§ 462. (3.) The credit of a witness may also be impeached by proof, that he has made *statements out of Court, contrary to what he has testified at the trial.* But it is only in such matters as are relevant to the issue, that the witness can be contradicted. And before this can be done, it is generally held necessary, in the case of verbal statements, first to ask him as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so, nor whether he has always told the same story; because it may frequently happen, that, upon the general question, he may not remember whether he has so said; whereas, when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said.[1] This course

such characters, ought the Jury to be precluded from drawing inferences unfavorable to their truth as witnesses, by excluding their general turpitude? By the character of every individual, that is, by the estimation in which he is held in the society or neighborhood where he is conversant, his word and his oath is estimated. If that is free from imputation, his testimony weighs well. If it is sullied, in the same proportion his word will be doubted. We conceive it perfectly safe, and most conducive to the purposes of justice, to trust the Jury with a full knowledge of the standing of a witness, into whose character an inquiry is made. It will not thence follow, that from minor vices, they will draw the conclusion, in every instance, that his oath must be discredited, but only be put on their guard to scrutinize his statements more strictly, while in cases of vile reputation, in other respects, they would be warranted in disbelieving him, though he had never been called so often to the book, as to fix upon him the reputation of a liar, when on oath." Hume *v.* Scott, 3 A. K. Marsh. 261, 262, per Mills, J. This decision has been cited and approved in North Carolina, where a similar course prevails. The State *v.* Boswell, 2 Dev. Law Rep. 209, 210. See also The People *v.* Mather, 4 Wend. 257, 258, per Marcy, J.; Cowen's note 531, to 1 Phil. Evid. p. 293. Whether evidence of common prostitution is admissible to impeach a female witness, *quære.* See Commonwealth *v.* Murphy, 14 Mass. 387; 2 Stark. Ev. 369, note (1), by Metcalf, that it is admissible. Spears *v.* Forrest, 15 Verm. 435, that it is not.

[1] Angus *v.* Smith, 1 M. & Malk. 473, per Tindal, J.; Crowley *v.* Page, 7 C. & P. 789, per Parke, B.; Regina *v.* Shellard, 9 C. & P. 277; Regina *v.* Holden, 8 C. & P. 606. In the Queen's case, this subject was very much discussed, and the unanimous opinion of the learned Judges was delivered by

of proceeding is considered indispensable, from a sense of justice to the witness; for, as the direct tendency of the evidence is to impeach his veracity, common justice requires

Abbott, C. J. in these terms: — "The legitimate object of the proposed proof is to discredit the witness. Now the usual practice of the Courts below, and a practice, to which we are not aware of any exception, is this; if it be intended to bring the credit of a witness into question by proof of any thing that he may have said or declared, touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary; and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the Court at once, which, in our opinion, is the most convenient course. If the witness denies the words or declarations imputed to him, the adverse party has an opportunity, afterwards, of contending, that the matter of the speech or declaration is such, that he is not to be bound by the answer of the witness, but may contradict and falsify it; and, if it be found to be such, his proof in contradiction will be received at the proper season. If the witness declines to give any answer to the question proposed to him, by reason of the tendency thereof to criminate himself, and the Court is of opinion that he cannot be compelled to answer, the adverse party has, in this instance, also his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received. But the possibility, that the witness may decline to answer the question, affords no sufficient reason for not giving him the opportunity of answering, and of offering such explanatory or exculpatory matter as I have before alluded to; and it is, in our opinion, of great importance that this opportunity should be thus afforded, not only for the purpose already mentioned, but because, if not given in the first instance, it may be wholly lost; for a witness, who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the Court, and may not be found or brought back until the trial be at an end. So that, if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done; and, in our opinion, not unfrequently would be done both to the witness and to the party; and this not only in the case of a witness called by a plaintiff or prosecutor, but equally so in the case of a witness called by a defendant; and one of the great objects of the course of proceeding, established in our Courts, is the prevention of surprise, as far as practicable, upon any person who may appear therein." The Queen's case, 2 Brod. & Bing. 313, 314. In the United States the same course is under-

that, by first calling his attention to the subject he should have an opportunity to recollect the facts, and, if necessary, to correct the statement already given, as well as by a re-examination to explain the nature, circumstances, meaning, and design of what he is proved elsewhere to have said.[1] And this

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stood to be generally adopted; except in Maine; Ware *v.* Ware, 8 Greenl. 42; and perhaps in Massachusetts, Tucker *v.* Welch, 17 Mass. 160. But see Brown *v.* Bellows, 4 Pick. 188. The utility of this practice, and of confronting the two opposing witnesses, is illustrated by a case, mentioned by Mr. Justice Cowen, in his notes to Phillips on Evidence, Vol. 2, p. 774, (Note 533, to Phil. Evid. 308); "in which a highly respectable witness, sought to be impeached through an out of door conversation, by another witness, who seemed very willing to bring him into a contradiction, upon both being placed on the stand, furnished such a distinction to the latter, as corrected his memory, and led him, in half a minute, to acknowledge that he was wrong. The difference lay in only one word. The first witness had now sworn, that he did not rely on a certain firm as being in good credit; for he was not well informed on the subject. The former words imputed to him were a plain admission, that he was fully informed, and did rely on their credit. It turned out that, in his former conversation, he spoke of a partnership, from which one name was soon afterward withdrawn, leaving him now to speak of the latter firm thus weakened by the withdrawal. In regard to the credit of the first firm, he had, in truth, been fully informed by letters. With respect to the last, he had no information. The sound in the titles of the two firms was so nearly alike, that the ear would easily confound them; and had it not been for the colloquium thus brought on, an apparent contradiction would doubtless have been kept on foot, for various purposes, through a long trial. It involved an inquiry into a credit, which had been given to another on the fraudulent representations of the defendant." Mr. Starkie, for a different purpose, mentions another case, of similar character, where the Judge understood the witness to testify that the prisoner, who was charged with forgery, said, "I *am* the drawer, acceptor, and indorser of the bill," whereas the words were, "I *know* the drawer, acceptor, and indorser of the bill." 1 Stark. Evid. 484.

[1] Regina *v.* St. George, 9 C. & P. 483, 489; Carpenter *v.* Wahl, 11 Ad. & El. 803. On this subject, the following observations of Ld. Langdale deserve great consideration. "I do not think," said he, "that the veracity or even the accuracy of an ignorant and illiterate person is to be conclusively tested by comparing an affidavit, which he has made, with his testimony given upon an oral examination in open Court. We have too much experience of the great infirmity of affidavit evidence. When the witness is illiterate and

rule is extended, not only to contradictory statements by the witness, but to other declarations, and to acts done by him, through the medium of verbal communications or correspondence, which are offered with the view either to contradict

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ignorant, the language presented to the Court is not his; it is, and must be, the language of the person who prepares the affidavit; and it may be, and too often is, the expression of that person's erroneous inference as to the meaning of the language used by the witness himself; and however carefully the affidavit may be read over to the witness, he may not understand what is said in language so different from that which he is accustomed to use. Having expressed his meaning in his own language, and finding it translated by a person on whom he relies, into language not his own, and which he does not perfectly understand, he is too apt to acquiesce; and testimony not intended by him is brought before the Court as his. Again, evidence taken on affidavit, being taken *ex parte*, is almost always incomplete and often inaccurate, sometimes from partial suggestions, and sometimes from the want of suggestions and inquiries, without the aid of which the witness may be unable to recall the connected collateral circumstances, necessary for the correction of the first suggestions of his memory, and for his accurate recollection of all that belongs to the subject. For these and other reasons, I do not think that discrepancies between the affidavit and the oral testimony of a witness are conclusive against the testimony of the witness. It is further to be observed, that witnesses, and particularly ignorant and illiterate witnesses, must always be liable to give imperfect or erroneous evidence, even when orally examined in open Court. The novelty of the situation, the agitation and hurry which accompanies it, the cajolery or intimidation to which the witness may be subjected, the want of questions calculated to excite those recollections which might clear up every difficulty, and the confusion occasioned by cross-examination, as it is too often conducted, may give rise to important errors and omissions; and the truth is to be elicited, not by giving equal weight to every word the witness may have uttered, but by considering all the words with reference to the particular occasion of saying them, and to the personal demeanor and deportment of the witness during the examination. All the discrepancies which occur, and all that the witness says in respect of them, are to be carefully attended to, and the result, according to the special circumstances of each case, may be, either that the testimony must be altogether rejected, on the ground that the witness has said that which is untrue, either wilfully or under self-delusion, so strong as to invalidate all that he has said, or else the result must be, that the testimony must, as to the main purpose, be admitted, notwithstanding discrepancies which may have arisen from innocent mistake, extending to collateral matters, but perhaps not affecting the main question in any important degree." See Johnson *v.* Todd, 5 Beav. 600 – 602.

his testimony in chief, or to prove him a corrupt witness himself, or to have been guilty of attempting to corrupt others.[1]

§ 463. A similar principle prevails in cross-examining a witness as to the *contents of a letter*, or other paper written by him. The counsel will not be permitted to represent, in the statement of a question, the contents of a letter, and to ask the witness, whether he wrote a letter to any person with such contents, or contents to the like effect; without having first shown to the witness the letter, and having asked him whether he wrote that letter, and his admitting that he wrote it. For the contents of every written paper, according to the ordinary and well established rules of evidence, are to be proved by the paper itself, and by that alone, if it is in existence.[2] But it is not required that the whole paper should be shown to the witness. Two or three lines only of a letter may be exhibited to him, and he may be asked, whether he wrote the part exhibited. If he denies, or does not admit that he wrote that part, he cannot be examined as to the contents of such letter, for the reason already given; nor is the opposite counsel entitled, in

[1] See 2 Phil. Evid. 433 – 442; 1 Stark. Evid 183 – 185. If the witness does not recollect the conversation imputed to him, it may be proved by another witness, provided it is relevant to the matter in issue. Crowley *v.* Page, 7 C. & P. 789, per Parke, B. The contrary seems to have been ruled, some years before, in Pain *v.* Beeston, 1 M. & Rob. 20, per Tindal, C. J. But if he is asked, upon cross-examination, if he will swear that he has not said so and so, and he answers that he will not swear that he has not, the party cannot be called to contradict him. Long *v.* Hitchcock, 9 C. & P. 619; Ante, § 449. If he denies having made the contradictory statements inquired of, and a witness is called to prove that he did, the particular words must not be put, but the witness must be required to relate what passed. Hallett *v.* Cousens, 2 M. & Rob. 238.

[2] The Queen's case, 2 Brod. & Bing. 286; Ante, § 87, 88; Bellinger *v.* The People, 8 Wend. 595, 598; Rex *v.* Edwards, 8 C. & P. 26; Regina *v.* Taylor, Ib. 726. If the paper is not to be had, a certified copy may be used. Regina *v.* Shellard, 9 C. & P. 277. So, where a certified copy is in the case for other purposes, it may be used for this also. Davies *v.* Davies, 9 C. & P. 253.

that case, to look at the paper.[1] And if he admits the letter to be his writing, he cannot be asked whether statements, such as the counsel may suggest, are contained in it, but the whole letter itself must be read, as the only competent evidence of that fact.[2] According to the ordinary rule of proceeding in such cases, the letter is to be read as the evidence of the cross-examining counsel, in his turn, when he shall have opened his case. But if he suggests to the Court, that he wishes to have the letter read immediately, in order to found certain questions upon its contents, after they shall have been made known to the Court, which otherwise could not well or effectually be done; that becomes an excepted case; and, for the convenient administration of justice, the letter is permitted to be read, as part of the evidence of the counsel so proposing it, subject to all the consequences of its being so considered.[3]

§ 464. If the *paper* in question *is lost*, it is obvious that the course of examination, just stated, cannot be adopted. In such case, it would seem, that regularly, the proof of the loss of the paper should first be offered, and that then the witness may be cross-examined as to its contents; after which he may be contradicted by secondary evidence of the contents of the paper. But, where this course would be likely to occasion inconvenience, by disturbing the regular progress of the cause, and distracting the attention, it will always be in the power of the Judge, in his discretion, to prevent this inconvenience, by postponing the examination, as to this point, to some other stage of the cause.[4]

§ 465. A witness cannot be asked, on cross-examination, *whether he has written such a thing*, stating its particular nature or purport; the proper course being to put the writing into his hands, and to ask him whether it is his writing. And

[1] Regina *v.* Duncombe, 8 C. & P. 369.

[2] Ibid.; 2 Phil. Evid. 438.

[3] The Queen's case, 2 Brod. & Bing. 289, 290.

[4] Phil. & Am. on Evid. 439, 440.

if he is asked, generally, whether he has made *representations*, of the particular nature stated to him, the counsel will be required to specify, whether the question refers to representations in writing, or in words alone; and if the former is meant, the inquiry, for the reasons before mentioned, will be suppressed, unless the writing is produced.[1] But whether the witness may be asked the general question, whether he has given any account, by letter or otherwise, differing from his present statement; the question being proposed without any reference to the circumstance, whether the writing, if there be any, is or is not in existence, or whether it has or has not been seen by the cross-examining counsel; is a point which is considered still open for discussion. But so broad a question, it is conceived, can be of very little use, except to test the strength of the witness's memory, or his confidence in assertion; and, as such, it may well be suffered to remain with other questions of that class, subject to the discretion of the Judge.[2]

§ 466. If the memory of the witness is *refreshed by a paper* put into his hands, the adverse party may cross-examine the witness upon that paper, without making it his evidence in the cause. But if it be a book of entries, he cannot cross-examine as to other entries in the book, without making them his evidence.[3] But if the paper is shown to the witness merely to prove the handwriting, this alone does not give the opposite party a right to inspect it, or to cross-examine as to its contents.[4] And if the paper is shown to the witness upon his cross-examination, and he is cross-examined

[1] The Queen's case, 2 Brod. & Bing. 292 - 294.

[2] This question is raised and acutely treated, in Phil. & Am. on Evid. 932 - 938. See also Regina *v.* Shellard, 9 C. & P. 277; Regina *v.* Holden, 8 C. & P. 606.

[3] Gregory *v.* Tavernor, 6 C. & P. 280; Ante, § 437, note (3). And see Stephens *v.* Foster, 6 C. & P. 289.

[4] Russell *v.* Rider, 6 C. & P. 416; Sinclair *v.* Stevenson, 1 C. & P. 582; 2 Bing. 514, S. C.; Ante, § 437, note (3).

upon it, the party will not be bound to have the paper read, until he has entered upon his own case.[1]

§ 467. After a witness has been cross-examined respecting a former statement made by him, the party who called him has a *right to re-examine* him to the same matter.[2] The counsel has a right, upon such re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions, used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive, by which the witness was induced to use those expressions; but he has no right to go further and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.[3] This point, after having been much discussed in the Queen's case, was brought before the Court several years afterwards, when the learned Judges held it as settled, that proof of a detached statement, made by a witness at a former time, does not authorize proof, by the party calling that witness, of all that he said at the same time, but only of so much as can be in some way connected with the statement proved.[4] Therefore, where a witness had been cross-examined as to what the plaintiff said in a particular conversation, it was held,

[1] Holland *v.* Reeves, 7 C. & P. 36.

[2] In the examination of witnesses in Chancery, under a commission to take depositions, the plaintiff is not allowed to re-examine, unless upon a special case, and then only as to matters not comprised in the former interrogatories. King of Hanover *v.* Wheatley, 4 Beav. 78.

[3] Such was the opinion of seven out of eight Judges, whose opinion was taken in the House of Lords, in the Queen's case, as delivered by Lord Tenterden, 2 Brod. & Bing. 297. The counsel calling a witness who gives adverse testimony, cannot, in re-examination, ask the witness whether he has not given a different account of the matter to the attorney. Winter *v.* Butt, 2 M. & Rob. 357. See Ante, § 444. See also Holdsworth *v.* Mayor of Dartmouth, Ib. 153. But he may ask the question, upon his examination in chief. Wright *v.* Beckett, 1 M. & Rob. 414; Dunn *v.* Aslett, 2 M. & Rob. 122.

[4] Prince *v.* Samo, 7 Ad. & El. 627.

that he could not be re-examined as to other assertions, made by the plaintiff in the same conversation, but not connected with the assertions to which the cross-examination related; although the assertions as to which it was proposed to re-examine him were connected with the subject-matter of the suit.[1]

§ 468. If the counsel chooses to cross-examine the witness to *facts, which were not admissible in evidence*, the other party has a right to re-examine him as to the evidence so given. Thus, where issue was joined upon a plea of prescription, to a declaration for trespass in G., and the plaintiff's witnesses were asked, in cross-examination, questions respecting the user in other places than G., which they proved; it was held that the plaintiff, in re-examination, might show an interruption in the user, in such other places.[2] But an adverse witness will not be permitted to obtrude such irrelevant matter, in answer to a question not relating to it; and if he should, the other party may either cross-examine to it, or may apply to have it stricken out of the Judge's notes.[3]

§ 469. Where evidence of contradictory statements by a witness, or of other particular facts, is offered by way of impeaching his veracity, his *general character* for truth being thus in some sort *put in issue*, it has been deemed reasonable to admit general evidence, that he is a man of strict integrity, and scrupulous regard for truth.[4] But evidence, that he has on other occasions made statements, similar to what he has

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[1] Ibid. In this case, the opinion of Lord Tenterden, in the Queen's case, 2 Brod. & Bing. 298, quoted in 1 Stark. Evid. 180, that evidence of the whole conversation, if connected with the suit, was admissible, though it were of matters not touched in the cross-examination, was considered, and overruled.

[2] Blewett *v.* Tregonning, 3 Ad. & El. 554.

[3] Blewett *v.* Tregonning, 3 Ad. & El. 554, 565, 581, 584.

[4] Phil. & Am. on Evid. 944; Rex *v.* Clarke, 2 Stark. R. 241. And see Ante, § 54, 55.

testified in the cause, is not admissible;[1] unless where a design to misrepresent is charged upon the witness, in consequence of his relation to the party, or to the cause; in which case, it seems, it may be proper to show that he made a similar statement before that relation existed.[2] So, if the character of a deceased attesting witness to a deed or will is impeached on the ground of fraud, evidence of his general good character is admissible.[3] But mere contradiction among witnesses examined in Court, supplies no ground for admitting general evidence as to character.[4]

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[1] Bull. N. P. 294.

[2] 2 Phil. Evid. 445, 446.

[3] Doe *v.* Stephenson, 3 Esp. 284; 4 Esp. 50, S. C., cited and approved by Lord Ellenborough in The Bishop of Durham *v.* Beaumont, 1 Campb. 207–210, and in Provis *v.* Reed, 5 Bing. 135.

[4] Bishop of Durham *v.* Beaumont, 1 Campb. 207; 1 Stark. Evid. 186.