And the same discretion will be exercised by the Courts, where the documents called for are in the hands of solicitors for the assignees of bankrupts;[1] though it was at one time thought that their production was a matter of public duty.[2] So, if the documents called for are in the hands of the *agent* or *steward* of a third person, or even in the hands of the owner himself, their production will not be required where, in the judgment of the Court, it may injuriously affect his title.[3] This extension of the rule, which will be more fully treated hereafter, is founded on a consideration of the great inconvenience and mischief which may result to individuals from a compulsory disclosure and collateral discussion of their titles, in cases where, not being themselves parties, the whole merits cannot be tried.

§ 247. There is one other situation, in which the exclusion of evidence has been strongly contended for, on the ground of confidence and the general good, namely, that of a *clergyman;* and this chiefly, if not wholly, in reference to criminal conduct and proceedings; that the guilty conscience may with safety disburden itself by penitential confessions, and by spiritual advice, instruction, and discipline, seek pardon and relief. The law of Papal Rome has adopted this principle in its fullest extent; not only excepting such confessions from the general rules of evidence, as we have already intimated,[4]

[1] Bateson *v.* Hartsink, 4 Esp. 43; Cohen *v.* Templar, 2 Stark. R. 260; Laing *v.* Barclay, 3 Stark. R. 38; Hawkins *v.* Howard, Ry. & M. 64; Corsen *v.* Dubois, Holt's Cas. 239; Bull *v.* Loveland, 10 Pick. 9, 14.

[2] Pearson *v.* Fletcher, 5 Esp. 90, per Lord Ellenborough.

[3] Rex *v.* Hunter, 3 C. & P. 591; Pickering *v.* Noyes, 1 B. & C. 262; Roberts *v.* Simpson, 2 Stark. R. 203; Doe *v.* Thomas, 9 B. & C. 288; Bull *v.* Loveland, 10 Pick. 9, 14.

[4] Ante, § 229, note. By the Capitularies of the French kings, and some other continental codes of the middle ages, the clergy were not only excused, but in some cases were utterly prohibited from attending as witnesses in any cause. Clerici de judicii sui cognitione non cogantur in publicum dicere testimonium. Capit. Reg. Francorum, lib. 7, § 118, (A. D. 827). Ut nulla ad testimonia dicendum, ecclesiastici cujuslibet pulsetur persona. Ibid. § 91. See

but punishing the priest who reveals them. It even has gone farther; for *Mascardus*, after observing, that in general, persons coming to the knowledge of facts under an oath of secrecy are compellable to disclose them as witnesses, proceeds to state the case of confessions to a priest, as not within the operation of the rule; on the ground that the confession is made not so much to the priest as to the Deity, whom he represents; and that therefore the priest, when appearing as a witness in his private character, may lawfully swear that he knows nothing of the subject. *Hoc tamen restringe, non posse procedere in sacerdote producto in testem contra reum criminis, quando in confessione sacramentali fuit aliquid sibi dictum, quia potest dicere, se nihil scire ex eo; quod illud, quod scit, scit ut Deus, et ut Deus non producitur in testem, sed ut homo, et tanquam homo ignorat illud super quo producitur.*[1] In Scotland, where a prisoner in custody and preparing for his trial has confessed his crimes to a clergyman, in order to obtain spiritual advice and comfort, the clergyman is not required to give evidence of such confession. But even in criminal cases, this exception is not carried so far as to include communications made confidentially to clergymen, in the ordinary course of their duty.[2] Though the law of England encourages the penitent to confess his sins, "for the unburthening of his conscience, and to receive spiritual consolation and ease of mind," yet the minister to whom the confession is made is merely excused from presenting the offender to the

Leges Barbar. Antiq. Vol. 3, p. 313, 316. — Leges Langobardicæ, in the same collection, Vol. 1, p. 184, 209, 237. But from the constitutions of King Ethelred, which provide for the punishment of priests guilty of perjury, — "Si presbyter *alicubi* inveniatur in falso testimonio, vel in perjurio," — it would seem that the English law of that day did not recognise any distinction between them and the laity, in regard to the obligation to testify as witnesses. See Leges Barbaror. Antiq. Vol. 4, p. 294; Ancient Laws and Inst. of England, Vol. 1, p. 347, § 27.

[1] Mascard. De Probat. Vol. 1, Quæst. v. n. 51; Id. Concl. 377. Vid. et P. Farinac. Opera, Tit. 8, Quæst. 78, n. 73.

[2] Tait on Evidence, p. 386, 387; Alison's Practice, p. 586.

civil magistracy, and enjoined not to reveal the matter confessed, "under pain of irregularity."[1] In all other respects he is left to the full operation of the rules of the Common Law, by which he is bound to testify in such cases, as any other person, when duly summoned. In the Common Law of evidence there is no distinction between clergymen and laymen; but all confessions and other matters, not confided to legal counsel, must be disclosed, when required for the purposes of justice. Neither penitential confessions, made to the minister, or to members of the party's own church, nor secrets confided to a Roman Catholic priest in the course of confession, are regarded as privileged communications.[2]

§ 248. Neither is this protection extended to *medical persons*,[3] in regard to information which they have acquired

[1] Const. & Canon. 1 Jac. 1, Can. cxiii; 2 Gibson's Codex, p. 963.

[2] Wilson *v.* Rastall, 4 T. R. 753; Butler *v.* Moore, McNally's Evid. 253 – 255; Anon. 2 Skin. 404, per Holt, C. J.; Du Barre *v.* Livette, Peake's Cas. 77; Commonwealth *v.* Drake, 15 Mass. 161. The contrary was held by De Witt Clinton, Mayor, in the Court of General Sessions in New York, June, 1813, in the People *v.* Phillips, 1 Southwest. Law Journ. p. 90. By a subsequent statute of New York, (2 Rev. St. 406, § 72,) "No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." A similar statute exists in Missouri, (Rev. St. of 1835, p. 623, § 16.) See also Broad *v.* Pitt, 3 C. & P. 518; in which case, Best, C. J. said, that he, for one, would never compel a clergyman to disclose communications made to him by a prisoner; but that, if he chose to disclose them, he would receive them in evidence. See also Joy on Confessions, &c. p. 49 – 58.

[3] Duchess of Kingston's case, 11 Hargr. St. Tr. 243; 20 Powell's St. Tr. 613; Rex *v.* Gibbons, 1 C. & P. 97; Broad *v.* Pitt, 3 C. & P. 518, per Best, C. J. By the Revised Statutes of New York, (Vol. 2, p. 406, § 73,) and of Missouri, (Revised Code of 1835, p. 623, § 17,) "No person, duly authorized to practise physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." But though the statute is thus express, yet it seems the party himself may waive the privilege; in which case the facts may be disclosed.

confidentially, by attending in their professional characters; nor to *confidential friends*,[1] *clerks*,[2] *bankers*,[3] or *stewards*,[4] except as to matters which the employer himself would not be obliged to disclose, such as his title deeds and private papers, in a case in which he is not a party.

§ 249. The case of *Judges* and *arbitrators* may be mentioned, as the *second class* of privileged communications. In regard to Judges of Courts of record, it is considered dangerous to allow them to be called upon to state what occurred before them in Court; and on this ground, the grand jury were advised not to examine the chairman of the Quarter Sessions, as to what a person testified in a trial in that Court.[5] The case of arbitrators is governed by the same general policy; and neither the Courts of Law nor of Equity will disturb decisions deliberately made by arbitrators, by requiring them to disclose the grounds of their award, unless under very cogent circumstances, such as upon an allegation of fraud; for, *Interest Reipublicæ ut sit finis litium*.[6]

§ 250. We now proceed to the *third class* of cases, in which evidence is excluded from motives of public policy, namely, *secrets of State*, or things, the disclosure of which would be prejudicial to the public interest. These matters are either those which concern the administration of penal justice, or those which concern the administration of govern-

Johnson *v.* Johnson, 14 Wend. 637. A consultation, as to the means of procuring abortion in another, is not privileged by this statute. Hewitt *v.* Prime, 21 Wend. 79.

[1] 4 T. R. 758, per Ld. Kenyon; Hoffman *v.* Smith, 1 Caines, 157, 159.

[2] Lee *v.* Birrell, 3 Campb. 337; Webb *v.* Smith, 1 C. & P. 337.

[3] Loyd *v.* Freshfield, 2 C. & P. 325.

[4] Vaillant *v.* Dodemead, 2 Atk. 524; 4 T. R. 756, per Buller, J.; E. of Falmouth *v.* Moss, 11 Price, 455.

[5] Regina *v.* Gazard, 8 C. & P. 595, per Patteson, J.

[6] Story Eq. pl. 458, note (1); Anon. 3 Atk. 644; 2 Story, Eq. Jurisp. 680; Johnson *v.* Durant, 4 C. & P. 327; Ellis *v.* Saltau, Ib. n. (*a*); Habershon *v.* Troby, 3 Esp. 38.

ment; but the principle of public safety is in both cases the same, and the rule of exclusion is applied no farther than the attainment of that object requires. Thus, in criminal trials, the names of persons employed in the discovery of the crime are not permitted to be disclosed, any farther than is essential to a fair trial of the question of the prisoner's innocence or guilt.[1] "It is perfectly right," said Lord Chief Justice Eyre,[2] "that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made should not be unnecessarily disclosed." Accordingly, where a witness, possessed of such knowledge, testified that he related it to a friend, not in office, who advised him to communicate it to another quarter; a majority of the learned Judges held that the witness was not to be asked the name of that friend; and they all were of opinion that all those questions which tend to the discovery of the channels by which the disclosure was made to the officers of justice, were, upon the general principle of the convenience of public justice, to be suppressed; that all persons in that situation were protected from the discovery; and that, if it was objected to, it was no more competent for the defendant to ask the witness who the person was that advised him to make a disclosure, than to ask who the person was to whom he made the disclosure in consequence of that advice, or to ask any other question respecting the channel of communication, or all that was done under it.[3]

[1] Rex *v.* Hardy, 24 Howell's St. Tr. 753. The rule has been recently settled, that, in a public prosecution, no question can be put which tends to reveal who was the secret informer of the government; even though the question be addressed to a witness in order to ascertain whether he was not himself the informer. Attor. Gen. *v.* Briant, 15 Law Journ. N. S. Exch. 265; 5 Law Mag. 333, N. S.

[2] In Rex *v.* Hardy, 24 Howell's St. Tr. 808.

[3] Rex *v.* Hardy, 24 Howell's St. Tr. 808 – 815, per Ld. C. J. Eyre; Ib. 815 – 820.

Hence it appears that a witness, who has been employed to collect information for the use of government, or for the purposes of the police, will not be permitted to disclose the name of his employer, or the nature of the connexion between them, or the name of any person who was the channel of communication with the government or its officers, nor whether the information has actually reached the government. But he may be asked whether the person to whom the information was communicated was a magistrate or not.[1]

§ 251. On a like principle of public policy, the official transactions between the *heads of the departments of State and their subordinate officers* are in general treated as privileged communications. Thus, communications between a provincial governor and his attorney-general, on the state of the colony or the conduct of its officers;[2] or between such governor and a military officer under his authority;[3] the report of a military commission of inquiry, made to the commander-in-chief;[4] and the correspondence between an agent of the government and a secretary of state,[5] are confidential and privileged matters, which the interests of the State will not permit to be disclosed. The President of the United States and the Governors of the several States are not bound to produce papers or disclose information communicated to them, when, in their own judgment, the disclosure would on public considerations be inexpedient.[6] And where the law is restrained by public policy from enforcing the production of

[1] 1 Phil. Evid. 180, 181; Rex *v.* Watson, 2 Stark. R. 136; 32 Howell's St. Tr. 101; United States *v.* Moses, 4 Wash. 726; Home *v.* Ld. F. C. Bentinck, 2 B. & B. 162, per Dallas, C. J.

[2] Wyatt *v.* Gore, Holt's N. P. Cas. 299.

[3] Cooke *v.* Maxwell, 2 Stark. R. 183.

[4] Home *v.* Ld. F. C. Bentinck, 2 B. & B. 130.

[5] Anderson *v.* Hamilton, 2 B. & B. 156, note; 2 Stark. R. 185, per Ld. Ellenborough, cited by the Attorney-General; Marbury *v.* Madison, 1 Cranch, 144.

[6] 1 Burr's Trial, p. 186, 187, per Marshall, C. J.; Gray *v.* Pentland, 2 S. & R. 23.

papers, the like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary evidence of their contents.[1] But communications, though made to official persons, are not privileged, where they are not made in the discharge of any public duty; such, for example, as a letter by a private individual to the chief secretary of the postmaster-general, complaining of the conduct of the guard of the mail towards a passenger.[2]

§ 252. For the same reason of public policy, in the furtherance of justice, the *proceedings of grand jurors* are regarded as privileged communications. It is the policy of the law, that the preliminary inquiry, as to the guilt or innocence of a party accused, should be secretly conducted; and in furtherance of this object every grand juror is sworn to secrecy. One reason may be to prevent the escape of the party, should he know that proceedings were in train against him; another may be, to secure freedom of deliberation and opinion among the grand jurors, which would be impaired, if the part taken by each might be made known to the accused. A third reason may be, to prevent the testimony produced before them from being contradicted at the trial of the indictment, by subornation of perjury on the part of the accused. The rule includes

[1] Gray *v.* Pentland, 2 Serg. & R. 23, 31, 32, per Tilghman, C. J., cited and approved in Yoter *v.* Sanno, 6 Watts, 156, per Gibson, C. J. In Law *v.* Scott, 5 Har. & J. 438, it *seems* to have been held, that a senator of the United States may be examined, as to what transpired in a secret executive session, if the Senate has refused, on the party's application, to remove the injunction of secrecy. *Sed quære;* for if so, the object of the rule, in the preservation of State secrets, may generally be defeated. And see Plunkett *v.* Cobbett, 29 Howell's St. Tr. 71, 72; 5 Esp. 136, S. C., where Lord Ellenborough held, that though one member of parliament may be asked as to the fact, that another member took part in a debate, yet he was not bound to relate any thing which had been delivered by such speaker as a member of parliament. But it is to be observed, that this was placed by Lord Ellenborough on the ground of personal privilege in the member; whereas the transactions of a session, after strangers are excluded, are placed under an injunction of secrecy, for reasons of State.

[2] Blake *v.* Pilford, 1 M. & Rob. 198.

not only the grand jurors themselves, but their clerk,[1] if they have one, and the prosecuting officer, if he is present at their deliberations;[2] all these being equally concerned in the administration of the same portion of penal law. They are not permitted to disclose who agreed to find the bill of indictment, or who did not agree; nor to detail the evidence on which the accusation was founded.[3] But they may be compelled to state whether a particular person testified as a witness before the grand jury;[4] though it seems they cannot be asked, if his testimony there agreed with what he testified upon the trial of the indictment.[5] Grand jurors may also be asked whether twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of that fact.[6]

§ 252 *a*. On similar grounds of public policy, and for the

[1] 12 Vin. Abr. 38, tit. Evid. B. a. pl. 5; Trials per Pais, 315.

[2] Commonwealth *v.* Tilden, cited in 2 Stark. Evid. 232, note (1), by Metcalf; McLellan *v.* Richardson, 1 Shepl. 82.

[3] Sykes *v.* Dunbar, 2 Selw. N. P. p. 815, [1059]; Huidekoper *v.* Cotton, 3 Watts, 56; McLellan *v.* Richardson, 1 Shepl. 82; Low's case, 4 Greenl. 439, 446, 453; Burr's Trial, [Anon.] Evidence for Deft. p. 2.

[4] Sykes *v.* Dunbar, 2 Selw. N. P. 815, [1059]; Huidekoper *v.* Cotton, 3 Watts, 56; Freeman *v.* Arkell, 1 C. & P. 135, 137, n. (c).

[5] 12 Vin. Abr. 20, tit. Evidence, H.; Imlay *v.* Rogers, 2 Halst. 347. The rule in the text is applicable only to civil actions. In the case last cited, which was trespass, the question arose on a motion for a new trial, for the rejection of the grand juror, who was offered in order to discredit a witness; and the Court being equally divided, the motion did not prevail. Probably such also was the nature of the case in Clayt. 84, pl. 140, cited by Viner. But where a witness before the grand jury has committed perjury in his testimony, either before them or at the trial, the reasons mentioned in the text, for excluding the testimony of grand jurors, do not prevent them from being called as witnesses, after the indictment has been tried, in order to establish the guilt of the perjured party. See 4 Bl. Comm. 126, n. 5, by Christian; 1 Chitty's Crim. Law, p. [317]; Sir J. Fenwick's case, 13 Howell's St. Tr. 610, 611; 5 St. Tr. 72. By the Revised Statutes of New York, Vol. 2, p. 724, § 31, the question may be asked, even in civil cases.

[6] 4 Hawk. P. C., B. 2, ch. 25, § 15; McLellan *v.* Richardson, 1 Shepl. 82; Low's case, 4 Greenl. 439; Commonwealth *v.* Smith, 9 Mass. 107.

protection of parties against fraud, the law excludes the testimony of *traverse jurors*, when offered to prove *misbehavior* in the Jury in regard to the verdict. Formerly, indeed, the affidavits of jurors have been admitted, in support of motions to set aside verdicts by reason of misconduct; but that practice was broken in upon by Lord Mansfield, and the settled course now is to reject them, because of the mischiefs which may result, if the verdict is thus placed in the power of a single juryman.[1]

§ 253. There is a *fourth* species of evidence which is excluded, namely, that which is *indecent*, or offensive to public morals, or *injurious to the feelings or interest of third persons*, the parties themselves having no interest in the matter, except what they have impertinently and voluntarily created. The mere indecency of disclosures does not, in general, suffice to exclude them, where the evidence is necessary for the purposes of civil or criminal justice; as, in an indictment for a rape; or, in a question upon the sex of one, claiming an estate entailed, as heir male or female; or, upon the legitimacy of one claiming as lawful heir; or, in an action by the husband for criminal conversation with the wife. In these and similar cases the evidence is necessary, either for the proof and punishment of crime, or for the vindication of rights existing before, or independent of, the fact sought to be disclosed. But where the parties have voluntarily and impertinently interested themselves in a question, tending to violate the peace of society, by exhibiting an innocent third person to the world in a ridiculous or contemptible light, or to disturb his own peace and comfort, or to offend public decency by the disclosures which its decision may require, the evidence will not be received. Of this sort are wagers or contracts respecting the

[1] Vaise *v.* Delaval, 1 T. R. 11; Jackson *v.* Williamson, 2 T. R. 281; Owen *v.* Warburton, 1 New R. 326; Little *v.* Larrabee, 2 Greenl. 37, 41, note, where the cases are collected. The State *v.* Freeman, 5 Conn. 348; Meade *v.* Smith, 16 Conn. 346; Straker *v.* Graham, 4 M. & W. 721.

sex of a third person,[1] or upon the question whether an unmarried woman has had a child.[2] In this place may also be mentioned the declarations of the husband or wife, that they have had no connexion, though living together, and that therefore the offspring is spurious; which, on the same general ground of decency, morality, and policy, are uniformly excluded.[3]

§ 254. *Communications between husband and wife* belong also to the class of privileged communications, and are therefore protected, independently of the ground of interest and identity which precludes the parties from testifying for or against each other. The happiness of the married state requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures, by providing that it shall be kept forever inviolable; that nothing shall be extracted from the bosom of the wife, which was confided there by the husband. Therefore, after the parties are separated, whether it be by divorce, or by the death of the husband, the wife is still precluded from disclosing any conversations with him; though she may be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation.[4] Their general incompetency to testify for or against each other will be considered hereafter, in its more appropriate place.

[1] Da Costa *v.* Jones, Cowp. 729.

[2] Ditchburn *v.* Goldsmith, 4 Campb. 152. If the subject of the action is frivolous, or the question impertinent, and this is apparent on the record, the Court will not proceed at all in the trial. Brown *v.* Leeson, 2 H. Bl. 43; Henkin *v.* Gerss, 2 Campb. 408.

[3] Goodright *v.* Moss, Cowp. 594, said, per Lord Mansfield, to have been solemnly decided at the Delegates. Cope *v.* Cope, 1 M. & Rob. 269, per Alderson, J.; Rex *v.* Book, 1 Wils. 340; Rex *v.* Luffe, 8 East, 193, 202, 203; Rex *v.* Kea, 11 East, 132; Commonwealth *v.* Shepherd, 6 Binn. 283.

[4] Monroe *v.* Twistleton, Peake's Evid. App. lxxxvii. as explained by Lord Ellenborough in Aveson *v.* Lord Kinnaird, 6 East, 192, 193; Doker *v.*

§ 254 *a*. It may be mentioned in this place, that though papers and other subjects of evidence may have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The Court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question.[1]

Hasler, Ry. & M. 198; Stein *v.* Bowman, 13 Peters, R. 209, 223; Coffin *v.* Jones, 13 Pick. 441, 445; Edgell *v.* Bennett, 7 Vermont R. 536; Williams *v.* Baldwin, Ib. 503, 506, per Royce, J. In Beveridge *v.* Minter, 1 C. & P. 364, where the widow was permitted, by Abbott, C. J., to testify to certain admissions of her deceased husband, relative to the money in question, this point was not considered, the objection being placed wholly on the ground of her interest in the estate. See also 2 Kent, Comm. 180, and note (a), 4th edit.; 2 Stark. Evid. 399; Robbins *v.* King, 2 Leigh's R. 142, 144. See further, Post, § 333–345.

[1] Commonwealth *v.* Dana, 2 Metc. 329, 337; Leggett *v.* Tollewey, 14 East, 302; Jordan *v.* Lewis, Ib. 306, note.

CHAPTER XIV.

OF THE NUMBER OF WITNESSES, AND THE NATURE AND QUANTITY OF PROOF REQUIRED IN PARTICULAR CASES.

§ 255. UNDER this head it is not proposed to go into an extended consideration of the statutes of Treason, or of Frauds, but only to mention briefly some instances in which those statutes, and some other rules of law, have regulated particular cases, taking them out of the operation of the general principles, by which they would otherwise be governed. Thus, in regard to *treasons*, though by the Common Law the crime was sufficiently proved by one credible witness,[1] yet, considering the great weight of the oath or duty of allegiance, against the probability of the fact of treason,[2] it has been deemed expedient to provide[3] that no person shall be indicted

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[1] Foster's Disc. p. 233; Woodbeck *v.* Keller, 6 Cowen, 120; McNally's Evid. 31.

[2] This is conceived to be the true foundation on which the rule has, in modern times, been enacted. The manner of its first introduction into the statutes was thus stated by the Lord Chancellor, in Lord Stafford's case, T. Raym. 408. "Upon this occasion my Lord Chancellor in the lords house was pleased to communicate a notion concerning the reason of two witnesses in treason, which he said was not very familiar, he believed; and it was this; anciently all or most of the Judges were churchmen and ecclesiastical persons, and by the canon law now, and then, in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and anciently heresy was treason; and from thence the parliament thought fit to appoint, that two witnesses ought to be for proof of high treason."

[3] This was first done by Stat. 5 & 6 Ed. 6, c. 11, but was more distinctly enacted by Stat. 7 W. 3, c. 3, § 2. The same regulation has been incorporated into the Constitution of the United States, which provides that — "No person shall be convicted of treason, unless on the testimony of two