CHAPTER III.

OF THE EXAMINATION OF WITNESSES.

§ 431. HAVING thus treated of the means of procuring the attendance of witnesses, and of their competency, we come now to consider the manner in which they are to be examined. And here, in the first place, it is to be observed, that the subject lies chiefly in the discretion of the Judge, before whom the cause is tried, it being from its very nature susceptible of but few positive and stringent rules. The great object is to elicit the truth from the witness; but the character, intelligence, moral courage, bias, memory, and other circumstances of witnesses are so various, as to require almost equal variety in the manner of interrogation, and the degree of its intensity, to attain that end. This manner and degree, therefore, as well as the other circumstances of the trial, must necessarily be left somewhat at large, subject to the few general rules, which we shall proceed to state; remarking only, that wherever any matter is left to the discretion of one Judge, his decision is not subject to be reversed or revised by another.

§ 432. If the Judge deems it essential to the discovery of truth, that the witnesses should be *examined out of the hearing of each other*, he will so order it. This order, upon the motion or suggestion of either party, is rarely withheld; but, by the weight of authority, the party does not seem entitled to it as a matter of right.[1] The course in such cases is, either

[1] In Rex *v.* Cook, 13 Howell, St. Tr. 348, it was declared by Ld. C. J. Treby to be grantable of favor only, at the discretion of the Court. And this opinion was followed by Ld. C. J. Holt, in Rex *v.* Vaughan, Ib. 494, and by Sir Michael Foster, in Rex *v.* Goodere, 17 Howell, St. Tr. 1015. See also 1 Stark. Evid. 163; Beamon *v.* Ellice, 4 C. & P. 585, per Taunton, J.;

to require the names of the witnesses to be stated by the counsel of the respective parties, by whom they were summoned, and to direct the sheriff to keep them in a separate room until they are called for; or, more usually, to cause them to withdraw, by an order from the bench, accompanied with notice, that if they remain they will not be examined. In the latter case, if a witness remains in Court in violation of the order, even by mistake, it is in the discretion of the Judge, whether or not he shall be examined. The course formerly was to exclude him; and this is still the inflexible rule in the Exchequer in revenue cases, in order to prevent any imputation of unfairness in proceedings between the crown and the subject. But with this exception, the rule in criminal and civil cases is the same.[1] But an attorney in the cause, whose personal attendance in Court is necessary, is usually excepted from the order

The State *v.* Sparrow, 3 Murphy, R. 487. The rule is stated by Fortescue, in these words: — Et si necessitas exegerit, dividantur testes hujusmodi, donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit aut concitavit eorum alium ad consimiliter testificandum. Fortesc. De Laud. Leg. Angl. c. 26. This, however, does not necessarily exclude the right of the Court to determine whether there is any need of a separate examination. Mr. Phillips states it only as the uniform course of practice, that "the Court, on the application of counsel, will order the witnesses on both sides to withdraw." 2 Phil. Evid. 395. And see, accordingly, Williams *v.* Hulie, 1 Sid. 131; Swift on Evid. 512. In Taylor *v.* Lawson, 3 C. & P. 543, Best, C. J. regretted that the rule of Parliamentary practice, which excludes all witnesses but the one under examination, was not universally adopted. But in Southey *v.* Nash, 7 C. & P. 632, Alderson, B. expressly recognised it as "the right of either party, at any moment, to require that the unexamined witnesses shall leave the Court." It is a general rule in the Scotch Law, that witnesses should be examined separately; and it is founded on the importance of having the story of each witness fresh from his own recollection, unmingled with the impression received from hearing the testimony of others in the same case. To this rule, an exception is allowed in the case of medical witnesses; but even those, on matters of medical opinion, are examined apart from each other. See Alison's Practice, p. 542 – 545; Tait on Evid. 420.

[1] Attor. Gen. *v.* Bulpit, 9 Price, 4; Parker *v.* McWilliam, 6 Bing. 683; 4 Moore & Payne, 480, S. C.; Thomas *v.* David, 7 C. & P. 350; Rex *v.* Colley, 1 M. & Malk. 329; Beamon *v.* Ellice, 4 C. & P. 585, and note (b).

to withdraw.[1] The right of excluding witnesses for disobedience to such an order, though well established, is rarely exercised in America;[2] but the witness is punishable for the contempt.

§ 433. When a witness has been duly sworn, and his competency is settled, if objected to,[3] he is first examined by the party producing him; which is called his *direct examination.* He is afterwards examined to the same matters by the adverse party; which is called his *cross-examination.* These examinations are conducted orally in open Court, under the regulation and order of the Judge, and in his presence and that of the Jury, and of the parties and their counsel.

§ 434. In the direct examination of a witness, it is not allowed to put to him what are termed *leading questions;* that is, questions which suggest to the witness the answer desired.[4] This rule is to be understood in a reasonable sense; for if it were not allowed to approach the points at issue by such questions, the examination would be most inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, the counsel may lead him on to that length, and may recapitulate to him the acknowledged facts of the case which have been already established. The rule, therefore, is not applied to that

[1] Everett *v.* Lowdham, 5 C. & P. 91; Pomeroy *v.* Baddeley, Ry. & M. 430.

[2] 1 Phil. Evid. 268, note 501, by Cowen & Hill.

[3] The course in the Scotch Courts, after a witness is sworn, is, first to examine him *in initialibus*, namely, whether he has been instructed what to say, or has received or has been promised any good deed for what he is to say, or bears any ill will to the adverse party, or has any interest in the cause, or concern in conducting it; together with his age, and whether he is married or not, and the degree of his relationship to the party adducing him. Tait on Evid. 424.

[4] 1 Stark. Evid. 149; 2 Phil. Evid. 401; Parkin *v.* Moon, 7 C. & P. 408; Alison's Practice, 545; Tait on Evid. 427.

part of the examination, which is merely introductory of that which is material. Questions are also objectionable, as leading, which, embodying a material fact, admit of an answer by a simple negative or affirmative. An argumentative or pregnant course of interrogation, is as faulty as the like course in pleading. The interrogatory must not assume facts to have been proved, which have not been proved; nor, that particular answers have been given, which have not been given.[1] The witness, except in certain cases hereafter to be mentioned, is to be examined only to matters of fact within his own knowledge, whether they consist of words or actions; and to these matters he should in general be plainly, directly, and distinctly interrogated. Inferences or conclusions, which may be drawn from facts, are ordinarily to be drawn by the Jury alone; except where the conclusion is an inference of skill and judgment; in which case it may be drawn by an expert, and testified by him to the Jury.[2]

§ 435. In *some cases,* however, *leading questions are permitted,* even in a *direct examination;* namely, where the witness appears to be hostile to the party producing him, or in the interest of the other party, or unwilling to give evidence;[3] or where an omission in his testimony is evidently caused by want of recollection, which a suggestion may assist. Thus, where the witness stated, that he could not recollect the names of the component members of a firm, so as to repeat them without suggestion, but thought he might possibly recollect them if suggested to him, this was permitted to be done.[4] So, where the transaction involves numerous items or dates.

[1] Hill *v.* Coombe, 1 Stark. Evid. 163, note, (qq); Handley *v.* Ward, Ib.; Turney *v.* The State, 8 Sm. & Marsh. 104.

[2] 1 Stark. Evid. 152; Goodtitle d. Revett *v.* Braham, 4 T. R. 497.

[3] Clarke *v.* Saffery, Ry. & M. 126, per Best, C. J.; Regina *v.* Chapman, 8 C. & P. 558; Regina *v.* Ball, Ib. 745; Regina *v.* Murphy, Ib. 297. Leading questions are not allowed in Scotland, even in cross-examining. Tait on Evid. 427; Alison's Practice, 545.

[4] Acerro et al. *v.* Petroni, 1 Stark. R. 100, per Ld. Ellenborough.

So, where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry, without a particular specification of it; as, where he is called to contradict another, as to the contents of a letter which is lost, and cannot, without suggestion, recollect all its contents, the particular passage may be suggested to him.[1] So, where a witness is called to contradict another, who has stated, that such and such expressions were used, or the like, counsel are sometimes permitted to ask, whether those particular expressions were used, or those things said, instead of asking the witness to state what was said.[2] Where the witness stands in a situation, which of necessity makes him adverse to the party calling him, as, for example, on the trial of an issue out of Chancery, with power to the plaintiff to examine the defendant himself as a witness, he may be cross-examined, as a matter of right.[3] Indeed, when and under what circumstances a leading question may be put, is a matter resting in the sound discretion of the Court, and not a matter which can be assigned for error.[4]

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[1] Courteen *v.* Touse, 1 Campb. 43; Edmonds *v.* Walter, 3 Stark. R. 7.

[2] 1 Stark. Evid. 152. Mr. Phillips is of opinion that the regular mode should first be exhausted in such cases, before leading questions are resorted to. Phil. & Am. on Evid. p. 890, 891; 2 Phil. Evid. 404, 405.

[3] Clarke *v.* Saffery, Ry. & M. 126. The policy of these rules, as well as of almost all other rules of the Common Law on the subject of evidence, is controverted in the Rationale of Judicial Evidence, by Jeremy Bentham; — "a learned writer, who has devoted too much of his time to the theory of jurisprudence, to know much of the practical consequences of the doctrines he has published to the world." Per Best, C. J. in Hovill *v.* Stephenson, 5 Bing. 493.

[4] Moody *v.* Rowell, 17 Pick. 498. In this case the law on this point was thus stated by the learned Chief Justice: — "The Court have no doubt, that it is within the discretion of a Judge at the trial, under particular circumstances, to permit a leading question to be put to one's own witness; as, when he is manifestly reluctant and hostile to the interest of the party calling him, or where he has exhausted his memory, without stating the particular required, where it is a proper name, or other fact, which cannot be significantly pointed to by a general interrogatory, or where the witness is a child of tender years, whose attention can be called to the matter required, only by a pointed or leading question. So a Judge may, in his discretion, prohibit certain leading questions from being put to an adversary's witness, where the witness shows a strong interest or bias in favor of the cross-examining party, and needs only an intimation, to say whatever is most favorable to that party. The witness may have purposely concealed such bias in favor of one party, to induce the other to call him and make him his witness; or the party calling him may be compelled to do so, to prove some single fact necessary to his case. This discretionary power, to vary the general rule, is to be exercised only so far as the purposes of justice plainly require it, and is to be regulated by the circumstances of each case."

§ 436. Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and *assist his memory, by the use of a written instrument*, memorandum, or entry in a book, and may be compelled to do so, if the writing is present in Court.[1] It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection.[2] So also, where the witness recollects that he saw the paper while the facts were fresh in his memory, and remembers that he then knew that the particulars therein mentioned were correctly stated.[3] And it is not necessary that the writing thus used to refresh the memory, should itself be admissible in evidence; for if inadmissible in itself, as, for want of a stamp, it may still be

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[1] Reed *v.* Boardman, 20 Pick. 441.

[2] Doe *v.* Perkins, 3 T. R. 749, expounded in Rex *v.* St. Martin's Leicester, 2 Ad. & El. 215; Burton *v.* Plummer, Ib. 341; Burrough *v.* Martin, 2 Campb. 112; Duchess of Kingston's case, 20 Howell's St. Tr. 619; Henry *v.* Lee, 2 Chitty, R. 124; Rambert *v.* Cohen, 4 Esp. 213. In Meagoe *v.* Simmons, 3 C. & P. 75, Ld. Tenterden observed, that the usual course was not to permit the witness to refresh his memory from any paper not of his own writing. And so is the Scotch practice. Tait on Evid. 433. But a witness has been allowed to refresh his memory from the notes of his testimony, taken by counsel at a former trial. Laws *v.* Reed, 2 Lewin, Cr. Cas. 152. And from his deposition. Smith *v.* Morgan, 2 M. & Rob. 259. And from a printed copy of his report. Home *v.* Mackenzie, 6 C. & Fin. 628.

[3] Burrough *v.* Martin, 2 Campb. 112; Burton *v.* Plummer, 2 Ad. & El. 343, per Ld. Denman; Jacob *v.* Lindsay, 1 East, 460.

referred to by the witness.[1] But where the witness neither recollects the fact, nor remembers to have recognised the written statement as true, and the writing was not made by him, his testimony, so far as it is founded upon the written paper, is but hearsay; and a witness can no more be permitted to give evidence of his inference from what a third person has written, than from what a third person has said.[2]

§ 437. The cases in which writings are permitted to be used for this purpose may be divided into three classes. (1.) Where the writing is used only for the purpose of assisting the memory of the witness. In this case, it does not seem necessary that the writing should be produced in Court,[3] though its absence may afford matter of observation to the Jury; for the witness at last testifies from his own recollection. (2.) Where the witness recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers that at the time he saw it he knew the contents to be correct. In this case, the writing itself must be produced in Court, in order that the other party may cross-examine; not that such writing is thereby made evidence of itself, but that the other party may have the benefit of the witness's refreshing his memory by every part.[4] And for the

[1] Maugham *v.* Hubbard, 8 B. & C. 14; Kensington *v.* Inglis, 8 East, 273; Ante, § 90, 228.

[2] Phil. & Am. on Evid. 895; 2 Phil. Evid. 413.

[3] Kensington *v.* Inglis, 8 East, 273; Burton *v.* Plummer, 2 Ad. & El. 341.

[4] Ante, § 115, 436; Rex *v.* St. Martin's Leicester, 2 Ad. & El. 215, per Patteson, J.; Sinclair *v.* Stevenson, 1 C. & P. 582; 2 Bing. 516, S. C.; 10 Moore, 46, S. C.; Loyd *v.* Freshfield, 2 C. & P. 325; 8 D. & R. 19, S. C. If the paper is shown to the witness merely to prove the handwriting, it has been ruled, that the other party has not therefore a right to see it. Sinclair *v.* Stevenson, supra. But the contrary has since been held by Bosanquet, J., in Russell *v.* Ryder, 6 C. & P. 416, and with good reason; for the adverse party has a right to cross-examine the witness as to the handwriting. 2 Phil. Evid. 400. But if the counsel, in cross-examination, puts a paper into a witness's hand in order to refresh his memory, the opposite counsel has a

same reason, a witness is not permitted to refresh his memory by extracts made from other writings.[1] (3.) Where the writing in question neither is recognised by the witness, as one which he remembers to have before seen, nor awakens his memory to the recollection of any thing contained in it; but, nevertheless, knowing the writing to be genuine, his mind is so convinced, that he is on that ground enabled to swear positively to the fact. An example of this kind is where a banker's clerk is shown a bill of exchange, which has his own writing upon it, from which he knows and is able to state positively that it passed through his hands. So, where an agent made a parol lease, and entered a memorandum of the terms in a book, which was produced, but the agent stated that he had no memory of the transaction but from the book, without which he should not, of his own knowledge, be able to speak to the fact, but on reading the entry he had no doubt that the fact really happened; it was held sufficient.[2] So, where a witness, called to prove the execution of a deed, sees his own signature to the attestation, and says, that he is therefore

right to look at it, without being bound to read it in evidence; and may also ask the witness when it was written, without being bound to put it into the case. Rex *v.* Ramsden, 2 C. & P. 603. The American Courts have sometimes carried the rule farther than it has been carried in England, by admitting the writing itself to go in evidence to the Jury in all cases, where it was made by the witness at the time of the fact, for the purpose of preserving the memory of it, if, at the time of testifying, he can recollect nothing further than that he had accurately reduced the whole transaction to writing. Farmers and Mechanics Bank *v.* Boraef, 1 Rawle, 152; Smith *v.* Lane, 12 S. & R. 84, per Gibson, J.; The State *v.* Rawls, 2 Nott & McCord, 331; Clark *v.* Vorce, 15 Wend. 193; Merrill *v.* Ithaca & Oswego Rail Road Co. 16 Wend. 586, 596, 597, 598; Haven *v.* Wendell, 11 N. Hamp. 112. But see Lightner *v.* Wike, 4 S. & R. 203. Other American cases upon the general subject of the text, are stated in Cowen & Hill's note 528, to 1 Phil. Evid. 290.

[1] Doe *v.* Perkins, 3 T. R. 749; 2 Ad. & El. 215.

[2] Rex *v.* St. Martin's Leicester, 2 Ad. & El. 210; Phil. & Am. on Evid. 893. See also Haig *v.* Newton, 1 Const. Rep. 423; Sharpe *v.* Bingley, Ib. 373.

sure that he saw the party execute the deed, that is sufficient proof of the execution of the deed, though he adds that he has no recollection of the fact.[1] In these and the like cases, for the reason before given, the writing itself must be produced.[2]

§ 438. As to the *time when the writing*, thus used to restore the recollection of facts, *should have been made*, no precise rule seems to have been established. It is most frequently said, that the writing must have been made at the time of the fact in question, or recently afterwards.[3] At the farthest, it ought to have been made before such a period of time has elapsed, as to render it probable that the memory of the witness might have become deficient.[4] But the practice in this respect is governed very much by the circumstances of the particular case. In one case, to prove the date of an act of bankruptcy committed many years before, a witness was permitted to recur to his own deposition, made some time

1 Maugham *v.* Hubbard, 8 B. B. & C. 16, per Bayley, J.; Russell *v.* Coffin, 8 Pick. 143, 150; Den *v.* Downam, 1 Green's R. 135, 142; Jackson *v.* Christman, 4 Wend. 277, 282; Merrill *v.* Ithaca &c. Rail Road Co. 16 Wend. 598; Patterson *v.* Tucker, 4 Halst. 322, 332, 333; Wheeler *v.* Hatch, 3 Fairf. 389; Pigott *v.* Holloway, 1 Binn. 436; Collins *v.* Lemasters, 2 Bail. 141; 1 Phil. Evid. by Cowen & Hill, p. 475, note 899.

2 Tanner *v.* Taylor, cited by Buller, J. in Doe *v.* Perkins, 3 T. R. 754; Howard *v.* Canfield, 5 Dowl. P. C. 417; Dupuy *v.* Truman, 2 Y. & Col. 341. Where A. was proved to have written a certain article in a newspaper, but the manuscript was lost, and A. had no recollection of the fact of writing it, it was held that the newspaper might be used to refresh his memory, and that he might then be asked whether he had any doubt that the fact was as therein stated. Topham *v.* McGregor, 1 Car. & Kir. 320. So, where the transaction had faded from the memory of the witness, but he recollected that while it was recent and fresh in his memory, he had stated the circumstances in his examination before commissioners of bankrupt, which they had reduced to writing, and he had signed; he was allowed to look at his examination to refresh his memory. Wood *v.* Cooper, Ib. 645.

3 1 Stark. Evid. 154, 155; Alison's Practice, p. 540, 541; Tait on Evid. 432.

4 Phil. & Am. on Evid. 896; 2 Phil. Evid. 414.

during the year in which the fact happened.[1] In another case, the witness was not permitted to refresh his memory with a copy of a paper, made by himself six months after he made the original, though the original was proved to have been so written over with figures as to have become unintelligible; the learned Judge saying, that he could only look at the original memorandum, made near the time.[2] And in a still later case, where it was proposed to refer to a paper, which the witness had drawn up for the party who called him, after the cause was set down for trial, the learned Judge refused it, observing, that the rule must be confined to papers written contemporaneously with the transaction.[3] But where the witness had herself noted down the transactions from time to time as they occurred, but had requested the plaintiff's solicitor to digest her notes into the form of a deposition, which she afterwards had revised, corrected, and transcribed, the Lord Chancellor indignantly suppressed the deposition.[4]

§ 439. If a witness has *become blind*, a contemporaneous writing made by himself, though otherwise inadmissible, may yet be read over to him, in order to excite his recollection.[5] So, where a receipt for goods was inadmissible for want of a stamp, it was permitted to be used to refresh the memory of a witness who heard it read over to the defendant, the latter at the same time admitting the receipt of the goods.[6]

1 Vaughan *v.* Martin, 1 Esp. 440.

2 Jones *v.* Stroud, 2 C. & P. 196, per Best, C. J. In this case the words in the copy, and as sworn to by the witness, were spoken *to* the plaintiff; but on producing the original, which, on farther reflection, was confirmed by the witness, it appeared that they were spoken *of* him. The action was slander; and the words being laid according to the copy, for this variance the plaintiff was nonsuited.

3 Steinkeller *v.* Newton, 9 C. & P. 313.

4 Anon. cited per Ld. Kenyon, in Doe *v.* Perkins, 3 T. R. 752. See also Sayer *v.* Wagstaff, 5 Beav. 462.

5 Catt *v.* Howard, 3 Stark. R. 3.

6 Jacob *v.* Lindsay, 1 East, 460. In Scotland, the subject of the use and proper office of writings, in restoring the recollection of witnesses, has been

§ 440. In general, though a witness must depose to such *facts* only as are *within his own knowledge*, yet there is no rule

well considered and settled; and the law, as practised in the Courts of that country, is stated with precision by Mr. Alison, in his elegant and philosophical Treatise on the Practice of the Criminal Law. "It is frequently made a question," he observes, "whether a witness may refer to notes or memorandums made to assist his memory. On this subject, the rule is, that notes or memoranda made up by the witness at the moment, or recently after the fact, may be looked to in order to refresh his memory; but if they were made up at the distance of weeks or months thereafter, and still more, if done at the recommendation of one of the parties, they are not admissible. It is accordingly usual to allow witnesses to look to memorandums made at the time, of dates, distances, appearances on dead bodies, lists of stolen goods, or the like, before emitting his testimony, or even to read such notes to the Jury, as his evidence, he having first sworn that they were made at the time, and faithfully done. In regard to lists of stolen goods, in particular, it is now the usual practice to have inventories of them made up at the time from the information of the witness in precognition, signed by him, and libelled on as a production at the trial, and he is then desired to read them, or they are read to him, and he swears that they contain a correct list of the stolen articles. In this way much time is saved at the trial, and much more correctness and accuracy is obtained, than could possibly have been expected, if the witness were required to state from memory all the particulars of the stolen articles, at the distance perhaps of months from the time when they were lost. With the exception, however, of such memorandums, notes, or inventories, made up at the time, or shortly after the occasion libelled, a witness is not permitted to refer to a written paper as containing his disposition; for that would annihilate the whole advantages of parol evidence, and viva voce examination, and convert a Jury trial into a mere consideration of written instruments. There is one exception, however, properly introduced into this rule; in the case of medical or other scientific reports or certificates, which are lodged in process before the trial, and libelled on as productions in the indictment, and which the witness is allowed to read as his deposition to the Jury, confirming it at its close by a declaration on his oath, that it is a true report. The reason of this exception is founded in the consideration, that the medical, or other scientific facts or appearances, which are the subject of such a report, are generally so minute and detailed, that they cannot with safety be intrusted to the memory of the witness, but much more reliance may be placed on a report made out by him at the time, when the facts or appearances are fresh in his recollection; while, on the other hand, such witnesses have generally no personal interest in the matter, and from their situation and rank in life, are much less liable to suspicion than those of an inferior class, or more intimately connected with the transaction in question. Although, therefore, the scientific witness is always called on to read his report, as affording the best evidence of the appearances he was called on to examine, yet he may be, and generally is, subjected to a farther examination by the prosecutor, or a cross-examination on the prisoner's part; and if he is called on to state any facts in the case, unconnected with his scientific report, as conversations with the deceased, confessions heard by him from the panel, or the like, utitur jur commune, he stands in the situation of an ordinary witness, and must give his evidence verbally in answer to the questions put to him, and can only refer to jottings or memorandums of dates, &c. made up at the time, to refresh his memory, like any other person put into the box." See Alison's Practice, p. 540 – 542.

that requires him to speak with such expression of certainty, as to exclude all doubt in his mind. If the fact is impressed on his memory, but his recollection does not rise to positive assurance, it still admissible, to be weighed by the Jury; but if the impression is not derived from recollection of the fact, and is so slight as to render it probable that it may have been derived from others, or may have been some unwarrantable deduction of the witness's own mind, it will be rejected.[1] And though the opinions of witnesses are in general not evidence, yet on certain subjects some classes of witnesses may deliver their opinions, and on certain other subjects any competent witness may express his *opinion or belief;* and on any subject, to which a witness may testify, if he has any recollection at all of the fact, he may express it as it lies in his memory, of which the Jury will judge.[2] Thus, it is the constant practice to receive in evidence any witness's belief of the identity of a person, or that the handwriting in question is or is not the handwriting of a particular individual, provided he has any knowledge of the person or handwriting; and if he testifies falsely as to his belief, he may be convicted of perjury.[3] On questions of science, skill, or trade, or others of the like kind, persons of skill, sometimes called *experts*, may not only testify

1 Clark *v.* Bigelow, 4 Shepl. 246.

2 Miller's case, 3 Wils. 427, per. Ld. Ch. Just. De Grey; McNally's Evid. 262, 263. And see Carmalt *v.* Post, 8 Watts, 411, per Gibson, C. J.

3 Rex *v.* Pedley, Leach, Cr. Cas. 365, case 152.

to facts, but are permitted to give their opinions in evidence. Thus, the opinions of medical men are constantly admitted, as to the cause of disease, or of death, or the consequences of wounds, and as to the sane or insane state of a person's mind, as collected from a number of circumstances; and as to other subjects of professional skill.[1] And such opinions are admissible in evidence, though the witness founds them, not on his own personal observation, but on the case itself, as proved by other witnesses on the trial.[2] But where scientific men are called as witnesses, they cannot give their opinions as to the general merits of the cause, but only their opinions upon the facts proved.[3] And if the facts are doubtful, and remain to be found by the Jury, it has been held improper to ask an expert, who has heard the evidence, what is his opinion upon the case on trial; though he may be asked his opinion upon a similar case, hypothetically stated.[4] Nor is the opinion of a medical man admissible, that a particular act, for which a prisoner is tried, was an act of insanity.[5] So, the subscribing witnesses to a will may testify their opinions, in respect to the sanity of the testator at the time of executing the will; though other witnesses can speak only as to facts; for the law has placed the subscribing witnesses about the testator, to ascertain and judge of his capacity.[6] Seal engravers may be called to

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[1] Stark. Evid. 154; Phil. & Am. on Evid. 899; Tait on Evid. 433; Hathorn *v.* King, 8 Mass. 371; Hoge *v.* Fisher, 1 Pet. C. C. R. 163; Folkes *v.* Chadd, 3 Doug. 157, per. Ld. Mansfield; McNally's Evid. 329–335, ch. 30.

[2] Rex *v.* Wright, Russ. & Ry. 456; Rex *v.* Searle, 1 M. & Rob. 75; McNaghten's case, 10 Cl. & Fin. 200, 212.

[3] Jameson *v.* Drinkald, 12 Moore, 148. But professional books, or books of science, (e. g. medical books,) are not admissible in evidence; though professional witnesses may be asked the grounds of their judgment and opinion, which might in some degree be founded on these books as a part of their general knowledge. Collier *v.* Simpson, 5 C. & P. 73.

[4] Sills *v.* Brown, 9 C. & P. 601.

[5] Rex *v.* Wright, Russ. & R. 456.

[6] Chase *v.* Lincoln, 3 Mass. 237; Poole *v.* Richardson, Ib. 330; Rambler *v.* Tryon, 7 S. & R. 90, 92; Buckminster *v.* Perry, 4 Mass. 593; Grant *v.* Thompson, 4 Conn. 203. And see Sheafe *v.* Rowe, 2 Lee's R. 415; Kinleside *v.* Harrison, 2 Phil. 523; Wogan *v.* Small, 11 S. & R. 141. But where the witness has had opportunities for knowing and observing the conversation, conduct, and manners of the person whose sanity is in question, it has been held, upon grave consideration, that the witness may depose, not only to particular facts, but to his opinion or belief as to the sanity of the party, formed from such actual observation. Clary *v.* Clary, 2 Iredell, R. 78. Such evidence is also admitted in the Ecclesiastical Courts. See Wheeler *v.* Alderson, 3 Hagg. Eccl. R. 574, 604, 605.

give their opinion upon an impression, whether it was made from an original seal, or from an impression.[1] So, the opinion of an artist in painting is evidence of the genuineness of a picture.[2] And it seems, that the genuineness of a postmark may be proved by the opinion of one who has been in the habit of receiving letters with that mark.[3] In an action for breach of a promise to marry, a person accustomed to observe the mutual deportment of the parties, may give in evidence his opinion upon the question, whether they were attached to each other.[4] A shipbuilder may give his opinion as to the seaworthiness of a ship, even on facts stated by others.[5] A nautical person may testify his opinion whether, upon the facts proved by the plaintiff, the collision of two ships could have been avoided by proper care on the part of the defendant's servants.[6] Where the question was, whether a bank which had been erected to prevent the overflowing of the sea, had caused the choking up of a harbor, the opinions of scientific engineers, as to the effect of such an embankment upon the harbor, were held admissible evidence.[7] A secretary of a fire insurance company, accustomed to examine buildings with reference to

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[1] Per. Ld. Mansfield, in Folkes *v.* Chadd, 3 Doug. 157.

[2] Ibid.

[3] Abbey *v.* Lill, 5 Bing. 299, per Gaselee, J.

[4] McKee *v.* Nelson, 4 Cowen, 355.

[5] Thornton *v.* The Royal Exch. Assur. Co. 1 Peake, R. 25; Chaurand *v.* Angerstein, Ib. 43; Beckwith *v.* Sydebotham, 1 Campb. 117. So of nautical men, as to navigating a ship. Malton *v.* Nesbit, 1 C. & P. 70.

[6] Fenwick *v.* Bell, 1 Car. & Kirw. 312.

[7] Folkes *v.* Chadd, 3 Doug. 157.