CHAPTER XXII.

Of Evidence, Continued, and Particularly of Presumptions and Hearsay.

PRESUMPTIONS.

§ 402. In general.—A presumption of any fact is properly an inference of that fact from other facts that are known. When the fact itself cannot be proved directly, that which comes nearest to the proof of it is the proof of the circumstances that necessarily and usually attend such fact, and from which it is inferred or presumed; that is, taken for granted until the contrary be proved.[1] In the order of nature, facts do not occur singly or independently but each is connected with some antecedent fact, or combination of facts, from which the fact in question follows as an effect from a cause.[2] Therefore, the ground of all presumptions is the necessary or usual connection between facts and circumstances.[3]

1—Jackson v. Warford, 7 Wend., 66.

2—People v. Jenness, 5 Mich., 324.

3—Thus the law presumes every man to intend the legal consequences which must naturally flow from his own voluntary acts, and every man is held responsible accordingly. If a debtor makes an assignment which, if carried out, must necessarily hinder and defraud his creditors, the legal presumption is, that the fraud was intended: Pierson v. Manning, 2 Mich., 454. And in all cases a mischief or wrong which is the natural and direct result of voluntary action, necessarily indicates a voluntary wrong-doer, for the law rigidly holds all persons to the presumption that they intended such results as are to be expected from their conduct, whenever these results arrive: Daily Post Co. v. McArthur, 16 Mich., 452; see, People v. Potter, 5 Mich., 8; People v. Carmichael, 5 Mich., 10, 17; People v. Scott, 6 Mich., 296; People v. Getchell, *Ibid.*, 504.

In civil cases death may be presumed from circumstances, and it is not necessary to produce an eye witness to the fact: John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich., 41;

§ 403. Classification of presumptions.—Presumptions are usually classified into *presumptions of law,* and *presumptions of fact.* Presumptions of law are either *conclusive* or *disputable.* This classification is based upon common experience, which has shown that when fact *a* or facts *a* and *b,* or facts *a, b,* and *c* are found fact *d* is, with more or less certainty, found also. As to certain conditions this is so universally true that the law has said when these conditions are shown it shall be conclusively presumed that fact *d* exists, and no evidence in such cases is permitted to show that, in the particular case, it does not exist. As to other conditions this common experience has not been so uniform in finding fact *d* to exist when the other facts are shown, as that it has seemed wise to ex-

Bailey v. Bailey, 36 Mich., 182. And a person may be presumed to be dead at the expiration of seven years from the time he was last heard of or known to be alive: Bailey v. Bailey, 36 Mich., 181. As to proving death within that period, see same cases.

The law will presume that the name used by a person in signing an instrument is his true name; thus, where a deed was signed by *Harmon,* and acknowledged by *Hiram,* the law will not presume that it was signed and acknowledged by the same person, without proof that such was the fact: Boothroyd v. Engles, 23 Mich., 19. See, Dillin v. People, 8 Mich., 368. But presumptions are never allowable when better evidence of a primary nature is required by law to be preserved; as, where a record of the fact is required to be kept: People v. Tredway, 17 Mich., 485. And if a paper is not found where, if in existence, it ought by law to be deposited or recorded, the presumption arises that no such document has ever been in existence: Hall v. Kellogg, 16 Mich., 135; see, Platt v. Stewart, 10 Mich., 260. No court or jury has a right to presume the existence of a fact without evidence legally tending to prove it directly, or tending to prove other facts and circumstances, from which the existence of the fact in question may be reasonably inferred. Cicotte *et al.* v. Morse, 8 Mich., 428. And all legal presumption must be reasonable: Hotchin v. Kent, 8 Mich., 529. Therefore a person's motives are presumed to be good, and that he is honest in his transactions, in the absence of evidence showing fraud or improper motives, as this is the more reasonable: Fleming v. Slocum, 18 John., 403; Bank of Silver Creek v. Talcott, 22 Barb., 552. So the law presumes that a public officer will perform his official duty: Hall v. Kellogg, 16 Mich., 139; Blair v. Compton, 33 Mich., 424; *Ibid.,* 9. And for this reason fraud will not be presumed upon slight circumstances, nor from circumstances of an equivocal nature, but must be clearly proved, so as to leave no rational doubt upon the mind: Buck v. Sherman, 2 Doug. Mich., 176; Hollister v. Loud, 2 Mich., 324; see, Hubbard v. Taylor, 5 *Ibid.,* 155; Baldwin v. Buckland, 11 *Ibid.,* 389. At least the proof must create a reasonable belief—something more than a suspicion of fraud: Watkins v. Wallace, 19 Mich., 77. A particular fraud cannot be proved by presumption alone; but when a fraudulent act is shown to have been committed by one or more persons, presumption is allowable to show the complicity of others who have authorized or procured it to be committed: Dayton v. Monroe, 47 Mich., 193; 10 N. W., 196. In the absence of any showing to the contrary, the time of the delivery of a deed will be presumed to have been the same as the date of its acknowledgment: Johnson v. Moore, 28 Mich., 3.

clude evidence to show that in the particular case fact *d* does not exist; and yet it is so uniform as that the rule has been established that in these cases when the facts *a*, or *a* and *b*, or *a*, *b*, and *c* are shown, fact *d* shall be presumed to exist in the absence of evidence that it does not, and evidence is admitted to show that in the particular case it does not exist. In these cases of presumptions of law, the facts upon which the presumptions are founded are given a probative force, *by reason of the rule of law*, which in the particular case they might not have, except for the rule; in the one case establishing fact *d* and excluding all evidence to show that it does not exist, and in the other, establishing fact *d* in the absence of evidence to show it does not exist. In the case of presumptions of fact, so called, the facts upon which it is founded are given their natural probative value unaided by any rule of law requiring any particular conclusion from them.

§ 404. Conclusive presumptions of law, illustrations of.— The statutes of limitations furnish illustrations of this class. It appearing that the obligation arose at a time anterior to the beginning of the period fixed by the statute, and that there has been no recognition of it within the statutory period, then it is conclusively presumed that the obligation is extinguished.[4] Judicial records are conclusively presumed to be correct.[5] Title by prescription is another illustration.[6] Estoppels, discussed *post*, § 416, are also within the principle.

§ 405. Disputable presumptions of law, illustrations of.— Proof that an individual has acted notoriously as a public officer, raises the presumption of his appointment to the office and is *prima facie* evidence of his official character and right to perform the duties of the office, without producing his commission or appointment.[7] Proof that he was reputed to be, and was acting as such officer at the time in question, is *prima facie* sufficient.[8] The rule of law excluding parol proof when

4—See, *ante*, §§ 222 *et seq.*

5—Reed v. Jackson, 1 East, 355.

6—Uninterrupted occupation of lands for a period fixed gives rise to a conclusive presumption of title in the occupier: Big Rapids v. Comstock, 65 Mich., 78; 31 N. W., 811; Yelverton v. Steele, 40 Mich., 538.

7—1 Greenl. Ev., §§ 83, 92.

8—Scott v. Detroit Y. M. S., 1 Doug. Mich., 119, 152; McCoy v. Curtice, 9 Wend., 17. And so, evidence that a man officiated regularly as a minister or clergyman, may be received, and is sufficient *prima facie* to show that he was such: Goshen v. Ston-

there is written evidence, does not apply in these cases.[9] And where it was shown that the person was acting as justice of the peace at the time in question, it was held to be sufficient evidence that he was such officer. The court said: "It is not usually necessary to prove more than this, and the acts of a person in the full enjoyment of public office do not require any further sanction. The actual legal right of an incumbent cannot be tried in a collateral action between third parties, and the user of an office may be proved by anyone who knows the fact."[10] And it is not material how the question arises, whether in a civil or criminal case; nor whether the officer is or is not a party to the record.[11]

Other common illustrations of this class of presumptions are found in the presumption of innocence;[12] that one intends the natural consequences of his acts;[13] that a state of things shown to exist continues;[14] that one absent from his home

ington, 4 Conn., 219; Berryman v. Wise, 4 Term. R., 366; Town of Vernon v. East Hartford, 3 Conn., 475; Hayes v. P., 25 N. Y., 390; State v. Rood, 12 Vt., 396.

9—Cahill v. Kalamazoo Ins. Co., 2 Doug. Mich., 124, 136. Where it was proved that a person who signed a policy of insurance, was acting as president of the insurance company, this was held sufficient evidence that he *was* such officer, and to bind the company: *Ibid.*, p. 136. Where the question of official character arises collaterally, parol evidence is admissible to show an actual incumbency *de facto:* Druse v. Wheeler, 22 Mich., 439; see, Walrath v. Campbell, 28 Mich., 117, and People v. Marion, 29 Mich., 38. Persons in the actual and unobstructed exercise of office, must be held to be legal officers, except in proceedings where their official character is the issue to be tried as against themselves. Jhons v. People, 25 Mich., 503; Keator v. People, 32 Mich., 484; Corrigan's case, 37 Mich., 66. And it will not be presumed that a *de facto* officer has neglected to make any necessary qualification: F. N. Bank of St. Joseph v. St. Joseph, 46 Mich., 256; 9 N. W., 838.

10—Facey v. Fuller, 13 Mich., 527, 531. And to this end evidence is admissible, not only to show that he exercised the office before or at the period in question, but also, limited to a reasonable time, that he exercised it afterwards: Doe v. Young, 8 Ad. & El. N. S., 63; Cabot v. Given, 45 Maine, 144.

11—1 Greenleaf Ev., § 92. It seems, however, that executors, in an action brought by themselves, cannot prove their office by general reputation: Middlesworth v. Nixon, 2 Mich., 425; Albright v. Cobb., 30 Mich., 355. When letters of guardianship are issued, the presumption is that they were regularly granted and after lawful proceedings had for that purpose: Burrows v. Bailey, 34 Mich., 64. A person actually obtaining an office with the legal *indicia* of title is a legal officer until ousted, so as to render his official acts valid as if his title were not disputed: Auditors v. Benoit, 20 Mich., 176.

12—Maher v. People, 10 Mich., 212; Monaghan v. Agricultural F. I. Co., 53 Mich., 238; 18 N. W., 797.

13—People v. Potter, 5 Mich., 1; Allison v. Chandler, 11 Mich., 512.

14—Ormsby v. Barr, 22 Mich., 80; Howland v. Davis, 40 Mich., 545.

and unheard of for seven years is dead;[15] that all persons are sane;[16] that officials have acted regularly,[17] and the like.

HEARSAY EVIDENCE.

§ 406. Definition of hearsay evidence.—Hearsay evidence is evidence of the declarations of another not made under oath and subject to cross-examination, offered to prove the truth of the fact involved in the declarations. If offered to prove simply that the declarations were made, regardless of whether true or false, it is not hearsay. As where in defamatory action evidence of the speaking of the words alleged as slanderous is not hearsay. So, evidence that the plaintiff called the defendant a liar offered in mitigation of damages in an action for an assault provoked by the words. The defendant does not offer the evidence to prove that he, the defendant, is a liar, but to prove that plaintiff said so. The principal objections to hearsay evidence are, *first,* that the declarations offered were not made under oath; *second,* that the declarant, upon whose credit the declaration depends, is not subject to cross-examination.[18]

There are, however, some exceptions to the rule, where the circumstances of the case are such as to afford a presumption that the hearsay is true;[19] such as, when the hearsay is a part

15—Newman v. Jenkins, 10 Pick., 515; People v. Eaton, 59 Mich., 559; 26 N. W., 702.

16—People v. Garbutt, 17 Mich., 9.

17—Scott v. Detroit Young Men's Society, 1 Mich., 119, 150; Love v. Wood, 55 Mich., 451; 21 N. W., 887; Westbrook v. Miller, 56 Mich., 148; 22 N. W., 256.

18—Stockton v. Williams, 1 Doug. Mich., 570; Hamilton v. People, 29 Mich., 173; Ruggles v. Fay, 31 Mich., 141; Hunt v. Strew, 33 Mich., 85. Thus, the statements of persons not witnesses, through whose hands a treasury note has passed, are not admissible in evidence, either for the purpose of identification, or to prove the note counterfeit, in a suit by one who has taken the note, to recover its value: Atwood v. Cornwall, 28 Mich., 336. In an action by a wife for alienation of husband's affections, the husband's statements tending to show defendant's attitude toward the wife cannot be shown against defendant: Derham v. Derham, 125 Mich., 109; 83 N. W., 1005. Letters written by wife to defendant in a *crim. con.* case tending to show alienation of her affections by defendant are competent: Dalton v. Dregge, 99 Mich., 250; 58 N. W., 57. Statements made by wife to husband in absence of defendant tending to show defendant's guilt are not competent: *Ibid.* An inventory based in part on information received by the one making it from other persons is inadmissible: Black v. Simon, 116 Mich., 382; 74 N. W., 527.

19—1 Greenleaf's Ev., §§ 98-99; Roscoe's Cr. Ev., 4th Am. ed., 22. A judgment will not be reversed because hearsay testimony, which is *not irrelevant,* has been admitted without objection at the time. By allowing such

of the transaction in question, or relates to matters of public and general interest, or to ancient possessions, relationship, declarations against interest, and testimony of a deceased witness.[20]

§ 407. Some exceptions to the rule—hearsay as a part of the transaction.—Where the inquiry is into the nature and character of a transaction, not only what was done, but what was said also, by both parties, during the continuance of the transaction, is admissible.[21]

A person's statements and expressions while suffering from ill health or physical injury, are sometimes admissible for the

evidence to be introduced without objection, a party treats it as competent, and is thereby precluded from raising the question on error: Hadden v. Shortridge, 27 Mich., 212.

20—Stockton v. Williams, 1 Doug., 570; 1 Phil. Ev. Ch. & Edwards' notes, 185, 201.

Where defendant referred the plaintiff to a third person for information upon a subject afterwards coming in controversy, the conversation had with the third person and his statements upon the subject referred to him, are a part of the *res gestae*, and admissible in evidence, notwithstanding the defendant may have been absent during the interview with the third person: Beebe v. Knapp, 28 Mich., 53.

21—Stockton v. Williams, 1 Doug. Mich., 570; 1 C. H. & Edwards' notes, 189, 202, note 81. When the state of mind, sentiment or disposition of a person at a given time becomes pertinent subjects of inquiry, his declarations and conversations, being a part of the *res gestae*, may be shown: Barthelemy v. People, 2 Hill, 248. Where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give character to the act, and which may derive a degree of credit from the act itself, are admissible as a part of the *res gestae:* Sessions v. Little, 9 N. H., 271. And so, when the declarations are so connected with a material fact as to explain or qualify it, or show the intent with which it was done: Russel v. Frisbie, 19 Conn., 205; and see, Dillin v. People, 8 Mich., 357. But subsequent statements of a party of his motives and intentions will not be received; it is only what was said at the time of the transaction, which as a part of the *res gestae*, is admissible: Dawson v. Hall, 2 Mich., 390. Unless such statements bear against him: Dillin v. People, 8 Mich., 357. But where the allegation was that the wife, by undue influence induced her husband to make a will, evidence was admitted that he said he regretted the marriage; that he was not master at home; that he was afraid of his wife, and was compelled to submit to her demands: Beaubien v. Cicotte, 12 Mich., 450. A witness testifying to an occurrence, will not be permitted to state what a bystander, who is not a witness in the cause, said about the transaction at the time, as the bystander's statements or version of the affair would be merely hearsay: Detroit & Milwaukee Ry. Co. v Steinberg, 17 Mich., 99, 107-8. But where the question was as to whether a bone had been fractured, and it was important to know whether the movement of the limb produced a grating sound, it was held that the remarks of bystander at the time the limb was being manipulated, showing that they heard such a sound, might be proved: Hitchcock v. Burgett, 38 Mich., 501. Nor can a witness' statements out of court be given in evidence to corroborate his own testimony: Brown v. People, 17 Mich., 429. But see, Stewart v. People, 23 Mich., 63.

purpose of showing his condition at the time, such statements being more in the nature of direct evidence than hearsay. Thus, in an action for an assault and battery, the plaintiff's complaints of pain and soreness, made to other persons, at the time and soon after the assault, are competent in his own behalf, in respect to the extent of the injury, when taken in connection with other testimony,[22] and in case of malpractice, the patient's exclamations of pain and suffering, and her complaints as to the nature of her sufferings during and after the operation, were admitted. This being the only mode in which their nature and extent can be ascertained, such exclamations and statements are original evidence.[23]

§ 408. **Pedigree.**—Hearsay is sometimes admitted to prove parentage, marriage, descent and relationship. But such evidence is confined to the declarations of deceased persons, who were connected by blood or marriage to the person to whom they relate.[24] Therefore, what has been said by servants and acquaintances of the family is not admissible.[25] But general reputation in the family, shown by surviving members of it, has been held admissible.[26] On the same principle, entries in a

22—Caldwell v. Murphy, 1 Kern 416; Wercly v. Persons, 1 Tiff. N. Y., 344; Baker v. Griffin, 10 Bosw., 140; Aveson v. Kinnaird, 6 East., 188; Elliott v. Van Buren, 33 Mich., 49; Johnson v. McKee, 27 Mich., 471 Grand Rapids & Indiana Ry. Co. v. Huntley, 38 Mich., 503. A physician may testify to examinations of pain on an occasion when an examination was being made for purposes of treatment: Heddle v. City El. Ry. Co., 112 Mich., 547; 70 N. W., 1096; People v. Foglesong, 116 Mich., 556; 74 N. W., 730; Butts v. Eaton Rapids, 116 Mich., 539; 74 N. W., 872; Beath v. Rapid Ry. Co., 119 Mich., 512; 78 N. W., 537; Mott v. Detroit, etc., Ry. Co., 120 Mich., 127; 79 N. W., 3. But not, it seems, if the examination was made for the purpose of enabling him to testify: Grand Rapids & I. Ry. Co. v. Huntley, 38 Mich., 537; McKormick v. West Bay City, 110 Mich., 265; 68 N. W., 148.

23—Hyatt v. Adams, 16 Mich., 200. And see, Johnson v. McKee, 27 Mich., 471; Elliot v. Van Buren, 33 Mich., 49. But exclamations of pain during an examination made by a physician for the purpose of enabling him to testify as to the extent of an alleged injury, are not admissible: Grand Rapids & Indiana Ry Co. v. Huntley, 38 Mich., 537, 543-4.

24—1 Greenl. Ev., 103; Jackson v. Browner, 18 Johns., 37.

25—Johnson v. Lawson, 2 Bing., 86.

26—Doe v. Griffin, 15 East., 293. Family connection and membership, deaths, births, marriages and relationship, may be shown by the common understanding and traditions in the family and among relatives, and need not rest upon the direct personal knowledge of the witness: Van Sickle v. Gibson, 40 Mich., 173. Family history, as known and recognized in the family, seems not to be objectionable as hearsay: Fraser v. Jennison, 42 Mich., 206, 235; 3 N. W., 882.

family Bible, made by a deceased parent, inscriptions on tombstones and on pictures, and charts of pedigree, are admitted.[27]

§ 409. Matters of public and general interest.—Hearsay is admissible in this class of cases, upon the principle that, in matters of public interest, all persons must be conversant; and rights which are common, are naturally talked of in community. The subjects to which such evidence is applicable are public prescriptions, customs, boundaries, highways, and the like. But hearsay under this head is admitted only in cases of ancient rights, and in respect to the declarations of persons supposed to be dead; the origin of the right being antecedent to the time of legal memory, and incapable of proof by living witnesses; the general rule being that facts, which from their nature and antiquity do not admit of proof by living witnesses, may be proved by hearsay. Such declarations, however, must have been made before any dispute arose. But in matters of mere *private right*, evidence of reputation or of common fame is inadmissible, and so of reputation or hearsay with respect to particular facts.[28] Therefore general hearsay and public reputation are admissible to prove which of two persons, claiming by the same name, were the grantees or reservees in a treaty.[29]

§ 410. Evidence of witnesses deceased, or out of the state.—In some cases evidence of what a witness since deceased has sworn to, is admissible. In this case the objection that the declarant did not speak under oath and subject to cross-examination does not obtain, but it is still in its nature, when used, hearsay. To allow the admission of such testimony, it must be shown that a prior trial was had between the same parties and for the same cause of action.[30] To prove that fact the record is the best evidence, and must be introduced.[31] It must also be proved that the witness is dead or unavailable.[32]

27—1 Greenl. Ev., §§ 104, 105. It is competent for a person to testify to his own age: Cheever v. Congdon, 34 Mich., 196.

28—Stockton v. Williams, 1 Doug. Mich., 546, 570.

29—*Ibid.*, and Campau v. Dewey, 9 Mich., 381; see, Stockton v. Williams, 1 Doug. Mich., 546.

30—Wilbur v. Selden, 6 Cow., 162, 164; Osborn v. Bell, 5 Denio, 370.

31—Beals v. Guernsey, 8 Johns., 446; White v. Kibling, 11 Johns., 128.

32—Powell v. Waters, 17 Johns., 176; Wilbur v. Selden, 6 Cow., 162. When a witness has died, or is sick, insane, or beyond the jurisdiction of

The proof of what the deceased testified, may be made by any person who heard him, even though he took no minutes of the evidence.[33] An attorney or other person who took minutes at the time the witness testified, and swears to their accuracy, may state on a subsequent trial what the deceased swore to, although he cannot testify from his mere recollection without a reference to his minutes. It is sufficient if, after refreshing his recollection from his minutes, he can then state what the evidence given by deceased was.[34]

It is not necessary to prove the precise words of the deceased witness. If the substance is fully given it is all that is required.[35]

the court, his testimony given upon a former trial upon the same issue and between the same parties may be introduced: Howard v. Patrick, 38 Mich., 685-9; People v. Sligh, 48 Mich., 54; 11 N. W., 782. And the fact that the deposition of a witness, who at the time of the second trial of a case is beyond the jurisdiction of the court, has been taken by the consent of the parties, will not prevent his testimony on the former trial, as taken down by the stenographer, from being offered in evidence. Labar v. Crane, 56 Mich., 585, 23 N. W., 323.

As to whether it is competent to prove the testimony given on a former trial by a witness who is only temporarily absent from the state, where it does not appear that he had been subpoenaed, or that any effort had been made to procure his testimony or personal attendance at the trial; see, Hiscock v. Norton, 42 Mich., 320; 3 N. W., 868.

33—Grimm v. Hamel, 2 Hilt, 434.

34—Van Buren v. Cockburn, 14 Barb., 118; Huff v. Bennett, 2 Selden, 337; see, Fisher v. Kyle, 27 Mich. 454. A memorandum produced by a witness as to what a party swore to on a former trial, and made at that time, may be admitted in another trial as evidence of what such testimony was, but it is entitled to no greater weight than should be accorded to the evidence of the witness, if he were swearing from his own personal recollection of what was testified to on the former trial: Spalding v. Lowe, 56 Mich., 366; 23 N. W., 46.

35—Chaffee v. Cox, 1 Hilt., 79; Clark v. Vorce, 15 Wend., 193; Clark v. Vorce, 19 Wend., 232-3; Burson v. Huntington, 21 Mich., 415; see, also, Halsey v. Sinsebaugh, 1 E. P. Smith, 485; Russell v. Hudson R. Ry. Co., 3 *Ibid.*, 134, 140; Crawford v. Loper, 25 Barb., 449.