the insurance of them, and who, as a county commissioner, had frequently estimated damages occasioned by the laying out of railroads and highways, has been held competent to testify his opinion, as to the effect of laying a railroad within a certain distance of a building, upon the value of the rent, and the increase of the rate of insurance against fire.[1] Persons accustomed to observe the habits of certain fish, have been permitted to give in evidence their opinions, as to the ability of the fish to overcome certain obstructions in the rivers which they were accustomed to ascend.[2] A practical surveyor may express his opinion, whether the marks on trees, piles of stone, &c., were intended as monuments of boundaries;[3] but he cannot be asked whether, in his opinion, from the objects and appearances which he saw on the ground, the tract he surveyed was identical with the tract marked on a certain diagram.[4]

§ 441. But witnesses are *not receivable to state their views* on matters *of legal or moral obligation*, nor on the manner in which *other persons* would probably be influenced, if the parties acted in one way rather than in another.[5] Therefore the

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[1] Webber *v.* Eastern Railroad Co. 2 Metc. 147. Where a point, involving questions of practical science, is in dispute in Chancery, the Court will advise a reference of it to an expert in that science, for his opinion upon the facts; which will be adopted by the Court as the ground of its order. Webb *v.* Manchester & Leeds Railw. Co. 4 My. & C. 116, 120; 1 Railw. Cas. 576.

[2] Cottrill *v.* Myrick, 3 Fairf. 222.

[3] Davis *v.* Mason, 4 Pick. 156.

[4] Farar *v.* Warfield, 8 Mart. N. S. 695, 696.

[5] Per. Ld. Denman, C. J. in Campbell *v.* Rickards, 5 B. & Ad. 840; 2 N. & M. 542, S. C. But where a libel consisted in imputing to the plaintiff that he acted dishonorably in withdrawing a horse which had been entered for a race; and he proved by a witness that the rules of the Jockey Club, of which he was a member, permitted owners to withdraw their horses, before the race was run; it was held that the witness, on cross-examination, might be asked whether such conduct as he had described as lawful under those rules, would not be regarded by him as dishonorable. Greville *v.* Chapman, 5 Ad. & El. 731, N. S.

opinions of medical practitioners, upon the question, whether a certain physician had honorably and faithfully discharged his duty to his medical brethren, have been rejected.[1] So, the opinion of a person conversant with the business of insurance, upon the question, whether certain parts of a letter, which the broker of the insured had received, but which he suppressed, when reading the letter to the underwriters, were or were not material to be communicated, has been held inadmissible;[2] for, whether a particular fact was material or not in the particular case, is a question for the Jury to decide, under the circumstances.[3] Neither can a witness be asked, what would have been his own conduct, in the particular case.[4] But, in an action against a broker for negligence in not procuring the needful alterations in a policy of insurance, it has been held, that other brokers might be called to say, looking at the policy, the invoices, and the letter of instructions, what alterations a skilful broker ought to have made.[5]

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[1] Ramadge *v.* Ryan, 9 Bing. 333. See also Cowen & Hill's note 529, to 1 Phil. Evid. 290.

[2] Campbell *v.* Rickards, 5 B. & Ad. 840, in which the case of Rickards *v.* Murdock, 10 B. & C. 527, and certain other decisions to the contrary, are considered and overruled. See, accordingly, Phil. & Am. on Evid. 899, 900; Carter *v.* Boehm, 3 Burr. 1905, 1918; Durell *v.* Bederley, 1 Holt's Cas. 283; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72, 79.

[3] Rawlins *v.* Desborough, 2 M. & Rob. 328; Westbury *v.* Aberdein, 2 M. & W. 267.

[4] Berthon *v.* Loughman, 2 Stark. R. 258.

[5] Chapman *v.* Walton, 10 Bing. 57. Upon the question, whether the opinion of a person, conversant with the business of insurance, is admissible, to show that the rate of the premium would have been affected by the communication of particular facts, there has been much diversity of opinion among Judges, and the cases are not easily reconciled. See Phil. & Am. on Evid. 899; 2 Stark. Evid. 886. But the later decisions are against the admissibility of the testimony, as a general rule. See Campbell *v.* Rickards, 5 B. & Ad. 840. Perhaps the following observations of Mr. Starkie, on this subject, will be found to indicate the true principle of discrimination among the cases which call for the application of the rule. "Whenever the fixing the fair price and value upon a contract to insure is

§ 442. When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and having thus presented them to the Court, *the law will not permit the party* afterwards *to impeach their general reputation* for truth, or to impugn their credibility by general evidence, tending to show them to be unworthy of belief. For this would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him.[1]

§ 443. But to this general rule there are *some exceptions*. For, where the witness is not one of the party's own selection, but is one whom *the law obliges him to call*, such as the subscribing witness to a deed, or a will, or the like; here he can hardly be considered as the witness of the party calling him, and therefore, as it seems, his character for truth may be generally impeached.[2] But, however this may be, it is

a matter of skill and judgment, acting according to certain general rules and principles of calculation, applied to the particular circumstances of each individual case, it seems to be matter of evidence to show whether the facts suppressed would have been noticed as a term in the particular calculation. It would not be difficult to propound instances, in which the materiality of the fact withheld would be a question of pure science; in other instances it is very possible that mere common sense, independent of any peculiar skill or experience, would be sufficient to comprehend that the disclosure was material, and its suppression fraudulent, although not to understand to what extent the risk was increased by that fact. In intermediate cases, it seems to be difficult in principle wholly to exclude the evidence, although its importance may vary exceedingly according to circumstances." See 2 Stark. Evid. 887, 888, (3d Lond. Ed.) 649, (6th Am. Ed.)

[1] Bull. N. P. 297; Ewer *v.* Ambrose, 3 B. & C. 746; Stockton *v.* Demuth, 7 Watts, 39; Smith *v.* Price, 8 Watts, 447. But where a witness testified to the Jury, contrary to her statement in a former deposition given in the same cause, it was held not improper for the *Judge to order* the deposition to be read, in order to impeach the credit of the witness. Rex *v* Oldroyd, Rus. & Ry. 88.

[2] Lowe *v.* Jolliffe, 1 W. Bl. 365; Poth. on Obl. by Evans, Vol. 2, p. 232, App. No. 16, Williams *v.* Walker, 2 Rich. Eq. R. 291. And see Goodtitle *v.* Clayton, 4 Burr. 2224; Cowden *v.* Reynolds, 12 S. & R. 281. But see Whitaker *v.* Salisbury, 15 Pick. 544, 545; Dennett *v.* Dow, 5 Shepl. 19; Brown *v.* Bellows, 4 Pick. 194.

exceedingly clear that the party, calling a witness, is not precluded from proving the truth of any *particular fact*, by any other competent testimony, in direct *contradiction* to what such witness may have testified; and this not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief.[1]

§ 444. Whether it be competent for a party to prove that a witness whom he has called, and whose testimony is unfavorable to his cause, *had previously stated the facts in a different manner*, is a question upon which there exists some diversity of opinion. On the one hand it is urged, that a party is not to be sacrificed to his witness; that he is not represented by him, nor identified with him; and that he ought not to be entrapped by the arts of a designing man, perhaps in the interest of his adversary.[2] On the other hand, it is said, that to admit such proof, would enable the party to get the naked declarations of a witness before the Jury, operating, in fact, as independent evidence; and this, too, even where the declarations were made out of Court, by collusion, for the purpose of being thus introduced.[3] But the weight of au-

[1] Bull. N. P. 297; Alexander *v.* Gibson, 2 Campb. 555; Richardson *v.* Allan, 2 Stark. R. 334; Ewer *v.* Ambrose, 3 B. & C. 746; 6 D. & R. 127; 4 B. & C. 25, S. C.; Friedlander *v.* London Assur. Co. 4 B. & Ad. 193; Lawrence *v.* Barker, 5 Wend. 305, per Savage, C. J.; Cowden *v.* Reynolds, 12 S. & R. 281; Bradley *v.* Ricardo, 8 Bing. 57; Jackson *v.* Leek, 12 Wend. 105; Stockton *v.* Demuth, 7 Watts, 39; Brown *v.* Bellows, 4 Pick. 179, 194; Perry *v.* Massey, 1 Bail. 32. See further cases, in Cowen & Hill's notes, 534, 535, 536, to 1 Phil. Evid. p. 309, 310; Spencer *v.* White, 1 Iredell, R. 239; Dennett *v.* Dow, 5 Shepl. 19; McArthur *v.* Hurlbert, 21 Wend. 190.

[2] Phil. & Am. on Evid. 904, 905; 2 Phil. Evid. 447.

[3] Ibid; Smith *v.* Price, 8 Watts, 447; Wright *v.* Beckett, 1 M. & Rob. 414, 428, Per Bolland, B.

thority seems in favor of admitting the party to show, that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify; or, that the witness has recently been brought under the influence of the other party, and has deceived the party calling him. For it is said this course is necessary for his protection against the contrivance of an artful witness; and the danger of its being regarded by the Jury as substantive evidence is no greater in such cases, than it is where the contradictory declarations are proved by the adverse party.[1]

§ 445. When a witness has been examined in chief, the other party has a right to *cross-examine* him. But a question often arises, whether the witness has been so examined in chief, as to give the other party this right. If the witness is called merely for the purpose of producing a paper, which is to be proved by another witness, he need not be sworn.[2] Whether the right of cross-examination, that is, of treating the witness as the witness of the adverse party, and of examining him by leading questions, extends to the whole case, or is to be limited to the matters upon which he has already been examined in chief, is a point upon which there is some diversity of opinion. In England, when a competent witness is called and sworn, the other party will, ordinarily, and in strictness, be entitled to cross-examine him, though the party

[1] Wright *v.* Beckett, 1 M. & Rob. 414, 416, per Ld. Denman; Phil. & Am. on Evid. 904–907; Rice *v.* New Eng. Marine Ins. Co. 4 Pick. 439; Rex *v.* Oldroyd, Rus. & Ry. 88, 90, per. Ld. Ellenborough and Mansfield, C. J.; Brown *v.* Bellows, 4 Pick. 179; The State *v.* Norris, 1 Hayw. 437, 438; 2 Phil. Evid. 450–463; Dunn *v.* Aslett, 2 M. & Rob. 122; Bank of Northern Liberties *v.* Davis, 6 Watts & Serg. 285; Post, § 467, n. 5. But see Holdsworth *v.* Mayor of Dartmouth, 2 M. & Rob. 153; Regina *v.* Ball, 8 C. & P. 745; and Regina *v.* Farr, 8 C. & P. 768, where evidence of this kind was rejected.

[2] Perry *v.* Gibson, 1 Ad. & El. 48; Davis *v.* Dale, 1 Mo. & M. 514; Read *v.* James, 1 Stark. R. 132; Rush *v.* Smith, 1 C. M. & R. 94; Summers *v.* Moseley, 2 C. & M. 477.

calling him does not choose to examine him in chief;[1] unless he was sworn by mistake;[2] or, unless an immaterial question having been put to him, his further examination in chief has been stopped by the Judge.[3] And even where a plaintiff was under the necessity of calling the defendant in interest as a witness, for the sake of formal proof only, he not being party to the record, it has been held, that he was thereby made a witness for all purposes, and might be cross-examined to the whole case.[4] In some of the American Courts the same rule has been adopted;[5] but in others the contrary has been held;[6] and the rule is now considered by the Supreme Court of the United States, to be well established, that a party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination; and that if he wishes to examine him to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause.[7]

§ 446. The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious tests, which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts, to

[1] Rex *v.* Brooke, 2 Stark. R. 472; Phillips *v.* Eamer, 1 Esp. 357; Dickinson *v.* Shee, 4 Esp. 67; Regina *v.* Murphy, 1 Armstr. Macartn. & Ogle, R. 204; 2 Phil. Evid. 397, 398.

[2] Clifford *v.* Hunter, 3 C. & P. 16; Rush *v.* Smith, 1 C. M. & R. 94; Wood *v.* Mackinson, 2 M. & Rob. 273.

[3] Creevy *v.* Carr, 7 C. & P. 64.

[4] Morgan *v.* Brydges, 2 Stark. R. 314.

[5] Moody *v.* Rowell, 17 Pick. 490, 498; Jackson *v.* Varick, 7 Cowen, 238; 2 Wend. 166; Fulton Bank *v.* Stafford, 2 Wend. 483.

[6] Harrison *v.* Rowan, 3 Wash. 580; Ellmaker *v.* Buckley, 16 S. & R. 77.

[7] The Philadelphia & Trenton Rail Road Co. *v.* Stimpson, 14 Peters, R. 448, 461; Floyd *v.* Bovard, 6 Watts & Serg. 75.

which he bears testimony, the manner in which he has used those means, his powers of discernment, memory and description, are all fully investigated and ascertained, and submitted to the consideration of the Jury, before whom he has testified, and who have thus had an opportunity of observing his demeanor, and of determining the just weight and value of his testimony. It is not easy for a witness, who is subjected to this test, to impose on a Court or Jury; for however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended.[1]

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[1] 1 Stark. Evid. 160, 161. On the subject of examining and cross-examining witnesses vivâ voce, Quintilian gives the following instructions. "Primum est, nosse testem Nam timidus terreri, stultus decipi, iracundus concitari, ambitiosus inflari, longus protrahi potest: prudens vero et constans, vel tanquam inimicus et pervicax dimittendus statim, vel non interrogatione, sed brevi interlocutione patroni, refutandus est; aut aliquo, si continget, urbane dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamia criminum destruendus. Probos quosdam et verecundos non aspere incessere profuit; nam sæpe, qui adversus insectantem pugnassent, modestia mitigantur. Omnis autem interrogatio, *aut in causa est*, *aut extra causam*. *In causa*, (sicut accusatori præcepimus,) patronus quoque altius, unde nihil suspecti sit, repetita percontatione, priora sequentibus applicando, sæpe eo perducit homines, ut invitis, quod prosit, extorqueat. Ejus rei, sine dubio, nec disciplina ulla in scholis, nec exercitatio traditur; et naturali magis acumine, aut usu contingit hæc virtus. * * *Extra causam* quoque multa, quæ prosint, rogari solent, de vita testium aliorum, de sua quisque, si turpitudo, si humilitas, si amicitia accusatoris, si inimicitæ cum reo, in quibus aut dicant aliquid, quod prosit, aut in mendacio vel cupiditate lædendi deprehendantur. Sed in primis *interrogatio debet esse circumspecta;* quia multa contra patronos venuste testis sæpe respondet eique præcipue vulgo favetur; tum verbis quam maxime ex medio sumptis; ut qui rogatur (is autem sæpius imperitus) intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est." Quintil. Inst. Orat. lib. 5, c. 7. Mr. Alison's observations on the same subject are equally interesting both to the student and the practitioner. He observes: — "It is often a convenient way of examining, to ask a witness, whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that stage of the proceeding on which it is desired that he should dilate. But this is not always fair; and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way also, if the witness is at all intelligent, a more consistent and intelligible statement will generally be got, than by putting separate questions; for the witnesses generally think over the subjects, on which they are to be examined in criminal cases, so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel. Where a witness is evidently prevaricating or concealing the truth, it is seldom by intimidation or sternness of manner that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradictions may be reconciled. The most effectual method is to examine rapidly and minutely, as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony which it is desired to overturn. It frequently happens, that in the course of such a rapid examination, facts most material to the cause are elicited, which are either denied, or but partially admitted before. In such cases, there is no good ground on which the facts thus reluctantly extorted, or which have escaped the witness in an unguarded moment, can be laid aside by the Jury. Without doubt they come tainted from the polluted channel, through which they are adduced; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens, that in this way the most important testimony in a case is extracted from the most unwilling witness, which only comes with the more effect to an intelligent Jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal." See Alison's Practice, 546, 547. See also the remarks of Mr. Evans on cross-examination, in his Appendix to Poth. on Obl. No. 16, Vol. 2, p. 233, 234.

§ 447. Whether, when a party is once entitled to cross-examine a witness, *this right continues through all the subsequent stages of the cause*, so that if the party should afterwards recall the same witness, to prove a part of his own case, he may interrogate him by leading questions, and treat him as the witness of the party who first adduced him, is also a question upon which different opinions have been held. Upon the general ground, on which this course of examina-

tion is permitted at all, namely, that every witness is supposed to be inclined most favorably towards the party calling him, there would seem to be no impropriety in treating him, throughout the trial, as the witness of the party who first caused him to be summoned and sworn. But as the general course of the examination of witnesses is subject to the discretion of the Judge, it is not easy to establish a rule, which shall do more than guide, without imperatively controlling, the exercise of that discretion.[1] A party, however, who has not opened his own case, will not be allowed to introduce it to the Jury by cross-examining the witnesses of the adverse party,[2] though, after opening it, he may recall them for that purpose.

§ 448. We have already stated it as one of the rules, governing the production of testimony, that the evidence offered must correspond with the allegations, and be confined to the point in issue. And we have seen, that this rule *excludes all evidence of collateral facts*, or those which afford no reasonable inference as to the principal matter in dispute.[3] Thus, where a broker was examined to prove the market value of certain stocks, it was held that he was not compellable to state the names of the persons to whom he had sold such stocks.[4] As the plaintiff is bound, in the proof of his case, to confine his evidence to the issue, the defendant is in like manner restricted to the same point; and the same rule is applied to the respective parties, through all the subsequent stages of the cause, all questions as to collateral facts, *except in cross-examination*, being strictly excluded. The reasons of this rule have been already intimated. If it were not so, the true merits of the controversy might be lost sight of, in the mass of testimony to other points, in which they would be

[1] 2 Phil. Evid. 403; 1 Stark. Evid. 162; Moody *v.* Rowell, 17 Pick. 498; Ante, § 435.

[2] Ellmaker *v.* Bulkley, 16 S. & R. 77; 1 Stark. Evid. 164.

[3] Ante, § 51, 52.

[4] Jonau *v.* Ferrand, 3 Rob. Louis. R. 366.

overwhelmed; the attention of the Jury would be wearied and distracted; judicial investigations would become interminable; the expenses might be enormous, and the characters of witnesses might be assailed by evidence which they could not be prepared to repel.[1] It may be added, that the evidence not being to a material point, the witness could not be punished for perjury, if it were false.[2]

§ 449. In cross-examinations, however, this rule is not usually applied with the same strictness as in examinations in chief; but, on the contrary, great latitude of interrogation is sometimes permitted by the Judge, in the exercise of his discretion, where, from the temper and conduct of the witness, or other circumstances, such course seems essential to the discovery of the truth; or, where the cross examiner will undertake to show the relevancy of the interrogatory afterwards, by other evidence.[3] On this head, it is difficult to lay down any precise rule.[4] But it is a well settled rule, that a witness *cannot be cross-examined as to any fact, which is collateral and irrelevant to the issue, merely* for the purpose of *contradicting him* by other evidence, if he should deny it, thereby to discredit his testimony.[5] And, if a question is put to a witness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question; but it is conclusive against him.[6] But it is *not irrelevant* to inquire of

[1] Phil. & Am. on Evid. 909, 910.

[2] But a question, having no bearing on the matter in issue, may be made material by its relation to the witness's credit, and false swearing thereon will be perjury. Reg. *v.* Overton, 2 Mood. Cr. Cas. 263.

[3] Haigh *v.* Belcher, 7 C. & P. 389; Ante, § 52.

[4] Lawrence *v.* Baker, 5 Wend. 305.

[5] Spenceley *v.* De Willott, 7 East, 108; 1 Stark. Evid. 164; Lee's case, 2 Lewin's Cr. Cas. 154; Harrison *v.* Gordon, Ib. 156.

[6] Harris *v.* Tippett, 2 Campb. 627; Odiorne *v.* Winkley, 2 Gall. 51, 53; Ware *v.* Ware, 8 Greenl. 42; Rex *v.* Watson, 2 Stark. R. 116, 149; Lawrence *v.* Barker, 5 Wend. 301, 305; Meagoe *v.* Simmons, 3 C. & P. 75; Crowley *v.* Page, 7 C. & P. 789; Commonwealth *v.* Buzzell, 16 Pick. 157, 158. Thus, if he is asked whether he has not said to A. that a bribe had

the witness, whether he has not on some former occasion *given a different account* of the matter of fact, to which he has already testified, in order to lay a foundation for impeaching his testimony by contradicting him. The inquiry, however, in such cases, must be confined to matters of *fact only;* mere opinions which the witness may have formerly expressed being inadmissible, unless the case is such as to render evidence of opinions admissible and material.[1] Thus, if the witness should give, in evidence in chief, his opinion of the identity of a person, or of his handwriting, or of his sanity, or the like, he may be asked, whether he has not formerly expressed a different opinion upon the same subject; but if he has simply testified to a fact, his previous opinion of the merits of the case is inadmissible. Therefore, in an action upon a marine policy, where the broker, who effected the policy for the plaintiff, being called as a witness for the defendant, testified that he omitted to disclose a certain fact, now contended to be material to the risk, and being cross-examined whether he had not expressed his opinion that the underwriter had not a leg to stand upon in the defence, he

been offered to him by the party by whom he was called; and he denies having so said; evidence is not admissible to prove that he did so state to A. Attor. Gen. *v* Hitchcock, 11 Jur. 478; 1 Exch. R. 91, S. C. Where a witness, called by the plaintiff to prove the handwriting in issue, swore it was not that of the defendant, and another paper, not evidence in the cause, being shown to him by the plaintiff, he swore that this also was not the defendant's, the latter answer was held conclusive against the plaintiff. Hughes *v.* Rogers, 8 M. & W. 123. See also Griffiths *v.* Ivery, 11 Ad. & El. 322; Philad. & Trenton Railroad Co. *v.* Stimpson, 14 Peters, 461; Harris *v.* Wilson, 7 Wend. 57; Tennant *v.* Hamilton, 7 Clark & Fin. 122; The State *v.* Patterson, 2 Iredell, R. 346.

[1] Elton *v.* Larkins, 5 C. & P. 385; Daniels *v.* Conrad, 4 Leigh's R. 401, 405. But a witness cannot be cross-examined as to what he has sworn in an affidavit, unless the affidavit is produced. Sainthill *v.* Bound, 4 Esp. 74; Rex *v.* Edwards, 8 C. & P. 26; Regina *v.* Taylor, Ib. 726. If the witness does not recollect saying that which is imputed to him, evidence may be given that he did say it, provided it is relevant to the matter in issue. Crowley *v.* Page, 7 C. & P. 789.

denied that he had said so; this was deemed conclusive, and evidence to contradict him in this particular was rejected.[1]

§ 450. So also, it has been held not irrelevant to the guilt or innocence of one charged with a crime, to inquire of the witness for the prosecution, in cross-examination, whether he has not expressed feelings of hostility towards the prisoner.[2] The like inquiry may be made in a civil action; and if the witness denies the fact, he may be contradicted by other witnesses.[3] So also, in assumpsit upon a promissory note, the execution of which was disputed, it was held material to the issue, to inquire of the subscribing witness, she being a servant of the plaintiff, whether she was not his kept mistress.[4]

§ 451. In regard to the *privilege of witnesses, in not being compellable to answer*, the cases are distinguishable into several classes. (1.) Where it reasonably appears that the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment, or to a criminal charge. Here the authorities are exceedingly clear that the witness is not bound to answer.[5] And he may claim the protection at any stage of the inquiry, whether he has already answered the question in part, or not at all.[6] If the fact, to

[1] Elton *v.* Larkins, 5 C. & P. 385.

[2] Rex *v.* Yewin, cited 2 Campb. 638.

[3] Atwood *v.* Welton, 7 Conn. 66.

[4] Thomas *v.* David, 7 C. & P. 350, per Coleridge, J.

[5] 1 Stark. Evid. 165, 166; Phil. & Am. on Evid. 913, 914; 1 Phil. Evid. 417–420; Cowen & Hill's note 516, to 1 Phil. Evid. 277, and cases there cited; E. Ind. Co. *v.* Campbell, 1 Vez. 227. See also Paxton *v.* Douglass, 19 Ves. 225; Cates *v.* Hardacre, 3 Taunt. 424; Macbride *v.* Macbride, 4 Esp. 248; Rex *v.* Lewis, Ib. 225; Rex *v.* Slaney, 5 C. & P. 213; Rex *v.* Pegler, 5 C. & P. 521; Dodd *v.* Norris, 3 Campb. 519; Maloney *v.* Bartly, Ib. 210. If he is wrongfully compelled to answer, what he says will be regarded as obtained by compulsion, and cannot be given in evidence against him. Regina *v.* Garbett, 1 Denis. C. C. 236. And see Ante, § 193; 7 Law Rev. 19–30.

[6] Regina *v.* Garbett, 1 Denis. C. C. 236; Ex parte Cossens, Buck, Bankr. Cas. 531, 545.

which he is interrogated, forms but one link in the chain of testimony, which is to convict him, he is protected. And whether it may tend to criminate or expose the witness, is a point upon which the Court are bound to instruct him;[1] and which the Court will determine, under all the circumstances of the case; but without requiring the witness fully to explain how he might be criminated by the answer, which the truth would oblige him to give. For if he were obliged to show how the effect would be produced, the protection which this rule of law is designed to afford him would at once be annihilated.[2] But the Court will not prevent the

[1] Close *v.* Olney, 1 Denio, R. 319.

[2] The People *v.* Mather, 4 Wend. 229; 1 Burr's Trial, 245; Southard *v.* Rexford, 6 Cowen, 254, 255; Bellinger, in error, *v.* The People, 8 Wend. 595. In the first of these cases, this doctrine was stated by the learned Judge, in the following terms:— "The principal reliance of the defendant, to sustain the determination of the Judge, is placed, I presume, on the rule of law, that protects a witness in refusing to answer a question, which will have a tendency to accuse him of a crime or misdemeanor. Where the disclosures he may make can be used against him to procure his conviction for a criminal offence, or to charge him with penalties and forfeitures, he may stop in answering, before he arrives at the question, the answer to which may show directly his moral turpitude. The witness, who knows what the Court does not know, and what he cannot communicate without being a self-accuser, is to judge of the effect of his answer, and if it proves a link in the chain of testimony, which is sufficient to convict him, when the others are made known, of a crime, he is protected by law from answering the question. If there be a series of questions, the answer to all of which would establish his criminality, the party cannot pick out a particular one and say, if that be put, the answer will not criminate him. 'If it is one step having a tendency to criminate him, he is not compelled to answer.' (16 Ves. 242.) The same privilege that is allowed to a witness, is the right of a defendant in a Court of Equity, when called on to answer. In Parkhurst *v.* Lowten, 2 Swanst. 215, the Chancellor held, that the defendant 'was not only not bound to answer the question, the answer to which would criminate him directly, but not any which, however remotely connected with the fact, would have a tendency to prove him guilty of simony.' The language of Chief Justice Marshall, on Burr's trial, is equally explicit on this point. 'Many links,' he says, 'frequently compose that chain of testimony, which is necessary to convict an individual of a crime.' It appears to the Court to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself, and, to every effectual purpose, accuse himself entirely as he would by stating every circumstance, which would be required for his conviction. That fact of itself would be unavailing, but all other facts without it would be insufficient. While that remains concealed in his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares, that no man is compellable to accuse himself, would most obviously be infringed by compelling a witness to disclose a fact of this description.' (1 Burr's Trial, 244.) My conclusion is, that where a witness claims to be excused from answering a question, because the answer may disgrace him, or render him infamous, the Court must see that the answer may, without the intervention of other facts, fix on him moral turpitude. Where he claims to be excused from answering, because his answer will have a tendency to implicate him in a crime or misdemeanor, or will expose him to a penalty or forfeiture, then the Court are to determine, whether the answer he may give to the question can criminate him directly or indirectly, by furnishing direct evidence of his guilt, or by establishing one of many facts, which together may constitute a chain of testimony sufficient to warrant his conviction, but which one fact of itself could not produce such result; and if they think the answer may in any way criminate him, they must allow his privilege, without exacting from him to explain how he would be criminated by the answer, which the truth may oblige him to give. If the witness was obliged to show how the effect is produced, the protection would at once be annihilated. The means which he would be in that case compelled to use to obtain protection, would involve the surrender of the very object, for the security of which the protection was sought." See 4 Wend. 252, 253, 254.

witness from answering it, if he chooses; they will only advertise him of his right to decline it.[1] This rule is also administered in Chancery, where a defendant will not be compelled to discover that which, if answered, would tend to subject him to a penalty or punishment, or which might lead to a criminal accusation, or to ecclesiastical censures.[2] But in all cases where the witness, after being advertised of his privilege, chooses to answer, he is bound to answer every

[1] Ibid.

[2] Story's Eq. Pl. § 524, 576, 577, 592–498; McIntyre *v.* Mancius, 16 Johns. 592; Wigram on Discovery, p. 61, 150, 195; Mitford's Eq. Pl. 157–163.