 144; Patterson *v.* Choate, 7 Wend. 441; McIntire *v.* Oliver, 2 Hawks, 209; Cady *v.* Shepherd, 11 Pick. 400; Van Reimsdyk *v.* Kane, 1 Gall. 635, 636. But see Bell *v.* Morrison, 1 Peters, 351. But the admission must be distinctly made by a party still liable upon the note; otherwise, it will not be binding against the others. Therefore, a payment, appropriated, by the election of the creditor only, to the debt in question, is not a sufficient admission of that debt, for this purpose. Holme *v.* Green, ub. sup. Neither is a payment, received under a dividend of the effects of a bankrupt promissor. Brandram *v.* Wharton, ub. sup. In this last case, the opposing decision in Jackson *v.* Fairbank, 2 H. Bl. 340, was considered and strongly disapproved; but it was afterwards cited by Holroyd, J. as a valid decision,, in Burleigh *v.* Stott, 8 B. & C. 36. The admission where one of the promissors is dead, to take the case out of the statute of limitations against him, must have been made in his lifetime; Burleigh *v.* Stott, supra; Slater *v.* Lawson, 1 B. & Ad. 396; and by a party originally liable; Atkins *v.* Tredgold, 2 B. & C. 23. This effect of the admission of indebtment by one of several joint promissors, as to cases barred by the statute of limitations, when it is merely a verbal admission, without part payment, is now restricted, in England, to the party making the admission; by stat. 9 Geo. 4, c. 14, (Lord Tenterden's act.) So in Massachusetts, by Rev. Stat. ch. 120, § 14; and in Vermont, Rev. Stat. ch. 58, § 23, 27. The application of this doctrine to partners, after the dissolution of the partnership, has already been considered. Ante, § 112, note. Whether a written acknowledgment made by one of several partners, stands upon different ground from that of a similar admission by one of several joint contractors, is an open question. Clark *v.* Alexander, 8 Jur. 496, 498. See Post, Vol. 2, § 441, 444.

the act of making a partial payment within six years, by one of several joint makers of a promissory note, takes it out of the statute of limitations.[1] And where several were both legatees and executors in a will, and also appellees, in a question upon the probate of the will, the admission of one of them, as to facts which took place at the time of making the will, showing that the testatrix was imposed upon, was held receivable in evidence against the validity of the will.[2] And where two were bound in a single bill, the admission of one was held good against both defendants.[3]

§ 175. In settlement cases, it has long been held that declarations by *rated parishioners* are evidence against the parish; for they are parties to the cause, though the nominal parties to the appeal be the churchwardens and overseers of the poor of the parish.[4] The same principle is now applied in England to all other prosecutions against towns and parishes, in respect to the declarations of *rateable inhabitants*, they being substantially parties to the record.[5] Nor is it necessary first to call the inhabitant, and show that he refuses to be examined, in order to admit his declarations.[6] And the same principle would seem to apply to the inhabitants of towns, counties, or other territorial political divisions of this country, who sue and are prosecuted as inhabitants, *eo nomine*, and are termed *quasi* corporations. Being parties,

[1] Burleigh *v.* Stott, 8 B. & C. 36; Munderson *v.* Reeve, 2 Stark. Ev. 484; Wyatt *v.* Hodson, 8 Bing. 309; Chippendale *v.* Thurston, 4 C. & P. 98; 1 M. & M. 411, S. C.; Pease *v.* Hirst, 10 B. & C. 122. But it must be distinctly shown to be a payment on account of the particular debt. Holme *v.* Green, 1 Stark. R. 488.

[2] Atkins *v.* Sanger et al. 1 Pick. 192. See also Jackson *v.* Vail, 7 Wend. 125; Osgood *v.* the Manhattan Co. 3 Cowen, 612.

[3] Lowe *v.* Boteler et al. 4 Har. & McHen. 346; Vicary's case, 1 Gilbert's Evid. by Lofft, p. 59, note.

[4] Rex *v.* Inhabitants of Hardwick, 11 East, 579. See Ante, § 128, 129.

[5] Regina *v.* Adderbury, 5 Ad. & El. 187, N. S.

[6] Rex *v.* Inhabitants of Whitley Lower, 1 M. & S. 637; Rex *v.* Inhabitants of Woburn, 10 East, 395.

personally liable, their declarations are admissible, though the value of the evidence may, from circumstances, be exceedingly light.[1]

§ 176. It is a *joint interest*, and *not a mere community of interest*, that renders such admissions receivable. Therefore the admissions of one executor are not received, to take a case out of the statute of limitations, as against his co-executor.[2] Nor is an acknowledgment of indebtment by one executor, admissible against his co-executor, to establish the original demand.[3] The admission of the receipt of money, by one of several trustees, is not received to charge the other trustees.[4] Nor is there such joint interest between a surviving promissor and the executor of his co-promissor, as to make the act or admission of the one sufficient to bind the other.[5] Neither

[1] 11 East, 586, per Ld. Ellenborough; 2 Stark. Evid. 580. The statutes rendering *quasi* corporators competent witnesses, (see 54 Geo. 3, c. 170; 3 & 4 Vict. c. 25,) are not understood as interfering with the rule of evidence respecting admissions. Phil. & Am. on Evid. 395, and n. (2); 1 Phil. Evid. 375, n. (2). In some of the United States, similar statutes have been enacted. LL. Vermont, (Rev. Code, 1824,) vol. 1, ch. 7, n. 26; Massachusetts, Rev. Stat. ch. 94, § 54; Delaware, (Rev. Code, 1829,) p. 444; New Jersey, Elmer's Dig. p. 604; Louisiana, 3 Martin's Dig. 482. In other States, the interest of inhabitants, merely as such, has been deemed too remote and contingent, as well as too minute, to disqualify them, and they have been held competent at Common Law. Eustis *v.* Parker, 1 New Hamp. 273; Cornwell *v.* Isham, 1 Day, 35; Fuller *v.* Hampton, 5 Conn. 416; Falls *v.* Belknap, 1 Johns. 486; Bloodgood *v.* Jamaica, 12 Johns. 285; Watertown *v.* Cowen, 4 Paige, 510; Ex parte Kip, 1 Paige, 613; Corwein *v.* Hames, 11 Johns. 76; Orange *v.* Springfield, 1 Southard, 186; State *v.* Davidson, 1 Bayley, 35; Jonesborough *v.* McKee, 2 Yerger, 167; Gass *v.* Gass, 3 Humphr. 278, 285. See post, § 331.

[2] Tullock *v.* Dunn, R. & M. 416. Qu. and see Hammon *v.* Huntley, 4 Cowen, 493.

[3] Hammon *v.* Huntley, 4 Cowen, 493; James *v.* Hackley, 16 Johns. 277; Forsyth *v.* Ganson, 5 Wend. 558.

[4] Davies *v.* Ridge et al. 3 Esp. 101.

[5] Atkins *v.* Tredgold et al. 2 B. & C. 23; Slater *v.* Lawson, 1 B. & Ad. 396; Slaymaker *v.* Gundacker's Ex'r, 10 Serg. & Raw. 75; Hathaway *v.* Haskell, 9 Pick. 42.

will the admission of one, who was joint promissor with a *feme sole*, be received to charge her husband, after the marriage, in an action against them all, upon a plea of the statute of limitations.[1] For the same reason, namely, the absence of a joint interest, the admissions of one tenant in common are not receivable against his co-tenant, though both are parties on the same side in the suit.[2] Nor are the admissions of one of several devisees or legatees, admissible to impeach the validity of the will, where they may affect others not in privity with him.[3] Neither are the admissions of one defendant evidence against the other, in an action on the case for the mere negligence of both.[4]

§ 177. It is obvious, that an *apparent joint interest is not sufficient* to render the admissions of one party receivable against his companions, *where the reality of that interest is the point in controversy*. A foundation must first be laid, by showing, *primâ facie*, that a joint interest exists. Therefore, in an action against several joint makers of a promissory note, the execution of which was the point in issue, the admission of his signature only by one defendant, was held not sufficient to entitle the plaintiff to recover against him and the others, though theirs had been proved; the point to be proved against all being a joint promise by all.[5] And where it is sought to charge several as partners, an admission of the fact of partnership by one is not receivable in evidence against any of the others, to prove the partnership. It is only

[1] Pittam *v.* Foster et al. 1 B. & C. 248.

[2] Dan et al. *v.* Brown et al. 4 Cowen, 483, 492. And see Smith *v.* Vincent, 15 Conn. R. 1.

[3] Hauberger *v.* Root, 6 Watts & Serg. 431.

[4] Daniels *v.* Potter, 1 M. & M. 501; Ante, § 111. Neither is there such privity among the members of a board of public officers, as to make the admissions of one binding on all. Lockwood *v.* Smith et al. 5 Day, 309. Nor among several indorsers of a promissory note. Slaymaker *v.* Gundacker's Ex'r. 10 Serg. & Raw. 75. Nor between executors and heirs or devisees. Osgood *v.* Manhattan Co. 3 Cowen, 611.

[5] Gray *v.* Palmer et al. 1 Esp. 135.

after the partnership is shown to exist, by proof satisfactory to the Judge, that the admissions of one of the parties is received, in order to affect the others.[1] If they sue upon a promise to them as partners, the admission of one is evidence against all, even though it goes to a denial of the joint right of action, the partnership being conclusively admitted by the form of action.[2]

§ 178. In general, the *answer* of one defendant *in Chancery* cannot be read in evidence against his co-defendant; the reason being, that, as there is no issue between them, there can have been no opportunity for cross-examination.[3] But this rule does not apply to cases where the other defendant claims through him, whose answer is offered in evidence; nor to cases where they have a joint interest, either as partners, or otherwise, in the transaction.[4] Wherever the confession of any party would be good evidence against another, in such case, his answer, *a fortiori*, may be read against the latter.[5]

§ 179. The admissions, which are thus receivable in evidence, must, as we have seen, be those of a person having at

[1] Nicholls *v.* Dowding et al. 1 Stark. R. 81; Grant *v.* Jackson et al. Peake's Cas. 204; Burgess *v.* Lane et al. 3 Greenl. 165; Grafton Bank *v.* Moore, 13 N Hamp. 99. See Ante, § 112; Post, Vol. 2, § 484; Latham *v.* Kenniston, 13 N. Hamp. 203; Whitney *v.* Ferris, 10 Johns. 66; Wood *v.* Braddick, 1 Taunt. 104; Sangster *v.* Mazarredo et al. 1 Stark. R. 161; Van Reimsdyk *v.* Kane, 1 Gall. 635; Harris *v.* Wilson, 7 Wend. 57; Bucknam *v.* Barnum, 15 Conn. R. 68.

[2] Lucas et al. *v.* De La Cour, 1 M. & S. 249.

[3] Jones *v.* Turberville, 2 Ves. 11; Morse *v.* Royall, 12 Ves. 355, 360; Leeds *v.* The Marine Ins. Co. of Alexandria, 2 Wheat. 380; Gresley on Eq. Ev. 24; Field *v.* Holland, 6 Cranch, 8; Clark's Exrs. *v.* Van Reimsdyk, 9 Cranch, 153; Van Reimsdyk *v.* Kane, 1 Gall. 630; Parker *v.* Morrell, 12 Jur. 253.

[4] Field *v.* Holland, 6 Cranch, 8, 24; Clark's Exrs. *v.* Van Reimsdyk, 9 Cranch, 153, 156; Orborne *v.* United States Bank, 9 Wheat. 332; Christie *v.* Bishop, 1 Barb. Ch. R. 105, 116.

[5] Van Reimsdyk *v.* Kane, 1 Gall. 630, 635.

the time some interest in the matter, afterwards in controversy in the suit to which he is a party. The admissions, therefore, of a *guardian*, or of an *executor* or *administrator*, made before he was completely clothed with that trust, or of a *prochein ami*, made before the commencement of the suit, cannot be received, either against the ward or infant in the one case, or against himself, as the representative of heirs, devisees, and creditors, in the other;[1] though it may bind the person himself, when he is afterwards a party *suo jure*, in another action. A solemn admission, however, made in good faith, in a pending suit, for the purpose of that trial only, is governed by other considerations. Thus, the plea of *nolo contendere*, in a criminal case, is an admission for that trial only. One object of it is, to prevent the proceedings being used in any other place; and therefore it is held inadmissible in a civil action against the same party.[2] So, the answer of the guardian of an infant defendant in Chancery can never be read against the infant in another suit; for its office was only to bring the infant into Court, and make him a party.[3] But it may be used against the guardian, when he afterwards is a party in his private capacity, for it is his own admission upon oath.[4] Neither can the admission of a *married woman*, answering jointly with her husband, be after-

[1] Webb *v.* Smith, R. & M. 106; Fraser *v.* Marsh, 2 Stark. R. 41; Cowling *v.* Ely, Ib. 366; Plant *v.* McEwen, 4 Conn. 544. So the admissions of one, before he became assignee of a bankrupt, are not receivable against him, where suing as assignee. Fenwick *v.* Thornton, 1 M. & M. 51. But see Smith *v.* Morgan, 2 M. & Rob. 257. Nor is the statement of one partner admissible against the others, in regard to matters which were transacted before he became a partner in the house, and in which he had no interest prior to that time. Catt *v.* Howard, 3 Stark. R. 3.

[2] Guild *v.* Lee, 3 Law Reporter, p. 433. So, an admission in one plea cannot be called in aid of the issue in another. Stracy *v.* Blake, 3 C. M. & R. 168; Jones *v.* Flint, 2 P. & D. 594; Gould on Pleading, 432, 433; Mr. Rand's note to Jackson *v.* Stetson, 15 Mass. 58.

[3] Eggleston *v.* Speke, alias Petit, 3 Mod. 258, 259; Hawkins *v.* Luscombe, 2 Swanst. 392, cases cited in note (a); Story on Equity Pl. 668; Gresley on Eq. Evid. 24, 323; Mills *v.* Dennis, 3 Johns. Ch. 367.

[4] Beasley *v.* Magrath, 2 Sch. & Lefr. 34; Gresley on Eq. Evid. 323.

wards read against her, it being considered as the answer of the husband alone.[1]

§ 180. We are next to consider the admissions of persons who are not parties to the record, but yet are *interested in the subject-matter of the suit.* The law, in regard to this source of evidence, looks chiefly to the real parties in interest, and gives to their admissions the same weight, as though they were parties to the record. Thus, the admissions of the *cestui que trust* of a bond;[2] those of the persons interested in a policy effected in another's name for their benefit;[3] those of the ship-owners, in an action by the master for freight;[4] those of the indemnifying creditor, in an action against the sheriff;[5] those of the deputy sheriff, in an action against the high sheriff for the misconduct of the deputy;[6] are all re-

[1] Hodgson *v.* Merest, 9 Price, 563; Elston *v.* Wood, 2 My. & K. 678.

[2] Hanson *v.* Parker, 1 Wils. 257. See also Harrison *v.* Vallance, 1 Bing. 45. But the declarations of the *cestui que trust* are admissible, only so far as his interest and that of the trustee are identical. Doe *v.* Wainwright 3 Nev. & P. 598. And the nature of his interest must be shown, even though it be admitted that he is a *cestui que trust*. May *v.* Taylor, 6 M. & Gr. 261.

[3] Bell *v.* Ansley, 16 East, 141, 143.

[4] Smith *v.* Lyon, 3 Campb. 465.

[5] Dowdon *v.* Fowle, 4 Campb. 38; Dyke *v.* Alridge, cited 7 T. R. 665; 11 East, 584; Young *v.* Smith, 6 Esp. 121; Harwood *v.* Keys, 1 M. & Rob. 204; Procter *v.* Lainson, 7 C. & P. 629.

[6] The admissions of an under-sheriff are not receivable in evidence against the sheriff, unless they tend to charge himself, he being the real party in the cause. He is not regarded as the general officer of the sheriff, to all intents; Snowball *v.* Goodricke, 4 B. & Ad. 541; though the admissibility of his declarations has sometimes been placed on that ground. Drake *v.* Sykes, 7 T. R. 113. At other times they have been received on the ground, that, being liable over to the sheriff, he is the real party to the suit. Yabsley *v.* Doble, 1 Ld. Raym. 190. And where the sheriff has taken a general bond of indemnity from the under officer, and has given him notice of the pendency of the suit, and required him to defend it, the latter is in fact the real party in interest, whenever the sheriff is sued for his default; and his admissions are clearly receivable, on principle, when made against himself. It has elsewhere been said, that the declarations of an under-sheriff are evidence to charge the sheriff, only where his acts might be given in evidence to charge him; and

ceivable against the party making them. And in general, the admissions of any party, represented by another, are receivable in evidence against his representative.[1] But here, also, it is to be observed, that the declarations or admissions must have been made, while the party making them had some interest in the matter; and they are receivable in evidence only so far as his own interests are concerned. Thus, the declaration of a bankrupt, made before his bankruptcy, is good evidence to charge his estate with a debt; but not so, if it was made afterwards.[2] While the declarant is the only party in interest, no harm can possibly result from giving full effect to his admissions. He may be supposed best to know the extent of his own rights, and to be least of all disposed to concede away any that actually belonged to him. But admissions, made after other persons have acquired separate rights in the same subject-matter, cannot be received to disparage their title, however it may affect that of the declarant himself. This most just and equitable doctrine will be found to apply not only to admissions made by bankrupts and insolvents, but to the cases of vendor and vendee, payee and indorsee, grantor

then, rather as acts, than as declarations, the declarations being considered as part of the *res gestæ*. Wheeler *v.* Hambright, 9 Serg. & R. 396, 397. See Scott *v.* Marshall, 2 Cr. & Jer. 238; Jacobs *v.* Humphrey, 2 Cr. & Mees. 413; 2 Tyrwh. 272, S. C. But wherever a person is bound by the record, he is, for all purposes of evidence, the party in interest, and as such, his admissions are receivable against him, both of the facts it recites, and of the amount of damages, in all cases where, being liable over to the nominal defendant, he has been notified of the suit, and required to defend it. Clark's Exrs. *v.* Carrington, 7 Cranch, 322; Hamilton *v.* Cutts, 4 Mass. 349; Tyler *v.* Ulmer, 12 Mass. 166; Duffield *v.* Scott, 3 T. R. 374; Kip *v.* Brigham, 6 Johns. 158; 7 Johns. 168; Bender *v.* Fromberger, 4 Dall. 436. See also Carlisle *v.* Garland, 7 Bing. 298; North *v.* Miles, 1 Campb. 389; Bowsher *v.* Calley, 1 Campb. 391, note; Underhill *v.* Wilson, 6 Bing. 697; Bond *v.* Ward, 1 Nott & McCord, 201; Carmack *v.* The Commonwealth, 5 Binn. 184; Sloman *v.* Herne, 2 Esp. 695; Williams *v.* Bridges, 2 Stark. R. 42; Savage *v.* Balch, 8 Greenl. 27.

[1] Stark. Evid. 26; North *v.* Miles, 1 Campb. 390.

[2] Bateman *v.* Bailey, 5 T. R. 513; Smith *v.* Simmes, 1 Esp. 330; Deady *v.* Harrison, 1 Stark. R. 60.