§ 547. "The general doctrine maintained in the *American Courts*, in relation to foreign judgments *in personam*, certainly is, that they are *primâ facie* evidence; but that they are impeachable. But how far and to what extent this doctrine is to be carried, does not seem to be definitely settled. It has been declared that the jurisdiction of the Court, and its power over the parties and the things in controversy, may be inquired into; and that the judgment may be impeached for fraud. Beyond this no definite lines have as yet been drawn."[1]

§ 548. We have already adverted to the provisions of the Constitution and *Statutes of the United States*, in regard to the admissibility and effect of the judgments of one State in the tribunals of another.[2] By these provisions, such judgments, authenticated as the statutes provide, are put upon the same footing as domestic judgments. "But this," observes Mr. Justice Story, "does not prevent an inquiry into the jurisdiction of the Court, in which the original judgment was rendered, to pronounce the judgment, nor an inquiry into the right of the State to exercise authority over the parties, or the subject-matter, nor an inquiry whether the judgment is founded in, and impeachable for a manifest fraud.[1] The Constitution did not mean to confer any new power upon the States; but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory.[2] It did not make the judgments of other States domestic judgments to all intents and purposes; but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments, without a new suit in the tribunals of other States. And they enjoy not the right of priority, or privilege, or lien, which they have in the State where they are pronounced, but that only which the *Lex fori* gives to them by its own laws, in the character of foreign judgments."[3]

show the intrinsic difficulties of the subject. Indeed the rule, that the judgment is to be primâ facie evidence of the plaintiff, would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for under such circumstances it would be equivalent to granting a new trial. It is easy to understand, that the defendant may be at liberty to impeach the original justice of the judgment, by showing that the Court had no jurisdiction; or, that he never had any notice of the suit; or, that it was procured by fraud; or, that upon its face it is founded in mistake; or, that it is irregular, and bad by the local law, Fori rei judicatæ. To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to re-try the merits of the original cause at large, and to put the defendant upon proving those merits. See Alivon *v.* Furnival, 1 Cromp. Mees. & Rosc. 277."

[1] Story, Confl. Laws, § 608. See also 2 Kent, Comm. 119–121; and the valuable notes of Mr. Metcalf to his edition of Starkie on Evid. Vol. 1, p. 232, 233, (6th Am. Ed.) The American cases are collected in Cowen & Hill's notes 636, 337, to 1 Phil. Evid. p. 353. The American cases seem further to agree, that when a foreign judgment comes *incidentally* in question, as, where it is the foundation of a right or title derived under it, and the like, it is conclusive. See Cowen & Hill's notes just cited, p. 895. If a foreign judgment proceeds upon an error in law, apparent upon the face of it, it may be impeached every where; as, if a French Court, professing to decide according to the law of England, clearly mistakes it. Novelli *v.* Rossi, 2 B. & Ad. 757.

[2] Ante, § 504, 505, 506.

[1] Taylor *v.* Bryden, 8 Johns. 173. Where the jurisdiction of an inferior Court depends on a fact, which such Court must necessarily and directly decide, its decision is taken as conclusive evidence of the fact. Brittain *v.* Kinnaird, 1 B. & B. 432; Betts *v.* Bagley, 12 Pick. 572, 582, per Shaw, C. J.; Cowen & Hill's note 694, to 1 Phil. Evid. 380; Steele *v.* Smith, 7 Law Rep. 461.

[2] See Story's Comment. on the Constit. U. S. ch. 29, § 1297–1307, and cases there cited; — Hall *v.* Williams, 6 Pick. 237; Bissell *v.* Briggs, 9 Mass. 462; Shumway *v.* Stillman, 6 Wend. 447; Evans *v.* Tarleton, 9 Serg. & R. 260; Benton *v.* Burgot, 10 Serg. & R. 240; Hancock *v.* Barrett, 1 Hall, 155; S. C. 2 Hall, 302; Wilson *v.* Niles, 2 Hall, 358; Hoxie *v.* Wright, 2 Verm. 263; Bellows *v.* Ingraham, 2 Verm. 573; Aldrich *v.* Kinney, 4 Conn. 380; Bennett *v.* Morley, 1 Wilcox, 100. See further, 1 Kent, Comm. 260, 261, and note (d). As to the effect of a discharge under a foreign insolvent law, see the learned judgment of Shaw, C. J. in Betts *v.* Bagley, 12 Pick. 572.

[3] Story, Confl. Laws, § 609; McElmoyle *v.* Cohen, 13 Peters, 312, 328, 329; Story, Confl. Laws, § 582 *a*, note.

§ 549. The *Common Law* recognises *no distinction* whatever, as to the effect of foreign judgments, whether they are between citizens, or between foreigners, or between citizens and foreigners; deeming them of equal obligation in all cases, whoever are the parties.[1]

§ 550. In regard to the decrees and sentences of Courts, exercising any branches of the *Ecclesiastical jurisdiction*, the same general principles govern, which we have alredy stated.[2] The principal branch of this jurisdiction in existence in the United States, is that which relates to matters of *probate and administration*. And as to these, the inquiry, as in other cases, is, whether the matter was exclusively within the jurisdiction of the Court, and whether a decree or judgment has directly been passed upon it. If the affirmative be true, the decree is conclusive. Where the decree is of the nature of proceedings *in rem*, as is generally the case in matters of probate and administration, it is conclusive, like those proceedings, against all the world. But where it is a matter of exclusively private litigation, such as, in assignments of dower, and some other cases of jurisdiction conferred by particular statutes, the decree stands upon the footing of a judgment at Common Law.[3] Thus, the probate of a will, at least as to the personalty, is conclusive in civil cases, in all questions upon its execution and validity.[4] The grant of letters of administration is, in general, *primâ facie* evidence of the intestate's death; for, only upon evidence of that fact ought they to have been granted.[5] And if the grant of administration turned upon the question as to which of the parties was next of kin, the sentence or decree upon that question is conclusive every where, in a suit between the same parties for distribution.[1] But the grant of administration upon a woman's estate determines nothing as to the fact whether she were a feme covert or not; for that is a collateral fact, to be collected merely by inference from the decree or grant of administration, and was not the point directly tried.[2] Where a Court of Probate has power to grant letters of guardianship of a lunatic, the grant is conclusive of his insanity at that time, and of his liability, therefore, to be put under guardianship, against all persons subsequently dealing directly with the lunatic, instead of dealing, as they ought to do, with the guardian.[3]

§ 551. *Decrees in Chancery* stand upon the same principles with judgments at Common Law, which have already been stated. Whether the statements in the *bill* are to be taken conclusively against the complainant as admissions by him, has been doubted; but the prevailing opinion is supposed to be against their conclusiveness, on the ground that the facts therein stated are frequently the mere suggestions of counsel, made for the purpose of obtaining an answer, under oath.[4] If the bill has been sworn to, without doubt the party would

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[1] Story, Confl. Laws, § 610. On the general subject of the effect of foreign judgments, see also 2 Phil. Evid. 49 – 64.

[2] 2 Smith's Leading Cases, 446 – 448.

[3] Ante, § 525, 528.

[4] Poplin *v.* Hawke, 8 N. Hamp. 124; 1 Jarman on Wills, p. 22, 23, 24, and notes by Perkins; Langdon *v.* Goddard, 3 Story, R. 1.

[5] Thompson *v.* Donaldson, 3 Esp. 63; French *v.* French, 1 Dick. 268; Succession of Hamblin, 3 Rob. Louis. R. 130. But if the fact, that the intestate is living, when pleadable in abatement, is not so pleaded, the grant of administration is conclusive. Newman *v.* Jenkins, 10 Pick. 515. In Moons *v.* De Bernales, 1 Russ. 301, the general practice was stated and not denied, to be to admit the letters of administration, as sufficient proof of the death, until impeached; but the Master of the Rolls, in that case, which was a foreign grant of administration, refused to receive them; but allowed the party to examine witnesses to the fact.

[1] Barrs *v.* Jackson, 1 Phil. Ch. R. 582; 2 Y. & C. 585; Thomas *v.* Ketteriche, 1 Vez. 333.

[2] Blackham's case, 1 Salk. 290, per Holt, C. J. See also Hibsham *v.* Dulleban, 4 Watts, 183.

[3] Leonard *v.* Leonard, 14 Pick. 280. But it is not conclusive against his subsequent capacity to make a will. Stone *v.* Damon, 12 Mass. 488. See further, 1 Stark. Evid. 241 – 244; 2 Phil. Evid. 29 – 36; Cowen & Hill's notes 616 – 622, to 1 Phil. Evid. 344.

[4] 2 Phil. Evid. 27.

be held bound by its statements, so far as they are direct allegations of fact. The admissibility and effect of the *answer* of the defendant is governed by the same rules.[1] But a *demurrer* in Chancery does not admit the facts charged in the bill; for if it be overruled, the defendant may still answer. So it is, as to *pleas* in Chancery; these, as well as demurrers, being merely hypothetical statements, that, *supposing* the facts to be as alleged, the defendant is not bound to answer.[2] But pleadings, and depositions, and a decree, in a former suit, the same title being in issue, are admissible, as showing the acts of parties, who had the same interest in it as the present party, against whom they are offered.[3]

§ 552. In regard to *depositions*, it is to be observed, that, though informally taken, yet as mere declarations of the witness, under his hand, they are admissible against him, wherever he is a party, like any other admissions; or, to contradict and impeach him, when he is afterwards examined as a witness. But, as secondary evidence, or as a substitute for his testimony *vivâ voce*, it is essential that they be regularly taken, under legal proceedings duly pending, or in a case and manner provided by law.[4] And though taken in a foreign State, yet if taken to be used in a suit pending here, the forms of our law, and not of the foreign law, must be pursued.[5] But if the deposition was taken *in perpetuam*, the forms of the law under which it was taken must have been strictly

[1] Ante, § 171, 179, 186, 202.

[2] Tompkins *v.* Ashby, 1 M. & Malk. 32, 33, per Abbott, Ld. C. J.

[3] Viscount Lorton *v.* Earl of Kingston, 5 Clark & Fin. 269.

[4] As to the manner of taking depositions, and in what cases they may be taken, see Ante, § 320–325.

[5] Evans *v.* Eaton, 7 Wheat. 426; Farley *v.* King, S. J. Court, Maine, in Lincoln, Oct. Term, 1822, per Preble, J. But depositions taken in a foreign country, under its own laws, are admissible here in proof of probable cause, for the arrest and extradition of a fugitive from justice, upon the preliminary examination of his case before a Judge. See Metzger's case, before Betts, J., 5 N. Y. Legal Obs. 83.

pursued, or it cannot be read in evidence.[1] If a bill in equity be dismissed merely as being in its substance unfit for a decree, the depositions, when offered as secondary evidence in another suit, will not on that account be rejected. But if it is dismissed for irregularity, as, if it come before the Court by a bill of revivor, when it should have been by an original bill; so that in truth there was never regularly any such cause in the Court, and consequently no proofs, the depositions cannot be read; for the proofs cannot be exemplified without bill and answer, and they cannot be read at law, unless the bill on which they were taken can be read.[2]

§ 553. We have seen, that in regard to the admissibility of a former judgment in evidence, it is generally necessary that there be a perfect *mutuality* between the parties; neither being concluded, unless both are alike bound.[3] But with respect to *depositions*, though this rule is admitted in its general principle, yet it is applied with more latitude of discretion; and complete mutuality, or identity of all the parties, is not required. It is generally deemed sufficient, if the matters in issue were the same in both cases, and the party, against whom the deposition is offered, had full power to cross-examine the witness. Thus, where a bill was pending in Chancery, in favor of one plaintiff against several defendants, upon

[1] Gould *v.* Gould, 3 Story, R. 516.

[2] Backhouse *v.* Middleton, 1 Ch. Cas. 173, 175; Hall *v.* Hoddesdon, 2 P. Wms. 162; Vaughan *v.* Fitzgerald, 1 Sch. & Lefr. 316.

[3] Ante, § 524. The reason given by Chief Baron Gilbert, for applying the rule, to the same extent, to depositions taken in Chancery is, that otherwise great mischief would ensue; "for then a man, that never was party to the Chancery proceedings, might use against his adversary all the depositions that made against him, and he, in his own advantage, could not use the depositions that made for him, because the other party, not being concerned in the suit, had not the liberty to cross-examine, and therefore cannot be encountered with any depositions, out of the cause." Gilb. Evid. 62; Rushworth *v.* Countess of Pembroke, Hardr. 472. But the exception allowed in the text is clearly not within this mischief, the right of cross-examination being unlimited, as to the matters in question.

which the Court ordered an issue of *devisavit vel non*, in which the defendants in Chancery should be plaintiffs, and the plaintiff in Chancery defendant; and the issue was found for the plaintiffs; after which the plaintiff in Chancery brought an ejectment on his own demise, claiming, as heir at law of the same testator, against one of those defendants alone, who claimed as devisee under the will formerly in controversy; it was held, that the testimony of one of the subscribing witnesses to the will, who was examined at the former trial, but had since died, might be proved by the defendant in the second action, notwithstanding the parties were not all the same; for the same matter was in controversy, in both cases, and the lessor of the plaintiff had precisely the same power of objecting to the competency of the witness, the same right of calling witnesses to discredit or contradict his testimony, and the same right of cross-examination, in the one case, as in the other.[1] If the power of cross-examination was more limited in the former suit, in regard to the matters in controversy in the latter, it would seem that the testimony ought to be excluded.[2] The same rule applies to privies, as well as to parties.

§ 554. But though the *general rule, at law*, is, that no evidence shall be admitted, but what *is or might be under the examination of both parties;*[3] yet it seems clear, that, *in*

[1] Wright *v.* Tatham, 1 Ad. & El. 3; 12 Vin. Abr. tit. *Evidence*, A. b. 31, pl. 45, 47. As to the persons who are to be deemed parties, see Ante, § 523, 535.

[2] Phil. & Am. on Evid. 572, note (3); 1 Stark. Evid. 270, 271. It has been held that the deposition of a witness before the coroner, upon an inquiry touching the death of a person killed by a collision of vessels, was admissible in an action for the negligent management of one of them, if the witness is shown to be beyond sea. Sills *v.* Brown, 9 C. & P. 601, 603, per Coleridge, J.; 1 Phil. Evid. 373, (4th Am. from 7th Lond. Ed.) But *quære*, and see Phil. & Am. on Evid. 570, note (1).

[3] Cazenove *v.* Vaughan, 1 M. & S. 4, 6; Attor. Gen. *v.* Davison, 1 McCl. & Y. 160; Gass *v.* Stinson, 3 Sumn. 98, 104, 105; 1 Stark. Evid. 270, 271.

Equity, a deposition is *not, of course, inadmissible* in evidence, because there has been *no cross-examination*, and no waiver of the right. For if the witness, after his examination on the direct interrogatories, should refuse to answer the cross-interrogatories, the party producing the witness will not be deprived of his direct testimony, for, upon application of the other party, the Court would have compelled him to answer.[1] So, after a witness was examined for the plaintiff, but before he could be cross-examined, he died; the Court ordered his deposition to stand;[2] though the want of the cross-examination ought to abate the force of his testimony.[3] So, where the direct examination of an infirm witness was taken by the consent of parties, but no cross-interrogatories were ever filed, though the witness lived several months afterwards, and there was no proof that they might not have been answered, if they had been filed; it was held that the omission to file them was at the peril of the party, and that the deposition was admissible.[4] A new commission may be granted, to cross-examine the plaintiff's witnesses abroad, upon subsequent discovery of matter for such examination.[5] But where the deposition of a witness, since deceased, was taken, and the direct examination was duly signed by the magistrate, but the cross-examination, which was taken on a subsequent day, was not so signed, the whole was held inadmissible.[6]

§ 555. *Depositions*, as well as *verdicts*, which relate to a custom, or prescription, or pedigree, where reputation would be evidence, are admissible against strangers; for as the declarations of persons deceased would be admissible in such

[1] Courtenay *v.* Hoskins, 2 Russ. 253.

[2] Arundel *v.* Arundel, 1 Chan. R. 90.

[3] O'Callaghan *v.* Murphy, 2 Sch. & Lef. 158; Gass *v.* Stinson, 3 Sumn. 98, 106, 107. But see Kissam *v.* Forrest, 25 Wend. 651.

[4] Gass *v.* Stinson, 3 Sumn. 98, where this subject is fully examined by Story, J. See also 2 Phil. Evid. 91; 1 Stark. Evid. 171.

[5] King of Hanover *v.* Wheatley, 4 Beav. 78.

[6] Regina *v.* France, 2 M. & Rob. 207.

cases, *à fortiori* their declarations on oath are so.[1] But in all cases at law, where a deposition is offered as secondary evidence, that is, as a substitute for the testimony of the witness *vivâ voce*, it must appear that the witness cannot be personally produced; unless the case is provided for by statute, or by a rule of the Court.[2]

§ 556. The last subject of inquiry under this head, is that of *inquisitions*. These are the results of inquiries, made under competent public authority, to ascertain matters of public interest and concern. They are said to be analogous to proceedings *in rem*, being made on behalf of the public; and that therefore no one can strictly be said to be a stranger to them. But the principle of their admissibility in evidence, between private persons, seems to be, that they are matters of public and general interest, and therefore within some of the exceptions to the rule in regard to hearsay evidence, which we have heretofore considered.[3] Whether, therefore, the adjudication be founded on oath or not, the principle of its admissibility is the same. And moreover, it is distinguished from other hearsay evidence, in having peculiar guaranties for its accuracy and fidelity.[4] The general rule in regard to these documents, is, that they are admissible in evidence, but that they are not conclusive, except against the parties immediately concerned, and their privies. Thus, an inquest of office, by the attorney general, for lands escheating to the government by reason of alienage, was held to be evidence of title, in all cases; but not conclusive against any person, who was not tenant at the time of the inquest, or party or privy thereto, and that such persons, therefore, might show that there were lawful heirs *in esse*, who were not aliens.[5] So, it has been

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[1] 1 Stark. Evid. 272; Bull. N. P. 239, 240; Ante, § 127 – 130, 139, 140.
[2] Ante, § 322, 323.
[3] Ante, § 127 – 140.
[4] Phil. & Am. on Evid. 578, 579; 1 Stark. Evid. 260, 261, 263.
[5] Stokes *v.* Dawes, 4 Mason, 268, per Story, J.

repeatedly held, that inquisitions of lunacy may be read; but that they are not generally conclusive against persons not actually parties.[1] But inquisitions, extrajudicially taken, are not admissible in evidence.[2]

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[1] Sergeson *v.* Sealey, 2 Atk. 412; Den *v.* Clark, 5 Halst. 217, per Ewing, C. J.; Hart *v.* Deamer, 6 Wend. 497; Faulder *v.* Silk, 3 Campb. 126; 2 Madd. Chan. 578.

[2] Glossop *v.* Pole, 3 M. & S. 175; Latkow *v.* Eamer, 2 H. Bl. 437. See Ante, § 550, that the inquisition is conclusive against persons, who undertake subsequently to deal with the lunatic, instead of dealing with the guardian, and seek to avoid his authority, collaterally, by showing that the party was restored to his reason.