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PREFACE

TO THE FOURTH EDITION.

In presenting the Fourth Edition of this Work to the profession and the public we desire to make the following prefatory remarks.

The Supreme Court of Judicature Acts, 1873 and 1875, have rendered necessary the excision of some of the matter contained in the preceding edition and the remodelling of more. The latter task cannot, obviously, be satisfactorily performed until judicial decisions have settled the exact scope of many of the new Rules of Court.

We have availed ourselves of the space which has been set free by the dropping out of old matter to incorporate into the text many branches of law more or less intimately connected with Evidence, which were previously omitted in order to keep the work within a convenient size. Without putting forward any claim to that exhaustiveness which other works dealing with the Law of Evidence aim at, we venture to think that "Powell on Evidence" will now be found not only sufficiently complete for the student, but also for the general purposes of the practitioner.

A variation in the sequence of the chapters has

been adopted with the view of producing a more symmetrical arrangement.

Many important statutes (in addition to the Judicature Acts) have been passed since the date (1868) of the last Edition of this Work: these will be found alluded to in the proper places. In addition to this, we have selected for incorporation into its pages the most valuable of the many judicial decisions, since the above date, bearing more or less directly on the Law of Evidence; but, while doing so, we have steadily adhered to the principle of not overloading the book with cases.

References to the corresponding Indian Law will be found in footnotes throughout the body of the Work; and the important and interesting Indian Evidence Act is given *in extenso* in the Appendix, together with, for the benefit of Indian practitioners, the decisions of the Indian Courts thereon up to a recent date noted against the proper sections.

JOHN CUTLER.
E. F. GRIFFIN.

LINCOLN'S INN,
August, 1875.

PREFACE

TO THE THIRD EDITION.

In preparing the Third Edition for the press we have not departed radically from that portion of the plan of the Author which seems to have been to illustrate each point by quoting only the most important decision, and not to overload the Work by a multitude of cases. Our alterations have been threefold: first, we have attempted to bring the law down to the close of the last year—a task of considerable magnitude, for, although during the eight years which have elapsed since the publication of the last edition the statutory alterations in the Law of Evidence have been few, still its rules have been modified by a large number of decisions, the most important of which, to the number of several hundreds, we have selected for quotation. Secondly, we have endeavoured to make the Work more useful to the practitioner in Equity by quoting a large number of Chancery cases, and by incorporating the principles and practice of the Law of Evidence adopted by the Court of Chancery. As there exists at present no modern work devoted exclusively to these subjects, this alteration may give the edition greater value to the practitioner for use not only in the Court of Chancery but also in cases falling under

the equitable jurisdition of the County Courts. Thirdly, we have referred to the salient Rules of Evidence adopted in the Anglo-Indian Courts, adding the chief part of the Indian Evidence Act in the Appendix. This we have done for the following reasons: that it may be found useful in England to those studying for the Indian Bar or the Indian Civil Service; and in India, to the practitioner, as supplementary to works treating exclusively of Indian Evidence. It also appears to us that the time cannot be far distant when the existing English Law of Evidence will be consolidated into a statute, and that it may be then found desirable to alter certain rules and perhaps to adopt the substance of some of the clauses of this Act of the Indian Legislature.

In conclusion, we desire to acknowledge the assistance which we have derived from the text books on various branches of the law; to particularize them would be invidious, to enumerate them all would be for obvious reasons unnecessary.

JOHN CUTLER.
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THE

Principles and Practice

OF THE

LAW OF EVIDENCE.

CHAPTER I.

GENERAL PRINCIPLES OF EVIDENCE.

SINCE mathematical or demonstrative certainty is unattainable in any of the affairs of daily life, courts of justice, like individuals, are compelled to be satisfied with that inferior kind of certainty which is called moral. All moral science, of which law is the practical expression, consists intrinsically of inquiry and investigation, which are infinite by nature, but finite by necessity: and, in the administration of justice, the exigencies of public and private business require that this limit should be neither recondite nor fanciful, but well defined and according with the maxims and experience of common sense. Therefore moral probability, or, as it is erroneously termed, moral certainty, is the utmost to which the science of legal evidence aspires. In this respect, the analogy between ethics, or moral philosophy, and the English Law of Evidence is complete. As in

ethics, and in all purely transcendental inquiries which seek for knowledge beyond the limits of the senses, the logical result is seldom more than a slight elevation or depression of one of two or more sets of competitive probabilities (*a*): so moral philosophy, when applied to the daily business of life, and made a standard and a test of the existence or non-existence of uncertain and disputable facts, gives, as the result, only a greater or less amount of verisimilitude, or probability. The region of evidence lies, therefore, exclusively between moral certainty on the one hand, as its most perfect extreme, and moral possibility on the other, as its most imperfect extreme. It does not look for more than the first, and it will not act on less than the last. Its whole object is to produce those convictions which spring spontaneously from the suggestions of the intuition, as embodied in the conclusions of the reasoning or comparative faculty of the mind; and in every case the last conclusion of the speculative intellect rightly suggests and governs the first outward operation of the practical mind (*b*). From such a speculative conclusion there may spring also ulterior inferences, connected strictly in a chain of cause and effect: for "if a strong probability be raised by express evidence, unless the probable consequence may be inferred, the business of life could not be conducted, and justice could not be administered" (*c*). But the

(*a*) Cicero De Officiis: Butler's Analogy of Religion.

(*b*) Aristotle, Eth. Nic. lib. 6.

(*c*) Per Lord Campbell, C. J., *Wheelton* v. *Hardisty*, 8 E. & B. 279.

fundamental maxims of the Law of Evidence are not by any means founded on the most approved principles of modern metaphysics; for, bounded and fallible as the human senses are in their demonstration, yet the science of evidence recognizes in them its best and highest exposition. Thus, it is often stated that the English Law of Evidence may be regarded as primarily always striving after the depositions of eye-witnesses. Yet their statements, although always valuable, are so far from being, as is sometimes supposed, of a demonstrative character, that they are often intrinsically less satisfactory than many other grades of presumptive evidence, which are nominally inferior. Ignorance, passion, prejudice, and other constitutional infirmities of the witness, which are far beyond the sight or conjecture of either a judge or jury, may, and constantly do, without the consciousness of the deponent, distort his evidence so far as to render it absolutely worthless; although it may be delivered with perfect calmness and consistency, and even remain unshaken by the most searching cross-examination. As a general rule, however, a rigid cross-examination, coupled with a careful observation of the demeanour of the witness (*d*), will throw considerable light upon his credibility. Simplicity, minuteness, and ease

(*d*) By the Indian Code of Civil Procedure (Act viii. of 1859, s. 172), the court is directed to "record such remarks as it may think material respecting the demeanour of the witness while under examination." By the Code of Criminal Procedure (Act x. of 1872, s. 341), a similar duty is imposed on every sessions judge and magistrate.

are the characteristics of truth; evasion, exaggeration, over-zeal for either party, too great readiness in answering, are indications of insincerity, if not of falsehood. A still more alarming ground for distrust lies in the possibility that the witness may be committing perjury; and the experience of the profession has added tenfold weight to this deplorable hypothesis. The suspicion with which oral evidence is often regarded will not be lessened by the recent statute (*d*), which enacts that "if any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration: 'I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth,' and any person who, having made such promise and declaration, shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried and convicted for perjury as if he had taken an oath" (*e*).

The reliance placed upon the statements of others arises from an instinctive tendency to confide in their veracity, and from our faith in human testimony being on the whole sanctioned by experience. This

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(*d*) 32 & 33 Vict. c. 68.

(*e*) By the Indian Oaths Act, 1873, it is provided that when a witness, interpreter or juror is a Hindu or Mohammedan, or has an objection to making an oath, he shall, instead of making an oath, make an affirmation.

reliance is increased by corroboration. In spite of the maxim *testimonia ponderanda sunt non numeranda*, the evidence of three witnesses carries more weight than that of two, *i. e.*, where the three witnesses are independent. It should also be noted, that in estimating the value of evidence more weight should be given in matters of observation to the testimony of an educated than to that of an uneducated man; and that the testimony of a man who swears positively that a certain conversation took place is of more value than that of one who says that it did not, because the evidence of the latter may be explained by supposing that his attention was not drawn to the latter at the time (*f*). Another ground for reliance on testimony is its probability, *i. e.*, its accordance with facts previously known and believed. But although probability is useful as an aid to considering the true value of direct evidence, it can seldom with safety be had recourse to alone for the purpose of entirely invalidating direct evidence. As connected with this subject the remarks of Parke, B., may be quoted, that "There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life" (*g*).

It is universally the object of courts to obtain the

(*f*) *Chowdry Debi Persad* v. *Dowlut Sing*, 3 Moo. I. A. 357.
(*g*) *Mir Asadulah* v. *Bibi Imaman*, 5 Cal. W. R., P. C. 26.

best evidence. Hence second-hand or *hearsay* evidence is generally inadmissible; and it is an inflexible rule, that secondary evidence is always inadmissible until the absence of primary evidence has been explained to the satisfaction of the court. Thus, in a dispute on a contract under seal, the deed is primary evidence, and should be produced to show the terms of the contract. As long as it exists, and can be obtained by reasonable diligence, no other written or oral evidence of its contents will be received; but if it be destroyed, or if it cannot be found after proper search, or if an adverse party, holding it, refuse to produce it, after due notice, then either written or oral evidence may be given by any one who is acquainted with the contents of the deed. The rule is the same in the case of written contracts, not under seal. As long as the writing exists it must be produced, if possible; but if it be impossible to produce it, the court may, in its discretion, allow the contract to be proved by secondary evidence.

Where direct evidence is not obtainable, and in many cases where it is, the law permits facts to be proved by indirect evidence, which is usually called presumptive or circumstantial, but is better described as inferential. Even direct evidence, when analysed, is found to be to a certain extent presumptive, as it depends for its weight on a number of circumstantial peculiarities which affect the credibility of the witness or other proof: while it has been asserted that what is termed circumstantial evidence is of a nature identical with direct evidence (*h*). It is, however,

(*h*) Wills on Circumstantial Evidence, p. 23.

a ble to treat it as differing. Presumptive or circumstantial evidence, as distinct from direct evidence, consists of inferences drawn from established facts, *i. e.*, certain collateral facts being established or assumed, the court either presumes or is asked to presume from these the *factum probandum.* To give two simple illustrations: If a man be stabbed in a house, and another man be seen running from the house immediately after, with a bloody sword in his hand, the flight, the weapon, and the blood raise, in legal language, a violent presumption that the second man murdered the first (*i*). Similarly, in larceny, where goods have been stolen by a person unknown, and they have been found shortly after in the possession of the prisioner, juries are always told by judges, that on this evidence alone they are bound to convict, unless they are satisfied with the prisoner's explanation of the manner in which he obtained the goods. But on this class of evidence it has been remarked by a learned writer (*k*), and the remark is universally applicable to all presumptive evidence, that it must be admitted that, like every other rule of human institution, it will sometimes fail to guide rightly. Lord Hale mentions a case which he says was tried before a very learned and wary judge, where a man was condemned and executed for horse-stealing, upon proof of his having been apprehended with the horse shortly after it was stolen; and afterwards it came out that the real thief, being closely pursued,

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(*i*) Co. Litt. 6, b.

(*k*) Russell on Crimes, by Greaves; note by editor.

had overtaken the man upon the road, and asked him to hold the horse for him for a few minutes. The thief escaped, and the innocent man was apprehended with the horse (*l*). In such cases, and generally, it is well to bear in mind, that "where it is sought to establish a theory by circumstantial evidence, all the facts proved must be consistent with the theory; but there must also be some one substantial, credible fact inconsistent with the contrary"(*m*). Hence it has been decided, that since there can be no larceny of goods unless there be a felonious intention in the taker's mind at the time of the taking, a mere fraudulent conversion of goods by the taker after the taking is no evidence that he had a felonious intention at the time of taking, because such a misappropriation is consistent with the theory that he had no felonious intention at the time of the taking, but that he conceived the intention subsequently (*n*).

What, then, is meant by the term evidence? In the first place it must be borne in mind that there is a wide distinction between evidence and proof, which is the effect of evidence. "When the result of evidence is undoubting assent to the certainty of the event or proposition which is the subject-matter of the enquiry, such event or proposition is said to be proved" (*o*). Evidence, then, "includes all legal

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(*l*) 2 Hale, P. C. 289.

(*m*) Per Willes, J., *Great Western Railway* v. *Rimmell*, 27 L. J., C. P. 201; 18 C. B. 575.

(*n*) *R.* v. *Christopher*, Bell, 27.

(*o*) Whately's Logic, Book iv. ch. iii. s. 1.

means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation" (*p*). There are several divisions of evidence, of which the most important are the divisions into (1) primary and secondary, (2) sufficient and satisfactory, (3) direct and inferential, (4) original and second-hand, or hearsay, (5) oral, documentary and real. The first four divisions will be discussed elsewhere. The fifth, which is a threefold division, explains itself; but an illustration may convey a clearer notion of real evidence to the student: When a knife, covered with blood, is found close to the body of a murdered man, the production of the knife in court is offering real evidence.

Finally, it may be remarked that the law of evidence applicable in every case is that of the *lex fori*. To quote the words of Lord Brougham: "The law of evidence is the *lex fori* which governs the courts whether a witness is competent or not, whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not; these and the like questions must be determined, not *lege loci contractûs*, but by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it" (*q*).

(*p*) Taylor on Evidence, s. 1. For the definition of evidence in India, see the Ind. Ev. Act, s. 3. The act will be found in extenso in the Appendix.

(*q*) *Bain* v. *Whitehaven Railway Co.*, 10 H. L. Cas. 1.

CHAPTER II.

ON THE FUNCTIONS OF JUDGE AND JURY.

Ad quæstionem juris non respondent juratores; ad quæstionem facti non respondent judices. Whether there is *any* reasonable evidence is a question for the judge; but whether the evidence is satisfactory is a question for the jury (*a*).

THE meaning of this rule, which may be regarded as fundamental, is, that it is for the judge to decide on the character of all evidence that may be tendered, and to admit or reject it according to its consistency or inconsistency with the established rules of courts. The ancient rule is, however, exploded, by which a judge was bound to leave a case to a jury if there were *any* evidence for their consideration. Where there is merely a *scintilla* of evidence a judge ought not to leave it to a jury (*b*). At the same time it is a very delicate function for a judge to withdraw a case from a jury on the ground either that there is no evidence, or merely a scintilla; and it seems that when there is any sort of *primâ facie* presumption in a

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(*a*) *Avery* v. *Bowden*, 6 E. & B. 953; *Wheelton* v. *Hardisty*, 8 E. & B. 232.

(*b*) Per Cur. *Avery* v. *Bowden*, sup.

case (*c*), or a condition of facts which does not clearly negative the supposition that there is *some* evidence, the decision is for the jury, and not for the judge (*d*). Thus, in actions for negligence, it has been held by the Court of Exchequer Chamber that there are some accidents which imply negligence from the very nature of the circumstances, as where the plaintiff was struck by a brick which unexpectedly fell from a railway viaduct immediately after a train had passed (*e*); though when there is no such presumption, the plaintiff must give affirmative evidence of negligence (*f*); and where the evidence is equally consistent with the existence or absence of negligence, the case must be withdrawn from the jury (*g*). Wherever the judge discharges at once his own peculiar functions and also those of the jury, then it is his duty to estimate the credibility as well as the admissibility of evidence.

It is for the judge to explain the law to a jury (*h*); and the jury is bound to take the law to be that

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(*c*) *Dare* v. *Heathcote*, 25 L. J., Ex. 245.

(*d*) *Jewsbury* v. *Newbold*, 26 L. J., Ex. 247.

(*e*) *Scott* v. *London Dock Co.*, 3 H. & C. 596; *Kearney* v. *London, Brighton & South Coast Railway*, 39 L. J., Q. B. 203; 40 L. J., Q. B. 285; L. R., 5 Q. B. 411; L. R., 6 Q. B. 759; 18 W. R. 1006.

(*f*) *Hammack* v. *White*, 11 C. B., N. S. 588.

(*g*) *Cotton* v. *Wood*, 8 C. B., N. S. 568.

(*h*) As to the relative functions of judge and jury in criminal cases tried by the Courts of Session in India (in which alone trials are by jury there), see the Indian Code of Criminal Procedure, ss. 256, 257.

which the judge tells them that it is. It is for the judge to tell them how the law is applicable to the issues of fact, and to distinguish for them questions of law from those of fact; to decide on the competency of witnesses; to examine them as to their religious belief, before they are admitted to be sworn; and to decide whether or not the taking of an oath would have any binding effect on their consciences (*k*). So also it is the function of the judge to determine whether a witness be sane or insane; whether dying declarations, in cases of homicide, are admissible evidence as having been made by the deceased in the expectation of immediate death; whether secondary evidence may be substituted for primary evidence (*l*); whether a document comes from proper custody, or is properly stamped; and generally on all conditions precedent to the reception of evidence. But he cannot decide the question of the existence of an original document if denied by the pleadings (*m*). When the judge has once admitted evidence, his function is complete (*n*): though if, after admitting a witness to give evidence, he is convinced by proof of subsequent facts, and by observation of the witness's demeanour, that the latter is not competent, he may withdraw such evidence from

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(*k*) See The Evidence Further Amendment Act, 1869, s. 4, and see also infra, p. 29.

(*l*) *Boyle* v. *Wiseman*, 10 Ex. 647.

(*m*) *Stowe* v. *Querner*, L. R., 5 Ex. 155; 39 L. J., Ex. 60; 18 W. R. 466.

(*n*) *Heslop* v. *Chapman*, 12 Q. B. 928.

the jury (*o*). He has nothing whatever to do with the *credibility* of evidence, which is a consideration solely for the jury.

It is also the duty of the judge to instruct the jury in the rules of law, by which evidence in particular cases has to be weighed (*p*): but in summing up a case to a jury the judge will, in his discretion, comment, or decline to comment, on the weight of evidence. It would appear that the latter course is his strict duty; and that he may be regarded as *functus officio* when he has laid the real issues, with the evidence that bears on them, before the jury, and stated the rules of law applicable to the evidence, and the general principles applicable to the case. Practically, however, this rule is not observed inflexibly; and in many cases, which consist in equal and inseparable parts of law and fact, it is found to be impossible to declare the former without revealing opinions as to the latter. It is, however, the custom, as it is the constitutional duty, of the most distinguished judges, to avoid, as far as possible, every remark that may bias the jury in their verdict. Thus in cases of libel it is the duty of a judge to define the law of libel to a jury, and to tell them generally what kind of written statements when published amount to a libel; but not to deliver his own opinion on the case (*q*). He may, however, withdraw the case from the jury, if in his opinion

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(*o*) *R.* v. *Whitehead*, 35 L. J., M. C. 187; L. R., 1 C. C. R. 33; 14 W. R. 677. See also *R.* v. *Hill*, 2 Den. 254.

(*p*) See pp. 5, 37, 39, 50 et seq.

(*q*) See Lord Campbell's Life of Lord Kenyon, pp. 51, 52.

the words are not reasonably capable of defamatory meaning (*r*).

It often becomes an important and difficult question whether a point is properly matter for the decision of the judge or for that of the jury. The general rule is more indisputable in theory than it is easy in application. In *R.* v. *The Dean of St. Asaph* (*s*), Lord Mansfield said:—"Where a question can be severed by the form of pleading, the distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the court: where, by the form of pleading, the two questions are blended together and cannot be separated upon the face of the record, there the distinction is preserved by the honesty of the jury. The constitution trusts that, under the direction of a judge, they will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law; they are not sworn to decide the law; they are not required to decide the law. . . . It is the duty of the judge in all cases of general justice to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their consciences." The leading heads of this obscure and unsatisfactory doctrine seem to be the following:—

The question of probable cause is for the judge, and the jury can find only the

(*r*) *Hunt* v. *Goodlake*, 43 L. J., C. P. 54.
(*s*) 21 How. St. Tr. 1039, 1040.

facts, and the inferences from facts, on which the theory of probability is founded.

Thus in an action for false imprisonment the judge is to say whether the facts, as found by the jury, disclose reasonable and probable cause for arresting (*t*); and in an action for malicious prosecution, what circumstances show that the defendant was actuated by malice or not (*u*).

Questions as to what is or is not a reasonable time for the performance of an act, are generally for the decision of the judge.

Thus the judges have exercised the right to decide whether notice of the dishonour of a bill has been given within a reasonable time according to the circumstances of the case (*x*), what are reasonable hours for presenting a bill for payment at a banker's (*y*); for tendering rent (*z*); for delivering goods (*a*). A reasonable notice for a yearly tenant to quit has been decided to mean a notice of six

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(*t*) *Lister* v. *Perryman*, L. R., 4 E. & I. 521; 39 L. J., Ex. 177; 19 W. R. 9; cf. *West* v. *Baxendale*, 9 C. B. 141.

(*u*) *Heslop* v. *Chapman*, 12 Q. B. 928; cf. *Mitchell* v. *Williams*, 11 M. & W. 205.

(*x*) *Stocken* v. *Collin*, 7 M. & W. 515.

(*y*) *Parker* v. *Gordon*, 7 East, 385; *Elford* v. *Teed*, 1 M. & S. 28.

(*z*) *Startup* v. *Macdonald*, 6 M. & G. 593.

(*a*) Ibid.

months (*b*); and in the case of a domestic servant, a calendar month (*c*).

On the other hand:—

Reasonable skill, due diligence, and gross negligence, are questions for a jury.

Whether a surgeon has treated his patient negligently; whether an agent is fitted to perform his duties (*d*); whether a gratuitous bailee has lost his deposit by gross negligence (*e*), are examples of this rule. In *Doorman* v. *Jenkins* (*f*), which was an action to recover money belonging to the plaintiffs which had been lost by the defendant while in his custody as a gratuitous bailee, it was held that it was rightly left by the judge to the jury to say, on the facts, whether the defendant had been guilty of gross negligence; and Taunton, J., said:—"A great deal has been said on the question whether gross negligence is a question of law or fact. Such a question will always depend on circumstances. There may be cases where the question of gross negligence is matter of law more than of fact, and others where it is matter of fact more than of law. An action brought against an attorney for negligence turns upon matter of law rather than fact. It charges the attorney with having undertaken to

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(*b*) *Doe* v. *Spence*, 6 East, 120.
(*c*) *Fawcett* v. *Cash*, 5 B. & Ad. 904.
(*d*) *M'Call* v. *Australian Meat Co.*, 19 W. R. 189.
(*e*) *Doorman* v. *Jenkins*, 2 Ad. & E. 261.
(*f*) Ibid.

perform the business properly; and alleges, that from his failure to do so, such and such injuries resulted to the plaintiff. Now, in nineteen cases out of twenty, unless the court told the jury that the injurious consequences did, *in point of law*, follow from the misconduct of the defendant, they would be utterly unable to form a judgment on the matter. Yet even there the jury have to determine whether in point of fact the defendant has been guilty of that particular misconduct. On the other hand, take the case of an action against a surgeon for negligence in the treatment of his patient. What law can there possibly be in the question whether such and such conduct amounts to negligence? That must be determined entirely by the jury."

Bona fides, actual knowledge, express malice, and real intention, are questions for a jury.

In *Harratt* v. *Wise* (*g*), the action was on a policy of insurance of goods which had been shipped to a blockaded port and there seized. It was found by the jury that notification of the blockade had been published in the *London Gazette*, and that information of it might have reached the captain of the vessel before he arrived at the port. But it was also found that it had not reached him when he arrived there. A verdict was found for the plaintiff, and a rule for a new trial applied for, on the ground that notice in the *Gazette* was notice to all the King's

(*g*) 9 B. & C. 712.

subjects: and that it must be presumed that the captain knew of it. But it was refused; and Lord Tenterden in his judgment observed:—"Knowledge, like other matters, must become a question of fact for the decision of a jury." So in indictments for libel and all felonies it is for the jury to pronounce on the *animus* or malice of the act. But

> In questions whether a communication is privileged, the jury must speak to the *bona fides;* and, if they affirm it, it is a question of law whether the occasion of publication was such as to rebut the inference of malice.

Thus in actions for defamation it is matter of law for the judges to determine whether the occasion of writing or speaking criminatory language, which would be otherwise actionable, repels the inference of malice, and constitutes what is called a privileged communication (*h*); but if there is any evidence of malice it should be left to the jury (*i*).

It may be stated broadly, but subject to limitations, that—

> In all cases where the character of a fact depends on an inference from circumstances, the jury must pronounce on the character and the fact; but where the character of a fact depends on a latent intention, there

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(*h*) *Cook* v. *Wildes*, 5 E. & B. 340, per Lord Campbell, C. J.

(*i*) *Harrison* v. *Bush*, 5 E. & B. 344; *Beatson & Skene*, 5 E. & B. 838.

it is the duty of the jury to find the fact, and of the judge to declare its character and meaning.

Thus in an action for goods sold and delivered, where the plea is infancy, and the replication that the goods are necessaries, the jury will pronounce them to be necessaries or not necessaries according to the condition of the infant. But it has been decided by the Exchequer Chamber, that before they do so the judge must decide, first, whether the case is such as to throw on the plaintiff the *onus* of proving that the articles are necessaries, and, secondly, whether there is any evidence to go to the jury to satisfy that *onus* (*k*). This case was followed by the Judicial Committee of the Privy Council, who have laid down that in every case, before evidence is left to the jury, there is the preliminary question for the judge, not whether there is literally any evidence, but whether there is any evidence upon which a jury can properly find a verdict for the party producing it, upon whom the *onus* of proof is imposed (*l*). So the suppression of evidence, such as a will, by an adverse holder will warrant the jury in inferring that it is consistent with the case of the other party (*m*); and generally where the facts warrant an inference the court will not disturb a verdict (*n*).

(*k*) *Ryder* v. *Wombwell*, L. R., 4 Ex. 42; 38 L. J., Ex. 8; 17 W. R. 167.

(*l*) *Giblin* v. *Macmullen*, L. R., 2 P. C. 317; 38 L. J., P. C. 25; 17 W. R. 445.

(*m*) *Sutton* v. *Devonport*, 27 L. J., C. P. 54.

(*n*) *Gibson* v. *Doeg*, 2 H. & N. 615.

An illustration of the second branch of the general rule is found in the maxim, that—

> The construction of written documents is for the judge; but the construction of peculiar or technical phrases is for the jury.

Thus the judge will instruct the jury as to the meaning of Acts of Parliament, records, deeds, wills, and written contracts generally, even where the evidence is secondary (*o*); and the jury is bound to follow his construction. But it seems that the question whether an article is of a certain description mentioned in an Act of Parliament, is for the jury (*p*). In *Hutchinson* v. *Bowker* (*q*), Parke, B., said:— "The law I take to be this: that it is the duty of the court to construe all written instruments; if there are peculiar expressions used in it which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the *meaning of those expressions* was, but for the court to decide *what the meaning of the contract* was." In that case, it was attempted to prove a contract, for the sale of barley, by letters, one of which offered *good* barley, and the other accepted the offer, "expecting you will give us *fine* barley and good weight:" and the court held that, though the jury might be asked as to the mercantile meaning of the words "*good*"

(*o*) *Berwick* v. *Horsfall*, 4 C. B., N. S. 450.
(*p*) *Brunt* v. *Midland Railway Co.*, 2 H. & C. 889.
(*q*) 5 M. & W. 542.

and "*fine*," yet, after having found a distinction between them, they could not further decide that the parties did not misunderstand each other; but were bound to take the interpretation of the contract as a matter of law from the judge. The rules by which an English court ought to be governed in construing a foreign contract were thus laid down by Lord Cranworth (*r*):—"When a written contract is made in a foreign country and in a foreign language, the court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if it contains any); thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of any peculiar rules of construction (if any such rules exist) by the foreign law. With this assistance the court must interpret the contract itself on ordinary principles of construction." The question whether a writing constitutes a sufficient acknowledgment within the meaning of the Statutes of Limitation is for the judge, unless there is extrinsic evidence affecting the construction, when it is a question for the jury (*s*). In patent cases it is for the judge to construe the specification of a patent (*t*), but for the jury to decide whether or not there has been an infringement of the patent (*u*). In a libel it is for the judge to say whether words in

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(*r*) *De Sora* v. *Phillips*, 10 H. L. Cas. 633.
(*s*) *Routledge* v. *Ramsay*, 6 A. & E. 231.
(*t*) *Bovill* v. *Pim*, 11 Ex. 718.
(*u*) *Delarue* v. *Dickenson*, 7 E. & B. 738.

ordinary use have a defamatory meaning; but for the jury to say whether words of a cant or slang character have acquired such a meaning (*x*), or what meaning and construction would render the publication of the words complained of libellous *per se* (*y*); and the substantial truth of an alleged libel will also be for the jury (*z*), as well as the questions whether the alleged libel goes beyond the limits of fair criticism (*a*), and whether a report of legal proceedings is a fair one (*b*). The court has also directed juries, that the words "as soon as possible," in a contract, mean without unreasonable delay according to the circumstances (*c*); that "forthwith" has a similar meaning (*d*); but the signification of words, according to the custom of particular trades, such as "bales," is for a jury (*e*); and where on a sale of goods the invoice provided that they should be paid for "in from six to eight weeks," this was held to be a phrase for the jury to interpret (*f*). Under this rule also is contained the general principle that whenever facts have to be proved by oral evidence

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(*x*) *Barnett* v. *Allen*, 3 H. & N. 376.

(*y*) *Stannus* v. *Finlay*, Ir. R., 8 C. L. 264.

(*z*) *Alexander* v. *N. E. Railway Co.*, 34 L. J., Q. B. 152; 6 B. & S. 340.

(*a*) *Jenner* v. *A'Beckett*, L. R., 7 Q. B. 11; 41 L. J., Q. B. 14; 20 W. R. 181.

(*b*) *Street* v. *Licensed Victuallers' Society*, 22 W. R. 553.

(*c*) *Attwood* v. *Emery*, 1 C. B., N. S. 110.

(*d*) *Roberts* v. *Brett*, 6 C. B., N. S. 611.

(*e*) *Gorrissen* v. *Perrin*, 2 C. B., N. S. 631.

(*f*) *Ashworth* v. *Retford*, L. R., 9 C. P. 20; 43 L. J., C. P. 57.

or extrinsic circumstances, the jury pronounce the inference; but when the evidence assumes a written form this function belongs to the judge. Thus when the question is whether a contract has been executed as an escrow, or not, if the question depend on facts the jury decides: if on the construction of writings it belongs to the judge (*g*). But when secondary oral evidence of writings is admitted it has been decided that the judge and not the jury construes the evidence, because the issue is substantially one on the construction of a writing (*h*). The court, however, will not consider the question of improper rejection of a document by a judge, unless it clearly appears that it was formally tendered in evidence at the trial (*i*).

This rule does not apply in cases of actionable or indictable tort, where guilt or innocence is to be inferred from the contents and meaning of a writing. Thus, on an indictment for writing a menacing letter, the jury will say whether the language amounts to a menace (*k*). In libel, the question of libel or no libel is entirely for the jury in civil cases, it would appear, as well as in criminal cases, and the judge may only give a general definition of the offence (*l*). But if the jury find against the defendant, the court will

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(*g*) *Furness* v. *Meek*, 27 L. J., Ex. 34.
(*h*) *Berwick* v. *Horsfall*, 4 C. B., N. S. 450.
(*i*) *Campbell* v. *Loader*, 3 H. & C. 520.
(*k*) *R.* v. *Girdwood*, 2 East, P. C. 1120.
(*l*) Sup. p. 13.

arrest the judgment, if the writing, on the face of it, appear not to be libellous (*m*). And if the words complained of appear to be not reasonably capable of a defamatory meaning, the judge is bound to withdraw the case from the jury (*n*).

Finally, it is for the jury to determine the meaning of foreign law and documents, on the testimony of skilled witnesses; but for the court to decide on the competency of such witnesses, the admissibility of documents, and the applicability of the foreign law to the matter in issue (*o*).

The importance of the distinctions between the functions of judge and jury is by no means as great as it was when those distinctions were first established. Then every civil action in the courts of common law, and almost every criminal trial (for summary jurisdiction was in its infancy), was by jury. Now not only has the summary jurisdiction of magistrates, in the exercise of which they sit without a jury, been vastly increased, but in spite of the provisions of the legislature, enabling all county court cases, where the subject-matter in dispute is over £5, to be tried by jury if either party requires it, and all cases under that amount to be so tried if the judge thinks fit, almost all county court cases are tried by a judge sitting alone. But the new

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(*m*) *Hearne* v. *Stowell*, 12 A. & E. 719; *Goldstein* v. *Foss*, 6 B. & C. 154.

(*n*) *Hunt* v. *Goodlake*, 43 L. J., C. P. 54.

(*o*) *R.* v. *Picton*, 30 How. St. Tr. 536—540, 864—870.

rules of court under the Judicature Act trench still more upon the province of trial by jury, by providing for every action which shall be commenced after the act comes into operation five different methods of trial; viz. (1) before a judge or judges; (2) before a judge sitting with assessors; (3) before a judge and jury; (4) before an official or special referee with assessors; (5) before the same without assessors.

CHAPTER III.

ON THE COMPETENCY OF WITNESSES—MATTERS NOT PROVEABLE BY A SINGLE WITNESS—AND THE TESTIMONY OF ACCOMPLICES.

It has already been stated (*a*) that all objections to the competency of witnesses are for the decision of the judge, who will, if there appear to be any doubt on the subject, examine the witness before allowing him to be sworn. This preliminary examination is called the examination on the *voir dire*, i. e., *vrai dire*. Under this head it may be considered to be the general and established principle of evidence, that—

> All persons of sound and adult mind, provided they believe in the religious obligation of an oath, or make a solemn promise and declaration to speak the truth, (including the parties to civil proceedings, but not a prisoner or defendant on a criminal charge), are competent, and, in general, compellable witnesses in every court of justice concerning the matters in issue (*b*).

(*a*) Supra, p. 12.

(*b*) In the Indian Evidence Act it is provided, by sect. 118, that "all persons shall be competent to testify unless the court considers

Under this rule the first consideration will be—

SECT. 1. *The Incompetency from Defect of Understanding in Witnesses.*

Persons who have not the use of reason are, from their infirmity, utterly incapable of giving evidence, and are therefore excluded as incompetent witnesses.

This description of incompetency may be either constitutional or accidental: and in the latter case it may be either temporary or permanent. It may also arise from imperfect development. Hence we have three classes of incompetent witnesses:—

1. *Idiots.*
2. *Lunatics.*
3. *Children.*

1. An idiot is one that hath had no understanding from his nativity, and therefore is by law presumed never likely to attain any; and such a person is incapable of giving evidence. Deaf and dumb

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that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation: A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him, and giving rational answers to them." It is also provided by sect. 119, that "a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written, and the signs made, in open court. Evidence so given shall be deemed to be oral evidence."

persons were formerly regarded as idiots, and therefore incompetent to testify, but the modern doctrine is that if they are of sufficient understanding, and know the nature of an oath, they may give evidence either by signs, or through an interpreter, or in writing (*c*). It has been laid down that "the presumption is always in favour of sanity, and there is no exception to this rule in the case of a deaf and dumb person, but the *onus* of proving the unsoundness of mind of such a person must rest on those who dispute the sanity" (*d*).

2. A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason (*e*).

As long as the suspension of the intelligence continues, the lunatic is an incompetent witness: but there appears to be no doubt that his competency is restored during a lucid interval (*f*). Nor will the disability extend to cases of mere monomania, nor where the hallucination permits the witness to understand the nature of the duty which is expected from him (*g*). But where a person is tendered as a witness who is believed to be suffering from monomania, he must first be examined as to his capacity to give evidence (*h*).

(*c*) 1 Hale, P. C. 34; *Rushton's case*, 1 Leach, C. C. 408; *Morrison* v. *Lennard*, 3 Car. & P. 127.

(*d*) Per Ld. Hatherley, *Harrod* v. *Harrod*, 4 K. & J. 9.

(*e*) 1 Bl. Comm. 304.

(*f*) Com. Dig. Testim. (A. 1); s. v. Tayl. Med. Jur. 783.

(*g*) *R.* v. *Hill*, 2 Den. 254; see also *R.* v. *Whitehead*, L. R., 1 C. C. R. 33; 35 L. J., M. C. 187; 14 W. R. 677.

(*h*) *Spittle* v. *Walton*, 19 W. R. 405.

3. There is no epoch of legal discretion under which an infant is an incompetent witness. The rule by which an infant under seven years of age cannot commit a felony, because the law presumes him conclusively not to have sufficient intelligence for the act, has no analogy in the law of evidence (*i*). Age is immaterial; and the question is entirely one of intelligence, which, whenever a doubt arises, the court will ascertain to its own satisfaction, by examining the infant on his knowledge of the obligation of an oath, and the religious and secular penalties of perjury. Although tender age is no objection to the infant's competency, he cannot, when wholly destitute of religious education, be made competent by being superficially instructed just before a trial, with a view to qualify him (*k*). A judge may, in his discretion, postpone a trial, in order that the witness may be instructed in the nature of an oath, but the inclination of judges is against this practice.

SECT. 2. *On Incompetency from Defect of Religious Principle.*

The principle on this head was, that—

No person is a competent witness unless he believes in a Supreme Being who will punish him, either in the present or a future life, for perjury.

So, too, it was formerly the established principle of English law, that no witnesses were to be believed unless they delivered their evidence on oath. The

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(*i*) Per Patteson, J., *R.* v. *Williams*, 7 C. & P. 320.

(*k*) 1 Leach, 430 n.; *R.* v. *Nicholas*, 2 C. & K. 246.

only exceptions to this rule were statutory, and were granted reluctantly by the Legislature to satisfy the conscientious scruples of Quakers, Moravians, and Separatists; members of which sects were accordingly allowed to give evidence on affirmation instead of oath. This principle was much extended (*l*) by 17 & 18 Vict. c. 125, s. 20, which enacts that—

"If any person, called as a witness, or required to make an affidavit or deposition, shall refuse or be unwilling, from *alleged conscientious* motives, to be sworn, it shall be lawful for the court, or judge (or other presiding officer, or person qualified to take affidavits or depositions), *upon being satisfied* of the *sincerity* of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, viz.:—

"'I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, not lawful: and I do also solemnly and truly affirm and declare,' &c., which solemn declaration shall be of the same force and effect as if such person had taken an oath in the usual form" (*m*).

And by the 89th section of the same act:—

"Any person who shall, upon any examination upon oath or affirmation, or in any affidavit in the

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(*l*) Cf. Indian Code of Civil Procedure (Act viii. of 1854), s. 174, and Ind. Ev. Act, ss. 3, 4.

(*m*) Cf. 20 & 21 Vict. c. 77, s. 27 (Act to Amend the Law of Probate).

proceedings under this act, wilfully and corruptly give false evidence, or wilfully and corruptly swear or affirm anything which shall be false, being convicted thereof, shall be liable to the penalties of wilful and corrupt perjury."

Similar provisions are contained in 24 & 25 Vict. c. 66, ss. 1, 5.

A still further extension of this principle is embodied in the Evidence Further Amendment Act, 1869 (*n*), which provides, that "If any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration:

> 'I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth.'

And any person who having made such promise and declaration shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried and convicted for perjury as if he had taken an oath" (s. 4).

The promise or declaration provided by the 4th section of the Act of 1869 is substantially the same as the solemn affirmation or declaration prescribed by 17 & 18 Vict. c. 125, except that the former does not contain what the latter does—words expressing that the taking of any oath is according to the reli-

(*n*) 32 & 33 Vict. c. 68.

gious belief of the declarant unlawful. It is noticeable that whereas the objection to take the oath must under the old law emanate from the witness, now a witness may either object himself to take the oath or be objected to by the parties to the proceedings as incompetent to take an oath, and the presiding judge must allow the objection in either case if satisfied that an oath would not bind the conscience of the witness.

This act only applied to the examination of witnesses in open court, but it is now enacted by 33 & 34 Vict. c. 49, s. 1, that the words "presiding judge" shall include every person having by law authority to administer an oath for the taking of evidence.

Before the passing of these acts, when a witness, who did not belong to any one of the exempted sects, objected, on alleged conscientious grounds, to be sworn, the judge was bound, notwithstanding, to order an oath to be administered to the witness; and, in the event of continued contumacy, would direct him to be committed. This course was adopted by Wightman, J., at the summer assizes for Devonshire, 1854 (*n*). A lady, who described herself as a member of the society of Plymouth Brethren, refused, from alleged conscientious motives, to be sworn as a witness; and the judge, after commenting severely on the obstructions to public justice that must arise if such scruples were tolerated, committed her to prison during the term of the assizes.

An oath, or an affirmation, or solemn promise and

(*n*) MS.

declaration, when allowed, is regarded as an indispensable condition precedent to the admissibility of a witness, on the Common Law doctrine, that a mere statement of a fact is entitled to no credit. For even the admissibility of affirmations, promises, and declarations, by the existing law rests on principles which are widely different from those of a simple narrative. Virtually, the new law is the same as the old; and the diversity is one of terms rather than of essence. The same basis of religious belief, and the same temporal penalties are, in both cases, the conditions and safeguards of competency and credibility.

The Common Law doctrine on this head is contained in the well-known case of *Omichund* v. *Barker* (*o*). The question there arose on the admissibility in evidence of some depositions which had been made on oath by some Gentoos before a Chancery Commission in the East Indies. It had been thought, up to that time, on the authority of Coke (*p*), that none but Christians were competent witnesses. He had laid it down that "an infidel cannot be a witness;" and it was clear that, under the designation of infidel, he classified all who were not Christians. *Omichund* v. *Barker* exploded and liberalized the previous doctrine. Willes, C. J., undertook to show that Lord Coke's proposition was "without foundation, either in Scripture, reason, or

(*o*) Willes, 538; 1 Sm. L. C. 194.
(*p*) Co. Litt. 6, b.

law;" and gave it as his opinion, which was then regarded as settling the law, that—

"Such infidels who believe in God, and that he will punish them if they swear falsely [in some cases and under some circumstances], may and ought to be admitted as witnesses in this, though a Christian country." And,—"Such infidels, if any such there be, who either do not believe in God, or, if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses under any case or under any circumstances, for the plain reason, because an oath cannot possibly be any tie or obligation upon them" (*q*).

But the effect of the Evidence Further Amendment Act, 1869, is to render the evidence of atheists admissible, subject to observation as to its credibility.

The mode of administering an oath has been regulated by the 1 & 2 Vict. c. 105, which enacts—

"That in all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any Court of Law or Equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been

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(*q*) See *Malden* v. *Catanach*, 7 H. & N. 360; 31 L. J., Ex. 118; 10 W. R. 112.

administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

SECT. 3. *On the Competency of Parties to Civil Proceedings.*

It is no objection to the competency of a witness that he is of infamous character; or that he is a party to the record, or otherwise interested in the result of the issue (*r*).

Formerly, following the principle of the Roman law, a witness might be objected to as being of infamous character, or a party to the record, or otherwise *interested* in the result of the issue. The first inroad on this principle was made by the 6 & 7 Vict. c. 85, usually called Lord Denman's Act. This statute enacts that—

"No person offered as a witness shall hereafter be excluded by reason of incapacity, from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court,

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(*r*) The rule in India is the same. Ind. Ev. Act, s. 120.

or before any judge, jury, sheriff, coroner, magistrate, officer, or party having, by law or consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation, in those cases where affirmation is by law receivable, notwithstanding that such party may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence."

This act includes certain exceptions to the new law, which have ceased to operate.

Lord Denman's Act left actual parties to the record incompetent witnesses. This disability was removed by the 14 & 15 Vict. c. 99 (the Law of Evidence Amendment Act), which enacted that—

(Sect. 2.) "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the *parties* thereto, and the person in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be *competent* and *compellable* to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of

either or any of the parties to the said suit, action, or other proceeding."

But it was by the 4th section of this act provided, that nothing therein contained should apply to proceedings instituted in consequence of adultery, or to actions for breach of promise of marriage. The Divorce Act (*s*), however, provides that, on a petition for a divorce, the petitioner may be examined by order of the court, but is not compellable to answer questions which tend to show that he or she has committed adultery, nor, as was held (*t*), open to cross-examination by the respondent. Respondents and co-respondents were not compellable or competent witnesses under this act (*u*).

Finally came the Law of Evidence Further Amendment Act, 1869 (*x*), which abolished the two exceptions retained by the 14 & 15 Vict. c. 99. After repealing the 4th section of the last-mentioned act, the Act of 1869 renders (sect. 2) the parties to actions for breach of promise of marriage competent witnesses. The uncorroborated testimony of the plaintiff is, however, not to be sufficient proof of a promise to marry to entitle the jury to give a verdict for the plaintiff; his or her testimony must be corroborated by some *material evidence* in support of the alleged promise. The 3rd section of this act renders the parties to proceedings instituted in consequence of adultery, and the husbands and wives of such par-

(*s*) 20 & 21 Vict. c. 85.
(*t*) *Giles* v. *Giles*, 32 L. J., P. M. & A. 209.
(*u*) *Robinson* v. *Lane*, 1 S. & T. 362.
(*x*) 32 & 33 Vict. c. 68.

ties, *competent* witnesses: with the proviso that no witness to any proceeding, whether a party or not, is to be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of such adultery. The great aim of the legislature would seem to have been to enable persons charged with adultery in the Divorce Court to deny the charge on oath. This is effected by making such persons competent witnesses. In the measure, as originally brought into the House of Commons, the parties were to be compellable as well as competent. To this two objections were raised,—1st, that it would induce parties to institute proceedings on very slender grounds in the expectation of being able to elicit something in cross-examination of the respondent or co-respondent to establish their case; 2nd, that an adulteress or adulterer would be very much tempted to commit perjury to screen the partner in guilt. In deference to these objections the above-mentioned proviso was added to the 3rd section.

One question presents itself upon these two sections —are the parties to an action for breach of promise of marriage and to proceedings instituted in consequence of adultery, *compellable* as well as competent witnesses? *Primâ facie* every witness who is competent is also compellable unless some privilege intervenes, and therefore it may be assumed that the proper construction to be placed upon these sections is, that the parties mentioned are compellable as well as competent except when they can claim the

protection of the proviso to section 3. In fact, no doubt would present itself but for the language of section 2 of 14 & 15 Vict. c. 99, which enacts, that the parties to any action (except as thereinafter excepted) shall "be competent and compellable to give evidence." The words "and compellable," however, would seem to be mere surplusage.

The following points have been decided on the construction of this act, so far as it affects proceedings instituted in consequence of adultery. The act does not apply to a petition presented by a husband for payment of money out of court on the ground of his child having been bastardized by his wife's adultery (*y*). If a witness does not claim the protection given by the 3rd section, neither of the parties to the suit can object to the evidence (*z*), and a witness cannot be cross-examined as to any act of adultery not referred to in the examination in chief (*a*).

Any discussion as to the testimony of interested witnesses cannot be more appropriately closed than by quoting the remarks of Lord Justice James when Vice-Chancellor (*b*):—"It has been pressed on me that I cannot decide against the positive oath of the respondent without convicting him of wilful and corrupt perjury. I have had occasion more than once to say that this is not a criminal court, that I

(*y*) *Re Rideout's Trusts*, L. R., 10 Eq. 43; 39 L. J., Ch. 192.

(*z*) *Hebblethwaite* v. *Hebblethwaite*, L. R., 2 P. & D. 29; 39 L. J., P. & M. 15.

(*a*) *Babbage* v. *Babbage*, L. R., 2 P. & D. 222.

(*b*) *Pike* v. *Nicholas*, 17 W. R. 845; 38 L. J., Ch. 529.

am trying no one for any crime. I am here bound by my own judicial oath to well and truly try the issue joined between the parties, and a true verdict give accordingly to the evidence, that is to say, according as I, weighing all the evidence by all the lights I can get, and as best as I may, find the testimony credible or incredible, trustworthy or the reverse. The law which admitted the testimony of the parties and of interested persons was passed in full reliance on the judges and on juries that they would carefully scrutinize such testimony and give it such weight as it deserved, and no more, or no weight at all."

SECT. 4. *On the Incompetency of Parties to Criminal Proceedings.*

The 14 & 15 Vict. c. 99, s. 3, enacts that—

"Nothing herein contained shall render

Any person who in any criminal proceeding is charged with the commission of any indictable offence:—or

Any offence punishable on summary conviction:—competent or compellable to give evidence for or against himself or herself;—or

Shall render any person compellable to answer any question tending to criminate himself or herself;—or

Shall in any *criminal* proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

It has long been held that a prosecutor, in a criminal proceeding, is a competent witness against a prisoner; and, although there were formerly exceptions to the rule, they have all been removed by Lord Denman's Act, and other statutes (*c*).

Lord Denman's Act (*d*), by rendering all persons competent as witnesses notwithstanding they may have an interest in the matter in question, or the event of the trial, has removed all doubt as to the admissibility of informers and accomplices as witnesses. All such persons are competent witnesses; but the objections to their credibility remain as before (*e*).

We have now to consider the effect of the early part of the 3rd section of the 14 & 15 Vict. c. 99.

At Common Law, a defendant in a criminal charge, so far from being bound or competent to give evidence against himself, was never bound even to answer the questions put to him upon his examination before a magistrate. The statute confirms this state of the law; but the words of the act must be understood with some limitations. It will be observed that they are, that—"Nothing herein contained shall render any person who in any criminal proceeding is charged, &c. . . . *competent* or compellable to give evidence *for* or *against* himself."

It might be inferred from this clause that a defendant in a criminal proceeding cannot, in any case, be convicted on his own evidence. But this is not

(*c*) *R.* v. *Boston*, 4 East, 581.
(*d*) 6 & 7 Vict. c. 85.
(*e*) Vide p. 35.

the construction which has been put on this part of the act, although it might perhaps be contended that, according to the letter, the Common Law principle that no man is *bound* to criminate or betray himself (*nemo tenetur seipsum prodere*) is enlarged to the extent of an absolute and universal prohibition. The point, as far as we are aware, has never yet been raised; but the practice remains as before the act; and prisoners are daily, not merely suffered to plead guilty on arraignment, and so become convicted in the eye of the law on their own evidence, but their statements before magistrates, after the statutory caution of the 11 & 12 Vict. c. 42, s. 18, and their subsequent confessions, are always received as evidence on which alone a jury may convict. Although in all indictable crimes, or offences punishable on summary conviction, the prisoner or defendant cannot be compelled, nor is he even competent, to give oral evidence on oath for or against himself, still he has the right of stating his case before the committing magistrate, or to a jury.

By the Conspiracy and Protection of Property Act, 1875 (*e*), sect. 9, the respective parties to the contract of service (and their husbands and wives) are competent witnesses in proceedings under the act; and by the Merchant Shipping Act, 1871 (*f*), sect. 11, any person charged with the misdemeanor of sending a ship to sea in an unseaworthy state so as to endanger life, is empowered, in self-defence, to

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(*e*) 38 & 39 Vict.

(*f*) 34 & 35 Vict. c. 110.

give evidence in the same manner as any other witness. Finally, by the Licensing Act, 1872 (*g*), sect. 51, it is provided, that in all cases of summary proceedings under the act the defendant and his wife shall be competent to give evidence.

Several questions have arisen as to what is a criminal proceeding, and what is a civil proceeding. In *The Attorney-General* v. *Radloff* (*h*), which was an information for penalties under the Smuggling Act, 8 & 9 Vict. c. 87, the defendant offered himself as a witness, and the court was divided as to his competency.

It was held by Pollock, C. B., and Parke, B., that he was not a competent witness, because it was a criminal proceeding punishable on summary conviction; but Platt, B., and Martin, B., held it to be not of a criminal nature, and that the defendant was a competent witness. The view of Platt, B., appears to contain the true solution of all such difficulties:— "What is a civil proceeding as contradistinguished from a criminal proceeding? It strikes me that the true test is to see if the subject-matter be of a personal character; that is, if the proceeding relates to goods or property which it is sought to recover by legal proceedings, that is a *civil* proceeding; but if it is one which may at once affect the defendant personally by the imprisonment of his body in the event of a verdict of guilty being pronounced against him as a public offender, that is what I consider a

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(*g*) 35 & 36 Vict. c. 94.
(*h*) 10 Ex. 84.

criminal proceeding. . . . Now, although informations of this kind by the Attorney-General may by some be considered criminal proceedings, I rather deem them in the nature of civil proceedings, and like the old actions to recover penalties under the Game Laws, which we all remember were civil proceedings. . . . Here the object is to recover money —to recover that which, by the law, is made a debt." The Crown Suits Act, 1865 (*i*), sect. 34, has removed all doubt as to proceedings on the revenue side of the Court of Exchequer by making the 14 & 15 Vict. c. 99, ss. 2, 3, and the 16 & 17 Vict. c. 83, applicable to such proceedings, which, for the purposes of these enactments, are not to be deemed criminal proceedings. Similar doubts have been raised in bastardy cases as to the competency of the putative father to be sworn as a witness on his own behalf; but Erle, J., has held him to be competent, on the ground that the proceedings on an affiliation order are of a civil, and not of a criminal, nature (*k*). This view is confirmed by the language of Lord Campbell, C. J., in another case (*l*), which was a proceeding against the defendant for a breach of the Game Laws, viz., for using snares for game without having a certificate. The information was under 1 & 2 Will. 4, c. 32, by which, on conviction, the defendant is liable to a fine, and in default of payment to be imprisoned and *kept to hard labour.*

(*i*) 28 & 29 Vict. c. 104.
(*k*) *Ex parte Crowley*, 24 L. T. 244.
(*l*) *Cattell* v. *Ireson*, E. B. & E. 91.

The judges held unanimously that the defendant was not a competent witness in such a proceeding; and they relied, as it seems, chiefly on the fact that the prisoner was liable to hard labour in default of payment of the fine, to show that the proceeding was of a criminal, and not of a civil, character. It is also plain that the inclination of the court in this case was, to hold all proceedings to be of a criminal nature, when the judgment assumes the form of a fine, which may be enforced by imprisonment. The test, according to Lord Campbell, in such cases seems to be to consider whether it is sought to recover a sum of money in the nature of a debt from a person, as in bastardy cases; or to inflict punishment of an exemplary and public nature. In the former case the defendant is competent; in the latter he is incompetent, as a witness.

The above case was followed in *Parker* v. *Greene* (*m*), on a charge against the keeper of a licensed house, under 9 Geo. 4, c. 61, s. 21, for knowingly permitting notoriously bad characters to assemble in his house, although the statute only imposed imprisonment in default of payment of the fine and of sufficient distress, and gave no power to inflict hard labour; Crompton, J., saying that wherever there is power to punish in proportion to the offence, the proceeding is a criminal one, even though there be no power to imprison. The same view has been taken by the Irish Court of Criminal Appeal; for where a man had been charged before

(*m*) 2 B. & S. 299.

magistrates with keeping a dog without a licence, and had been called as a witness, and had sworn falsely as to the dog's age, the court quashed the conviction for perjury on the ground that he was not a competent witness, since as the statute under which he had been summoned imposed a maximum, and not a specific fine, the offence was against the public, and the proceeding a criminal one (*n*). In a suit under the Church Discipline Act (*o*), against a clergyman for immorality, Sir R. Phillimore held that the defendant was both competent and compellable to give evidence, the Ordinary, and not the Crown, being the prosecutor (*p*).

Sect. 5. *On the Incompetency of Husbands and Wives as Witnesses for or against each other.*

The concluding words of the 3rd section of the 14 & 15 Vict. c. 99, declare that nothing contained in the act—

> "Shall in any *criminal* proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

The first question which arose on the construction of this clause was as to the competency and compellability of husbands and wives to give evidence for

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(*n*) *R.* v. *Sullivan*, Ir. R., 8 C. L. 404.
(*o*) 3 & 4 Vict. c. 86.
(*p*) *Bishop of Norwich* v. *Pearse*, L. R., 2 A. & E. 281.

or against each other in civil proceedings. It was held in two cases, that they were severally incompetent (*q*); but it appeared that it was the intention of the Legislature to make them competent. And now, by the 16 & 17 Vict. c. 83, husbands and wives are rendered competent and compellable, in all *civil* cases, to give evidence "on behalf of any or either of the parties to the said suit, action or proceeding." But neither husband nor wife is compellable to disclose any *communication* whatsoever made to him or her by the other during marriage (*r*). These provisions were, by the act, not to apply in criminal cases, or in proceedings instituted in consequence of adultery; but now, as stated above, the Evidence Further Amendment Act, 1869, has made the husbands and wives of parties to proceedings instituted in consequence of adultery competent witnesses (*s*).

Previously to the 14 & 15 Vict. c. 99, husbands and wives had been rendered competent and compellable to give evidence for and against each other in the County Courts, under the 9 & 10 Vict. c. 95, s. 83. The only exception, therefore, to the existing rule of their competency are to be sought only in criminal cases. In criminal cases the general rule has always been that husbands and wives are not competent to give evidence for or against each

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(*q*) *Barbat* v. *Allen*, 7 Ex. 609; *Stapleton* v. *Crofts*, 18 Q. B. 367.

(*r*) After the death of either husband or wife the privilege enures for the benefit of the survivor; see *O'Connor* v. *Marjoribanks*, 4 M. & G. 435.

(*s*) Vide supra, p. 38.

other (*t*), and this rule prevents such witnesses from being examined either as to circumstances that happened before marriage, or as to the fact of marriage. Nor can a wife or husband be a witness for or against any person who is indicted jointly with the husband or wife (*u*); nor, on an indictment for a conspiracy, can the wife of one of the conspirators give evidence in favour of the others; because their acquittal must enure to the benefit of the husband (*x*). However, as stated above, by the Conspiracy and Protection of Property Act, 1875, the husbands and wives of the respective parties to the contract of service are competent witnesses in proceedings under that act; and by the 31st section of the Licensing Act, the defendant, in a proceeding under that act (as well as his wife), is a competent witness. Where a prisoner was indicted in one count for obtaining money from a savings bank by falsely pretending that a document had been filled up by the husband of T., and in another count for conspiring with T. to defraud the savings bank, it was held that T.'s husband could give evidence on the first count to prove that he gave no authority to fill up the document (*y*). In high treason it has been doubted whether a wife may not be made a witness against

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(*t*) Co. Litt. 6, b.

(*u*) *R.* v. *Thompson*, L. R., 1 C. C. R. 377; 41 L. J., M. C. 112; 20 W. R. 728.

(*x*) *R.* v. *Locker*, 5 Esp. 107.

(*y*) *R.* v. *Halliday*, 1 Bell, 257.

her husband (*z*). And in all cases where the husband is charged with a personal injury to the wife, or the wife with a personal injury to her husband, the injured party is a competent witness against the other (*a*). The dying declarations of a wife who has been murdered by her husband, if not otherwise inadmissible, are evidence against him (*b*). On an information under 5 Geo. 4, c. 83, s. 3, against a man for neglecting to maintain his wife, and causing her to become chargeable to the parish, she is not a competent witness against him, for the offence is against the parish, not against her (*c*).

In India husbands and wives are competent witnesses for or against each other in criminal as well as in civil cases (*d*), with a similar privilege in the case of communications during marriage to that of the English law (*e*). In the event of any further legislation on the subject it would appear desirable to assimilate the English to the Indian law in this respect (*f*).

It has also been held that, *propter bonos mores*, neither husband nor wife is competent to prove non-access, in order to bastardize the issue.

In an action against a husband for necessaries

(*z*) *R.* v. *Griggs*, T. Raym. 2.

(*a*) *R.* v. *Audley*, 1 St. Tr. 393; *R.* v. *Ayze*, 1 Str. 635.

(*b*) *R.* v. *John*, 1 East, P. C. 357.

(*c*) *Reeve* v. *Wood*, 5 B. & S. 364.

(*d*) Indian Evidence Act, s. 120.

(*e*) Sect. 122.

(*f*) For a good illustration of the anomalous working of the present rule, see Stephen on the Criminal Law of England, p. 286.

supplied to his wife when living apart from her, the defence being the wife's adultery, she is admissible to prove the same (*g*); though such evidence would be, of course, open to suspicion.

SECT. 6. *On Matters not proveable by a single Witness.*

As a general rule the testimony of a single witness, or any documentary evidence, however slight, provided it be admissible, is sufficient evidence to establish any fact (*h*), but it does not follow that it is satisfactory evidence for that purpose. Sufficient evidence, it may be observed, is the minimum which will satisfy the requirements of the law; satisfactory evidence is that which satisfies or convinces the court on any given point.

It should be observed, that where an act of parliament enacts what shall be "sufficient" evidence of any fact, the question arises whether sufficient means *primâ facie* or conclusive evidence. This was discussed by Sir G. Jessel, M. R., in the *Ystalyfera Iron Company* v. *Neath and Brecon Railway Company* (*i*). He expressed an opinion that no general rule could be laid down, but held that in the statutory enactment affecting that case (the 16th and 17th sections of the Lands Clauses

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(*g*) *Cooper* v. *Lloyd*, 6 C. B., N. S. 519.

(*h*) In India no particular number of witnesses are required to prove any fact. Ind. Ev. Act, s. 134.

(*i*) L. R., 17 Eq. 150; 43 L. J., Ch. 476; 22 W. R. 149.

Act), sufficient means conclusive evidence, except in the event of fraud being proved.

By the last-stated general rule a jury are quite justified if they think proper in finding a verdict on the uncorroborated statements of a single witness, as that would be sufficient evidence. But where there is but one witness, if he gives his testimony in an unsatisfactory way, or, *à fortiori*, if he is manifestly unworthy of credit, his evidence will not satisfy the jury, and they will not found a verdict upon it. Even where the only evidence consists of the directly opposite statements of adverse witnesses the jury may believe which they like (*k*).

To the above-stated general rule there are several exceptions :—*First.* In charges of treason no person can be convicted but upon the oaths and testimony of two lawful witnesses, either both to the same overt act or one to one, and the other to another, overt act of the same treason, unless the accused shall willingly and without violence in open court confess the same ; and if two or more distinct treasons of divers heads or kinds shall be alleged in one indictment, one witness produced to prove one of these treasons, and another another, shall not be deemed to be two witnesses to the same treason (*l*). *Secondly.* In order to convict a defendant of perjury it is necessary that there should be more than one witness to prove the falsehood ; "for this reason, that if there be the oath of one person only against

(*k*) Vide supra, p. 5.
(*l*) 7 Will. 3, c. 3, ss. 2, 4.

that of the defendant, it may be considered doubtful which of the two is true; but it is never necessary that there should be two independent witnesses to contradict the defendant on any one particular point, and it is sufficient that there should be two pieces of evidence, proved by separate witnesses, in direct contradiction to the statement of the accused on which the perjury is alleged" (*m*). It was formerly considered that to prove a charge of perjury there must be at least two witnesses, but it is now deemed sufficient if there is some other evidence *strongly* corroborating a single witness. Thus, a letter written by the defendant contradicting his statement upon oath has been held to render it unnecessary to call a second witness (*n*). The prosecution must turn the scale by corroborating the witness, but the degree of corroboration which is necessary is not definable (*o*). *Thirdly.* In cases of bastardy, also, an affiliation order on a putative father cannot be made on the uncorroborated statement of the mother; and the order will be bad unless it states that it was made on evidence corroborating the mother's statement in *some material particular* (*p*). *Fourthly.* The evidence of a plaintiff in an action for breach of promise of marriage does not entitle him or her to a verdict unless corroborated by some other material

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(*m*) Per Wightman, J., *R.* v. *Hook*, D. & B. 607.

(*n*) Per Lord Denman, *R.* v. *Mayhew*, 6 Car. & P. 315.

(*o*) Per Erle, C. J., *R.* v. *Shaw*, L. & C. 590.

(*p*) 7 & 8 Vict. c. 101; 8 & 9 Vict. c. 10; *R.* v. *Buckinghamshire*, 3 Q. B. 800; *R.* v. *Berry*, Bell, 95.

evidence in support of such promise (*q*). The conduct and letters of the defendant may afford the necessary corroborative evidence. It may also be observed that the corroborative evidence must be in support of the promise, and it will not be sufficient to corroborate the testimony of the plaintiff on other points, if it is uncorroborated in respect to the alleged promise. But it has been held, that the corroborative evidence may relate to matters anterior to the date of the alleged promise (*r*). In divorce cases a decree will not be pronounced upon the uncorroborated evidence of a woman of loose character (*s*). *Fifthly.* In Courts of Equity, where the defendant (replication having been filed) "positively, clearly, and precisely" denies by his answer any matter alleged on the bill, the denial must be countervailed by sufficient evidence of two witnesses, or of one witness and of circumstances, which is as good as two witnesses: otherwise the court will make no decree against the defendant (*t*). The alterations of practice have, however, rendered this rule less applicable than formerly (*u*). *Sixthly.* In Equity the evidence of a witness uncorroborated as against a party deceased will not be acted upon (*x*). Thus

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(*q*) 32 & 33 Vict. c. 68, s. 2.

(*r*) *Wilcox* v. *Gotfrey*, 26 L. T., N. S. 328, 481.

(*s*) *Ginger* v. *Ginger*, L. R., 1 P. & D. 37; 35 L. J., P. & M. 9.

(*t*) Per Kindersley, V.-C., *Williams* v. *Williams*, 12 W. R. 663; cf. *Holdernesse* v. *Rankin*, 2 De G., F. & J. 272.

(*u*) Per Lord Justice Turner, *Holdernesse* v. *Rankin*, ubi supra.

(*x*) *Hope* v. *Cloncurry*, Ir. R., 8 Eq. 555.

a pecuniary demand against the estate of a deceased person will not be considered as established by the oath of the person making such claim unsupported by any other evidence (*y*). Of this evidence it has been remarked (*z*): "even if legally admissible for any purpose the interests of mankind imperatively require that unless corroborated it should be wholly disregarded. Nobody would be safe in respect of his pecuniary transactions if legal documents found in his possession at the time of his death, and endeavoured to be enforced by his executors, could be set aside, or varied, or altered, by the parol evidence of the person who had bound himself."

Seventhly, there is the well-known rule that—

A prisoner ought not to be convicted upon the evidence of any number of accomplices, if unconfirmed or uncorroborated by other testimony (*a*).

The reasonableness of this rule is obvious from the suspiciousness which is inseparable from this kind of evidence. The Legislature has held that this quality is not sufficient of itself to justify them in excluding such evidence from a jury; or in laying down any principle by which it shall be denied all the elements of credibility. It may be tendered

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(*y*) *Poole* v. *Foxwell*, 13 W. R. 199; cf. *Morley* v. *Finney*, 18 W. R. 490; *Browne* v. *Collins*, 21 W. R. 222.

(*z*) Per James, L. J., *Hill* v. *Wilson*, L. R., 8 Ch. 900; 42 L. J., Ch. 817.

(*a*) *R.* v. *Noakes*, 5 C. & P. 236.

from motives of conscientious penitence; but ordinary experience, and knowledge of human nature, must convince every one that it is still more likely to be tendered from motives of interested treachery or revenge; and in every such case the amount of credibility sinks to a minimum. When the purity and solemnity of an oath have been tarnished by the mere contingency of such influences, they cannot be restored to their primal sanctity by any quantity of direct personal asseveration. Such evidence must always come before a jury, exposed to and attenuated by irresistible sentiments of distrust.

It is therefore held that the evidence of accomplices ought not merely to be corroborated, and that in the absence of corroboration a prisoner ought to be acquitted, but that the corroboration of an accomplice's evidence ought to go to the *identity* of the prisoner: *i. e.*, it should satisfy a jury that the prisoner is *the person* who committed the crime with which he is charged by the accomplice. This doctrine is illustrated by the case of *R.* v. *Foster* (*b*), where the prisoner was indicted for night-poaching; and the only evidence was that of an accomplice who swore to the fact of the prisoner being one of a party; but the only confirmation of the statement was, that on the same evening the witness and the prisoner had been seen drinking together at a public-house which was within one hundred and fifty yards of the prisoner's house, and four miles from the preserve. It was also proved that the prisoner frequented the

(*b*) 8 C. & P. 107.

house; and that he and the accomplice left the house together when the house was closed. Upon the opening of the case Lord Abinger, C. B., said:—"I am clearly and decidedly of opinion, and always have been, that there must be a corroboration as to the particular prisoner." . . . And in summing up the same learned judge said:—"I am strongly inclined to think that you will not consider the corroboration in this case sufficient. No one can hear the case without entertaining a suspicion of the prisoner's guilt, but the rules of law must be applied to all men alike. It is a practice, which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material circumstance. Now, in my opinion, the corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime will always be able to relate the facts of the case; and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house and put a knife to your throat and steal your property, it would be no corroboration that he had stated all the facts correctly: that he had described how the person did put the knife to the throat and did steal the property: *it would not at all tend to show that the person accused participated in it.* Here you find that the prisoner and the accomplice are seen together at the public-house. If they were found together under circumstances

that were extraordinary, and where the prisoner was not likely to be unless there were concert, it might be something. But he lives within one hundred and fifty yards, and there is nothing extraordinary in his being there: and he left when they were shutting up the house. It is perfectly natural that he should have been there and have left when he did. *The single circumstance is, that the prisoner was seen in a house which he frequents, where he may be seen once or twice a week: there the case ends against him; all the rest depends on the evidence of the accomplice.* The danger is that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others. I would suggest to you that the circumstances are too slight to justify you in acting on this evidence." The prisoner was acquitted.

It is still, however, *competent* to a jury to convict on the uncorroborated evidence of an accomplice (*c*). And it is only a rule of practice, and not of law, for a judge to tell a jury that they ought not to convict on the uncorroborated evidence of an accomplice (*d*). In *R.* v. *Jones* (*e*), Lord Ellenborough

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(*c*) *R.* v. *Hastings*, 7 C. & P. 152. The Ind. Ev. Act provides (sect. 133) that "an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." But among the miscellaneous presumptions contained in the illustrations to sect. 114 is this—"the court may presume that an accomplice is unworthy of credit unless corroborated in material particulars."

(*d*) *R.* v. *Stubbs*, Dears. 555.

(*e*) 2 Camp. 133.

said:—"No one can seriously doubt that a conviction is strictly legal, though it proceed upon the evidence of an accomplice only. Judges, in their discretion, will advise a jury not to believe an accomplice, unless he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts to which he deposes. It is allowed that he is a competent witness; and the consequence is inevitable, that *if* credit is given to his evidence, it requires no confirmation from another witness." He referred also to a case where *four* men were convicted on evidence of an accomplice who was confirmed only as to his evidence against *three* of the prisoners.

On an indictment for receiving stolen goods the principal thief is a competent witness (*f*). And where several are indicted, the prosecutor may, by leave of the court, take a verdict of acquittal as to one or more, and call them as witnesses against the remaining prisoners (*g*). It appears also that an accomplice, who is himself charged on a separate indictment, is a competent witness for a prisoner (*h*); and a prisoner, who has pleaded guilty, may be called, before sentence, for or against his co-defendants (*i*). So where the evidence against one of several prisoners is slight, the judge will direct an acquittal in order to enable the others to call him

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(*f*) *R.* v. *Patram*, 2 East, P. C. 782.
(*g*) *R.* v. *Owen*, 9 C. & P. 83.
(*h*) 2 Hale, P. C. 280.
(*i*) *R.* v. *George*, Car. & M. 111; *R.* v. *Hincks*, 1 Den. 84.

as a witness (*k*); and it seems that this may be done without taking a verdict against the prisoner who is called as a witness (*l*); though it would, as a general rule, be judicious, where the accomplice is indicted with the prisoner, to dispose of the indictment by acquitting or convicting the prisoner, before he is called as a witness, so that the temptation to strain the truth should be as slight as possible (*m*). Although the contrary was once held, it has now been decided by the full Court of Criminal Appeal that, if prisoners are indicted and tried together, neither is a competent witness for the other (*n*).

(*k*) Wels. Cr. Pr. 217.

(*l*) *Windsor* v. *Reg.*, 6 B. & S. 143; 7 B. & S. 360.

(*m*) Per Blackburn, J., 6 B. & S. 186.

(*n*) *R.* v. *Payne*, L. R., 1 C. C. R. 349; 41 L. J., M. C. 65; 20 W. R. 390.

CHAPTER IV.

ON THE RULE THAT THE BEST EVIDENCE MUST BE GIVEN; ON PRIMARY AND SECONDARY EVIDENCE.

It is an inflexible rule that—

The best evidence must be given.

This rule may also be stated thus:—

The law requires that evidence which is the best attainable of its class.

The true meaning of this rule is that no such evidence shall be brought, as *ex naturâ rei* supposes still greater evidence behind in the parties' own possession or power (*a*). The rule is founded on the presumption that if inferior evidence is offered, when evidence of a better and more original nature is attainable, the substitution of the former for the latter arises either from fraud, or from gross negligence, which is tantamount to fraud. Thus, if a copy of a deed or will be tendered, while the originals exist and are producible, it is reasonable to assume that the person who might have produced the original, but who omits to produce it, has some private and interested motive for tendering a copy

(*a*) Gilbert on Evidence, p. 5.

in its place. Here the deed or will itself is the *best* and *primary* evidence. The copy is *secondary*, and however indisputably it may be authenticated, it is inadmissible in evidence as long as the original can be produced, unless its production is dispensed with.

It is sometimes difficult to determine what is primary and what is secondary evidence; and where both oral and written proofs of a fact are producible, the character of the fact must be investigated in order to ascertain which species of evidence is the best. The questions to be asked for this purpose are, which species is most original in its nature, and which is most likely to convey accurate information as to the matter in dispute. According to its proximity to or remoteness from the highest sources of moral certainty, evidence will be either primary or secondary.

Thus, it is a rule that when a contract has been reduced to writing, the writing, as long as it exists, is the best and only evidence of the terms of the contract. Oral evidence is admissible to explain but not to contradict it. But if the writing be destroyed; or if it cannot be found after diligent search; or if an adverse party, in whose hands it is, refuses to produce it, after having received due notice; then it is considered fair and reasonable, that any competent witness who is acquainted with the terms of the contract should be allowed to give oral evidence of it, or that a copy of it should be produced.

So, too, if a prisoner has been committed for trial on the oral depositions of witnesses, it would be manifestly unfair to admit their depositions, even

when reduced to writing and certified by the committing magistrate, to be given in evidence against the prisoner, as long as the original witnesses can be produced before a jury, confronted with the prisoner, and subjected to the cross-examination of the latter, or his counsel. Therefore such depositions are secondary evidence which is admissible only in certain cases where the original deponents cannot be produced. This subject will be more fully discussed in a later chapter.

But there may be distinct sources of evidence, one of which may be oral, and another contained in writing. In such a case both will be primary, and therefore either will be admissible. Thus, a written receipt is *primâ facie* evidence of payment; but it is not the only evidence, because a written acknowledgment by a creditor that he has been paid, is not necessarily better evidence than the oral evidence of a debtor who swears that he has paid the money. Accordingly the payment may be proved either by producing the creditor's receipt and proving his signature, or by the oral deposition of the debtor.

In *R.* v. *Kingston-upon-Hull* (*b*), to prove a subsequent settlement, the pauper was asked whether he had not occupied and paid rent for a tenement. The opposite counsel interposed, and asked if he had held under a written contract. It appeared that he had, and it was then submitted that the writing must be produced, and that the original question could not be answered. But the court held

(*b*) 7 B. & C. 611.

that it might. Bayley, J., said:—"The general rule is, that the contents of a written instrument cannot be proved without producing it. But although there may be a written instrument between a landlord and tenant, defining the terms of the tenancy, the fact of tenancy may be proved by parol without proving the terms of it." And Littledale, J.:—"Payment of rent as rent is evidence of tenancy, and may be proved without producing the written instrument" (*c*).

But this class of exceptions to the general rule can be maintained only where the fact, of which oral evidence is admitted, is something extrinsic and collateral to the written contract (*d*). If it be in any degree of the essence and substance of the contract, then the writing must be produced; *e. g.*, in a question of title (*e*), or where the terms of the tenancy are material (*f*). But the fact of the existence of a writing or of its execution may be proved without producing the writing; but not any of its contents (*g*). So in the case of *Yorke* v. *Smith* (*h*), where a bill of sale was inadmissible for want of a stamp, it was held that oral evidence of the fact that there had been a sale was wrongly admitted. But if a contract be established by oral evidence, it is for the adverse party to prove that it was in writing.

(*c*) See also *Twyman* v. *Knowles*, 13 C. B. 222.
(*d*) *R.* v. *Castle Morton*, 3 B. & Ald. 590.
(*e*) *Cotterill* v. *Hobby*, 4 B. & C. 465.
(*f*) *R.* v. *Merthyr Tydvil*, 1 B. & Ad. 31.
(*g*) *Darby* v. *Ouseley*, 1 H. & N. 1.
(*h*) 21 L. J., Q. B. 53.

In *R.* v. *Rawdon* (*i*), Bayley, J., said:—"There can be no doubt that a party may, by keeping out of view a written instrument, make out by parol testimony a *primâ facie* case of tenancy, and that it then lies on the opposite party to rebut the *primâ facie* case so made out."

In an action to recover a written document oral evidence of its contents may be given, without previous notice to produce it (*k*). But where a prisoner was indicted for arson with intent to defraud a fire office, it was held that secondary evidence of the policy was inadmissible, as due notice had not been given to produce it (*l*).

The subject of Secondary Evidence in the case of documents will be further investigated in a later portion of this work (*m*).

When it is necessary to prove the handwriting of a document in any case, civil or criminal, the best evidence is that of the person who wrote or signed.

As fraud is the foundation of the rule by which the best evidence is required; secondary evidence is received whenever its substitution for primary evidence does not create a reasonable presumption of fraud. Thus it seems that the substance of old records may be proved by a witness who has examined them (*n*). Inscriptions on tombstones,

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(*i*) 8 B. & C. 710.

(*k*) *Jolly* v. *Taylor*, 1 Camp. 143.

(*l*) *R.* v. *Kitson*, Dears. 187; cf. *R.* v. *Elworthy*, L. R., 1 C. C. R. 103; 37 L. J., M. C. 3; 16 W. R. 287.

(*m*) Vide Part II. Ch. I. & IV.

(*n*) *Rowe* v. *Brenton*, 8 B. & C. 737.

escutcheons, and walls, may be proved by witnesses and examined copies. But Dugdale's Monasticon Anglicanum was rejected as evidence to show that the Abbey de Sentibus was an inferior abbey, because the original records were producible (*o*).

It is held that the rule relates not to the measure and *quantity* of evidence, but to the *quality*. It is not necessary to give the fullest proof of which a fact may admit. Thus, in the cases where there are several attesting witnesses, it is sufficient to call one only where one only is required by law to the validity of the instrument; or, in the event of the death of all the witnesses, it is sufficient to prove the handwriting of any one; and if attestation is not made necessary to the validity of the instrument by statute or otherwise the witness need not be called (*p*). So, too, there are no degrees in secondary evidence. The oral testimony of a witness is as sufficient secondary evidence of the contents of a written instrument as a copy of such instrument would be, although the latter may be more satisfactory.

(*o*) Salk. 281.

(*p*) 17 & 18 Vict. c. 125, s. 26; 28 & 29 Vict. c. 18, s. 7.

CHAPTER V.

ON PRESUMPTIVE EVIDENCE.

EVIDENCE is said to be Presumptive, or Circumstantial, or Inferential, as distinguished from Direct, when an inference as to a disputed fact is drawn from the proof or assumption of a collateral fact.

There is a considerable difference between Direct and Presumptive Evidence, in the case of oral testimony. In the former we credit the language of the senses as translated through the judgment of the witness, and certified by his solemn asseveration. The question then for decision is not one of inference, but of credibility. It is true that the credibility of the witness is itself a matter of inference, which must be gathered from his demeanour and surrounding circumstances. But when we are satisfied as to his veracity and judgment, the adoption of his statements follows as an included consequence. It is different in Presumptive Evidence. The same question of credibility occurs at the outset; and the judge or jury has to decide a similar and preliminary inquiry into the veracity and accuracy of the witness. But this is only a first and easy stage of reasoning. When the reality of the collateral fact has been established, it is then that the

judgment has to trace its relation to the matter in issue. It must not disdain to weigh remote analogies, distant affinities, nor even improbable possibilities. On the other hand, it must avoid scrupulously the tendency to over-refinement, which vitiates many subtle and imaginative minds. Only knowledge of the world, and an extensive experience of human nature, can enable men to determine, and that only in their own minds, what is the distinction between that proximate or recondite circumstance, which suggests irresistibly the truth or falsehood of a proposition, and that irrelevant, obscure and suspicious form of hypothesis, which checks us as irresistibly in making it the basis of affirmation or negation (*a*).

In *R.* v. *Burdett* (*b*), Abbott, C. J., said:—"A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of reasoning: and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given: the man who is charged with theft is rarely seen to break the house or take the goods; and in cases of murder, it

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(*a*) See this subject fully discussed in Bentham's Rationale of Judicial Evidence.

(*b*) 4 B. & Ald. 161.

rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction; if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily."

In the same case his Lordship recognized a principle which, although laid down by Lord Hale (*c*), and correct to a large extent, does not appear, according to other cases, to be true universally. The rule is—*Never to convict where the corpus delicti (the substantial crime or act of guilt) is not established.*

In *Evans* v. *Evans* (*d*), Lord Stowell said:—"It has been asked, and very properly asked, Do not courts of justice admit presumptive proof? Do you

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(*c*) 2 Hale's Pleas of the Crown, 290.
(*d*) 1 Hagg. Cons. Rep. 105.

expect ocular proof in all cases? I take the rule to be this:—If you have a criminal fact ascertained, you may then take presumptive proof to show who did it: to fix the criminal, having then an actual *corpus delicti*. . . . But to take presumption in order to swell an equivocal fact—a fact that is absolutely ambiguous in its own nature, into a criminal fact—is a mode of proceeding of a very different nature, and would, I take it, be an entire misapplication of the doctrine of presumption." But the same learned judge, in a later case (*e*), stated the evidence which is required in cases of adultery; and his judgment there seems to contain a more comprehensive statement of this rule.

"It is a fundamental rule that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that parties are surprised in the direct fact of adultery. In every case almost, the fact is inferred from circumstances that lead to it by a fair and necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally . . . because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves,

(*e*) 2 Hagg. Cons. Rep. 2.

but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations. Neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties and remote and artificial reasonings upon such subjects. Upon such subjects the rational and the legal interpretation must be the same."

Presumptions are said to be either presumptions of law or of fact. Presumptions of fact (termed by the civilians *præsumptiones hominis*) are rebuttable, and even if not rebutted are not conclusive. Presumptions of law are divided into those which are rebuttable, but if not rebutted are conclusive (*præsumptiones juris*), and those which are irrebuttable and therefore conclusive (*præsumptiones juris et de jure*). There are also mixed presumptions, or presumptions of mixed law and fact (*f*).

(*f*) The law as to presumptions in India stands thus: The 4th section of the Ind. Ev. Act establishes virtually three classes of

In connexion with the maxim of the law, "*stabitur præsumptioni donec in contrarium probetur*" (*g*), comes the doctrine of conflicting presumptions, which is not in a satisfactory state. That when two presumptions conflict, the stronger of the two prevails is certain, but how to ascertain which of two presumptions is the stronger in *all* cases is a difficult matter. Mr. Best (*h*) lays down the following rules, which are useful, so far as they go:—

I. Special presumptions take precedence of general.

II. Presumptions derived from the course of nature are stronger than casual presumptions.

III. Presumptions are favoured which give validity to acts.

IV. The presumption of innocence is favoured in law.

The law presumes innocence.

It is a *præsumptio juris* running through the whole law, that no person shall in the absence of proof be supposed to have done any act, which amounts to a violation of the criminal law, or which would subject

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presumptions similar to those adopted in England. But only twelve species of presumptions are to be found as such in the act, and all of these relate to documents (sects. 79—90); however, almost, if not quite, all the presumptions of the English law will be found, although perhaps in a different shape, in some part or another of the act, and especially in the Chapter (VII.) treating of the Burden of Proof.

(*g*) A presumption holds good until the contrary is established.

(*h*) Best on Evidence, 6th edit., p. 444.

him to any species of punishment, or involving any penalty or forfeiture; and this is so, even where the act charged is only one of omission, and whether the guilt of the party comes in question directly or collaterally. Where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burden of proving the negative on the other side. Thus, where the plaintiff declared that the defendant, who had chartered his ship, put on board a combustible article by which loss was occasioned, *without due notice* to the captain, it was held that the plaintiff must prove his negative averment, because the law will not presume negligence which amounts to a criminal neglect of duty (*i*).

So in bigamy the prosecution must prove that the first husband or wife was alive at the date of the second marriage (*k*). When the first husband or wife has not been heard of for seven years, the prisoner is not bound to prove ignorance of his or her death (*l*), and whether such person was alive at any time during the seven years is a question for the jury (*m*).

This rule also is subject to the qualification that if a negative averment be made by one party which

(*i*) Per Lord Ellenborough, *Williams* v. *East India Co.*, 3 East, 199.

(*k*) *R.* v. *Twining*, 2 B. & Ald. 386.

(*l*) *R.* v. *Curgenven*, 35 L. J., M. C. 58; L. R., 1 C. C. R. 1; 14 W. R. 45.

(*m*) *R.* v. *Lumley*, L. R., 1 C. C. R. 196; 38 L. J., M. C. 86; 17 W. R. 685.

is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative (*n*). Thus, on an indictment for night-poaching it is unnecessary to prove want of leave and licence; and it is enough to show that the prisoner was on the land; for the circumstances raise a presumption of illegality, and the jury may infer the want of licence (*o*).

So under the Poaching Act, 1862 (*p*), proof that the defendants were found on a highway at 6 a.m. with a bag full of hares and rabbits, and with nets and stakes, or with nets that were wet, has been held to be sufficient for magistrates to convict them of having obtained the game by unlawfully being upon land in pursuit of game, or having used the nets for unlawfully taking game, without actual proof of the defendants being upon the land or using the nets (*q*); there being under the circumstances a reasonable presumption against the men, unless they could give some explanation of the appearances against them.

(*n*) Per Bayley, J., *R.* v. *Turner*, 5 M. & S. 211.

(*o*) *R.* v. *Wood*, 1 D. & B. 1.

(*p*) 25 & 26 Vict. c. 114, s. 2.

(*q*) *Brown* v. *Turner*, 13 C. B., N. S. 485; *Evans* v. *Botterell*, 3 B. & S. 787; *Jenkin* v. *King*, 41 L. J., M. C. 145; L. R., 7 Q. B. 468; 20 W. R. 669.

Odiosa et inhonesta non sunt in lege præsumenda.

As a general rule the law will not presume fraud, which must be specially pleaded and proved, or, at least, some *primâ facie* evidence of it given, when it will lie on the opposite party to disprove the allegation (*r*); and this doctrine holds good even in the case of third parties, whose conduct comes in question collaterally (*s*). So Equity will never presume a fraud upon a power of appointment (*t*). But Equity, in deciding upon the validity of certain dispositions of property, will sometimes presume fraud. It is on this ground that when a person is trustee for sale, and he sells the estate to himself, the transaction is absolutely and *ipso facto* void (*u*); and a person who employs the trustee to purchase the estate for him stands in no better position than the trustee himself (*x*). So also when a reversionary interest is purchased, it was formerly incumbent on the purchaser to show that he gave a full and sufficient price for it; and if he failed to do so the transaction would be set aside (*y*). But now by 31 Vict. c. 4, s. 1, no *bonâ fide* purchase of

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(*r*) *Mather* v. *Lord Maidstone*, 1 C. B., N. S. 273.

(*s*) *Ross* v. *Hunter*, 4 T. R. 38.

(*t*) *Hamilton* v. *Kerwan*, 2 J. & L. 393; *Paris* v. *Paris*, 33 L. J., Ch. 215.

(*u*) Per Lord Romilly, M. R., *Denton* v. *Donner*, 23 Beav. 290.

(*x*) *Mookerjee* v. *Mookerjee*, L. R., 2 Ind. App. 18.

(*y*) *Foster* v. *Roberts*, 29 Beav. 470.

a reversion, whether of real or personal estate, is to be reopened or set aside merely on the ground of under value. Although, however, a trustee for sale cannot purchase the trust property from himself, he may purchase from his *cestui que trust;* but a transaction of this kind is one of great nicety, for Equity will presume that the transaction was tainted with fraud, and throw upon the purchaser the *onus* of proving that he took no undue advantage of his position as trustee. This rule applies equally to solicitors, confidential agents (*z*), guardians, and all others invested with a fiduciary character. In *Hunter* v. *Atkyns* (*a*), Lord Brougham said:—"There are certain relations known to the law as attorney, guardian, trustee; if a person standing in these relations to client, ward, or *cestui que trust,* takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is that the person standing in such relation must, before he can take a gift or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the

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(*z*) *Tate* v. *Williamson,* L. R., 1 Ch. Ap. 55.

(*a*) *Hunter* v. *Atkyns,* 3 M. & K. 135; cf. *Gibson* v. *Jeyes,* 6 Ves. 277.

natural and unavoidable consequence of kindness arising out of that relation" (*b*). When a purchaser has to give up his purchase, he will have to pay the costs of the litigation (*c*). In the case of *Rhodes* v. *Bate* (*d*), Lord Justice Turner expressed an opinion that in cases of trifling benefits the court would not interfere to set them aside upon the mere proof of influence derived from a confidential relationship, but would require proof of *mala fides*, or of undue or unfair exercise of the influence. It is on these principles that it was enacted by the Bankruptcy Act, 1869 (*e*), sect. 91, that any settlement of property, not being an ante-nuptial settlement, made in good faith for valuable consideration, or one made on or for the wife or children of the settlor of property accruing to the settlor "*jure mariti*," is void if the settlor becomes bankrupt within two years of its date: and if the settlor becomes bankrupt within ten years of its date, such a settlement is void unless those claiming under it can show that he was at the time of making it able to pay all his debts without the property comprised therein. Again, the law presumes strongly in favour of marriage (*f*); the maxim being "*semper præsumitur pro matrimonio*," and, as was said by Lord Lyndhurst in *Morris* v. *Davies* (*g*), and approved by Lord Cottenham in

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(*b*) The law is the same in India; see Ind. Ev. Act, s. 111.
(*c*) *Yetts* v. *Hilton*, 9 Jur., N. S. 1273.
(*d*) L. R., 1 Ch. Ap. 258; 35 L. J., Ch. 267; 14 W. R. 292.
(*e*) 32 & 33 Vict. c. 71, s. 91.
(*f*) *Harrod* v. *Harrod*, 1 K. & J. 15.
(*g*) 5 Cl. & Fin. 163.

Piers v. *Piers* (*h*), "this presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability." Cohabitation is therefore presumptive evidence of marriage, except in the case of a prosecution for bigamy. Lord Eldon once said, that in cases of cohabitation the presumption is in favour of its legality (*i*), and this is particularly so after a long interval of time (*k*).

The law also presumes strongly in favour of the legitimacy of children. A child born after marriage of which the wife was pregnant at the time of the marriage is conclusively presumed to be the child of the husband. So every child born subsequent to the marriage, unless a judicial separation has been decreed by a competent court, will be presumed to be the child of the husband, unless the fact of sexual intercourse be negatived (*l*).

The law presumes that every person intends the probable consequences of his acts.

Thus, in homicide, when the death is proved, malice is presumed; and it is for the prisoner to prove the extenuating circumstances which may reduce the act from murder to manslaughter, or to

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(*h*) 2 H. of L. Cas. 362.

(*i*) *Cunninghame* v. *Cunninghame*, 2 Dow. 507; *Piers* v. *Piers*, 2 H. L. Cas. 337.

(*k*) *Campbell* v. *Campbell*, L. R., 1 Sc. App. 193.

(*l*) *Morris* v. *Davies*, 5 Cl. & F. 163; *Banbury Peerage case*, 1 Sim. & Stu. 155.

justifiable or excusable homicide (*m*); and where the death of another person is caused by a wanton act of the prisoner he is guilty of murder, as if he purposely drove a carriage furiously amongst a number of people, or discharged a loaded gun in the middle of a crowd (*n*).

So a person carrying a child suffering from an infectious disease along a public highway, so as to endanger the health of passengers, was held to be guilty of a misdemeanor, without proof of an intent that any person should catch the disease (*o*); and, again, where a person had published a pamphlet with an indecent tendency, it was held to be no defence that he had done so with the *bonâ fide* purpose of exposing the errors of the Romish Church (*p*). Where a debtor knew that his departure from England would have the natural and necessary effect of defeating and delaying his creditors, he was held by the Lords Justices to have departed with that intent and to have committed an act of bankruptcy (*q*).

So in an action for libel, it was held, that a judge is wrong in leaving it to a jury to say whether the defendant intended to injure the plaintiff, inasmuch as if the tendency of the libel was injurious to the plaintiff, the defendant must be taken to have in-

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(*m*) Per Lord Ellenborough, *R.* v. *Dixon*, 3 M. & S. 15.
(*n*) 1 Hale, 475.
(*o*) *R.* v. *Vantandillo*, 4 M. & S. 73.
(*p*) *R.* v. *Hicklin*, L. R., 3 Q. B. 360; 37 L. J., M. C. 89.
(*q*) *Re Finney*, 22 W. R. 935.

tended the consequence of his own act (*r*). In *Bromage* v. *Prosser* (*s*), Bayley, J., said:—"Malice in common acceptation means ill-will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of *malice*, because I do it *intentionally* and without just cause or excuse. . . . And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not; and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? . . . And I apprehend the law recognizes this distinction between these two kinds of malice,—malice in fact, and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely;* it is not necessary to state that they were spoken *maliciously*. . . . But in actions for such slander as is *primâ facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice or communications to persons who ask it or have a right to expect it, *malice in fact* must be proved by the plaintiff," *i. e.* in such cases, it must be proved that the false representations were made with a knowledge of their falsehood. A

(*r*) *Haire* v. *Wilson*, 9 B. & C. 643.
(*s*) 4 B. & C. 255.

privileged communication was defined in *Somerville* v. *Hawkins* (*t*), to be one made "*bonâ fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words."

Omnia præsumuntur ritè esse acta.

It is a general presumption of law that a person acting in a public capacity is duly authorized so to do (*u*). Therefore it is presumed that all who act as justices of the peace, or as constables, have been duly appointed (*x*). On an indictment for having committed perjury before a surrogate of the Ecclesiastical Court, proof that the person who adminstered the oath acted as surrogate has been held sufficient *primâ facie* evidence that he had been duly appointed, and had authority to administer the oath (*y*). This presumption has been adopted by the legislature in the case of excise (*z*) and custom-house officers (*a*). The rule does not apply to *private* appointments, such as tithe-collectors, or assignees of a bankrupt, or a town-clerk (*b*), for in these cases the appointments must be proved. But a private document, such as a deed, bill of exchange, or promissory note, is presumed to

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(*t*) 10 C. B. 605; cf. *Wenman* v. *Ash*, 13 C. B. 836.
(*u*) Per Lord Ellenborough, *R.* v. *Verelst*, 3 Camp. 433.
(*x*) *Berryman* v. *Wise*, 4 T. R. 366.
(*y*) *R.* v. *Verelst*, supra.
(*z*) 7 & 8 Geo. 4, c. 53, s. 17.
(*a*) 16 & 17 Vict. c. 107, s. 307.
(*b*) *R.* v. *Mayor of Stamford*, 6 Q. B. 433.

have been written at the time when it bears date (*c*), and this extends even to letters (*d*). Where indentures of a pauper's apprenticeship would have been invalid, if not executed in conformity with the rules of the Poor Law Commissioners, and there was no evidence to show that their regulations had been observed; it was held, that, in the absence of contradictory evidence, it must be presumed that the regulations, had been observed (*e*). So generally the orders of justices will be presumed to have been made according to all statutory formalities (*f*). Thus, when to prove a parish apprenticeship secondary evidence of a lost indenture was admitted, it was presumed that the indenture had been executed according to all the requisites of 56 Geo. 3, c. 139, because there was evidence that an arrangement for the apprenticeship had been made before magistrates, and that an apprenticeship had subsequently existed (*g*). But it seems that it would be otherwise where there is no such evidence (*h*). This rule in similar cases has been extended to the principle that that may be presumed which accounts reasonably for an existing state of things. Therefore, the fact that a person served an apprenticeship raises a presumption that he was duly bound an apprentice,

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(*c*) *Malpas* v. *Clements*, 19 L. J., Q. B. 435.

(*d*) *Goodtitle* v. *Milburn*, 2 M. & W. 853; *Hunt* v. *Massey*, 5 B. & Ad. 992.

(*e*) *R.* v. *St. Mary Magdalen*, 2 E. & B. 809.

(*f*) *Williams* v. *Eyton*, 4 H. & N. 357.

(*g*) *R.* v. *Broadhempston*, 1 E. & B. 104.

(*h*) *R.* v. *Stonehouse*, 10 Q. B. 234.

sufficiently, where the indenture had been sought in vain, to create a settlement by apprenticeship (*i*).

So the fact of a marriage having taken place before a registrar in a chapel raises the presumption that the chapel was properly registered and the marriage legal (*k*); and, in support of a plea of coverture, a certificate of the defendant's marriage in a Roman Catholic Chapel according to the rites of that Church, with evidence of subsequent cohabitation, was *primâ facie* proof of a valid marriage under 6 & 7 Will. 4, c. 85, the same presumption arising as in the previous case (*l*). In short, wherever a marriage has been solemnized, the law strongly presumes that all legal requisites have been complied with (*m*); and a foreign marriage is presumed to have been celebrated with the due solemnities required by the law of the place where celebrated (*n*).

It will be seen from these cases that the rule has been extended from the acts of public servants to the purport of public and even some private instruments. Thus public records are evidence of their own authenticity, and may now generally be proved by exemplifications or examined copies (*o*). It would also appear that it is from a restricted application of the same rule that deeds and wills are presumed to

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(*i*) *R.* v. *Fordingbridge*, E. B. & E. 678.
(*k*) *R.* v. *Manwaring*, 1 D. & B. 139.
(*l*) *Sichel* v. *Lambert*, 15 C. B., N. S. 781.
(*m*) *Smith* v. *Huson*, 1 Phill. 294.
(*n*) *R.* v. *Brampton*, 10 East, 202.
(*o*) 14 & 15 Vict. c. 99, s. 14.

have been duly executed where thirty years have elapsed from the time of their execution (*p*). The Statutes of Limitation, according to which simple contract debts cannot be recovered after six years; specialty debts after twenty years; and land after an undisturbed possession of twenty years (*q*); are all founded on the same legal presumption, that an omission to prosecute a legal claim for a certain number of years, amounts to an admission that no adverse claim exists, and must be treated as such by the community. Accordingly it is presumed, under such circumstances, that the debts have been paid and the land duly conveyed: and no evidence of a different state of facts will be received. On this principle, where there is evidence of a long exclusive enjoyment of property, and of an exercise of a distinct right referable to a legal origin, the court will presume such an origin, and also (in the absence of proof to the contrary), that it commenced before legal memory (*r*). The maxim, *omnia præsumuntur ritè esse acta* is applied by the courts to the execution both of deeds and wills. Where all the witnesses are dead, and the handwriting of one of them is proved, the statement in the attestation clause will be presumed to be correct (*s*). The Court of Probate goes further than this, and presumes that all formalities have been complied with in respect of a

(*p*) *Doe* v. *Walley*, 8 B. & C. 22.

(*q*) *Nepean* v. *Doe*, 2 Sm. L. C. 396, notes. See 37 & 38 Vict. c. 37.

(*r*) *Johnson* v. *Barnes*, L. R., 7 C. P. 593; L. R., 8 C. P. 527.

(*s*) *Adam* v. *Kerr*, 1 B. & P. 360; *Andrews* v. *Mottley*, 12 C. B., N. S. 526.

will when the attestation clause is in the usual form (*t*). When there is no attestation clause, or when it is not in the usual form, the Courts of Common Law will, it seems, presume compliance with all formalities in respect of a will (*u*), and the tendency of the Court of Probate will be to give effect to the testator's intentions (*x*). Of course the evidence of attesting witnesses may rebut the presumption of due execution (*y*). But when a will appears on the face of it to have been duly attested, and surrounding circumstances imply that this was so, the contrary evidence of one attesting witness will not rebut the presumption of due execution (*z*). Again, where signing and sealing are proved, the courts will presume the delivery of a deed (*a*). So it will be presumed that an instrument lost or not produced after notice was duly stamped (*b*), unless there is evidence that it remained without a stamp for some time after the execution, in which case the *onus* is shifted, and lies upon the party who relies on the document (*c*).

With regard to alterations in documents, the general rule is, that the party producing an altered document in evidence must explain the alteration.

(*t*) *Vinnicombe* v. *Butler*, 3 S. & T. 580.
(*u*) *Spilsbury* v. *Burdett*, 10 Cl. & F. 840.
(*x*) *In the goods of Rees*, 34 L. J., P. M. & A. 56.
(*y*) *Croft* v. *Croft*, 34 L. J., P. M. & A. 44; 13 W. R. 526.
(*z*) *Wright* v. *Rogers*, 17 W. R. 833.
(*a*) *Hall* v. *Bainbridge*, 12 Q. B. 699.
(*b*) *R.* v. *Long Buckley*, 7 East, 45.
(*c*) *Marine Insurance Co.* v. *Haviside*, L. R., 5 E. & I. 624; 42 L. J., P. C. 173.

But in the case of deeds and all documents, which it is an offence to alter after completion, there is a presumption that alterations, if any, were made before execution in the one case, and completion in the other (*d*). In the case of bills of exchange and promissory notes there is no such presumption, and the question when an alteration was made is for the jury (*e*). In the case of wills the presumption is that an alteration was made after the execution of the will (*f*), but Lord Penzance has stated that there is a marked distinction between interlineations and alterations, and in a case of interlineations (*g*) he held, that he was not bound to presume they were made before execution. There is no presumption that blanks filled up in different ink were so filled up before execution (*h*).

In favour of a person who has been in long and peaceable possession, conveyances (*i*), royal grants (*k*), and acts of parliament (*l*) will be presumed; but this rule in the case of acts of parliament appears to be restricted to private acts, and not to apply against the

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(*d*) *Doe* v. *Catomore*, 16 Q. B. 745.

(*e*) *Johnson* v. *Duke of Marlborough*, 2 Stark. 313.

(*f*) *Coope* v. *Bockett*, 4 Moore, P. C. Cas. 449; *Doe* v. *Palmer*, 16 Q. B. 747.

(*g*) *In the goods of Cadge*, L. R., 1 P. & D. 545.

(*h*) See *Greville* v. *Tyler*, 7 Moore, P. C. Cas. 327.

(*i*) *England* v. *Slade*, 4 T. R. 682; *Cooke* v. *Soltau*, 2 Sim. & Stu. 154.

(*k*) *Goodtitle* v. *Baldwin*, 11 East, 488.

(*l*) *Att.-Gen.* v. *Ewelme Hospital*, 17 Beav. 366.

Crown (*m*). Even against the Crown, however, the uninterrupted user of a road by the public for forty or fifty years raises a presumption of dedication as a highway (*n*), and the enrolment of a tithe award has been presumed where the usage of paying tithes has been shown (*o*).

Presumptions as to Post Letters.

It may be useful to collect together in one place the most important presumptions as to post letters. They are as follows:—

1st. If a letter be found to have been correctly addressed, posted and not returned, it will be presumed to have arrived at its destination unless evidence is given sufficient to rebut the presumption (*p*). This presumption has been adopted by the Legislature in many acts of parliament, but with this difference, that no rebutting evidence is admissible, and therefore the presumption is conclusive. Thus the 63rd section of the Companies Act, 1862, says:—"Any document to be served by post on the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof, and

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(*m*) See dictum of Lord Abinger in *Jewson* v. *Dyson*, 9 M. & W. 555; but cf. dictum of Lord Wynford in *MacDougall* v. *Purrier*, 2 Dow & Cl. 170.

(*n*) *R.* v. *East Mark*, 11 Q. B. 877.

(*o*) *MacDougall* v. *Purrier*, 2 Dow & Cl. 135.

(*p*) *Warren* v. *Warren*, 1 C. M. & R. 250.

in proving service of such document it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post-office."

2ndly. A letter is presumed to have arrived at its destination at the time at which it would be delivered in the ordinary course of postal business, and the sender is never held answerable for any delay which occurs in its transmission through the post (*q*). So that where any notice has to be given on a particular day, it is sufficient to post it so that it would, in the ordinary course, arrive at its destination on that day, and if it is delayed in the post the sender is not responsible for the delay (*r*). This is important in reference to notices to quit and notices of dishonour. Here we may allude to the rule laid down by the House of Lords in *Dunlop* v. *Higgins* (*s*), that a contract to buy goods entered into by letter is complete when the letter of acceptance is posted; and the rule was held to be the same, in the case of a contract to take shares, by the Court of Appeal in Chancery in *Harris' case* (*t*). But the Court of Exchequer, in *The British and American Telegraph Co.* v. *Colson* (*u*), held, that if the letter of allotment is not received there is no contract; and in *Reidpath's case* (*x*), Lord Romilly held that it was necessary to

(*q*) *Stocken* v. *Collin*, 7 M. & W. 515.
(*r*) *Ward* v. *Lord Londesborough*, 12 C. B. 252.
(*s*) 1 H. L. Cas. 381.
(*t*) 20 W. R. 690; 41 L. J., Ch. 621; L. R., 7 Ch. 587.
(*u*) L. R., 6 Ex. 108; 40 L. J., Ex. 97.
(*x*) 19 W. R. 219; L. R., 11 Eq. 86; 40 L. J., Ch. 39.

prove receipt by the allottee when denied. Lord Justice Mellish, in *Harris' case*, said that he had great difficulty in reconciling *The British and American Telegraph Co.* v. *Colson* with the decision in *Dunlop* v. *Higgins*, and Vice-Chancellor Malins followed suit in *Wall's case* (*y*). Although the decisions in *The British and American Telegraph Co.* v. *Colson* and *Reidpath's case* have not been overruled, they would appear to be unsound, for if a contract is complete when a letter of acceptance is posted, how can it possibly become subsequently incomplete because that letter is not received?

3rdly. Where it is necessary to prove posting, it is in general sufficient to prove that the letter was delivered to the clerk whose duty it was, in the ordinary course of business in the office, to carry letters to the post. But this is not a conclusive presumption like the second, nor is it so strong as the first.

4thly. Whenever a letter, whether sent by post or by hand, is proved to have been correctly addressed and delivered to the clerk or servant of the person to whom it was addressed, it will be presumed that it came into his hands, although this presumption can be rebutted (*z*).

5thly. The post-mark on a letter, if decipherable, raises a presumption that the letter was in the post at the time and place specified in such post-mark, but this again is a rebuttable presumption (*a*).

(*y*) L. R., 15 Eq. 20; 42 L. J., Ch. 372.
(*z*) *Macgregor* v. *Kelly*, 3 Ex. 794.
(*a*) *R.* v. *Johnson*, 7 East, 65.

Omnia præsumuntur contra spoliatorem.

If a man, by his own wrongful act, withhold the evidence by which the facts of the case would be manifested, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted. In *Armory* v. *Delamirie* (*b*), the plaintiff, a boy, had found a jewel, which he gave for inspection to the defendant, a jeweller; and in trover for it, it was held, that unless the defendant produced it, the jury must presume it to be of the first water, and make the value of the best jewels that would fit the socket the measure of their damages. But this presumption only arises where there is a suspicion of fraud: so that where a person refused to allow his former solicitor to give evidence of matters connected with the professional relation, it was held that there was no adverse presumption against him, Lord St. Leonards saying, that there was no analogy to the case of *Armory* v. *Delamirie* (*c*). Nor where the deficiency of evidence arises from negligence, can the party who is accountable for it be benefited by it. Thus, where a liquor merchant sued for goods sold and delivered, and the only evidence was that some hampers of full bottles had been delivered to the defendant, but there was no evidence of the contents of the bottles; Lord Ellenborough told the jury to presume that the bottles were filled with the cheapest liquor in which the plaintiff dealt (*d*). If a devisee

(*b*) 1 Sm. L. C. 153, notes to *Armory* v. *Delamirie*.
(*c*) *Wentworth* v. *Lloyd*, 10 H. L. Cas. 589.
(*d*) *Clunnes* v. *Pezze*, 1 Camp. 8.

under a first will destroy a subsequent will, it will be presumed as against him that the first will has been revoked (*e*). On this principle, in admitting evidence of a will proved to have been destroyed by the heir-at-law, the judge of the Irish Court of Probate said, that he should be satisfied with evidence much less cogent than in the case of a lost will (*f*). The refusal, however, to produce documents on notice, is not ground for any inference as to their contents (*g*). Again, if an accounting party parts with or destroys his books, the strongest presumptions consistent with the rest of the case will be made against him (*h*). The principle of presuming against a spoliator is adopted in International Law, when papers have been spoliated by a captured party (*i*).

Miscellaneous Presumptions.

Some important presumptions adopted in Equity must now be briefly noticed. Where a person having contracted by his marriage settlement to provide for his wife or children, gives a legacy to her or them by will, then (*j*) if the legacy be of a sum as great as or greater than the portion or provision; if it be *ejusdem generis;* if it be equally certain with the latter and subject to no contingency not applicable to both; and if it be shown that it is not given for a

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(*e*) *Harwood* v. *Goodright*, Cowp. 86.
(*f*) *Mahood* v. *Mahood*, Ir. R., 8 Eq. 359.
(*g*) *Cooper* v. *Gibbons*, 3 Camp. 363.
(*h*) *Gray* v. *Haig*, 20 Beav. 231.
(*i*) *The Hunter*, 1 Dodson, 480.
(*j*) Story's Eq. Jur. 1109.

different purpose; then it will be deemed a complete satisfaction. If the legacy be less in amount than the portion or provision, or if it be payable at a different period or periods; then, although there is some diversity of opinion upon the subject, the weight of authority is, that it may be or will be deemed a satisfaction *pro tanto*, or in full, according to the circumstances (*k*). The reason of these rules being, that Equity presumes that the testator did not intend a double portion (*l*). But this presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions, or by extrinsic evidence (*m*). Under the Indian Succession Act, 1865, the law in this respect is the exact reverse of the English law (*n*).

Secondly, when a parent (*o*), or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and afterwards in his lifetime gives a portion, or makes a provision, for the same child or grandchild, without expressing it to be in lieu of the legacy: in such a case, if the portion so received or the provision so made be equal to or exceed the amount of the legacy; if it be certain and not merely contingent; if no other distinct object be pointed out, and if it be *ejusdem generis*, then an intention will be presumed to adeem the legacy;—if the portion or

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(*k*) *Lady Thynne* v. *Earl of Glengall*, 2 H. L. Cas. 131; but cf. *Coventry* v. *Chichester*, 2 Hem. & M. 149.

(*l*) *Weall* v. *Rea*, 2 Russ. & M. 267.

(*m*) Ibid.

(*n*) Act X. of 1865, s. 165.

(*o*) Story's Eq. Jur. 1111.

provision be less than the amount of the legacy, an ademption *pro tanto* will be at all events presumed (*o*). To raise such a presumption it has been recently said (*p*), that it is not incumbent on the person who alleges a satisfaction to show anything more than that the testator having given a legacy of a certain amount, afterwards in his lifetime gave the legatee a sum of money, the nature of the two gifts not being so different as to rebut the presumption.

Thirdly, it is an established rule in Equity, that where a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of his debt, it shall be presumed in the absence of any intimation of a contrary intention that the legacy was meant by the testator as a satisfaction of the debt. But if the debt is upon a negotiable security (*q*), or upon a current account (*r*), there is no such presumption; nor is there in India since the Indian Succession Act, 1865 (*s*), came into operation.

A fourth class of presumptions in Equity is with respect to the cumulation of legacies. In *Hurst* v. *Beach* (*t*), Sir John Leach, M. R., said, "where a testator leaves two testamentary instruments, and in both has given a legacy *simpliciter* to the same

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(*o*) *Pym* v. *Lockyer*, 5 M. & C. 29. But the rule is the reverse in India. Act X. of 1865, s. 163.

(*p*) Per Hall, V.-C., *Leighton* v. *Leighton*, L. R., 18 Eq. 468; 22 W. R. 839; 43 L. J., Ch. 594.

(*q*) *Carr* v. *Eastabrooke*, 3 Ves. 561.

(*r*) *Rawlins* v. *Powel*, 1 P. Wms. 299.

(*s*) Act X. of 1865, s. 164.

(*t*) 5 Mad. 358. But see *Wilson* v. *O'Leary*, L. R., 7 Ch. 448; 41 L. J., Ch. 342; 19 W. R. 501.

person, the court, considering that he who has twice given must *primâ facie* be intended to mean two gifts, awards to the legatee both legacies; and it is indifferent whether the second legacy is of the same amount, or less, or larger than the first. But if in such two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given, the court considers these two coincidences as raising a presumption that a testator did not by the second instrument mean a second gift, but meant only a repetition of the former gift."

The doctrine of resulting trusts arises from another presumption adopted in Equity. When a transfer is made of property without any consideration, express or implied, or any distinct trust stated, the transferee will be presumed to be intended to hold the property in trust for the transferor; and where a person purchases property with his own money in the name of another, it will be presumed that the property so bought is intended to be held in trust for him who pays the purchase-money. But where property is transferred to or purchased in the name of a child, the presumption is that it is intended as a provision for such child (*u*). The same rule applies to a purchase of property in the name of a wife (*x*), and by a mother in the name of her child (*y*). But

(*u*) See judgment of Eyre, C. B., in *Dyer* v. *Dyer*, 2 Cox, 92.
(*x*) *Rider* v. *Rider*, 10 Ves. 366.
(*y*) *Sayer* v. *Hughes*, 16 W. R. 662; 37 L. J., Ch. 401; L. R., 5 Eq. 376.

where a Hindu purchases property in India in the name of a child, the presumption is that it is the property of the father (*z*).

The declarations of the parent at the time of the transfer or purchase are admissible to rebut the presumption of advancement, but not his subsequent declarations (*a*). But Stuart, V.-C., once admitted the evidence of the transferor to rebut the presumption of advancement, by showing that he made the transfer under a mistake as to its legal consequences (*b*). When there is once evidence to rebut the presumption of advancement, the court is in the same position as a jury would be (*c*).

Where the question is as to the life or death of a person who has been once shown to be living, the proof of the fact lies on the party who asserts the death, and it was once considered that there was a presumption that a person continues alive until the contrary be shown (*d*). But it is now considered that whether a person is alive at a given date is a question for the jury, and that "his existence at an antecedent period may or may not afford a reasonable inference that he was living at a subsequent date" (*e*). Where it is proved that the person has

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(*z*) *Gopi Kristo Gosain* v. *Gunga Persad*, 6 Moore, Ind. Ap. 53.

(*a*) *Williams* v. *Williams*, 32 Beav. 370; followed in *O'Brien* v. *Speil*, Ir. R., 7 Eq. 255, the judgment in which see.

(*b*) *Devoy* v. *Devoy*, 3 Sm. & Gif. 403.

(*c*) *Fowkes* v. *Pascoe*, 23 W. R. 538.

(*d*) *Wilson* v. *Hodge*, 2 East, 313.

(*e*) Per Giffard, L. J., *In re Phene's Trusts*, L. R., 5 Ch. 150;

not been heard of for seven years, a presumption arises that he is dead. This presumption relates only to the fact of death; and the time of death, whenever it is material, must be a subject of distinct proof by the party interested in fixing the time; for there is no presumption as to when, during the seven years, he died (*f*). The fact of the Court of Probate having granted administration is not sufficient proof of death (*g*).

Where several persons have perished in the same calamity, the presumption was once said to be in favour of the survival of the stronger party (*h*); but in a case where it appeared that a husband, a wife, and their two children, were washed off from the deck of a ship by the same wave and drowned; the House of Lords held, that in the absence of further evidence it must be presumed that all died at the same moment (*i*). The same rule was applied when husband and wife were both killed in a railway accident, and the bodies were found two hours afterwards (*k*).

By the law of marine insurance, if a vessel has sailed, and no tidings of her have been received within a reasonable time, she will be presumed to

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39 L. J., Ch. 313; cf. *R.* v. *Lumley*, L. R., 1 C. C. R. 196; 38 L. J., M. C. 86; 17 W. R. 685.

(*f*) *Re Phene's Trusts*, ubi sup.; *Re Lewes's Trusts*, L. R., 6 Ch. 357; 40 L. J., Ch. 507; 19 W. R. 617.

(*g*) *Re Beamish*, 9 W. R. 475.

(*h*) *Sillish* v. *Booth*, 1 Y. & Col. 117.

(*i*) *Wing* v. *Angrave*, 8 H. of L. Cas. 183.

(*k*) *In the goods of Wheeler*, 31 L. J., P. M. & A. 40.

have foundered at sea. So it is said that if a ship, shortly after sailing, shall, without visible or adequate cause, become leaky or otherwise incapable of performing the voyage insured, she shall be presumed to have been unseaworthy at the commencement of the risk. But this last rule does not appear to be quite established (*l*).

Where goods have been lost or damaged while in the custody of a bailee or his servants, it is presumed that the loss or damage arises from his negligence (*m*). This presumption appears to arise as much in the case of a gratuitous bailee as in that of a bailee for valuable consideration; but the liability will be limited by the rules laid down in *Coggs* v. *Bernard* (*n*).

Partners are presumed to have authority to bind their co-partners in all matters relating to the partnership, but not in matters unconnected with it (*o*).

The place of a person's birth is presumed to be that of his domicil of origin, if it is the residence of his parents, but the place where a person resides must be taken *primâ facie* as his domicil (*p*).

In Equity if a person having a partial interest in a settled estate pays off an incumbrance, the presumption is that he intends to keep the charge alive for

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(*l*) *Thompson* v. *Hopper*, 6 E. & B. 937.

(*m*) *Carpue* v. *London and Brighton Railway*, 5 Q. B. 747; *Latch* v. *Rumner Railway*, 27 L. J., Ex. 155.

(*n*) 2 Lord Raym. 918; 1 Sm. L. C. 82, and notes.

(*o*) *Sandilands* v. *Marsh*, 2 B. & Ald. 673; *Bales* v. *Westwood*, 2 Camp. 12.

(*p*) *Bempde* v. *Johnston*, 3 Ves. 198.

his own benefit (*q*). But this presumption may be rebutted; and whenever there is an indication of intention, be it small or great, the court must decide whether the tenant for life intended to clear the inheritance or not (*r*).

It is a presumption that if a tenant show a receipt for rent, all previous rent has been paid by him to the landlord, and this presumption is one which requires strong evidence to rebut it. A similar presumption would doubtless apply to all cases of periodical payments. No receipt (except a receipt under seal) is, however, conclusive evidence against the maker, except in favour of any person who may have been induced by it to alter his condition (*s*). A mortgagor in possession is presumed to have authority to distrain as the bailiff of the mortgagee (*t*).

The possession of a bill of exchange by the drawer (*u*), or of a note by the maker (*x*), is *primâ facie* evidence of payment. But the possession of a lease by the lessor with the seals cut off is no evidence of a surrender by written instrument according to the Statute of Frauds (*y*).

When two parishes or properties are separated by a highway, the presumption is that the *medium filum*

(*q*) *Morley* v. *Morley*, 5 De G., M. & G. 610.

(*r*) *Lindsay* v. *Earl of Wicklow*, Ir. R., 7 Eq. 205; cf. *Pitt* v. *Pitt*, 22 Beav. 294.

(*s*) *Graves* v. *Key*, 3 B. & A. 318.

(*t*) *Trent* v. *Hunt*, 9 Ex. 24.

(*u*) *Gibbon* v. *Featherstonhaugh*, 1 Stark. 225.

(*x*) *Bembridge* v. *Osborne*, 1 Stark. 374.

(*y*) *Doe* v. *Thomas*, 9 B. & C. 288.

viæ is the actual boundary (*z*); when they are separated by a river the *medium filum aquæ* is presumed to be the actual boundary. In a recent case in Chancery, however, it was questioned whether the presumption as to the *medium filum viæ* being the actual boundary applied in the case of a street in a town (*a*). By International Law, where two states are bounded by a navigable river, the middle of the channel or Thalweg is presumed to be the boundary with a common right of navigation to both; but when it can be proved that one bank of the river was occupied before the other, it will be presumed that the first occupant has an exclusive title to the river.

The presumption that the bed and soil of a stream belong to the riparian owners does not apply to a large non-tidal and navigable lake (*b*).

(*z*) *R.* v. *The Strand Board of Works*, 4 B. & S. 526, 541.

(*a*) *Beckett* v. *Corporation of Leeds*, 20 W. R. 454; L. R., 7 Ch. 421.

(*b*) *Johnston* v. *Bloomfield*, Ir. R., 8 C. L. 68.

CHAPTER VI.

ON EVIDENCE IN MATTERS OF OPINION.

SINCE it is the province of the judge or of the jury to draw all inferences from facts, it follows, as a general rule, to which, however, there are several exceptions, that—

A witness must only state facts: and his mere personal opinion is not evidence.

The object of this rule is to keep the witness, as much as possible, from trespassing on the functions of either judge or jury; and it is relaxed as often as the opinion of a witness can be regarded in the nature of a presumptive fact. Thus, in cases of insanity a medical witness cannot be asked whether he considers that the patient was insane; for that is the issue for the court and jury; but he may be asked whether certain symptoms are indications of insanity, and his answers are evidence for the guidance of the court and jury (*a*). Thus, on an issue as to the sanity of a testator, it was proposed to hand a letter (purporting to be from the testator) to a medical witness, and to ask him whether the writer of such a letter could be of sound mind.

(*a*) *R.* v. *M'Naghten*, 10 Cl. & Fin. 200.

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Martin, B., held that this could not be done; but that the letter must first be proved to be in the testator's writing, and that the witness might then be asked if it was a rational letter (*b*).

In the case of *R.* v. *Rowton* (*c*), which established that, in reply to evidence of a prisoner's good character, the prosecution may call witnesses to prove that his general character is bad; it was held by the majority of the judges, that witnesses to character can only speak as to the prisoner's reputation, having reference to the nature of the charge, and may not give their own opinion on the subject (*d*).

In actions of slander, where it is important to prove an innuendo and that the obvious and natural meaning of a word was not that which the speaker intended to convey to the witness, the witness cannot be asked what he understood by the language; for the answer to such a question would be in the nature of an inference and a mere personal opinion. But questions ought to be put to him which tend to elicit all the surrounding facts and circumstances which led him to understand the words in a slanderous sense; and he may be asked whether there was irony in the speaker's tone at the time, and generally whether there was anything to prevent him from understanding the words in their ordinary sense (*e*).

(*b*) *Sharpe* v. *Macaulay*, Western Circuit, 1856, MS.

(*c*) L. & C. 520.

(*d*) Indian Evidence Act, ss. 53, 54.

(*e*) *Davies* v. *Hartley*, 3 Exch. 200; *Barnett* v. *Allen*, 3 H. & N. 376.

It has, however, been held that in an action for fraudulently representing a third person to be trustworthy, the defendant may call witnesses to give their opinion as to such person's trustworthiness (*f*).

In the leading case of *Carter* v. *Boehm* (*g*), it was a question whether a policy of insurance was vitiated by the concealment of facts which had not been communicated to the underwriters. A broker gave evidence of the materiality of the facts, and stated his opinion, that if they had been disclosed the policy would not have been underwritten; but the court held his statement to be inadmissible. Lord Mansfield said: "Great stress was laid upon the opinion of the broker; but we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence; it is opinion after an event; it is opinion without the least foundation from any previous precedent or usage; it is an opinion which, if rightly formed, could be drawn only from the same premises from which the court and jury were to determine the cause, and, therefore, it is improper and irrelevant in the mouth of a witness."

This judgment of Lord Mansfield contains the principles on which mere opinion is not received as evidence. But it is right to state that his view of the law, as to this particular case, has been much controverted; and that it has been considered by

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(*f*) *Sheen* v. *Bumpstead*, 2 H. & C. 193.
(*g*) 3 Burr. 1905; 1 Sm. L. C. 490.

other learned authorities (*h*) to come within the third exception to the general rule.

The general rule stated above is subject to the following exceptions (*i*):—

1*st Exception.* On questions of identification a witness is allowed to speak as to his opinion or belief (*k*).

This applies to any species of identification, whether of persons or of things, and especially to the identification of handwriting.

2*nd Exception.* A witness's opinion is receivable in evidence to prove the apparent condition or state of a person or thing.

Thus a witness may state that a person appeared to him confused or agitated, rich or poor, young or old, or that a building appeared decayed or stable, or that a document appeared to be in good or bad condition.

3*rd Exception.* The opinions of skilled or scientific witnesses are admissible evidence to elucidate matters which are of a strictly professional or scientific character.

(*h*) See note to *Carter* v. *Boehm*, 1 Sm. L. C. 504.

(*i*) The exceptions in India are, that in questions of foreign law, science or art, or as to the identity of handwriting, the opinions of persons specially skilled therein are admissible; Indian Evidence Act, s. 45; and by sect. 50, on questions of relationship, the opinion expressed by conduct as to the relationship held by any member of the family having special means of knowledge, is admissible in evidence.

(*k*) *Fryer* v. *Gathercole*, 13 Jur. 542.

In *Campbell* v. *Richards* (*l*), Lord Denman, C. J., said:—"Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opinions on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced if the parties had acted in one way rather than another. In the great case of *Carter* v. *Boehm*, a broker, who was called as a witness for the plaintiff, stated on cross-examination, that in his opinion certain letters ought to have been disclosed, and that if they had, the policy would not have been underwitten. The jury, however, found, against the witness's opinion, a verdict for the plaintiff. When his opinion was pressed, as a ground for a new trial, Lord Mansfield, in the name of the whole court, declared that the jury ought not to pay the least regard to it, because it was mere opinion and not evidence. The same doctrine is laid down in a case of *Durrell* v. *Bederley*, by Gibbs, C. J., though he received the evidence on great pressure. He said, 'The opinion of the underwriters on the materiality of facts and the effect they would have had upon the premium is not admissible in evidence.' Lord Mansfield and Lord Kenyon discountenanced this evidence of opinion, and I think it ought not to be received. It is the province of a jury and not of individual underwriters to decide that facts ought to be communicated. It is not a question

(*l*) 5 B. & Ad. 846.

of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory and ought to be rejected."

It will appear from this judgment that the principles, as stated above, are recognized and acted on universally; and that the only practical difficulty in applying them exists in the question as to what is and what is not a subject of scientific inquiry. The inclination of modern authorities appears to be to enlarge the definition; and it is probable that if *Carter* v. *Boehm*, and *Campbell* v. *Rickards*, were to be decided again, it would be held that the nature of mercantile traffic, and the principles of insurance in particular, are sufficiently recondite to entitle them to the privilege which was disallowed in those cases (*m*). In *Greville* v. *Chapman* (*n*), which was an action for libel arising out of a racehorse transaction, it was held by Lord Denman himself, that a member of the Jockey-club might be asked as a witness, whether he did not consider a certain course of conduct to be dishonourable. A skilled witness may not only say that he formed an opinion, but that he acted on that opinion, and his acting upon it is a strong corroboration of its truth (*o*).

(*m*) 1 Sm. L. C. 286 *a*; *Rickards* v. *Murdock*, 10 B. & C. 527.

(*n*) 5 Q. B. 731.

(*o*) *Stephenson* v. *River Tyne Commissioners*, 17 W. R. 590. In India, whenever a witness's opinion is relevant, the grounds of his opinion are relevant. Ind. Ev. Act, s. 51.

The evidence of experts must be received with caution, because, according to Lord Campbell (*p*), "they come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence." It is also deserving of remark, that there is no English case in which a witness has been indicted for perjury in a mere matter of opinion; nor does it seem that an indictment would lie, unless the opinion given amounts to the assertion of a fact that is untrue or suggests an inference that is obviously false.

Books, and, in particular, dictionaries (*q*), are admissible to show the sense in which words are used; and especially in cases of libel defendants have been permitted to refer largely to previous publications, and to read them as part of their defence, in order to show that certain forms of expression were not meant as matter of reproach or ridicule; and to explain whether they have been used in a metaphorical or literal sense. Books also may be used to show the opinions of their writers on their subjects; but such opinions cannot be made evidence of specific facts. "Thus, it is not competent in an action for not farming according to covenant, to refer to books for the purpose of showing what is the best way of farming. Nor in an action on the warranty of a horse would it be allowable to refer to works of a veterinary surgeon to show what is unsoundness" (*r*). So in an

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(*p*) 10 Cl. & Fin. 191.

(*q*) *Clements* v. *Golding*, 2 Camp. 25.

(*r*) Per Pollock, C. B., *Darby* v. *Ousley*, 1 H. & N. 12.

action for a libel charging the plaintiff with being a rebel and traitor, "because he was a Roman Catholic," the defendant was not allowed to justify by citing books of authority among the Roman Catholics, which seemed to show that their doctrines were inimical to loyalty (*s*). In all such cases, as also in the proof of foreign law, the evidence is matter of science, which must be given by experts or scientific witnesses in court. Books are only hearsay: often of the most vague, inconsistent and remote character; statements made by absent, perhaps anonymous, witnesses, who wrote without being under the fear of the spiritual or secular penalties of an oath, and without being subject to cross-examination. It is plain, therefore, on the first principles of evidence, that they are without any of the elements of legal credibility.

The general rule will not be construed to exclude from the consideration of a jury anything which would assist them in making up their minds upon the facts in dispute, but is intended simply to prevent the functions of the jury being usurped by the witness, which would be done, were he allowed to lead their opinion by his own.

By the 3rd Rule of the 37th Order, in affidavits in support of interlocutory motions, statements as to the belief of the witness, with the grounds thereof, are admissible, but all other affidavits are to be confined to such facts as the witness is able of his own knowledge to prove.

(*s*) *Darby* v. *Ousley*, 1 H. & N. 1.

CHAPTER VII.

ON PRIVILEGE.

EXCEPT when some positive rule intervenes, a witness is compellable to answer any question that may be put to him. It is generally understood now, that a witness may be *asked* any question (except questions tending to show that he has been guilty of adultery); but there are many questions which he will not be compellable, and some which he will not be permitted, *i. e.* is not competent, to *answer*. So in documentary evidence every writing is admissible, except when it is excluded by a similar principle of law.

Wherever a witness is not compellable or not competent to answer any question, it is because some privilege intervenes, which privilege is sometimes that of the witness himself, sometimes that of another person, and sometimes that of the state which asserts the right of excluding certain kind of evidence on grounds of public policy. Where the privilege is that of the witness himself, he may waive it and answer the question; where the privilege is that of another person, such person may waive it and permit the witness to answer, but the waiver cannot proceed from the witness himself. Where, in reliance on privilege, a witness refuses to answer, or is not

allowed to answer any question, no presumption arises that the evidence so withheld is unfavourable to any person (*a*).

The different kinds of privilege will be gathered from the following rules, viz. :—

Rule 1.

A witness is not compellable to answer any question tending to criminate himself.

I. e. on the principle *nemo tenetur seipsum prodere*, a witness, whether a party to a suit or not, cannot be compelled to answer any question, whether put *vivâ voce* or in the form of a written interrogatory, the answer to which may expose, or tend to expose, him to a criminal charge, penalty, or forfeiture of any kind. This rule is recognized and expressed by the Law of Evidence Amendment Act, 1851, which, after making the parties to civil actions and suits competent and compellable witnesses on behalf of either party, enacts that nothing in the act shall render any person compellable to answer any question tending to criminate himself or herself (*b*).

Some difficulty has arisen in the application of this rule, and some diversity of opinion appears to exist as to its construction and extent. It is still

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(*a*) In India, the court may presume that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him. Indian Evidence Act, sect. 114, Illustration (A); and see also sect. 148 (4).

(*b*) 14 & 15 Vict. c. 99, s. 3.

doubtful in some measure whether the witness is entitled to his privilege as of right, or only under the sanction of the court. In *R.* v. *Garbett* (*c*), it was held that a witness is not compellable to answer a question, if the court be of opinion that the answer might tend to criminate him. It was also held in the same case that the court may compel a witness to answer any such question; but that if the answer be subsequently used against the witness in a criminal proceeding, and a conviction obtained, judgment will be respited and the conviction reversed. In a later case (*d*), Maule, J., and Jervis, C. J., held that it is for the witness to exercise his own judgment, and to say whether the answer will criminate him, and that if he thinks that it will, he may refuse to answer. This view was doubted by Parke, B., in a later case (*e*), where the learned judge indicated his adhesion to the doctrine of *R.* v. *Garbett*. The Court of Queen's Bench, however, has since held that a witness can only claim the right of refusing to answer a question when the court is satisfied that there is any real danger of a prosecution if he does answer (*f*).

It is settled that it is no ground for a witness to refuse to go into the box, that the question will criminate him, and that he will refuse to answer it. The privilege can be claimed only by the witness

(*c*) 1 Den. 236.
(*d*) *Fisher* v. *Ronalds*, 12 C. B. 762.
(*e*) *Osborne* v. *London Dock Co.*, 10 Ex. 698.
(*f*) *R.* v. *Boyes*, 1 B. & S. 311.

himself after he has been sworn and the objectionable question put to him (*g*), and the witness must pledge his oath that he believes the answer will tend to criminate him. If he assigns a reason for not answering, which in the opinion of the court is insufficient, he will be compellable to answer. He can claim his privilege at any time, and does not waive it altogether by omitting to claim it at an earlier opportunity (*h*). A judge ought to caution a witness, where a privilege exists, that he is not bound to answer (*i*).

The question whether a wife is bound to answer questions criminating her husband is not in a satisfactory state. It was held at common law, in *R.* v. *Claviger* (*k*), that a wife could not be compelled to answer questions criminating her husband. In *R.* v. *Worcester* (*l*), Lord Ellenborough held that a wife was competent to answer such questions, and that the answers were not excluded on the ground of public policy: but Bayley, J., was of opinion that a wife who threw herself upon the protection of the court would not be compelled to answer. In equity there is no doubt that a wife cannot be compelled to answer any question, which may expose her husband to a charge of felony (*m*).

(*g*) *Boyle* v. *Wiseman*, 10 Ex. 647.

(*h*) *R.* v. *Garbett*, 1 Den. 258.

(*i*) Per Maule, J., *Fisher* v. *Ronalds*, sup.; *Paxton* v. *Douglas*, 16 Ves. 242.

(*k*) 2 T. R. 268.

(*l*) 6 M. & S. 194.

(*m*) *Cartwright* v. *Green*, 8 Ves. 410.

A witness may waive his privilege and answer at his peril (*n*). The privilege extends to cases in which an answer might subject the witness to penalties or forfeitures (*o*); but he cannot refuse to answer any question, relevant to the issue, on the ground that his answer would expose him to a civil action (*p*). In a creditor's administration suit, however, Bacon, V.-C., held, that a witness who was a defendant in an action brought on behalf of the estate, need not answer any question relating to the action (*q*).

Many difficulties have arisen and still exist in the application of the general rule in consequence of the special limitations which have been put on it by several statutes, which have enacted expressly that a witness cannot refuse to answer matters to which they refer, on the ground that the answers would criminate him; but that such answers shall not be used against him in a criminal proceeding arising out of the same transaction. This compulsion and indemnity apply to witnesses on prosecutions for unlawful combinations of workmen (*r*); to disclosures on oath in a judicial proceeding, and before indictment, of any act done by any banker, merchant, broker, factor, attorney or other agent (*s*); and to

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(*n*) *Paxton* v. *Douglas*, 16 Ves. 242.

(*o*) *Cates* v. *Hardacre*, 3 Taunt. 424; cf. *Pye* v. *Butterfield*, B. & S. 829.

(*p*) 46 Geo. 3, c. 37.

(*q*) *Venables* v. *Schweitzer*, L. R., 16 Eq. 76; 42 L. J., Ch. 386; 1 W. R. 505.

(*r*) 6 Geo. 4, c. 129, s. 6.

(*s*) 7 Geo. 4, c. 29, s. 52; 5 & 6 Vict. c. 39, s. 6.

prosecutions against gaming-house keepers (*t*). So, by the Larceny Act, 1861 (*u*), s. 85, nothing in the previous provisions therein affecting fraudulent agents, factors, bankers, attorneys, trustees, officers of companies, &c., is to entitle any such person to refuse to answer a bill in equity, or questions or interrogatories in any civil proceeding or bankruptcy investigation, but no prosecution is to be instituted for any offence so disclosed in a proceeding *bonâ fide* instituted by an aggrieved person. So, by the Merchandise Marks Act, 1862 (*x*), s. 11, nothing in the act is to exempt or excuse any person from answering or making discovery upon examination or upon a trial or otherwise in any civil proceeding, provided that no compulsory evidence, statement, or discovery is to be admissible in any indictment or other proceeding under the act. Again, by the Corrupt Practices at Elections Act, 1863 (*y*), s. 7, no witness called before commissioners appointed in pursuance of any of the Corrupt Practices Prevention Acts is to be excused from answering questions relating to corrupt practices at an election, though the answer would tend to criminate him, provided that if he, witness, answer all the questions put to him, he is to be entitled to a certificate to the effect that he was required to and did answer questions criminating or tending to criminate him; and in the

(*t*) 8 & 9 Vict. c. 109, s. 9.
(*u*) 24 & 25 Vict. c. 96.
(*x*) 25 & 26 Vict. c. 88.
(*y*) 26 & 27 Vict. c. 29.

event of any proceeding being afterwards taken against him under any of such acts, the court is to stay all proceedings on the production of such certificate, and no statement so made by such witness is to be admissible against him in any proceedings except for perjury. This last exception does not apply to a perjury committed on the occasion of giving the answers referred to (*z*); but the witness is not entitled to the certificate unless the commissioners are satisfied that his evidence was truly given (*a*). By the Parliamentary Elections Act, 1868 (*b*), s. 33, the above provisions as to the examination and indemnity are extended to witnesses before a judge on the trial of an election petition.

But what is the exception in England is the general rule in India, for by the 132nd section of the Indian Evidence Act it is provided, that "a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind. Provided, that no such answer which a witness shall be compelled to give

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(*z*) *R.* v. *Buttle*, L. R., 1 C. C. R. 248; 39 L. J., M. C. 115; 18 W. R. 956.

(*a*) *R.* v. *Hulme*, L. R., 5 Q. B. 377; 39 L. J., Q. B. 149; 18 W. R. 831.

(*b*) 31 & 32 Vict. c. 125.

shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

The object of the Indian Legislature in this enactment was to combine the necessary discovery of truth with the due protection of the witness; and therefore, while it compels him to answer, it makes the answer in all cases harmless to him, and in some beneficial; for in most of the above cases, not only cannot the answer be used against him in any criminal proceeding, but he cannot be convicted subsequently by any evidence whatever of any offence provable by the extorted answer.

In England, when the original proceedings are under the Bankruptcy Acts, the extent of a witness's privilege has been a subject of much controversy. Where the bankrupt answers without claiming his privilege his answer may be given in evidence against him on a criminal charge, precisely as any voluntary statement is at all times admissible against a prisoner (*c*). And even when the answer is clearly compulsory, or where it was obtained from the bankrupt by a threat of the commissioner that he would commit him if he did not answer a clearly criminatory question; it was held by a majority of judges that as such a question might be put to him lawfully under the Bankruptcy Act of 1849 (*d*) (by

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(*c*) *R.* v. *Sloggett*, Dears. 656.
(*d*) 12 & 13 Vict. c. 106, s. 117.

which a bankrupt might be examined touching all matters relating to his trade, dealings, or estate), therefore, the privilege of the witness is removed by statute, and therefore the answer may be used against him on a criminal charge. "The result seems to be that a question cannot be put to a bankrupt which does not touch his trade, dealings, or estate, or the direct object of which is to show that he has committed a criminal act; yet that he cannot refuse to answer a question which does touch his trade, dealings, or estate, although the answer may seem to show that he has concealed his effects or been guilty of any other offence connected with his bankruptcy"(*e*). This doctrine was dissented from by Coleridge, J. (*f*), and has been doubted since (*g*). In another case (*h*), the prisoners had been indicted under 5 & 6 Vict. c. 39, for embezzlement as brokers and agents, and relied on the 6th section, which provides "that no agent shall be liable to be convicted by any evidence whatsoever in respect of any act done by him if he shall at any time previously to his being indicted for such offence have disclosed the same in any examination or deposition before any commissioner in bankruptcy." After committal the prisoners stated facts before the commissioner, which had been proved already before the magistrate, and on which they were subsequently convicted. They

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(*e*) Per Lord Campbell, C. J., *R.* v. *Scott*, 1 D. & B. 56.
(*f*) Ibid.
(*g*) *R.* v. *Skeen*, Bell, 97.
(*h*) Ibid.

relied on their depositions before the commissioner as a statutory defence. A majority of the court held against a large minority that a statement by the prisoners of facts which were known previously *aliunde* was not a disclosure within the statute, and that, therefore, the prisoners were properly convicted. The same question was raised in *R.* v. *Robinson* (*i*), and decided in accordance with *R.* v. *Scott*,—Kelly, C. B., remarking, "I cannot but think that this decision is at variance with the principle of law that no man is bound to criminate himself, but it was a decision of this court and followed in *R.* v. *Skeen*."

In a case under the Bankruptcy Act, 1869 (*k*), ss. 96 and 125, statements made on an examination under the act taken before a registrar by a person who had filed a petition for liquidation, were admitted as evidence against him on an indictment under the Debtors Act, 1869 (*l*), s. 11, and the court held that the debtor, by attending the examination, had waived the right of objecting to any irregularity in holding it (*m*); and, as a general rule, all depositions on oath legally taken are evidence against a witness on a subsequent criminal charge, especially if he had not objected to them as criminatory (*n*).

(*i*) 36 L. J., M. C. 78; L. R., 1 C. C. R. 80.

(*k*) 32 & 33 Vict. c. 71.

(*l*) 32 & 33 Vict. c. 69.

(*m*) *R.* v. *Widdop*, L. R., 2 C. C. R. 3; 42 L. J., M. C. 9.

(*n*) *R.* v. *Coote*, 42 L. J., P. C. 445; 21 W. R. 553; L. R., 4 P. C. 599.

When the question is merely degrading to the witness, and its object is to discredit his testimony by showing him to be of a disreputable character, the authorities are conflicting as to the privilege of the witness in refusing to answer. Generally, it appears to be clear that such a question may be asked; but that where it is not material to the issue, and its object is merely to degrade the character of the witness, he is not compellable to answer it. Thus, on a charge of rape, or indecent assault, the prosecutrix cannot be compelled to say whether she has had connection with other men, or particular persons; nor can evidence of such connection be received, for if she has once denied it her answer is final (*o*). So, in an action of seduction, the woman is not compellable to say whether she has had connection with other men previous to the alleged seduction; but the defendant may prove such previous connection in reduction of damages (*p*).

In equity this rule is carried even further than at common law. A witness will not be compelled to answer any question which would subject him to a criminal charge, or to any pains or penalties, or to ecclesiastial censure, or to a forfeiture of interest; and the protection is said to be extended even to cases where the answer would prove the witness guilty of great moral turpitude, subjecting him to

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(*o*) *R.* v. *Holmes*, 41 L. J., M. C. 12; 20 W. R. 123; L. R., 1 C. C. R. 334. The Indian law is different. See Ind. Ev. Act, s. 155.

(*p*) *Dodd* v. *Norris*, 3 Camp. 519.

penal consequences (*q*). But when the reason for the privilege ceases the privilege will cease also. Therefore, if a penalty or forfeiture would enure for the benefit of a plaintiff and he waives the same, or when the time for suing for a penalty has expired, a witness is compelled to answer, as also he is if by contract he is bound to answer, notwithstanding the consequences (*r*).

Rule 2.

Professional Communications.

> Counsel, solicitors, and their clerks are not permitted to disclose communications which have been made to them in professional confidence by their clients, without the consent of such clients; nor can a man be compelled to disclose any communication which he has made in professional confidence to his solicitor (*s*).

When the relation of solicitor and client, or of counsel and client, has been established, then this rule operates, and neither the solicitor nor counsel can be compelled or will be permitted (*t*), without the consent of the client, to make any disclosure or admission which may be fairly presumed to have been communicated by the client, with reference to

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(*q*) Wigram on Discovery, 81; Mitford on Pleading, 194.

(*r*) Wigram on Discovery, 83.

(*s*) For the law in India, which is substantially the same, see Ind. Ev. Act, ss. 126–129.

(*t*) *Wilson* v. *Rastall*, 4 T. R. 759.

the matter in issue, under an implied promise of secrecy. The privilege does not terminate with the relationship, and when a solicitor has ceased to act for a client the Court of Chancery will restrain him by injunction from divulging what he has learnt from his old client to any new one (*u*). The rule extends to Scotch lawyers (*x*). But for the existence of the rule, "no man would dare to consult a professional adviser with a view to his defence, or the enforcement of his rights" (*y*). There is no doubt now that a client can withhold communications made to his solicitor, and that the privilege applies as much to communications made before as to those made during litigation (*z*).

When a solicitor holds a document for his client, he cannot, against the will of his client, be compelled to produce it by a person who has an equal interest in it with his client (*a*). But a solicitor may be asked whether he has papers of his client in court; and if by his answer, which is compulsory, he admit the fact, secondary evidence of their contents may be given if the originals are not produced (*b*). If a

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(*u*) *Lewis* v. *Smith*, 1 M'N. & G. 417.

(*x*) *Laurence* v. *Campbell*, 4 Drew. 485.

(*y*) Per Lord Brougham, *Bolton* v. *Corporation of Liverpool*, 1 M. & K. 94.

(*z*) *Minet* v. *Morgan*, L. R., 8 Ch. 361; 42 L. J., Ch. 627; 21 W. R. 467; cf. *Wilson* v. *Northampton Railway Co.*, L. R., 14 Eq. 477; 20 W. R. 938.

(*a*) *Newton* v. *Chaplin*, 10 C. B. 356.

(*b*) *Dwyer* v. *Collins*, 7 Ex. 639.

solicitor be subpœnaed to produce a document which he holds for a client, he may, in his discretion, refuse to produce it, and to answer any question as to its contents; and the judge ought not to examine it to ascertain whether it ought to be withheld (*c*).

Where an attorney had been subpœnaed to produce a deed which, at the trial, he refused to produce by the express instruction of his client (*d*), the party by whom he was subpœnaed then called another witness to give secondary evidence of the deed, by means of a copy. The second witness stated that he had a copy of a deed, but that he did not know whether it was a copy of the deed in question unless he was suffered to look at the deed. It was then suggested that he should be allowed to look at the names of the parcels and the parties to the deed, in order to identify it. The first witness still objected, and it was also contended on the opposite side, that the first witness's client ought to have been called to show that he had given the prohibition, and that all sources of primary evidence had been exhausted. The judge, however, ordered that the second witness should be allowed to look at the indorsement of the deed; and when the latter had thus identified it, the judge received the copy as secondary evidence. An application for a new trial was made, on the ground that this evidence was improperly admitted; but the court upheld the ruling of the Nisi Prius

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(*c*) *Volant* v. *Soyer*, 13 C. B. 231.

(*d*) *Phelps* v. *Prew*, 3 E. & B. 430; 23 L. J., Q. B. 140.

judge on both points. Coleridge, J., said (*e*):—"It is said that secondary evidence of the deed is not admissible, because all was not done to exhaust the means of obtaining primary evidence; the facts being that the defendant being desirous of the production of the deed in evidence, the attorney of the party interested was served with a *subpœna duces tecum*, and was present at the trial with the deed, and on being called on to produce the deed, he stated that it was the title deed of his client, and that he had received instructions from his client not to produce it. It is admitted that, where an original instrument is properly withheld on the ground of privilege, secondary evidence of the contents of the instrument is receivable; but here it is said, that the privilege, though properly put forward by the attorney, might have been waived by the client if he had been in court, and therefore this cannot be considered as an instrument properly withheld on the ground of privilege, because no steps had been taken to procure the attendance of the client at the trial. Now, questions of this sort are, after all, resolvable into what is reasonable with reference to the circumstances of the particular case. The true ground is, whether it was reasonable for the party to go further under the particular circumstances of the case; and I think it was not reasonable to require the party to go further. There was distinct evidence of the privilege being insisted upon by the client. In addition to the refusal by the attorney,

(*e*) 23 L. J., Q. B. 143.

he had received express instructions from his client not to produce the deed, which took away all discretion on the part of the attorney; and this was the state of things at the time when the privilege was claimed. The judge was right in assuming that the client remained of the same mind, and that there was nothing to alter that state of things. I think, therefore, enough was done to let in secondary evidence. Then, the second objection is, that the judge improperly overruled the privilege in the next step in the cause. There being some doubt, when the next witness was called, whether the draft which the witness was speaking of was a draft of the deed in question, the judge, in order to ascertain that, compelled the attorney to produce the document for the purpose of identification. It was contended that it was a breach of privilege to produce the deed in evidence for any purpose whatever. But whether it is a breach of the privilege or not, must depend upon the circumstances of each case. I quite agree that sometimes, as in *Brand* v. *Akerman*, the process of identification will require a disclosure of the contents of the deed; and, if so, I think the inquiry must stop. But here I do not see that anything was done that had the effect of disclosing the contents of the deed, or violating any of the secrets which the attorney had intrusted to him by his client. The indorsement might disclose that the deed was an assignment; but of what property, and whether it was of the legal or equitable estate, it would not disclose. I think, therefore, the learned judge was right."

The rule of professional confidence is held to extend to all cases in which the solicitor or counsel has been confided in as such, but not to cases where the confidence was given before the relation was formed; or after it has ceased. In *Gainsford* v. *Grammar* (*f*), Lord Ellenborough said: "I fully accede to the doctrine laid down in *Cobden* v. *Kendrick*, and *Wilson* v. *Rastall*, which is no more than this, that a communication by the party to the witness, whether prior or subsequent to the relation of client and attorney subsisting between them, is not privileged. But this relation may be formed before the commencement of any action. The solicitor may be retained and confided in as such in contemplation of an action; and shall it be said that he is bound to disclose whatever has been revealed to him previous to the suing out of, or the service of, the writ (*g*)?" The privilege is also held to extend to the clerks of solicitors and barristers to whom communications have been made as such (*h*); and to an unprofessional agent employed by a solicitor's advice to obtain information for a client (*i*); but not to cases where the communication has been made to the solicitor (*k*), or his clerk (*l*), while they have not been acting in their professional character. A person

(*f*) 2 Camp. 10.

(*g*) Cf. *Clark* v. *Clark*, 1 M. & R. 3.

(*h*) *Taylor* v. *Forster*, 2 C. & P. 195; *Foote* v. *Hayne*, R. & M. 165.

(*i*) *Lafone* v. *Falkland, &c. Company*, 4 K. & J. 39.

(*k*) *R.* v. *Brewer*, 6 C. & P. 363.

(*l*) *Doe* v. *Jauncy*, 8 C. & P. 99.

who is not a solicitor, in whom confidence has been placed under a mistaken idea that he is a solicitor, will be compelled to disclose the communication (*m*); and a written opinion given by an ex-Lord Chancellor to a friend has been held not to be privileged (*n*).

The privilege extends to all knowledge obtained by the solicitor which he would not have obtained if he had not been consulted professionally by his client (*o*). It has been held, that when a solicitor writes letters to a third party for the purposes of a suit the answers are privileged (*p*); and letters passing between a country solicitor and his town agent are privileged (*q*). Communications furnished with a view to litigation by a lay agent to a litigant are as much protected on principle as those made by a solicitor (*r*). So, in an action by the payee of a promissory note against the maker, it appeared that the plaintiff had acted as attorney to the defendant, and while holding that capacity had obtained documentary evidence from the defendant, which he stated was wanted to assist her in preparing a case for counsel; and on this he relied to take the note out of the Statute of Limitations. It was held that

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(*m*) *Fountain* v. *Young*, 6 Esp. 113; cf. per Bacon, V.-C., *Smith* v. *Daniell*, L. R., 18 Eq. 654.

(*n*) *Smith* v. *Daniell*, L. R., 18 Eq. 649; 44 L. J., Ch. 189; 22 W. R. 177.

(*o*) *Greenhough* v. *Gaskell*, 1 Myl. & K. 98.

(*p*) *Simpson* v. *Brown*, 33 Beav. 483.

(*q*) *Catt* v. *Tourle*, 19 W. R. 56.

(*r*) *Ross* v. *Gibbs*, L. R., 8 Eq. 522; 39 L. J., Ch. 61. But see post, where this point is more fully discussed.

the evidence was inadmissible for the plaintiff, Platt, B., observing that it would never have been in the hands of the attorney, except for the purpose of his preparing a case for counsel; and Martin, B., added: "The client might be in error in thinking the communication necessary to be laid before counsel, but if she communicated it *bonâ fide*, considering it necessary, the communication was privileged and could not be divulged" (*s*).

A remarkable case, partially restricting this doctrine, was decided some years since. In an action for false imprisonment and malicious prosecution on a charge of felony, it became a material question whether an entry in a book, by which the plaintiff acknowledged the receipt of money which the defendant had charged him with embezzling, existed at the time when the plaintiff was examined before the magistrates, or had been made, as the defendant alleged, by the plaintiff between the examination and before the trial. The counsel who had been concerned for the plaintiff before the magistrates, but who was not concerned for him on the trial, happened to be in court on the latter occasion; and at the suggestion of Jervis, C. J., after consulting Cresswell, J., he was called for the defendant, and asked whether the entry was in the book at the time of the examination before the magistrate. He gave evidence that it was not; and a verdict passed for the defendant. On a rule for a new trial on the ground that this evidence was improperly admitted,

(*s*) *Cleave* v. *Jones*, 6 Ex. 573.

the court held that it was properly admitted, because the witness was required only to disclose something which he had seen, and not what he had been told in his position as counsel. It is perhaps difficult to reconcile this case with principle, as it is not easy to see how the witness possessed his information except by means of documents which came to him only in his character of the plaintiff's counsel (*t*).

Where a communication between an attorney and his client appears to be of an irrelevant unprofessional character, the attorney will be compelled to disclose it. Thus, an attorney will be compelled to state what his client has said to him on a matter in which the latter was not asking for legal advice, but only for information as to a matter of fact, even though that fact involved a question of law. Thus, in *Bramwell* v. *Lucas*, an action by assignees (*u*) to prove an act of bankruptcy, it was held that the solicitor to the bankrupt is not privileged from saying whether his client had asked his opinion, whether he (the client) could attend a meeting of his creditors without danger of being arrested. The court held that the communication was not privileged, and Lord Tenterden, C. J., said: "A question for legal advice may come within the description of a confidential communication, because it is part of the attorney's duty, as attorney, to give legal advice; but a question for information as to matter of fact, as

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(*t*) *Brown* v. *Foster*, 1 H. & N. 736.

(*u*) 2 B. & C. 749.

to a communication the attorney has made to others, where the communication might have been made by any other person as well as the attorney, and where the character or office of attorney has not been called into action, has never been held within the protection, and is not within the principle upon which the privilege is founded. Was, then, this a question for legal advice put to Mr. Scott in his character of attorney, or was it not a question for information as to matter of fact, in which the professional character of Mr. Scott as attorney was not considered? It can hardly be supposed that a man could ask, as a matter of law, whether he would be free from arrest whilst attending a voluntary meeting of creditors, but he might well ask, as a matter of fact, whether any arrangement had been made with the creditors to prevent an arrest."

It will be observed that this case shows a tendency to confine the rule of privileged communication within a strict limit; as, with great deference to the learned judge, it may be submitted that the question put by the bankrupt to his attorney seems to be rather one of law than of fact; and is precisely that sort of legal question which ignorant clients put constantly to their attorneys: but as the case was between third parties, perhaps a greater latitude may be presumed to have been allowed on that account (*x*). But when a statement has been made by either plaintiff or defendant, in the presence of the

(*x*) Cf. per Lord Cottenham, C., *Desborough* v. *Rawlins*, 3 Myl. & Cr. 515.

attorney of either party, the attorney may be called to prove it (*y*).

The privilege is the privilege of the client, and may be waived by him, but no presumption adverse to him arises from his not waiving it (*z*). No waiver arises from the client calling the solicitor as a witness unless he is examined in chief as to the privileged matter. It was held by Malins, V.-C., that where a person had absconded with two wards of court, his solicitor must produce the envelopes of the letters received from him, such envelopes not being privileged communications, and even if they were, a solicitor cannot aid and abet in concealing from the Court of Chancery the residence of its wards (*a*). When a solicitor is a party to a fraud, no privilege attaches to the communications with him upon the subject (*b*). It is not sufficient that the client committed a fraud if the solicitor was no party to it (*c*). The rule is not apparently restricted to fraud, but extends to any illegal purpose (*d*). If a solicitor improperly hands a document to a third party, he may give it in evidence (*e*).

Although letters written between co-defendants *simpliciter* are not privileged, yet a letter written by one co-defendant to another with directions to send

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(*y*) *Griffith* v. *Davies*, 5 B. & Ad. 502.
(*z*) *Wentworth* v. *Lloyd*, 10 H. L. Cas. 589.
(*a*) *Ramsbotham* v. *Senior*, 17 W. R. 1057.
(*b*) Per Turner, V.-C., *Russell* v. *Jackson*, 9 Hare, 392.
(*c*) *Charlton* v. *Coombes*, 4 Giff. 372.
(*d*) Cf. *Russell* v. *Jackson*, ubi supra.
(*e*) Per Parke, B., *Cleave* v. *Jones*, 21 L. J., Ex. 106.

to the joint solicitor is (*f*). Where two parties employ the same solicitor, a letter by one of them to him, containing an offer to be made to the other, may be given in evidence against the writer (*g*); but in such case the joint solicitor cannot disclose the title of either. Thus, where a borrower and lender employ the same solicitor, he cannot be called to prove the abstract of the borrower's title as against the borrower (*h*).

The rule of privileged communications has been confined strictly by the English law to the cases which have been mentioned. It does not extend to communications made confidentially to stewards (*i*), or medical men (*k*). When a secret is entrusted to a person confidentially employed, the Court of Chancery will restrain such person from making use of the secret, or divulging it to others (*l*).

Nor, as it seems, are communications to clergymen strictly privileged (*m*). But the judges have shown an indisposition to receive communications which have been made to clergymen as such. Best, C. J., is reported to have said that he would never compel a clergyman, if he objected, to disclose

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(*f*) *Jenkyns* v. *Bushby*, L. R., 2 Eq. 548; 36 L. J., Ch. 820; 16 W. R. 189.

(*g*) *Baugh* v. *Cradocke*, 1 Moody & R. 182.

(*h*) *Doe* v. *Watkins*, 3 Bing. N. C. 421; cf. *R.* v. *Avery*, 8 C. & P. 596.

(*i*) *Earl of Falmouth* v. *Moss*, 11 Price, 455.

(*k*) *Duchess of Kingston's case*, 20 How. St. Tr. 613; *R.* v. *Gibbons*, 1 C. & P. 97; *Lee* v. *Hamerton*, 12 W. R. 975.

(*l*) *Morrison* v. *Moat*, 9 Hare, 241.

(*m*) *Broad* v. *Pitt*, M. & M. 233.

such communications (*n*); and in a case (*o*) where a woman was indicted for the murder of her child, Alderson, B., objected to hear the chaplain of the prison as a witness to conversations which he had had with the prisoner in his spiritual capacity. The learned judge said: "I think these conversations ought not to be given in evidence. The principle upon which an attorney is prevented from divulging what passes with his client is, because, without an unfettered means of communication the client would not have proper legal assistance. The same principle applies to a person, deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule, but I think such evidence ought not be given." The counsel for the prosecution said that after such an intimation, he should not tender the evidence.

Bankers are bound not to disclose the state of a customer's accounts, except upon a reasonable and proper occasion, and what is a reasonable and proper occasion is a question for the jury (*p*). The banker of a contributory can be compelled to give evidence as to his account under the 115th section of the Companies Act, 1862 (*q*).

(*n*) *Broad* v. *Pitt*, M. & M. 233.
(*o*) *R.* v. *Griffin*, 6 Cox, Cr. C. 219.
(*p*) *Hardy* v. *Veasey*, L. R., 3 Ex. 107; 37 L. J., Ex. 76.
(*q*) *Forbes' case*, 20 W. R. 585; 41 L. J., Ch. 467.

Rule 3.

As to Evidence excluded on grounds of Public Interest.

A witness cannot be asked, and will not be allowed, to state facts, or to produce documents, the disclosure or production of which may be prejudicial to any public interest (*r*).

On Hardy's trial for high treason (*s*), a witness for the crown was asked on cross-examination by Mr. Erskine, whether the person to whom he had communicated a report of the proceedings of the society to which the prisoner belonged, was a magistrate of any species or description, from a justice of peace to a secretary of state. It was held by Eyre, C. J., that he might say whether the communication was made to a magistrate or not. The witness said, "It was not to a magistrate." Mr. Erskine then asked, "Then to whom was it?" The Attorney-General objected to the question. Eyre, C. J., said:—"It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against the prisoner; but there is a rule, which has universally obtained on account of its importance to the

(*r*) In India, by ss. 123, 124 of the Indian Evidence Act, no one is permitted to give any evidence derived from unpublished official records, as to affairs of state, except with the permission of the head of the department concerned; and no public officer is compellable to disclose communications made to him in official confidence, if he thinks their disclosure would prejudice the public interest.

(*s*) 24 How. St. Tr. 815.

public for the detection of crimes, that those persons who are the channels by means of which that detection is made, should not be unnecessarily disclosed: if it can be made to appear that really and truly it is necessary for the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me that it is within the ordinary course to do it, or that there is any necessity for it in this particular case." The point was subsequently discussed before the other judges, and the majority concurred with Eyre, C. J., who thus laid down the rule: "My apprehension is, that among those questions which are not permitted to be asked, are all those questions which lead to the discovery of the channel by which the disclosure was made to the officers of justice, that it is upon the general principle of the convenience of public justice, that they are not to be disclosed; that all persons in that situation are protected from the discovery; and that, if it is objected to, it is no more competent for the defendant to ask who the person was that advised him to make the disclosure, than it is to whom he made the disclosure in consequence of the advice—than it is to ask any other question respecting the channel of communication, or all that was done under it."

It was held by Lord Ellenborough (*t*), that a member of parliament or the Speaker may be called on to give evidence of the fact of a member of par-

(*t*) *Plunkett* v. *Cobbett*, 5 Esp. 136.

liament having taken part or spoken in a particular debate; but that he cannot be asked what he then delivered in the course of the debate. It has also been held, that communications in official correspondence relating to matters of state cannot be produced as evidence in an action against a person holding an office, for an injury charged to have been done by him in exercise of the power given to him as such officer: not only because such communications are confidential, but because their disclosure might betray secrets of state policy (*u*). And where a minister of state, subpœnaed to produce public documents, objects to do so on the ground that their publication would be injurious to the public interest, the court ought not to compel their publication (*x*); and the question whether the production of such a document would be injurious to the public service must be determined by the head of the department having the custody of the paper and not by the judge (*y*). It has been said that this privilege is personal to the head and cannot be claimed by a subordinate (*z*); but in a suit against an admiral in the Royal Navy to recover damages for a collision caused by his flagship, Sir R. Phillimore refused the plaintiffs permission to inspect reports of the collision made by the admiral to the Lords of the Admiralty, the secretary to the Admiralty having made an affi-

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(*u*) *Anderson* v. *Hamilton*, 2 B. & B. 156, n.
(*x*) *Beatson* v. *Skene*, 5 H. & N. 838.
(*y*) Ibid., per Pollock, C. B., 5 H. & N. 853.
(*z*) *Dickson* v. *Lord Wilton*, 1 F. & F. 424.

davit that their production would be prejudicial to the public service (*a*). It has also been held that communications between a governor of a province and his attorney-general are privileged (*b*). This rule was discussed in the *Rajah of Coorg* v. *East India Co.* (*c*), where it was stated that the production of political documents depends not upon the question whether the person called on to produce them is a party to the suit or not, but upon the danger to the public interests which would result from their publication. Where an officer in the army sued a superior officer for defamation, the alleged libel being contained in evidence given by the latter before a military court of inquiry, the Court of Exchequer Chamber held such evidence to be not only privileged from being the subject of an action for libel, but also wholly inadmissible, since the proceedings of the court being delivered to the commander-in-chief, and held by him on behalf of the sovereign, ought not to be produced except by her Majesty's command or permission (*d*).

But the courts have occasionally shown a disposition to limit the rule. Thus, in an action (*e*) for a penalty for acting as a parish committee-man, being at the same time a collector of the property-tax; a clerk to the commissioners of the property-tax was

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(*a*) *The Bellerophon*, 23 W. R. 248; 41 L. J., Adm. 5.

(*b*) *Wyatt* v. *Gore*, Holt, 299.

(*c*) 29 Beav. 350.

(*d*) *Dawkins* v. *Lord Rokeby*, L. R., 8 Q. B. 255; 42 L. J., Q. B. 73: affirmed by the House of Lords, W. N. 1875, p. 154.

(*e*) *Lee* v. *Birrell*, 3 Camp. 337.

called, and directed to produce his books, to prove the defendant's appointment. The witness refused on the ground that he had been sworn, on his own appointment, not to disclose anything he should hear in that capacity respecting the property-tax, except with the consent of the commissioners, or by force of an act of parliament. But Lord Ellenborough said:—"I clearly think the oath contains an implied exception of the evidence to be given in a court of justice, in obedience to a writ of subpœna. The witness must produce the book, and answer all questions respecting the collection of the tax, as if no such oath had been administered to him." It appears also that a grand juror may be compelled, either in civil or criminal cases, to disclose what has passed before a grand jury. So Lord Campbell, C. J. (*f*), once held that a witness cannot refuse to produce a letter which he holds from a secretary of state, to whom it has been addressed in his public character, and who forbids its production. Where a document is privileged from production on the grounds of public policy, secondary evidence of its contents is inadmissible (*g*).

Rule 4.

As to Evidence excluded on ground of Indecency.

Evidence may be excluded on the ground of indecency. But this rule only holds in civil cases.

(*f*) *Sykes* v. *Dunbar*, 2 Selw. N. P. 1059; 4 Bl. Comm. 126; note by Mr. Christian of a case at York.

(*g*) *Horn* v. *Bentinck*, 2 B. & B. 130.

Thus, it is an established rule that parties shall not be permitted after marriage to say that they have had no connection (*h*). And Gibbs, C. J., refused to try an action on a wager, whether an unmarried woman had had a child (*i*). But although a wife cannot prove non-access in order to bastardize her issue (*k*); yet it appears that if that fact is proved by other evidence, she may be examined as to collateral facts, such as the name of an adulterer, or the time of a birth (*l*). In criminal cases no objection can be taken to evidence on the ground of indecency; and in civil cases the rule is restricted to such as involve considerations of domestic morality; or cases in which the admission of such evidence would only tend to encourage the shameless or morbid outrage of conventional propriety.

(*h*) *R.* v. *Inhabitants of Sourton*, 5 A. & E. 180; *Anon.* v. *Anon.*, 23 Beav. 273.

(*i*) *Ditchburn* v. *Goldsmith*, 4 Camp. 152.

(*k*) *Atchley* v. *Sprigg*, 33 L. J., Ch. 345.

(*l*) *R.* v. *Luffe*, 8 East, 193; *Legge* v. *Edmunds*, 25 L. J., Ch. 125.

CHAPTER VIII.

ON HEARSAY OR SECOND-HAND EVIDENCE.

THE term hearsay or second-hand evidence is by some writers extended to cover all evidence which is reported, whether by a witness or any other medium, to the court (*a*), and this is probably scientifically accurate. In a treatise of this nature it is, however, preferable to confine the term to its ordinary application, *i. e.*, to the oral or written statement of a person who is not produced in court, conveyed to the court either by a witness or by the instrumentality of a document. Therefore, what a witness himself says is original evidence, but when he repeats what another person has said this is hearsay. It is a well-settled general rule that—

Hearsay or second-hand evidence is inadmissible.

The ground for the rejection of hearsay or second-hand evidence lies in the fundamental principle that evidence has no claim to credibility unless it be given on oath, or what is equivalent to an oath, and unless the party to be affected by it have an opportunity of cross-examining the witness. The distinction between original and hearsay evidence is

(*a*) Best on Evidence, 6th ed., p. 627.

of the widest possible kind, when they are considered as elements of, and guides to, moral certainty. When a witness states something which he himself has either seen or heard, directly affecting the parties to a proceeding, such a statement contains clearly the requisite principles of presumptive truth: but when he states something which he has heard from another person, the statement affords no satisfactory or reasonable information. A multitude of probable contingencies annihilate its value. Thus, the witness may have misunderstood or imperfectly remembered, or even may be wilfully misrepresenting the words of the third person; or the latter may have spoken hastily, inaccurately, or even falsely.

In the Berkeley Peerage case (*b*), it was said by Mansfield, C. J.:—"By the general rule of law, nothing that is said by any person can be used as evidence between contending parties, unless it is delivered upon oath in the presence of those parties. . . . Some inconvenience no doubt arises from such rigour. If material witnesses happen to die before the trial the person whose cause they would have established may fail in the suit. But although all the bishops on the bench should be ready to swear to what they heard those witnesses declare, and add their own implicit belief of the truth of the declarations, the evidence would not be received. Upon this subject, the laws of other countries are quite different: they admit evidence of hearsay without scruple. There is not an appeal from the neighbour-

(*b*) 4 Camp. 414.

ing kingdom of Scotland, in which you will not find a great deal of hearsay evidence upon every fact brought into dispute. But the different rules which prevail there and with us seem to me to have a reasonable foundation in the different manner in which justice is administered in the two countries. In Scotland and most of the continental states, the judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when they come to consider their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds."

Accordingly it seems that where the object of evidence is to satisfy the court on matters which are for the court and not for a jury, hearsay evidence is unobjectionable, even where the court is discharging the function of a jury. Thus, in order to show that reasonable search has been made for a lost indenture, a witness may be asked whether he has inquired of persons who were likely to know about it, and what answers were given to his inquiries (*c*).

The general doctrine is illustrated in *Spargo* v. *Brown* (*d*), which was an action for excessive

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(*c*) *R.* v. *Braintree*, 1 E. & E. 51.
(*d*) 9 B. & C. 935.

distress; and the question was, whether the plaintiff was tenant to the defendant Hugh Brown, or to his brother John Brown. The plaintiff had paid rent to John; but the defendant, to show that the money had been paid to John as his (the defendant's) agent, offered in evidence accounts tendered to him by John Brown, in which John described himself as the agent of the defendant. It was objected that John Brown, not being dead, ought to have been called as a witness. The judge rejected the evidence on this ground, and the court above upheld his ruling. Littledale, J., said:—"The general rule is, that where a person is living, and can be called as a witness, his declaration, made at another time, cannot be received in evidence:" and Bayley, J.:—"The general rule is, that every material fact must be proved on oath. There is an exception to that rule, viz., that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence. But, generally speaking, mere declarations not upon oath are not evidence. The acts of a party may be evidence. But here the defendant merely produced a paper in the handwriting of John Brown, without showing that he was identified with the plaintiff."

It must also be borne in mind that evidence of the acts of a person is often as completely hearsay as the evidence of the words of the same person might have been. Thus it is equally hearsay to prove that a witness not before the court treated an individual as sane, as it is to show that in an oral or written statement he called him sane. This was to a great

extent the ground of the judgment in *Wright* v. *Doe* (*e*), in which case the judges in the Exchequer Chamber held, in an issue of *devisavit vel non* (and the judgment was affirmed on appeal by the House of Lords), that letters written to the testator by different persons since deceased, and who had been well acquainted with the testator, could not be received in evidence on a question of sanity. The court held that the letters were not receivable as mere declarations of deceased witnesses, or as proof of treatment. But, assuming that the letters were connected with any act of the testator relating to them by which intelligence was indicated, as, for example, if he had answered them, they were receivable. Parke, B., said:—"The question is, whether the contents of these letters are evidence of the fact to be proved upon the issue; that is, the actual existence of the qualities which the testator is in those letters, by implication, stated to possess; and these letters may be considered, in this respect, to be on the same footing as if they had contained a direct positive statement that he was competent. For this purpose they are mere hearsay evidence, statements of the writers, not on oath, of the truth of the matter in question, with the addition, that they have acted upon the statements on the faith of their being true, by thus sending the letters to the testator. That the so acting cannot give a sufficient sanction for the truth of the statement is perfectly plain, for it is clear that if the same statements had

(*e*) 7 A. & E. 313.

been made by parol or in writing to a third person it would have been insufficient. Yet in both cases there has been an acting on the belief of the truth, by making the statements, or writing and sending a letter to a third person; and what difference can it possibly make that this is an acting of the same nature by writing and sending the letter to the testator?" But in *Beavan* v. *M'Donnell* (*f*), which was an action to recover a sum of money paid by the plaintiff for the purchase of an estate, on the ground that he was a lunatic, and therefore incompetent to contract, evidence was received of his conduct before and after the transaction, to show that the lunacy was of such a character as would be apparent to the defendant when dealing with him.

There are a great many cases in which that which is apparently hearsay or second-hand evidence is treated by the law as original evidence, and admissible as such. Thus, (1) evidence is original and not hearsay which is given to prove, in corroboration of a witness's testimony, that he affirmed the same thing on previous occasions (*g*). And what a dead witness has sworn on a former trial, between the same parties, is evidence in the cause, and may be either read from the judge's notes, or proved upon oath by the notes or recollection of any person who heard it (*h*). Generally, however, evidence of the declaration of a man since dead, as to a fact done by

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(*f*) 10 Exch. 184.

(*g*) *Holliday* v. *Sweeting*, Bull. N. P. 294.

(*h*) *Doncaster* (*Mayor of*) v. *Day*, 3 Taunt. 262.

himself, is not admissible (*i*). But when a will is disputed on the ground of fraud, the declarations of the testator are admissible (*k*).

(2) The statements of persons not before the court are admitted where they can be regarded as essentially connected with or part of the *res gestæ*, or gist of the matter in issue. Thus, in false imprisonment, the defendant justified on the ground that he had given the plaintiff in custody for forging a bill of exchange, which had therefore been dishonoured on presentment to the drawee. A witness stated that he had accompanied the defendant to the drawee, who refused to pay. He was then asked what the drawee had said at the time of the refusal. The question was objected to, but the court held that the evidence ought not to be excluded. There were peculiar circumstances in the case, but Tindal, C. J., said:—"Even if the inquiry before us had depended on the determination of the point, whether evidence by the defendant of the dishonour of the bill, and of the circumstances attending such dishonour, was relevant to the question then before the jury, it would have been difficult altogether to exclude such evidence on the score of its irrelevancy" (*l*). On the same principle, proof has been received of the language uttered by the holders of seditious meetings, in order to show the objects and character of such meetings. In the same way evidence may be given

(*i*) *Garnons* v. *Barnard*, 1 Anst. 296.
(*k*) *Doe* v. *Hardy*, 1 M. & Rob. 825.
(*l*) *Perkins* v. *Vaughan*, 4 M. & G. 988.

of the inscriptions on flags used at such meetings without producing the flags themselves; for such inscriptions used on such occasions are the public expression of the sentiments of those who bear them, and have rather the character of speeches than of writings (*m*). Thus, a foreign proclamation, contained in a printed placard, is treated as an inscription or act done, and may be proved by oral evidence or an examined copy. In such a case Pollock, C. B., said:—"Hearsay evidence is admissible when it is part of a transaction; and in this way the exclamations of a crowd may be received as evidence. But there is, generally speaking, this distinction between what is said and what is done: in order to admit the former it is necessary that the authority of the speaker should be shown, in order to affect the parties; but if it be something done that is to be proved, no authority is required, because there is no danger of being misled; and I regard a placard or proclamation on a wall rather as something done. In a case before me at Guildford, where the plaintiff sought to recover the expenses of an election, I would not allow orders given by third parties by word of mouth to be admitted in evidence against the defendant, but I admitted inscriptions on coaches" (*n*). To prove an act of bankruptcy by the bankrupt beginning to keep his house, it is allowable to prove that the bankrupt was denied to his creditors by a servant at his house; but it is not enough to

(*m*) *R.* v. *Hunt*, 3 B. & Ald. 574.
(*n*) *Bruce* v. *Nicolupolo*, 11 Ex. 129.

prove that the bankrupt directed that he should be denied unless the direction be followed up by an actual denial (*o*). And in trover, by the assignees of a bankrupt, for goods, the property of the bankrupt, letters written by him during his absence from home, stating that he was absent to avoid two writs that were out against him, are admissible evidence for the plaintiffs of an act of bankruptcy, without proof that there was in fact any writ issued, or any pressure of creditors. It was held in the same case, also, that in order to make a declaration of a bankrupt admissible evidence of an act of bankruptcy, it is not essential that the declaration and the act should be contemporaneous (*p*). In this case Lord Denman concurred in a previous decision of Parke, B., "that it is impossible to tie down to time the rule as to the declarations," that may be made part of the *res gestæ* in cases of bankruptcy; and his Lordship added, "that if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gestæ*." But a more stringent rule seems to be followed in criminal cases. Thus, in cases of rape, it has been the practice of modern judges to reject the evidence of the statements of a deceased or absent prosecutrix, although made at or immediately after the commission of the crime (*q*). But in a case of manslaughter, several of the judges concurred in admitting the evidence of

(*o*) Per Lord Tenterden, *Fisher* v. *Boucher*, 10 B. & C. 710.
(*p*) *Rouch* v. *Great Western Railway*, 1 Q. B. 51.
(*q*) *R.* v. *Megson and others*, 9 C. & P. 420; *R.* v. *Gutteridge*, 471.

a witness as to a statement made by the deceased, in the absence of the prisoner, shortly after the accident through which the death ensued. Gurney, B., said:—"What the deceased said at the instant, as to the cause of the accident, is clearly admissible" (*r*). The distinction in all these cases lies in the consideration what is and what is not part of the original *res gestæ*. If the words are the natural accompaniment and consequence of the act, they may be stated; but where the connection is remote they will be rejected. It will be observed, that the question of admissibility here is very different from the case of dying declarations, which will be considered subsequently.

Although it is a rule at common law, that a parent cannot bastardize his issue; yet on an issue as to the legitimacy of the plaintiff, a witness was allowed to state the declaration and conduct of the deceased mother, when questioned about her child's parentage (*s*).

In an action for misrepresentation of solvency evidence may be adduced, that at the time the credit was given the plaintiff said that it was so given in consequence of the representations made to him (*t*).

(3) When it is material to prove the bodily or mental feelings of an individual, evidence of statements of such individual, at the time in question relative to such feelings, is original and not hearsay.

(*r*) *R.* v. *Foster*, 6 C. & P. 325.
(*s*) *Hargrave* v. *Hargrave*, 2 C. & K. 701.
(*t*) *Fellowes* v. *Williamson*, M. & M. 306.

Thus, in *Aveson* v. *Lord Kinnaird* (*u*), the action was on a policy of insurance, secured on the life of the plaintiff's wife; and the defendants offered evidence that, a few days after it was made, the deceased, who had previously represented herself to the defendants as being in good health, had given a totally different account of her health to a witness. It was held that the witness might relate her conversation with the deceased; and that the statements of the latter, as so related, are evidence in the same way as the answers of patients to the inquiries of their medical attendants are evidence as to the state of health: but letters to a medical man from his patient detailing the symptoms of his malady are not admissible (*x*). On the same principle, in actions for crim. con., what the husband and wife had said to each other, or letters written by either party to the other, when there was no ground to suspect collusion, were admissible evidence to show the terms on which they lived (*y*); and the same rule applies presumably to proceedings in the Divorce Court (*z*).

(4) Evidence of general reputation, general character, and general notoriety is original evidence and not hearsay. Thus, general reputation is admissible to prove marriage (*a*), except in prosecutions

(*u*) 6 East, 188.

(*x*) *Witt* v. *Klindworth*, 3 S. & T. 143.

(*y*) *Trelawney* v. *Coleman*, 1 B. & Ald. 90; cf. *Willis* v. *Berard*, 8 Bing. 376.

(*z*) 20 & 21 Vict. c. 85.

(*a*) *Evans* v. *Morgan*, 2 C. & J. 453; *Doe* v. *Fleming*, 4 Bing. 66.

for bigamy, and petitions for damages for adultery under the Divorce Act, in which the marriage must be strictly proved. Whenever the witness is shown to have derived his information from some assignable individual, it is excluded as hearsay (*b*). Following the principle laid down by Mr. Fraser (*c*), Lord Redesdale, in a case in the House of Lords (*d*), held, that repute to raise presumption of marriage must be founded on general not singular opinion; a divided repute is on such a subject no evidence at all. Here his Lordship was speaking probably of Scotch marriages only; for, in the recent case of *Lyle* v. *Elwood* (*e*), Vice-Chancellor Hall said: "It cannot be contended that wherever there is evidence of repute on one side and the other a marriage cannot be established."

When it is proposed to infer a marriage from repute, it is necessary to weigh the evidence cautiously—first, with respect to the degree in which the opinion prevails; next, with respect to its causes; and lastly, with respect to the inference to be drawn from it (*f*).

In trespass for destroying a picture, when the plea was not guilty, and the defence that the picture was a libel on the defendant's sister and brother-in-law, and that he had therefore destroyed it, Lord Ellenborough held, "that the declarations of the spectators while

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(*b*) *Shedden* v. *Att.-Gen.*, 2 S. & T. 170.
(*c*) Fraser on the Personal and Domestic Relation, Vol. I. p. 207.
(*d*) *Cunninghame* v. *Cunninghame*, 2 Dow. 511.
(*e*) 23 W. R. 157; L. R., 19 Eq. 98.
(*f*) Fraser, Vol. I. p. 206.

they looked at the picture in the exhibition room were evidence to show that the figures portrayed were meant to represent the defendant's sister and brother-in-law"(*g*). So under a devise of lands in a certain parish evidence is admissible that a part not comprised in the parish was reported to be in it, and was intended to be included in the devise (*h*). But evidence of a rumour is not admissible to justify a slander (*i*).

(5) Where several persons are proved to be engaged in one general conspiracy, all the transactions of that conspiracy by the different parties may and ought to be given in evidence; and it is enough if the party accused can be proved to be privy to the general conspiracy; for if that is proved everything that is done by the different parties concerned in it must also be imputed to him as a part of the conspiracy (*k*). Thus, in Hardy's trial for high treason, letters written by one conspirator to another, were held to be evidence against the prisoner after his complicity had been established. So, if several defendants in trespass be proved to be co-trespassers by other competent evidence, the declaration of one as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the common object (*l*).

(6) Where either of the parties to the record

(*g*) *Du Bost* v. *Beresford*, 2 Camp. 511.
(*h*) *Anstee* v. *Nelms*, 1 H. & N. 225.
(*i*) *Lockhart* v. *Jelly*, 19 L. T., N. S. 659.
(*k*) Per Eyre, C. J., Hardy's Trial, 24 How. St. Tr. 451.
(*l*) Per Lord Ellenborough, *R.* v. *Hardwicke*, 11 East, 585.

appears to be merely a trustee for a third party, his declaration or admissions may yet be given in evidence to defeat the claim of such third party (*m*). So, in an action against a sheriff for a false return, the statements of his deputy to the plaintiff's attorney, as to the cause of the omission to make an arrest, have been held to be evidence against the defendant (*n*).

A similar rule holds in cases of partnership and agency, *i. e.* that the acts or parol arrangements of a partner or agent, made in the ordinary course of business, bind a co-partner or principal respectively, and may therefore be given in evidence for or against him (*o*).

The general rule stated at the commencement of this chapter has several important exceptions, which are discussed in the following chapters.

The term hearsay or second-hand evidence finds no place in the Indian Evidence Act; but the law on the subjects treated of in this and the following chapters is substantially the same in India as it is in England (*p*).

(*m*) *Bauerman* v. *Radenius*, 7 T. R. 663; 2 Sm. L. C. 362.

(*n*) *North* v. *Miles*, 1 Camp. 389.

(*o*) *Sandilands* v. *Marsh*, 2 B. & Ald. 673; *Doe* v. *Hawkins*, 2 Q. B. 212.

(*p*) Vide the 32nd and 60th sections of the Indian Evidence Act.

CHAPTER IX.

ON HEARSAY IN MATTERS OF PUBLIC AND GENERAL INTEREST.

WHEN an issue involves a question of public or general interest, the rule that hearsay or second-hand evidence is inadmissible does not apply: and generally—

> In matters of public or general interest, popular reputation or opinion, or the declarations of deceased witnesses of competent knowledge, if made *ante litem motam* (*i. e.* before the litigated point has become the subject of controversy), and without reasonable suspicion of undue partiality or collusion, will be received as competent and credible evidence (*a*).

The ground for its reception lies in the supposition that the universality and notoriety of the interests

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(*a*) By sect. 32 of the Indian Evidence Act it is provided, that "statements, written or verbal, of relevant facts made by a person who is dead or not to be found, or incapable of giving evidence, or whose attendance cannot be procured without unreasonable expense, are relevant facts when they give the opinion of such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which (if existing) he would have been likely to be aware, the statement having been made before any controversy as to the right, custom, or matter had arisen."

concerned remove the temptation and the ability to misrepresent, which would arise if such evidence were received in matters of merely private and personal concern. Accordingly, it is rejected wherever the point at issue appears to partake more of the nature of a private than of a public interest.

In *Wright* v. *Doe* (*b*), Coltman, J., said:—"The true line (says Buller, J., in *R.* v. *Eriswell*), for courts to adhere to, is that wherever evidence not on oath has been repeatedly received and sanctioned by judicial determination, it shall be allowed; but beyond that, the rule that no evidence shall be admitted, but what is on oath, shall be observed. . . . Evidence of opinion is admitted in some cases without oath, as for instance where reputation is given in evidence to prove a public right. . . . The principle upon which I conceive the exception to rest is this, that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject; and such concurrence is presumptive evidence of the existence of an ancient right, of which, in most cases, direct proof can no longer be given, and ought not to be expected; a restriction now generally admitted as limiting the exception is this, that the right claimed must be of a public nature affecting a considerable number of persons." And in the same case in the Exchequer Chamber (*c*), Alderson, B., said:—"The general interest which belongs to the subject would lead to immediate contradiction

(*b*) 7 A. & E. 360.
(*c*) 4 Bing. N. C. 528.

from others, unless the statement proved were true; and the public nature of the right excludes the probability of individual bias, and makes the sanction of an oath less necessary."

In ejectment by the lessor of a plaintiff in tail, against the devisee in fee of a previous remainderman, the question was whether the land in dispute was part of the estate which had been originally devised by a testator between fifty and sixty years previously. Evidence of reputation had been received that the land had been purchased by the original testator; but it was held clear by the court above, notwithstanding some special circumstances in the case, that the question was merely one of private ownership, and that the evidence should have been rejected (*d*).

In *Weeks* v. *Sparke* (*e*), to trespass to the plaintiff's close, the defendant pleaded a prescriptive right of common for his cattle, and the plaintiff replied, traversing the plea, and prescribing for a right to use the *locus in quo* for growing corn until harvest time. It was held that witnesses might prove the statement of a deceased neighbour as to the nature of the enjoyment of the respective rights; but that a foundation for its reception must first be laid by proof of the actual enjoyment of the rights. Le Blanc, J., said:—"How is the right to be proved? First, it is to be proved by acts of enjoyment within

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(*d*) *Doe* v. *Thomas*, 14 East, 323.

(*e*) 1 M. & S. 679; sed cf. *Earl of Dunraven* v. *Llewellyn*, infra, p. 159.

the period of living memory. And when this foundation is laid, then, inasmuch as there cannot be any witnesses to speak to acts of enjoyment beyond the time of living memory, evidence is to be admitted from old persons (not any old persons, but persons who have been conversant with the neighbourhood where the waste lies, over which the particular right of common is claimed) of what they have heard other persons, of the same neighbourhood, who are deceased, say respecting the right. Thus far it is evidence as applicable to this prescriptive right, it being a prescription in which others are concerned, as well as the person claiming it; because a right of common is, to a certain extent, a public right. And the only evidence of reputation which was received was that from persons connected with the district. In the same manner, in questions of pedigree, although they are not of a public nature, the evidence of what persons connected with the family have been heard to say, is received as to the state of that family. In like manner also upon questions of boundary, though the evidence of perambulations may be considered to a certain degree as evidence of an exercise of the right, yet it has been usual to go further, and admit the evidence of what old persons who are deceased have been heard to say on those occasions. The rule generally adopted, upon questions either of prescription or custom, is this, that after a foundation is once laid of the right by proving acts of ownership, then the evidence of reputation becomes admissible, such evidence being confined to what old persons, who were in a situation

to know what those rights were, have been heard to say concerning them."

There was formerly considerable conflict of opinion among the judges, as to the admissibility of reputation, and the declarations of deceased persons to prove or disprove a claim of prescriptive right. In *Morewood* v. *Wood* (*f*), where to trespass the defendant pleaded a prescriptive right, Lord Kenyon and Ashurst, J., held the question to be one of a private nature, and that evidence of reputation should therefore be rejected. But Buller, J., and Grose, J., appear to have thought the issue to be sufficiently of a public nature to let in the evidence. In a later case, Lord Ellenborough laid down the principle that when the right claimed does not curtail the general rights of others, being merely the claim of an individual against an individual, such evidence is not admissible (*g*). Traditionary reputation has been received as evidence of the boundaries between two parishes and two manors; but not of the boundaries between two estates (*h*).

In *Reg.* v. *Sutton* (*i*), the defendant was indicted for the non-repair of a bridge; and, to disprove her liability, offered a presentment of a jury in the reign of Edward III., by which it was found that they did not know who was liable to repair; and this was held to be evidence of reputation for the defendant.

Reputation has been received in support of an

(*f*) 14 East, 327, n.
(*g*) *Weeks* v. *Sparke*, 1 M. & S. 679.
(*h*) 14 East, 331, n.
(*i*) 8 Ad. & El. 516.

immemorial right of common, *pur cause de vicinage* so pleaded (*j*). In *The Duke of Newcastle* v. *Hundred of Broxtowe* (*k*), the question was, whether Nottingham Castle was within the hundred; and it was held that orders made at the County Sessions between 1654 and 1660, in which the castle was described as being within the hundred, were admissible, as the justices must be presumed to have had sufficient acquaintance with the subject to which their declarations related; and that, although contrary evidence that the castle was excepted from the hundred was given from Domesday-Book and an old charter of Henry VI., the judge was right in telling the jury to act on the evidence of a more modern and continuous reputation. But when the question was as to the rights of the county of the city of Chester; as between that city and the County Palatine of Chester; a decree by a Lord Treasurer and other persons who were not a competent tribunal, and who had no personal knowledge of the facts except such as they derived from an irregular judicial proceeding, was held inadmissible evidence of reputation (*l*). So an extra-judicial report by a government surveyor, appointed by Queen Elizabeth, as to the boundaries of a manor, has been rejected as evidence of such boundaries. "The surveyor," said Lord Denman, "does not appear to have had any authority to institute the inquiry; and, stripped of his authority, he has not

(*j*) *Pritchard* v. *Powell*, 10 Q. B. 589.
(*k*) 4 B. & Ad. 273.
(*l*) *Rogers* v. *Wood*, 2 B. & Ad. 245.

merely no right to make any kind of return, but the presumption that he did make it falls to the ground. The paper may have been written by any clerk idling in the office, from his own imagination, or compelled, possibly, by some interested person in furtherance of a sinister object of his own"(*m*). And an old survey of landed property, taken under the directions of a former proprietor, is no evidence that he was entitled to it (*n*).

In a case in the Exchequer Chamber (*o*), on a question in replevin whether goods were taken in Norfolk or Suffolk, a map of Suffolk purporting to have been republished in 1766, *with corrections and additions*, by the sons of J. K., from a map published in 1736 by J. K., who then took an accurate survey of the whole country, was tendered to show that the *locus in quo* was not in Suffolk. It was produced by a magistrate of both Norfolk and Suffolk, who had purchased it twelve or fourteen years previously, and before any dispute as to the boundaries had arisen. The court rejected the evidence chiefly on the ground that the new editors did not appear to have had any personal knowledge of the subject, nor to be in any way connected with the district, so as to make it probable that they had such knowledge.

This case illustrates the important principle, that, before ancient documents can be received as evidence

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(*m*) *Evans* v. *Taylor*, 7 B. & A. 617.
(*n*) *Daniel* v. *Wilkin*, 7 Ex. 429.
(*o*) *Hammond* v. *Bradstreet*, 10 Ex. 390.

of reputation, it must be proved that they have come from the custody of a person who is presumptively connected sufficiently by knowledge with the matter in dispute, so as to render him an authority. They must also bear the plain marks of authenticity. Thus, in the above case it was held, that the fact of the map being in the possession of a county magistrate did not vouch for its accuracy; and that it was unlike the case of a deed of conveyance found in the custody of a party, who, if it were genuine, would be entitled to it. The hearsay, especially where it is documentary, must contain a clear and unambiguous declaration concerning the disputed issue. Thus, in a late case, to prove a public right of way over a manor, a map of the manor, which had been made by a deceased steward of the manor, was given in evidence. The map showed lines made by the deceased witness which indicated clearly some kind of way over the *locus in quo*, but contained nothing to show whether the way was a public one, or only one of several occupation ways such as existed on the manor. If the way had been an occupation way it would have been of a private nature, and it was admitted could not be proved by the evidence which had been given; and as there was nothing on the face of the map to show that it was a public way, and the map had been used only to settle the boundaries of the copyholds of the manor, it was held to be inadmissible (*p*).

The conversations of former tenants of a manor,

(*p*) *Pipe* v. *Fulcher*, 1 E. & E. 111.

and of other persons interested in it, have been held good evidence as to the boundaries of the manor (*q*). A document purporting to be a survey of a manor, while it was part of the possessions of the Duchy of Cornwall, and coming out of proper custody, was admitted by Lord Romilly (*r*) as evidence of the boundaries and customs of the manor. Although a survey of a manor belonging to Oliver Cromwell, and taken by commissioners appointed by him, containing also a presentment by a jury that certain dues were payable to the lord, was held inadmissible as a public document, or as reputation to prove such dues (*s*). The case of *Weeks* v. *Sparke* (*t*), and the whole doctrine by which personal prescriptive rights have been identified in a great measure with public and general rights were much shaken by the case of *The Earl of Dunraven* v. *Llewellyn* (*u*), in the Exchequer Chamber. There the question in trespass was, as to the property in a plot of ground which lay between the waste of the plaintiff and the estate of the defendant. The plaintiff offered evidence of statements made before any controversy arose, by his deceased tenants, who as such had exercised commonable rights over the waste adjoining the *locus in quo;* and other statements made by deceased persons, who, although not tenants, were resident in the manor, and well

(*q*) *Doe* v. *Sleeman*, 9 Q. B. 298.
(*r*) *Smith* v. *Earl Brownlow*, L. R., 9 Eq. 241; 39 L. J., Ch. 36; 18 W. R. 271.
(*s*) *Duke of Beaufort* v. *Smith*, 4 Ex. 450.
(*t*) Supra, p. 153.
(*u*) 15 Q. B. 791.

acquainted with it. No evidence was given of an actual enjoyment of the right on the close by the tenants. Parke, B., said:—"If the question had been one in which all the inhabitants of the manor, or all the tenants of it or of a particular district of it, had been interested, reputation from any deceased inhabitant or tenant, or even deceased residents in the manor, would have been admissible, such residents having presumably a knowledge of such local customs: and if there had been a common law right for every tenant of the manor to have common on the wastes of a manor, reputation from any deceased tenant as to the extent of those wastes, and therefore as to any particular land being waste of the manor, would have been admissible. But, although there are some books which state that 'common appendant' is of 'common right;' and that 'common appendant' is the 'common law right of every free tenant of the lord's wastes,' . . . it is not to be understood that every tenant of a manor has by the common law such a right, but only that certain tenants have such a right, not by prescription, but as a right by common law incident to the grant. . . . This right, therefore, is not a common right of all tenants, but belongs only to each grantee (before the statute of *Quia emptores*) of arable land by virtue of his individual grant, and is an incident thereto; and it is as much a peculiar right of the grantee as one derived by express grant or prescription. . . . We are therefore of opinion that the case is precisely in the same situation as if evidence had been offered that there were many persons, tenants of the manor, who had separate prescriptive rights over the lord's

wastes; and reputation is not admissible in the case of such separate right, each being private, and depending on each separate prescription, unless the proposition can be supported, that, because there are many such rights, the rights have a public character, and the evidence, therefore, becomes admissible. We think this position cannot be maintained. . . . We are of opinion, therefore, that the evidence of reputation offered in this case was, according to the well-established rule in the modern cases, inadmissible, as it is in reality in support of a mere private prescription; and the number of these private rights does not make them to be of a public nature."

On an issue whether or not certain land, in a district repairing its own roads, was a common highway, it has been held admissible, but slight, evidence that, before the point was litigated, the inhabitants held a public meeting to consider the repair of the way, and that several of them, since dead, signed a paper on the occasion, stating that the land was not a public highway (*x*). So the verdict or presentment of a jury summoned by a court of competent jurisdiction to determine the boundaries of two manors is admissible evidence of reputation, in an issue as to the boundary of a third manor, which is conterminous with one of the former (*y*). Some of the remarks of the learned judges, in this last case, may appear to be at variance with the later case of *The Earl of*

(*x*) *Barraclough* v. *Johnson*, 8 Ad. & El. 99.
(*y*) *Brisco* v. *Lomax*, 8 Ad. & El. 198.

Dunraven v. *Llewellyn*. Thus, Coleridge, J., states:—"On the question of boundary, between two owners, no doubt reputation is admissible." But this observation must be limited by the circumstances of the case, which seem to have been regarded as converting an apparently personal question into one of a public nature. An award, being in the nature of a private transaction, is not evidence of reputation (*z*).

The general doctrine was discussed elaborately in the case of *Reg.* v. *Bedfordshire* (*a*). There, on an indictment against a county for not repairing a public bridge, the defendants pleaded that A. was liable to repair a portion, *ratione tenuræ* of the manor of O.; G. a certain other portion, *ratione tenuræ* of the manor of H.; and T. the residue, *ratione tenuræ* of the manor of C. Evidence of reputation was tendered by the defendants to show that, by immemorial custom, the respective parties mentioned in this plea had repaired the respective portions. The evidence was rejected at the trial, apparently on the ground that the interests were of a private nature; but the court held that the evidence ought to have been received. Lord Campbell, C. J., after recognizing the general principle, "that public reports ought not to be held admissible so as to affect the rights of private persons," proceeded to say:—"Upon the question here raised, all the inhabitants

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(*z*) *Evans* v. *Rees*, 10 A. & E. 151; *Lady Wenman* v. *Mackenzie*, 5 E. & B. 447.

(*a*) 4 E. & B. 535.

of the county, who have property liable to be assessed to the county rate, have an interest whether this bridge was to be repaired in part by the owners of certain lands, *ratione tenuræ;* such persons would be affected by the verdict of the jury; and then there are others whom it would also affect, viz., those who require the use of the bridge, and to them it is of importance upon whom the liability rests to repair the bridge. If a prosecution arises, heavy expenses are sure to be incurred, and therefore such questions are certain to be discussed, and a true reputation is very likely to exist. . . . Certainly, the question objected to in this case touches the rights of individuals; but then it also affects that of the county and the ratepayers. For these reasons, we think that evidence of reputation was improperly rejected."

In questions concerning the admissibility of reputation, distinctions have been drawn between cases in which a public interest, and others in which merely a general or local interest, is concerned. But reputation appears to be equally receivable in both instances, although its value will depend essentially on the vicinity of the witness to the *locus in quo*, and his personal knowledge of the surrounding circumstances.

"In a matter in which all are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless, unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood" (*b*).

(*b*) Per Parke, B., *Crease* v. *Barrett*, 1 C. M. & R. 928.

The next important restriction on the rule under consideration, is contained in the principle that—

> The declarations of deceased persons are not admissible as reputation, unless they have been made *ante litem motam*, *i. e.*, before the issue has become, or appeared likely to become, a subject of judicial controversy.

In *R.* v. *Cotton* (*c*), Dampier, J., said:—"The reasons why the declarations of deceased persons [are admitted] upon public rights, made *ante litem motam*, when there was no existing dispute respecting them, is that these declarations are considered as disinterested, dispassionate, and made without any intention to serve a cause or mislead posterity. But the case is entirely altered *post litem motam*, when a controversy has arisen respecting the point to which the declarations apply. Declarations then made are so likely to be produced by interest, prejudice, or passion, that no reliance can safely be placed upon them, and they would more frequently impose upon the understanding, than conduce to the elucidation of the truth. It has, therefore, been wisely decided, that evidence of reputation arising *post litem motam* shall not be admitted."

Thus, the presentment of a homage, sworn to determine boundaries, has been rejected, because there was no jurisdiction, and because it amounted to a declaration *post litem motam* (*d*). But in an

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(*c*) 3 Camp. 446.

(*d*) *Basset* v. *Richards*, 10 B. & C. 657.

action by a copyholder against his lord, where the question was as to the amount of fine payable to the latter, the incidental depositions of witnesses, in an action by a former claimant against a former lord, have been admitted as evidence for the lord, as depositions of persons called on behalf of a person standing *in pari jure* with the plaintiff, and because the same custom was not in controversy (*e*).

It seems to be settled that, the *lis mota* dates, not from the commencement of an action or suit; nor even from the commencement of actual litigation; but from the time when the question began to attract public attention as a controversy. "The line of distinction is the origin of the controversy, and not the commencement of the suit. After the controversy has originated, all declarations are to be excluded, whether it was or was not known to the witness" (*f*). Declarations, however, will not be excluded on account of their having been made with the express view of preventing disputes (*g*), or in direct support of the declarant's title (*h*), or from the declarant being in the same situation, touching the matter in contest with the party relying on the declaration (*i*).

(*e*) *Freeman* v. *Phillipps*, 4 M. & S. 497.
(*f*) Per Mansfield, C. J., *Berkeley Peerage case*, 4 Camp. 417.
(*g*) *Berkeley Peerage case*, 4 Camp. 401.
(*h*) *Doe* v. *Davies*, 10 Q. B. 325.
(*i*) *Monkton* v. *Att.-Gen.*, 2 Russ. & M. 160.

CHAPTER X.

ON EVIDENCE OF ANCIENT POSSESSION.

ALTHOUGH, as has been previously stated, hearsay or second-hand evidence is not generally admissible in questions concerning merely private and personal rights, yet it is received, in some cases, where a controversy refers to a time so remote that it is unreasonable to expect a higher species of evidence. But in such cases the surrounding circumstances must be free from reasonable suspicion; and it must appear that the deeds or other documents, in which the hearsay is contained, are ancient, *i. e.*, more than thirty years old; that they come from the custody in which they would presumably be found, if authentic; and that they have been regarded and treated as authentic by the guardians of them. It is therefore a rule that—

> Ancient documents purporting to be a part of the transactions to which they relate, and not a mere narrative of them, are receivable in evidence that those transactions actually occurred, provided they be produced from proper custody (*a*).

(*a*) By the 90th section of the Indian Evidence Act, where a document, purporting or proved to be thirty years old, is produced from what the court considers proper custody, the court may pre-

In *Roe* v. *Rawlings* (*b*), a paper was received which purported to be a statement by a confidential agent, to a former tenant for life, of rent reserved in 1728, and as such had been indorsed by the latter. This was held to be evidence in 1806, of the fact for the plaintiff, a tenant in tail, to whom it had been handed down with other muniments of title, to show that the rent reserved by a tenant for life, who had immediately preceded the plaintiff, was less than the rent originally reserved. Lord Ellenborough said:—"Ancient deeds, proved to have been found amongst deeds and evidences of land, may be given in evidence, although the execution of them cannot be proved; and the reason given is, 'that it is hard to prove ancient things, and the finding them in such a place is a presumption they were fairly and honestly obtained, and reserved for use, and are free from suspicion of dishonesty.' This paper, therefore, having been found amongst the muniments of the family . . . accredited . . . and preserved . . . we think that it was evidence to be left to the jury of the amount of the ancient rent at the time it bears date."

Thus, the counterparts of old leases from the repository of the lord of a manor have been received in evidence of the demise of premises, even without

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sume that the signature and every other part of the document which purports to be in a particular person's handwriting is his writing; and in the case of a duly-executed and attested document, that it was duly executed and attested by the persons who purport to have done so.

(*b*) 7 East, 279.

proof of enjoyment (*c*). In that case, tried in 1782, several leases, dated between 1680 and 1702, were received as undoubtedly ancient; but a lease dated in 1730 was rejected as too recent. But in *Malcolmson* v. *O'Dea* (*d*), it was laid down that the true ground for admitting a lease is that of its showing an act or acts of ownership. So, to prove a personal prescriptive right of fishery, as appurtenant to a manor, old licences on the court rolls, granted by the lords of the manor, are admissible (*e*). And old rent rolls or court rolls are received to prove rights to which they refer.

In ejectment, where both plaintiff and defendant claimed through E., it was held that an ancient entry made by E.'s steward in his rent-book, was evidence as to the identity of the property (*f*). So, ancient terriers are received to prove the amount of vicarial tithes (*g*).

In *The Bishop of Meath* v. *Marquis of Winchester* (*h*), in the House of Lords, the general doctrine, more particularly as regards the next point to be considered, viz., the custody of the document, was fully considered. The main questions were, whether an ancient deed, and also a case concerning the right of presentation to a living, prepared for counsel by a

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(*c*) *Clarkson* v. *Woodhouse*, 3 Doug. 189; *S. C.*, 5 T. R. 412, n.

(*d*) 10 H. L. Cas. 593.

(*e*) *Rogers* v. *Allen*, 1 Camp. 309; and *Malcolmson* v. *O'Dea*, 10 H. L. Cas. 593.

(*f*) *Doe* v. *Seaton*, 2 Ad. & El. 171.

(*g*) *Pearson* v. *Beck*, 8 Ex. 452.

(*h*) 3 Bing. N. C. 183.

former Bishop of Meath, in 1695, and found among the family papers of his descendants, were evidence touching the right of presentation as against the plaintiff in error. Both documents were held clearly admissible.

Ancient documents, to be receivable as such, must be proved to have come from the custody in which it was reasonable that they should be found. This doctrine has been recently applied to family Bibles. A New Testament containing entries of the births, deaths, and marriages of a family, produced by a member thereof, and proved to have been in the possession of the family for a long time, is admissible in evidence without proof of handwriting (*i*).

In the case of *The Bishop of Meath* v. *Marquis of Winchester* (*k*), Tindal, C. J., said:—"The result of the evidence, upon the bill of exceptions, we think is this—that these documents were found in a place in which, and under the care of persons with whom, papers of Bishop Dopping might naturally and reasonably be expected to be found, and that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit. If documents continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit, that the investigation commences, whether it was reason-

(*i*) *Hubbard* v. *Lees*, 4 H. & C. 418.
(*k*) 3 Bing. N. C. 183.

able and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction, that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases. On the one hand, old grants to abbeys have been rejected as evidence of private rights, where the possession of them has appeared altogether unconnected with the persons who had any interest in the estate. Thus, a manuscript found in the Herald's Office, enumerating the possessions of the dissolved monastery of Tutbury, a manuscript found in the Bodleian Library, Oxford, and a grant to a priory brought from the Cottonian MSS. in the British Museum were all held to be inadmissible, the possession of the documents being unconnected with the interests in the property. On the other hand an old chartulary of the dissolved abbey of Glastonbury was held to be admissible because found in the possession of the owner of part of the abbey lands, though not of the principal proprietor. This was not the proper custody, which, as Lord Redesdale observed, would have been the Augmen-

tation Office; and, as between the different proprietors of the abbey lands, it might have been more reasonably expected to have been deposited with the largest; but it was, as the court argued, a place of custody where it might be reasonably expected to be found. So also, in the case of *Jones* v. *Waller*, the collector's book would have been as well authenticated if produced from the custody of the executor of the incumbent or his successor, as from the hands of the successor of the collector. Upon this principle, we think the case stated for the opinion of counsel, purporting to be stated on the part of Bishop Dopping, and found in the place and in the custody before described, was admissible in evidence. It was a document which related to the private interests of the bishop, at the time it was stated, for it bears date in 1695, about which time, it appears from other facts found, that Barry, the late incumbent, was dead, and that before 1697 Bishop Dopping collated his own son. It related, therefore, to a real transaction which took place at the time; and although it might be said to have related in some degree to the see, for the right of collation was claimed, as of an advowson granted to the see; yet it is manifest this case had been stated with reference to the private interests of the bishop in the particular avoidance, and that it was more reasonable to expect it to be preserved with his private papers, and family documents, than in the public registry of the diocese. But even considered as a document belonging to the see, it was not unreasonable that it should have been found in the bishop's mansion house; for, upon the evidence, there

is only one single ecclesiastical record preserved in the registry of the diocese of Meath of an earlier date than 1717; and, on the other hand, the case and grant are found in the same parcel with several papers relating to the see of Meath, and in the same room were several visitation books of the diocese and other papers relating to the see."

It appears from this case, that it is not necessary that the custody should be that which is strictly proper: it is sufficient if it be one which may be reasonably and naturally explained (*l*), and one which affords reasonable assurance of the authenticity of the document (*m*). But it is not sufficient to produce the documents without calling a witness to prove the custody from which they come (*n*).

It has been doubted whether it is not necessary to show some act of recognition or enjoyment, done with reference to the documents. For in *Doe* v. *Pulman* (*o*), where, in ejectment to prove that an ancient ancestor had been seised of the *locus in quo*, the lessor of the plaintiff produced from her muniment room the counterpart of an old lease, purporting to be granted by the ancestor, but executed only by the lessee, it was held admissible, without proof that the lessee had actually enjoyed under it.

It is said to be an established principle, that nothing said or done by a person having at the time

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(*l*) *Doe* v. *Sampter*, 8 Ad. & El. 154.

(*m*) Per Coleridge, J., *Doe* v. *Phillips*, 8 Q. B. 158.

(*n*) *Evans* v. *Rees*, 10 Ad. & El. 154.

(*o*) 3 Q. B. 623; sed cf. *Malcolmson* v. *O'Dea*, 10 H. L. Cas. 593.

an interest in the subject-matter, shall be evidence either for him or persons claiming under him (*p*); and, therefore, in a settlement case (*q*), an old entry in a parochial book was held not to be evidence of the terms under which a pauper resided in the parish. So, entries made by a deceased person, through whom the defendant claims, acknowledging the receipt of rent for the premises in question, are not evidence of title for the defendant (*r*).

(*p*) Per Abbott, C. J., *R.* v. *Debenham*, 2 B. & Ald. 185.
(*q*) Ibid.
(*r*) *Outram* v. *Morewood*, 5 T. R. 123.

CHAPTER XI.

ON EVIDENCE IN QUESTIONS OF PEDIGREE.

In questions of pedigree, or inquiries concerning relationship or descent, the rule by which hearsay or second-hand evidence is excluded is waived, and it is held that—

> The statements of deceased persons, who were connected by blood or marriage with the family in question, are admissible in cases of disputed pedigree (*a*).

In *Davies* v. *Lowndes* (*b*), Parke, B. said:—"There seems to be no limitation in the rule as to blood relations; but with regard to relationship by affinity, it is different; it seems to be confined to declarations by a husband as to his wife's relations. It is for the judge to decide, as a question precedent to the admission of the evidence, whether the declarant has been sufficiently proved to have been connected by consanguinity or affinity to the family in question; and it makes no difference that the legitimacy of the declarant happens to be also the only question in issue" (*c*). As to the danger of

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(*a*) For the Indian Law, see Ind. Ev. Act, ss. 32 (5 & 6), and 50.

(*b*) 7 Scott, N. R. 188; but declarations by a wife as to her husband's relations are now admissible. Vide infra, p. 177.

(*c*) *Doe* v. *Davies*, 10 Q. B. 314.

placing too great reliance on this species of evidence, see the judgment of Lord Romilly in *Crouch* v. *Hooper* (*d*).

It is held that the declarations must have been from persons having such a connection with the family that it is natural and likely, from their domestic habits, that they were speaking the truth, and could not be mistaken (*e*). The declaration of others than blood relations, and husbands and wives, are not admissible; thus, the declarations of deceased servants and intimate acquaintances are rejected (*f*); even though coming under the head of dying declarations (*g*). Nor are the declarations of illegitimate relations received (*h*). In India, however, the declarations of illegitimate relations and even of persons, who though not related to the family were intimately acquainted with its members and state, are admitted (*i*).

"The law resorts to hearsay of relations upon the principle of interest in the person from whom the descent is to be made out; and it is not necessary that evidence of consanguinity should have the correctness required as to other facts. If a person says another is his relative or next-of-kin, it is not necessary to state how the consanguinity exists. It is sufficient that he says A. is his relation, without

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(*d*) 16 Beav. 182.
(*e*) *Whitelocke* v. *Baker*, 13 Ves. 511.
(*f*) *Johnson* v. *Lawson*, 9 Moore, 183.
(*g*) *Doe* v. *Ridgway*, 4 B. & Ald. 53.
(*h*) *Doe* v. *Barton*, 2 M. & R. 28.
(*i*) Ind. Ev. Act, s. 32 (5).

stating the particular degree, which perhaps he could not tell if asked, But it is evidence, from the interest of the person in knowing the connections of the family; therefore, the opinion of the neighbourhood of what passed among acquaintances will not do" (*k*). In this case it was held clear that the declarations by a deceased husband as to his wife's legitimacy are admissible, as well as those of her blood relations. Accordingly, in *Doe* v. *Randall* (*l*), it was held that the declaration of a deceased woman of statements made by her former husband, that his estate would go to J. F., and then to J. F.'s heir, were admissible to show the relationship of the lessor of the plaintiff to J. F. There Best, C. J., said:— "Consanguinity, or affinity by blood, therefore, is not necessary, and for this obvious reason, that a party by marriage is more likely to be informed of the state of the family of which he is to become a member, than a relation who is only distantly connected by blood; as, by frequent conversations, the former may hear the particulars and characters of branches of the family long since dead. . . . The declarations of deceased persons must be taken with all their imperfections, and if they appear to have been made honestly and fairly, they are receivable. If, however, they are made *post litem motam*, they are not admissible, as the party making them must be presumed to have an interest, and not to have expressed an unprejudiced or unbiassed

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(*k*) Per Lord Erskine, *Vowles* v. *Young*, 13 Ves. 147.
(*l*) 2 M. & P. 20.

opinion." The statement of a wife as to her husband's family, and that of a husband as to his wife's family, stand upon the same footing (*m*).

It has been said by a learned judge, on the authority of an old case: "Hearsay is good evidence to prove who is my grandfather, when he married, and what children he had, &c., of which it is not reasonable to presume I have better evidence. So, to prove my father, mother, cousin, or other relation, beyond the sea, dead; and the common reputation and belief of it in the family gives credit to such evidence" (*n*). Hence arises the doctrine, that the declaration need not be one which has been made immediately by the deceased, as of his own knowledge or belief, to the witness; but it may be, as a learned judge has expressed it, "two deep," or infinitely more remote in degree. It is sufficient to show that a general belief has prevailed in a family. Thus, evidence that a person went abroad when a young man, and, according to the repute of the family, had afterwards died in the West Indies, and that the family had never heard of his being married, is strictly admissible to show that he died unmarried (*o*).

On this ground, not merely oral declarations of deceased persons connected with the family, but old family documents, genealogies, entries in family Bibles (*p*), inscriptions on tombstones, or walls, or

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(*m*) Per Lord St. Leonards, *Shrewsbury Peerage case*, 7 H. L. Cas. 23.

(*n*) Bull. N. P. 294, cited in note 15 East, 294.

(*o*) *Doe* v. *Griffin*, 1 East, 293.

(*p*) Cf. *Hubbard* v. *Lees*, 4 H. & C. 418; supra, p. 169.

rings, if sufficiently authenticated as genuine, and as having been recognized as such by the family, will be received. The advisability of genealogies was discussed in *Davies* v. *Lowndes* (*q*), in the Exchequer Chamber. A paper purporting to be an old genealogy having been offered as evidence of pedigree, Lord Denman said: "A pedigree, whether in the shape of a genealogical tree, or map, or contained in a book, or mural or monumental inscription, if recognized by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced. On what ground is this admitted? It may be because the simple act of recognition of the document, and consequent acknowledgment of the relationship, stated in it by a member of the family, is some evidence of that relationship from whatever sources his information may have been derived, because he was likely from his situation both to inquire into the truth of such matters, and from his means of knowledge to ascertain it. . . . . But the reason why a pedigree, when made or recognized by a member of the family, is admissible, may be that it is presumably made or recognized by him in consequence of his personal knowledge of the individuals therein stated to be relations; or of information received by him from some deceased members, of what the latter knew or heard from other members who lived before his time. And if so, it may well be contended that if the facts rebut that presumption, and show that no part of

(*q*) 6 M. & G. 525.

the pedigree was derived from proper sources of information, then the whole of it ought to be rejected; and so also, if there be some, but an uncertain and undefined, part derived from reference to improper sources. But where the framer speaks of individuals whom he describes as living, we think the reasonable presumption is that he knew them, and spoke of his own personal knowledge, and not from registers, wills, monumental inscriptions, and family records or history: and consequently to that extent the statements in the pedigree are derived from a proper source, and are good evidence of the relationship of those persons."

In the *Berkeley Peerage Case* (*r*), on an issue as to the legitimacy of the petitioner, the three questions referred by the House of Lords to the judges were substantially—

1. Whether the depositions made by A.'s reputed father, in a suit by A. against B., were evidence of pedigree for A., in a suit by A. against C.

2. Whether, in a similar case, entries made by A.'s reputed father in a Bible, that A. was his son, born in wedlock on a certain day, were inadmissible.

3. Whether such entries were inadmissible, if made with the express purpose of establishing A.'s legitimacy in case it should ever be called in question.

The point in the first question involved the question whether hearsay declarations of pedigree, made after a judicial controversy has arisen, are admissible. The point in the second question was, whether an

(*r*) 4 Camp. 401.

entry in a book made by a deceased relation is evidence; and in the third, whether such an entry, if otherwise admissible, continues to be so when made with an express purpose of providing against a contemplated or impending controversy.

It was held that the evidence in the first case was inadmissible, as having been made after an actual, and not merely a judicial controversy had arisen; that in the second it was strictly admissible, whether the entry was made in a Bible or any other book, or on any other piece of paper; and that in the third case it was also admissible, but with strong objections to its credibility, on account of the particularity, and perhaps the professed view with which it was made.

The doctrine in this important case has been followed up by the *Sussex Peerage Case* (*s*). There an entry made in her prayer-book, by Lady Augusta Murray, of her marriage at Rome to the Duke of Sussex, was received not as conclusive proof, but as a declaration made by one of the parties. In the same case, evidence of declarations by a deceased clergyman that he had celebrated the marriage was rejected.

In accordance with the rules recognized in the preceding cases, a cancelled will of an ancestor, found among family papers, has been received as a declaration concerning the relations of the family (*t*). Pedigrees hung up in family mansions (*u*); a mar-

(*s*) 11 Cl. & Fin. 85.

(*t*) *Doe* v. *Earl of Pembroke*, 11 East, 504.

(*u*) *Goodright* v. *Moss*, Cowp. 591.

riage certificate kept by the family (*x*); a genealogy made by a deceased member of a family, even though purporting to be founded partly on hearsay (*y*); engravings on rings (*z*); coffin-plates, and monumental inscriptions generally, are regarded as admissible, but not always as credible, evidence (*a*). Bacon, V.-C., said of inscriptions on tombstones:—"In the case of tombstones, no doubt the publicity of the inscription gives a sort of authenticity to it, and if it remains uncontradicted for a great many years, it would, in the absence of every other fact in the case, be taken to be true; but you cannot put it higher than that" (*b*).

Not only hearsay declarations of deceased relatives, but also proof of the manner in which a person has been brought up and treated by his family, will be evidence. In the *Berkeley Peerage Case*, Mansfield, C. J., said:—"If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached; and indeed it amounts to a daily assertion that the son is legitimate" (*c*).

The term pedigree embraces not only general questions of descent and relationship, but also the particular facts of birth, marriage and death, and

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(*x*) *Doe* v. *Davies*, 10 Q. B. 314.
(*y*) *Monkton* v. *Att.-Gen.*, 2 Russ. & M. 147.
(*z*) *Vowles* v. *Young*, 13 Ves. 144.
(*a*) *Davies* v. *Lowndes*, 6 M. & G. 527, and sup. 178.
(*b*) *Haslam* v. *Crow*, 19 W. R. 969.
(*c*) 4 Camp. 416; cf. *Khajah Hidayut Oollah* v. *Rai Jan Khanum*, 3 Moo. Ind. App. 295.

the times when, either absolutely or relatively, these events happened. All these facts, therefore, may be proved from hearsay derived from relatives. It has been doubted whether specific dates can be so proved: but the preponderance of authority appears to be in favour of permitting them to be so proved. The written memorandum of a father as to the time when his child was born, has been received to prove when the infant would come of age (*d*); but in a settlement case the declaration of a father as to the place of his child's birth has been rejected, as not being strictly a question of pedigree (*e*). So, an order of removal was quashed, for being founded merely on the pauper's own evidence as to the time and place of her birth; because the statement was held to be one which she could not make of her own knowledge (*f*). But in *Shields* v. *Boucher* (*g*), Knight Bruce, V.-C., was of opinion that declarations of a person deceased as to what place his father came from would be admissible.

Before the declarations of deceased relations can be received as such, it must be proved *aliunde*, *i. e.*, by extrinsic and independent sources of evidence, that the declarants were related to the family (*h*).

The declaration must not be in the declarant's own interest. Thus, a statement by a deceased person, who had been married twice, tending to invali-

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(*d*) Per Lord Ellenborough, *Roe* v. *Rawlings*, 7 East, 290.

(*e*) *R.* v. *Erith*, 8 East, 539.

(*f*) *R.* v. *Rishworth*, 2 Q. B. 487.

(*g*) 1 De G. & Sm. 40.

(*h*) Per Lord Eldon, *Berkeley Peerage case*, 4 Camp. 419.

date his first, and thus establish his second marriage, was rejected (*i*). But it is no objection that the declarant was *in pari casu* with the party tendering the evidence (*k*).

The rule which has been mentioned in the preceding chapter, that the hearsay declarations of deceased witnesses to be admissible must have been made *ante litem motam*, is observed generally in cases of pedigree. On this head, it is only necessary to refer to the declaration, which has been already quoted, of Mansfield, C. J., in the *Berkeley Peerage Case*, that the *lis mota*, or beginning of the litigation, dates from the origin of the controversy, and not from the commencement of the trial. When a question of pedigree has assumed such a degree of conflicting interest, that the declarant must be reasonably presumed to be under the influence of undue partiality or prejudice, the disposition of the courts is either to reject his evidence altogether, or to receive it only with the strict limitations as to credibility which are laid down by the judges in their answer to the third question in the *Berkeley Peerage Case*. So in a case of disputed descent from a lunatic, one of the claimants was allowed to give in evidence a deposition, made by a deceased relation of the lunatic before a master in chancery, on an injunction to discover who was entitled by consanguinity to become committee. It was urged that the deposition was inadmissible as being made

(*i*) *Plant* v. *Taylor*, 7 H. & N. 211.
(*k*) *Monckton* v. *Att.-Gen.*, 2 R. & M. 159.

post litem motam ; but the court held that it was not so (*l*). In a petition for a declaration of legitimacy it was proved that A., the petitioner's grandfather (whose legitimacy was in issue), had claimed some property in the possession of his reputed maternal uncle, but the latter said that he should defend any action which A. might bring, and communicated the circumstances to A.'s maternal uncle, and A. replied by letter that he wished to establish his legitimacy, but took no further proceedings. Sir J. Hannen held that there was proof of the commencement of a controversy, so as to exclude subsequent declarations by any member of the family as to the marriage of A.'s father and mother (*m*).

A statement made by a deceased parent that a child was born before marriage, or that no marriage ever took place, is admissible (*n*); but evidence by the parents of want of access, or of non-access, in order to bastardize a child, appears to be generally inadmissible on grounds of public policy, and the rule applies to the case of a child born three months after marriage (*o*).

(*l*) *Gee* v. *Good*, 29 L. T. 123.

(*m*) *Frederick* v. *Att.-Gen.*, 44 L. J., P. & M. 1; L. R., 3 P. & D. 196; 22 W. R. 416.

(*n*) *Goodright* v. *Moss*, Cowp. 591; *Hargrave* v. *Hargrave*, 2 C. & K. 701.

(*o*) *Anon.* v. *Anon.*, 23 Beav. 273.

CHAPTER XII.

ON EVIDENCE OF DYING DECLARATIONS.

THE principle that evidence is inadmissible, unless given on oath, and when the party who is to be affected by it can have the benefit of cross-examination, is limited by another exception in cases of homicide, where the deceased, under the impression of immediate or impending dissolution, has made a statement concerning the person of the assailant, and the circumstances of the attack. It is presumed that the sense of approaching death in the declarant is calculated to produce in him a sentiment of responsibility, equal to that which a religious and conscientious man feels when required to make a statement on oath; and that the obligation to utter nothing but the strict truth is even greater, inasmuch as he knows the hour to be at hand when he must render an account of all his words and acts to the Supreme Being (*a*). Accordingly, where either the sense or conviction of approaching death is deficient or uncertain; or where it appears that the declarant had no sufficient belief in a future state, and his religious responsibility for his actions in this life; his dying declarations will not be received.

(*a*) "Nemo moriturus præsumitur mentiri."

But, even when they are received, their value and credibility will vary infinitely, according to circumstances. In all cases a strong objection to their full credibility arises from the fact, that they are usually given in evidence against one who has had no opportunity of cross-examining the declarant, and thus of refuting out of his own mouth the errors, omissions, contradictions, and possibly wilful misstatements which the latter may have committed. It often happens, also, that the declaration is made on great pressure, when the declarant is suffering from physical exhaustion or mental alienation; and when he is partially, or even wholly unconscious of the full purport of his declaration. These considerations, combined with the strong objection of the English law to condemn any man on the testimony of an absent, or even a deceased witness, induce courts to regard this species of evidence with great watchfulness and suspicion. The judge, therefore, whose duty it is to inquire into the circumstances under which the declaration has been made, as a condition precedent to its admission, will generally exclude it if there appear to be any reasonable doubt as to the veracity, sanity, consciousness, or sense of religious responsibility and impending dissolution in the mind of the declarant at the time of the statement. Subject to these remarks it is held to be a rule that—

> In murder, or homicide, the declarations of the deceased, concerning the cause and circumstances of his mortal wound, if made with a full consciousness of approaching death and religious responsi-

bility, are admissible in evidence for or against a prisoner who is charged with the crime (*b*).

In *Reg.* v. *Woodcock* (*c*), Eyre, C. J., said:— "The general principle on which this species of evidence is admitted, is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." In this case, it was held that a statement made by the deceased to a magistrate, who administered an oath to her extra-judicially, could not be received; but that a statement made by her when her dissolution was fast approaching, and when she must have known the fact, although she said nothing that indicated such a knowledge, was receivable. In this case the judge left it to the jury to say whether the statement was made under the apprehension of death; but the modern practice is for the judge himself to decide this question. It will be observed that, in this case, although the statement was inadmissible as a statement on oath, in a situation where an oath was improperly administered, there was no objection to it on the ground

(*b*) Dying declarations are inadmissible in civil cases; *Stobart* v. *Dryden*, 1 M. & W. 626.

(*c*) 1 Leach, C. C. 502.

that the statement was made in answer to a formal and solemn inquiry. Accordingly, it is not held to be necessary that the statement should be voluntary or spontaneous; and answers, *in articulo*, to questions put by a surgeon, for the purpose of ascertaining whether he ought to call in a magistrate, have been received (*d*).

It is stated by Lord Denman (*e*), that "with regard to declarations made by persons *in extremis*, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension at the time of the danger and of death, such declarations can be received in evidence; but all these things must concur to render such declarations admissible." To these three conditions a fourth must be added, viz., religious sentiment (*f*).

1. The declaration must be made when the declarant is in actual danger.

This proposition is commonly stated more broadly, that the declaration must be made *in extremis*, or *in articulo mortis* (*g*); but there appears to be no definite limitation of the time, before death, within which the declaration must be made; and recent cases support the doctrine, that declarations made under apprehension of death, if otherwise admissible, will not be rejected because a considerable time elapses between the declaration and the death.

(*d*) *R.* v. *Fagent*, 7 C. & P. 238.
(*e*) *Sussex Peerage case*, 11 C. & F. 112.
(*f*) *R.* v. *Pike*, 3 C. & P. 598.
(*g*) *R.* v. *Van Butchell*, 3 C. & P. 629.

Thus, in *R.* v. *Mosley* (*h*), the declarations were held by all the judges to have been rightly received, although the deceased did not die until eleven days after making them, and although the surgeon held out slight hopes of recovery to him until a few hours before his death. Here, however, the deceased had frequently expressed a belief, prior to the statement, that he should never get better.

2. It appears also that the doctrine laid down by Hullock, B., that "the declarations are admitted only if they are made under an impression of almost immediate dissolution," is by no means literally correct. It is true, as stated by Tindal, C. J., in *R.* v. *Hayward* (*i*), that "any hope of recovery, however slight, existing in the mind of the deceased at the time of the declarations made, will undoubtedly render the evidence of such declarations inadmissible;" and accordingly it has been held (*k*), that in the absence of expressions or conduct to show that the deceased was under the impression of approaching death, his statements are inadmissible. In this case the deceased had said, he was "a murdered man, and it would have been better if they had killed him on the spot than left him to linger; and that he thought he should never get over it;" but he lived several weeks afterwards. Wightman, J., at first held a statement made at the time of this remark to be admissible; but afterwards rejected it, on its appearing on cross-examination that the deceased

(*h*) 1 Moo. C. C. 97; cf. *R.* v. *Smith*, L. & C. 607.
(*i*) 6 C. & P. 157.
(*k*) Per Wightman, J., *R.* v. *Qualter*, 6 Cox, Crim. Cas. 357.

had not used the phrase, "murdered man," in its literal sense, and that he did not really believe at the time that he was dying. The learned judge said:—"The general principle is, that the deceased must be under the apprehension that he will die;" but the question, whether the impression in the mind of the deceased must amount to an apprehension of immediate death, was not touched. But in a later case, the same learned judge has stated his opinion more broadly (*l*). In that case it appeared that at the time of the statement the deceased was under the full impression that she would die, but there was no evidence to show that the impression amounted to an expectation of immediate dissolution; and it was contended for the prisoner, that as the statements had not been made under an impression of immediate death, *i. e.*, not *in articulo mortis*, they were inadmissible. But the learned judge said:—"It is not necessary that the person making the declaration should believe himself to be in danger of immediate death, if he believes that he will not recover from the disorder under which he is labouring. *Reg.* v. *Van Butchell* is an exceptional case. . . . . The deceased was of opinion throughout that she would die; and I receive her statement." The learned judge, in the same case, also received evidence of a subsequent declaration, made by the deceased after she had recently said that "she was better;" but no other evidence had been offered to show that her previous im-

(*l*) *R.* v. *Harvey*, 23 L. T. 258.

pression, of death ensuing before long, had been altered.

In a still later case the deceased made a declaration, stating at the time that he believed he should not recover. His spine was then broken in such a way that death must have followed soon. Shortly before he had made the declaration, he had said to a witness: "The surgeon has given me some little hope that I am better; but I do not myself think that I shall ultimately recover." The declaration was held to be admissible (*m*). But where a woman made a statement to the magistrate's clerk, and he added to it the words, "I have made the above statement with the fear of death before me and with no hope of my recovery," and then read it over to her and asked her if it was correct, and afterwards at her request interlined the words, "at present" after the word "hope," it was held that the words inserted qualified the force of her statement sufficiently to make it inadmissible in evidence as a dying declaration, because there was not that absolute and hopeless expectation of death which is required to give such declarations validity (*n*).

A different rule prevails in India, where a dying declaration may be given in evidence, in any case in which the cause of the declarant's death is in question, whatever the nature of the proceeding, without reference to his own expectation of death (*o*).

(*m*) *R.* v. *Reany*, D. & B. 151.

(*n*) *R.* v. *Jenkins*, 38 L. J., M. C. 82; L. R., 1 C. C. R. 187; 17 W. R. 621.

(*o*) Ind. Ev. Act, s. 32.

Where the prisoner was indicted for poisoning J. K., and it appeared that J. K. had eaten some cake and died; soon after which, the servant who had made the cake ate some, and died also; it was held by Coltman, J., after consulting Parke, B., that the dying declarations of the servant were evidence against the prisoner, because the two consecutive deaths formed one transaction (*p*).

It is held strictly, that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and where the circumstances of the death are the subject of the dying declaration. Accordingly, where the defendant had been indicted by the deceased for perjury, and after conviction had shot the prosecutor, it was held that a dying declaration by the latter as to the circumstances of the perjury was inadmissible, on an application by the defendant for a new trial (*q*). So, where the prisoner was indicted for administering savin to a pregnant woman, but not quick with child, with a view to procure abortion: Bayley, J., rejected evidence of her dying declaration concerning the cause of her death, because the death was not the subject of the pending inquiry (*r*). But it appears that in two old cases of perjury, evidence of a confession by a deceased accomplice

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(*p*) *R.* v. *Baker*, 2 M. & R. 53.

(*q*) Per Abbott, C. J., *R.* v. *Mead*, 2 B. & C. 605.

(*r*) *R.* v. *Hutchinson*, 2 B. & C. 608, n.; *R.* v. *Lloyd*, 4 C. & P. 233; *R.* v. *Hind*, Bell, 253.

was received (*s*). This doctrine, however, could hardly be supported in the present day (*t*).

The dying declarations of an accomplice are receivable (*u*), and also dying declarations made in favour of the person accused (*x*).

(*s*) Per Lord Ellenborough, *Aveson* v. *Kinnaird*, 6 East, 195.
(*t*) *Doe* v. *Ridgway*, 4 B. & Ald. 53.
(*u*) *R.* v. *Tinkler*, 1 East, P. C. 354.
(*x*) *R.* v. *Scaife*, 1 M. & R. 551.

CHAPTER XIII.

ON DECLARATIONS AGAINST INTEREST.

When a deceased person, whose veracity in other respects is unimpeached, has, during his lifetime, made a statement concerning the matter in issue, which statement was at the time opposed to his pecuniary or proprietary interest, the legal presumption is that the statement is true, or that it contains at least some elements of credibility. For in all the exceptions to the general rule by which hearsay is excluded, it must be remembered that credibility is by no means a necessary consequence of admissibility. English law, although frequently arbitrary, and perhaps unreasonable, in its dogmatic distinctions between credibility and incredibility, refuses to reject any evidence which it considers to contain any ingredients, however minute, of presumptive truth: but, while admitting it, the judge will often intimate to a jury, that they ought to give it little credit.

The rule which is now to be considered is the following:—

A declaration by a deceased person (*a*), who

(*a*) By the Indian Evidence Act, s. 32 (3), declarations against pecuniary or proprietary interest, or exposing the declarant to a criminal prosecution or a suit for damages, are admissible if the declarant is dead or cannot be found, or has become incapable of

had a competent knowledge of a fact, and no interest to pervert it; and which declaration was against the pecuniary or proprietary interest of the declarant at the time when it was made, is evidence between third parties, and is evidence of everything stated in the declaration (*b*).

In the leading case of *Higham* v. *Ridgway* (*c*), o prove the time of a birth, evidence was given, hat the man-midwife, who attended the birth, was ead; and the books of the latter, who had kept iem regularly, were offered in evidence. They con- ined an entry in the handwriting of the deceased the circumstances of the birth, and the date. here was also a charge for attendance, against hich the word "paid" was marked. It was held, at the entry was evidence of the time of the birth. ord Ellenborough, C. J., said:—"The entry made the party was to his own immediate prejudice, ien he had not only no interest to make it, if it s not true, but he had an interest the other way, t to discharge a claim, which it appears from other dence that he had." And Bayley, J., added:— ll the cases agree, that a written entry by which nan discharges another of a claim which he had inst him, or charges himself with a debt to ther, is evidence of the fact which he so admits

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ng evidence, or if his attendance cannot be procured without an asonable amount of delay or expense.

) *Middleton* v. *Melton*, 10 B. & C. 317.

) 10 East, 109; 2 Smith, L. C. 287; cf. *Gleadow* v. *Atkin*, & M. 410.

against himself; there being no interest of his own to advance by such entry. . . . . The principle to be drawn from all the cases is, that if a person have peculiar means of knowing a fact, and make a declaration of that fact which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his lifetime." So, in a later case (*d*), the same learned judges received evidence of entries of charges made by a deceased attorney, who had prepared a lease, to show that the lease was executed at a time later than its apparent date. In this case the charges for preparing the lease appear to have been paid, but not upon the face of the entries. In the recent case of *In the goods of Thomas* (*e*), Lord Penzance admitted as evidence of the execution of a will an entry made by a deceased solicitor in his ledger admitting payment of his charges for drawing it and attending its execution.

It may, therefore, be considered as an established principle, that, although it is necessary, it is not enough, that this class of declarations should be made by one who has no interest to pervert the facts. The declaration must be against either the pecuniary or the proprietary (*f*) interest of the declarant. This doctrine may be considered as finally settled by the *Sussex Peerage Case* (*g*). There, declarations as to the marriage of Lady Augusta Murray with the

(*d*) *Doe* v. *Robson*, 15 East, 32.
(*e*) 41 L. J., P. & M. 32.
(*f*) Per Cockburn, C. J., *R.* v. *Birmingham*, 1 B. & S. 768.
(*g*) 11 C. & F. 85.

Duke of Sussex, made by the deceased clergyman who performed the ceremony, were tendered on the ground that they were declarations of a person who knew the facts, who was not interested in misrepresenting them, and who had an interest in being silent concerning them, because the unlawful celebration of the marriage might have subjected him to a prosecution. But all the judges concurred in holding, that the declaration must be adverse to some pecuniary interest in the declarant; and that even the fear of a prosecution was not a sufficient interest to let in a declaration as contrary to it. Lord Campbell said:—"As to the point of interest, I have always understood the rule to be, that the declaration, to be admissible, must have been one which was contrary to the interests of the party making it in a pecuniary point of view. I think it would lead to most inconvenient consequences, both to individuals and the public, if we were to say that the apprehension of a criminal prosecution was an interest which ought to let in such declarations in evidence."

It is also settled law that the declaration, or written statement, is evidence of all the facts which it contains, and that in such cases the difference between oral and written statements is not one of admissibility, but only of weight (*h*). According to Parke, B., the entry in *Higham* v. *Ridgway* was evidence, not only of the payment of the man-mid-

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(*h*) *R.* v. *Birmingham*, 1 B. & S. 763.

wife's charges, but also of *partus cum forcipe* (*i*). So the statement of a deceased person that he occupied a house at 20*l.* a-year was admitted to prove not only the tenancy, but also his acquirement of a settlement of the annual value of 10*l.* Again, where, in order to establish a settlement, it was proved that the pauper's grandfather had occupied a house for four years in the appellant parish, and a book containing certain entries of payment of rent which were proved to be in his handwriting was produced, these entries were admitted in proof of the grandfather's settlement by renting a tenement, on the ground that the four years' occupation being by itself *primâ facie* of a seisin in fee, the proof of payment of rent would cut down the interest to a tenancy, and that therefore the evidence was against proprietary interest (*k*).

In *Davies* v. *Humphreys* (*l*), which was an action for contribution by one of several makers of a promissory note against a co-surety, the plaintiff, to establish the suretyship, relied on a receipt indorsed on the note by the deceased payee acknowledging a part payment of 280*l.* of the principal sum of 300*l.*; and adding "the 300*l.* having originally been advanced to E. H." (the defendant). This was held to be evidence of the defendant's liability. Parke, B., in delivering the judgment of the court, said:—"That the receipt was evidence of the fact of pay-

(*i*) *Percival* v. *Nanson*, 7 Ex. 3.

(*k*) *R.* v. *Birmingham*, 1 B. & S. 768; *R.* v. *Exeter*, 10 B. & S. 433.

(*l*) 6 M. & W. 153.

ment, which is admitted, in every case in which the proof of payment would be relevant, was not disputed; but it was denied that the whole entry would be admissible to show that the 300*l.* was advanced to E. H. . . . But the entry of a payment against the interest of the party making it has been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it." His Lordship then, after referring to *Higham* v. *Ridgway*, and *Doe* v. *Robson* (*m*), added: "Without overruling these cases (and we do not feel ourselves authorized to do so), we could not hold the memorandum in question not to be admissible evidence of the truth of the whole statement in it, and consequently to be evidence, not merely that 280*l.* was paid by the plaintiff to the payee, as for a debt due from E. H. as principal, but also of the fact, that the debt was due from E. H. to him."

Thus, also, where a paper purported to be an entry, by a deceased receiver, of rents received from T. H., as one of three proprietors, it was held to be evidence that two other proprietors were equally interested with T. H. In this case, Pollock, C. B., drew an important distinction between entries made against interest, and entries made in the course of business. His Lordship said:—"If the entry is admitted as being against the interest of the party making it, it carries with it the whole statement. But if the entry is made merely in the course of a man's duty, then

(*m*) 15 East, 33.

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it does not go beyond those matters which it was his duty to enter"(*n*).

It is held, that declarations against interest are admissible against third parties, even though the declarant himself received the facts on hearsay(*o*). Thus, in *Percival* v. *Nanson*(*p*), Alderson, B., said:—"An entry in an attorney's bill of a service of notice on A. B. would be evidence of a service, although, such notice being generally served by an attorney's clerk, the attorney probably had no personal knowledge of such service." And Pollock, C. B., said at the same time:—"So, if an accoucheur puts down in his book the name of a lady whom he had delivered, and debits himself with the payment, such entry would be evidence of the name, although he may have known nothing of her name except from the information of others."

The declarant must be deceased at the time when the evidence is offered. Thus, in assumpsit on a promissory note by an indorsee against the maker, the defendant, to prove fraud and the plaintiff's cognizance of it, tendered declarations of the first indorsee, who was alive, but not called. They were rejected; and Lord Denman, in delivering the judgment of the court, said:—"It is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect

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(*n*) *Percival* v. *Nanson*, 7 Ex. 3.
(*o*) *Crease* v. *Barrett*, 1 C. M. & R. 919.
(*p*) 7 Ex. 1.

the title or interests of other persons, merely because they are against the interest of those who make them"(*q*). Here there was held to be no community or privity of interest between the plaintiff and the absent witness; but if that had existed, the evidence would have been admitted according to the principle already quoted, as laid down by Bayley, J., in *Spargo* v. *Brown*(*r*). So it has been held that the entries of a person against his interest are not evidence between third parties, if the declarant be alive, although it appear that he has absconded on a criminal charge, and that it was quite impossible to produce him as a witness(*s*).

But an entry by a deceased person, against interest, will be good evidence, although it appear that persons are living, and not called, who are acquainted with the fact. Thus, entries by a deceased collector, charging himself with the receipt of taxes, were received as evidence against a surety that the money had been paid; although the persons who paid it were living, and might have been called. An attempt was made in this case to exclude his evidence, because the entries were contained in a private note-book, and not a public account-book; but the distinction was overruled(*t*).

After the expiration of a long term the death of

(*q*) *Phillips* v. *Cole*, 10 A. & E. 111.
(*r*) 9 B. & C. 938, and supra, p. 139.
(*s*) *Stephen* v. *Gwenap*, 1 M. & R. 120.
(*t*) *Middleton* v. *Melton*, 10 B. & C. 317.

the declarant will be presumed (*u*), though in other cases it must be proved.

Although it seems from the preceding cases to be at length clearly established, notwithstanding some adverse authorities, that declarations against interest are evidence of all facts to which they refer, without corroborative evidence dehors of the charge which is entered as liquidated (*x*); yet it appears to be necessary that extrinsic evidence should be given to show that the person making the entry or declaration was in the situation in which he purports to be. The character of the party making the entry or declaration must be established before the entry is read, unless it be made by a person in a public character, in which case due appointment will be presumed (*y*). Therefore agency must be proved, where the declaration was by an agent. Thus, accounts of rents signed by a person styling himself clerk to a steward, but not proved *aliunde* to have been so employed, although they were found among family muniments, were rejected, because there was no other evidence given to show that they affected the declarant in a pecuniary character (*z*). But proof of handwriting, and other extrinsic evidence of authenticity, will be unnecessary when entries have

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(*u*) *Doe* v. *Michael*, 17 Q. B. 276.

(*x*) *Doe* v. *Vowles*, 1 M. & R. 166; contra, *R.* v. *Heyford*, 2 Sm. L. C. 300.

(*y*) *Davies* v. *Morgan*, 1 C. & J. 587.

(*z*) *Baron de Rutzen* v. *Farr*, 4 Ad. & Ell. 53.

been made thirty years previously, and are produced from proper custody (*a*).

As miscellaneous instances of cases, in which declarations against interest have been admitted as evidence, the following may be mentioned. Where a deceased tenant, by a written instrument, acknowledged L. as his landlord, this was held to be evidence of L.'s title as against subsequent tenants who did not claim through the declarant (*b*). So, in ejectment by A., the declaration by deed of a deceased receiver of rents and profits, that he held under A.'s ancestor, is evidence against third parties of A.'s title (*c*). So, a declaration by a deceased occupant, that he managed an estate for a claimant, is evidence for the latter (*d*).

In an action by the corporation of Exeter for port duties, documents more than thirty years old, which purported to be the receipt of such duties by ancient receivers, but which were unsigned and in the third person, were admitted (*e*). So, the receipts of an ancient receiver of rents, brought from the muniment chest of the family, are unobjectionable evidence (*f*).

Where there is privity of interest between the declarant and a party, the declaration is received on this ground; and it will be admissible, even though

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(*a*) *Wynne* v. *Tyrwhitt*, 4 B. & Ald. 376.
(*b*) *Doe* v. *Edwards*, 5 A. & E. 95.
(*c*) *Doe* v. *Coulthard*, 7 A. & E. 235.
(*d*) *Baron de Bode's case*, 8 Q. B. 208.
(*e*) *Mayor of Exeter* v. *Warren*, 5 Q. B. 773.
(*f*) *Musgrave* v. *Emerson*, 10 Q. B. 326.

the declarant be alive (*g*). But neither the acts nor the declarations of deceased tenants, although against their interest, are any evidence against the reversioner; for a tenant cannot derogate from the title of his landlord. Therefore, in a disputed right of common, the plaintiff was not allowed to give evidence of declarations made concerning it by a deceased former tenant of the farm, in respect of which the plaintiff claimed the right (*h*).

The declarations of a person in possession of property are of course admissible, after his decease, to cut down his title, but not his declarations of what he heard other persons say (*i*). The same document may be proof of possession, and also admissible as a declaration against interest (*k*).

It will be observed that, in all the preceding cases where entries have been tendered, great stress has been laid on the circumstances of the custody from which they are produced. The declarations, under consideration, are also subject to the remarks which have been made on the declarations discussed in the two preceding chapters, as to the necessity that they must be made *ante litem motam*.

This rule is said to have been somewhat extended to an anomalous class of cases, where the declarations have been made by persons who have had no interest to misrepresent facts. The privilege, as it really exists, appears to have been confined to eccle-

(*g*) *Woolway* v. *Rowe*, 1 A. & E. 114.
(*h*) *Papendick* v. *Bridgwater*, 5 E. & B. 166.
(*i*) *Lord Trimleston* v. *Kemmis*, 9 Cl. & F. 749.
(*k*) *La Touche* v. *Hutton*, Ir. R., 9 Eq. 171.

siastical cases in which a vicar or other incumbent has claimed a benefit on the ground of an entry or statement made by a former incumbent. But the cases are obscure and the doctrine doubtful. In several instances, also, the statements appear to have been admissible as being against interest. It is not conceived to be necessary to do more than notice the questionable existence of these exceptions.

It has been said that, in the case of an entry against interest, "proof of the handwriting of the party, and his death, is enough to authorize its reception; at whatever time it was made, it is admissible"(*l*). The first part of this dictum applies of course only to entries made within thirty years prior to the time when they are tendered.

(*l*) Per Parke, B., *Doe* v. *Turford*, 3 B. & Ad. 898.

CHAPTER XIV.

ON EVIDENCE OF DECLARATIONS MADE IN THE COURSE OF PROFESSIONAL DUTY.

It was stated in the last chapter, that, notwithstanding some adverse authorities, declarations are not admissible merely because the deceased witness had no apparent interest to misrepresent the truth. But there is a class of cases, which are now to be considered, in which this condition, coupled with proof that the deceased made the declaration in the course of his trade or professional duty, is held to be a sufficient reason for admitting the statement in evidence. The foundation of this rule will not, perhaps, sustain a close analysis; but, as in declarations against interest, it is presumed that no man will wilfully or fraudulently state falsely what is injurious to his pecuniary advantage, so in the present case it is presumed that the deliberate statement by a man of anything which he has done strictly in the course of his daily duty is *primâ facie* deserving of credibility.

It has therefore long been a settled principle that—

> Declarations made by a person, strictly in the course of his trade or professional duty, and without any apparent interest

to misrepresent the truth, if contemporaneous with the fact, are evidence, after his death, against third persons, of the essential subject-matter, but not of its surrounding circumstances (*a*).

Price v. *Torrington* is generally cited as the leading case on this rule (*b*). The short report of it in Salkeld is as follows:—The plaintiff, being a brewer, brought an action against the Earl of Torrington for beer sold and delivered; and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brewhouse and gave an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names; that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery, but otherwise of the shop-book itself singly, without more.

Accordingly, in *Pritt* v. *Fairclough* (*c*), after evidence had been given that it was the course of business in the plaintiff's office for a deceased clerk to copy all letters, a letter-book containing a letter, which purported to be the copy by the deceased of a

(*a*) By sect. 32 (2) of the Indian Evidence Act, statements, written or verbal, made in course of business, or in discharge of professional duty, are relevant when the declarant is dead or not to be found, or incapable of giving evidence, or not procurable without unreasonable delay or expense.

(*b*) Salk. 285; 1 Sm. L. C. 290.

(*c*) 3 Camp. 305.

letter which the defendant refused to produce, was held good secondary evidence. So, where it was material to show that a licence had been sent to A. by the plaintiff, evidence was given, that it was the course of business in the plaintiff's office that such licences should be copied in the letter-book and noted before they were sent; and the copy and noted memorandum, in the handwriting of a deceased clerk, that the licence had been sent, were then received (*d*). Declarations by a deceased rector have also been admitted as evidence as to the custom of electing churchwardens in his parish (*e*).

In an important case (*f*) of ejectment, the lessor of the plaintiff had instructed A. to serve the defendant with notice to quit. A. entrusted the commission to his partner B., who had not served such notices before. B. prepared three notices to quit (two of them being for service on other persons), and as many duplicates. He then went out, and on his return delivered to A. three duplicate notices (one of which was a duplicate of the notice to the defendant), indorsed by B. It was proved that the two other notices had been served on the persons for whom they were intended; that the defendant had subsequently requested A. that he might not be compelled to leave, and that it was the invariable practice for A. and B.'s clerks, who usually served the notices to quit, to indorse, on a duplicate of such

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(*d*) *Hagedon* v. *Reed*, 3 Camp. 379.
(*e*) *Bremner* v. *Hull*, H. & R. 800.
(*f*) *Doe* v. *Turford*, 3 B. & Ad. 890.

notice, a memorandum of the fact and time of service. It was held, on these facts, that the third duplicate was admissible to prove that the notice had been served on the defendant. Parke, B., said:—"It was proved to be the ordinary course of this office, that when notices to quit were served, indorsements like that in question were made; and it is to be presumed that the principal observed the rule of the office as well as the clerks." And Taunton, J., observed:—"A minute in writing like the present, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances, which render it probable that that fact occurred, is admissible in evidence."

The doctrine was discussed in *Poole* v. *Dicas* (*g*), where it was held that an entry made in a bill-book, in the course of business, by a notary's clerk, since deceased, of the dishonour of a bill which he had been instructed to present for payment, was evidence of the dishonour.

In all the above cases, great importance was attached to the fact that the entries were immediately subsequent to, and virtually contemporaneous with, the transaction. In *Doe* v. *Turford* (*h*), Parke, B., said:—"It is to be observed, that in the case of an entry against interest, proof of the handwriting of the party, and his death, is enough to authorize its reception; at whatever time it is made, it is admis-

(*g*) 1 Bing. N. C. 649.
(*h*) 3 B. & Ad. 890.

sible; but in the other case [*scil.*, in declarations in the course of business], it is essential to prove that it was made at the time it purports to bear date: it must be a contemporaneous entry." So, in *Poole* v. *Dicas*, Tindal, C. J., said:—"If there were any doubt whether the entry were made at the time of the transaction, the case ought to go down to trial again." It seems, however, to be sufficient if the entry be made on the same day, or even on the following morning.

It has been recently held that the entry must not only be made at once, but confined to the matters which it is the duty of the writer to record (*i*).

This was in accordance with the dicta of the judges in *Doe* v. *Turford* and *Percival* v. *Nanson*, to the effect that an entry in the course of business, unlike an entry against interest, is evidence only of the facts which it was the duty as well as the custom of the deceased declarant to enter. The cases on this head are not quite consistent; but the general rule appears still to be maintained according to the principle laid down in *Chambers* v. *Bernasconi*, which was argued first in the Exchequer, and then in the Exchequer Chamber (*k*). In that case, in order to establish an act of bankruptcy by keeping house, it was necessary to prove the place where the plaintiff had been arrested; and the evidence offered was a paper, brought from the file of the under-sheriff, and addressed to him, and purporting to be signed by the

(*i*) *Smith* v. *Blakey*, L. R., 2 Q. B. 326; 36 L. J., Q. B. 160; 15 W. R. 492.

(*k*) 1 Tyr. 335; S. C., 4 Tyr. 531.

deceased officer who had made the arrest. The paper was as follows:—

"9th November, 1825.

"I arrested Abraham Henry Chambers, the elder only; in *South Molton Street*, at the suit of William Brenton.

"Thomas Wright."

It was proved that, by the course of the office, the officer was required, immediately after an arrest, to transmit to the sheriff's office a memorandum or certificate of the arrest; and that for the last few years an account of the place where the arrest took place had been also required from him. The court held the document not to be admissible evidence of the place of arrest, apparently on the ground that it was not the officer's duty to make the entry of the place, because the strict course of office business could not be considered to be affected by the recent innovation in its practice. Lord Denman, in delivering judgment, said:—"We are all of opinion that, whatever effect may be due to an entry, made in the course of any office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting, then, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what

particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done." Accordingly an entry by a deceased steward of a matter not in the course of his duty, but only important, in his opinion, to his master's interest, will not be received (*l*). It is right to observe, that the decision on the particular facts in *Chambers* v. *Bernasconi* has been much criticised by learned judges and other authorities; but the principle on which it was given, viz., that the act was not in the course of a duty, but collateral to it, is recognized as settled (*m*).

On the general doctrine, it seems to have been taken for granted, that an entry of the receipt of rates, by the deceased clerk of a collector, is evidence of the payment of rates, under the 4 & 5 Will. 3, c. 76 (*n*).

When the entry has been made on hearsay, it will not be received. Thus, in an action for goods sold, where the only evidence of delivery was an entry made by a witness, by the direction of a deceased foreman, who was not present when the goods were delivered, but who, in the course of business, had himself been informed of the delivery by the person whose duty it was to deliver the goods, and who was also dead, the entry was rejected. This case is also to be remarked, as containing the opinion of Lord

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(*l*) *Doe* v. *Skinner*, 2 Ex. 384; *Doe* v. *Whitcomb*, 6 Ex. 601.

(*m*) *Poole* v. *Dicas*, 1 Bing. N. C. 649; *Smith* v. *Blakey*, L. R., 2 Q. B. 326; 36 L. J., Q. B. 160; 15 W. R. 492.

(*n*) *R.* v. *St. Mary, Warwick*, 1 E. & B. 816.

Abinger, that the doctrine of *Price* v. *Torrington*, ought not to be extended (*o*).

It appears to be now settled law, that there is no distinction between verbal and written declarations made in the course of a duty, so far as regards their admissibility. But oral evidence will not be received to contradict, nor even to explain, a written entry which has been made in the course of business. Thus, in *Stapylton* v. *Clough* (*p*), to prove service of a notice to quit, a duplicate notice, indorsed with the day of service, and signed in the course of duty by a deceased agent, was tendered; but it was also sought to explain and vary the particulars of the indorsement, by evidence of subsequent oral declarations made by the deceased. But the court held, that the indorsement must be received as it stood; and Lord Campbell said:—"I agree with what I am reported to have said in the *Sussex Peerage Case*, that there is no distinction between verbal and written declarations made in the course of a duty, so far as regards their admissibility. But to deduce from this doctrine that whatever is said subsequently to the time of making the entry respecting the transaction may be admitted in evidence, would lead to the greatest injustice. How can it be said that the verbal declaration of Jackson was made in the course of his duty? What he did in discharging his duty was signing the written entry. What he

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(*o*) *Brain* v. *Price*, 11 M. & W. 773.
(*p*) 2 E. & B. 933.

may babble during the rest of his life on the subject cannot be admitted in evidence, contradicting, as it does here, what he has before written."

It was also held by Lord Campbell, in *Bright* v. *Legerton* (*q*), that any written entry or verbal declaration by a deceased solicitor, in the discharge of any duty entrusted to him, will be admissible in evidence on proof being given that he had a lawful and valid mandate. On this principle an entry by a deceased solicitor in his diary, of his having attended a client on a certain day on her executing a deed of appointment, was held sufficient evidence of the due execution of the deed (*r*).

When the entry or declaration does not appear to have been in the course of a trade or professional duty, but only a personal custom, not creating responsibility in the declarant, it is inadmissible. On this principle, the account books of deceased tradesmen, made by themselves, are not evidence for their executors to charge a debtor (*s*). So in *Reg.* v. *Worth* (*t*), to prove a settlement by hiring and service, the following document, made, according to personal custom, in the memorandum book and

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(*q*) 1 De G., F. & J. 614.

(*r*) *Rawlins* v. *Richards*, 28 Beav. 370; and see illustration (c) to sect. 32 of Indian Evidence Act.

(*s*) By the effect of sect. 34 of the Indian Evidence Act entries in books of account regularly kept in the course of business are relevant, when referring to a matter into which the court has to inquire, but they are not by themselves sufficient evidence to charge a person with liability.

(*t*) 4 Q. B. 133.

handwriting of the pauper's deceased master, was tendered:—

"April 4, 1824.—W. W. (the pauper) came, and to have for the half year 40*s*.

"September 29.—Paid this 2*l*.

"October 27.—Ditto came again; and to have 1*s*. per week: to March 1825, is 21 weeks 2 days, 1*l*. 1*s*. 6*d*.

"25th.—Paid this."

The court held this evidence to have been rightly rejected. Lord Denman said:—"In a case of this kind the entry must be against the interest of the party who writes it, or made in the discharge of some duty for which he is responsible. The book here does not show any entry operating against the interest of the party. The memorandum could only fix upon him a liability on proof that the services referred to had been performed; and whether, on dispute, a jury would have found him liable for the sum so entered, or more or less, we cannot say. Nor was this an entry made in the course of duty, as in *Doe* v. *Turford* (*u*). The act there was performed by a principal in the firm, and not by a clerk; but it was done by a person acting under the same responsibility." The other judges delivered similar judgments. So in Ireland, entries in registers kept in Roman Catholic chapels have been held inadmissible (*x*).

(*u*) Sup. p. 208.

(*x*) *Ennis* v. *Carrol*, 17 W. R. 344.

Declarations in the course of business are inadmissible while the declarant is alive (*y*). So, entries by a witness who is alive are not evidence *per se*, but may be used by him for the purpose of refreshing his memory (*z*).

In connection with this subject it may be observed that, by 15 & 16 Vict. c. 86, s. 54, power was given to the Court of Chancery, where any account is required to be taken, to direct that, in taking the account, the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *primâ facie* evidence of the truth of the matters therein contained. This principle is also adopted for equity proceedings in county courts by the 3rd rule of the County Courts Order (1865).

(*y*) *Digby* v. *Steadman*, 1 Esp. 328.
(*z*) *R.* v. *Worth*, 4 Q. B. 139.

CHAPTER XV.

ON EVIDENCE OF STATEMENTS BY DECEASED OR ABSENT WITNESSES.

(ON the general principle by which hearsay or second-hand evidence is inadmissible evidence, the statements of witnesses at former trials are not generally received at common law, but there is a large exception to this principle, which is contained in the rule that—

> In a matter between the same parties, the depositions of a witness at a former trial, or suit in equity, may be used on a subsequent trial, if the witness be dead; or if he be sought and cannot be found; or if he has been subpœnaed and has fallen ill on the way (*a*).

But the matter in issue must be the same, and ne depositions cannot be given in evidence against ny person who was not party or privy to the proeedings; the reason being that he had not liberty cross-examine the witness.

The general rule has been thus stated by Mansfield, . J.:—"What a witness, since dead, has sworn on a trial between the same parties, may be given evidence, either from the judge's notes, or from

(*a*) For the rule in India, see Indian Evidence Act, s. 33.

notes that have been taken by any other person who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given" (*b*).

The same rule holds if a witness be kept away by collusion, or other improper means. Thus, in an old case where a witness was sworn in a trial at C. B., and was subpœnaed by the defendant to appear at a subsequent trial in K. B., but did not appear; persons were admitted to prove what his evidence was at the first trial, because the court conceived there was reason to presume that he was kept away by the petitioner (*c*). But it appears to be doubtful whether every species of mere subsequent incapacity will let in evidence that has been given at a former trial (*d*).

It appears that under the 11 & 12 Vict. c. 42, s. 17, it is not necessary to prove that a witness absent from illness is so ill as to be unable to attend, but it is sufficient if it appear that it would endanger his life to attend (*e*). The full effect of the above statute, and the circumstances under which the depositions of deceased or absent witnesses will be received, according to its requirements, will be considered under the head of secondary documentary evidence.

If a party give evidence of a former trial to show that a verdict was improperly obtained, the other

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(*b*) *Mayor of Doncaster* v. *Day*, 3 Taunt. 262.
(*c*) *Green* v. *Gatewick*, Bull. N. P. 242, *b*.
(*d*) *R.* v. *Eriswell*, 4 T. R. 707.
(*e*) Per Platt, B., *R.* v. *Day*, 19 L. T. 35.

party may rebut it by proof of other evidence given at the first trial, although the second trial be not between the same parties nor on the same rights (*f*).

On a new trial of an issue out of Chancery, oral evidence of the statements at a former trial of a deceased witness was received, although the Master of the Rolls had made an order for reading the depositions in equity of such witnesses as had died since the first trial (*g*).

In order to render a deposition of a deceased or absent witness admissible, it must appear that it was taken on oath in a judicial proceeding in some cause, and that the party to be affected by it had an opportunity to cross-examine the witness (*h*). In actions of ejectment brought against the same person, and involving the same title, the evidence of a deceased witness in a former action will not be admitted in a subsequent one, unless the plaintiff in the second action claims through the plaintiff in the first (*i*).

It appears to be open to the parties to enter into an agreement, that the judge's or shorthand writer's notes at the first trial shall be received as evidence in the second; and after such consent neither party can dispute its validity (*k*). But the court will require distinct evidence of every such agreement (*l*).

(*f*) *Doe* v. *Parsingham*, 2 C. & P. 440.

(*g*) *Tod* v. *Earl of Winchelsea*, 3 C. & P. 387.

(*h*) Per Hullock, B., *Attorney-General* v. *Davison*, M. & Y. 169.

(*i*) *Morgan* v. *Nicholl*, 36 L. J., C. P. 86; L. R., 2 C. P. 117; 15 W. R. 110.

(*k*) *Wright* v. *Tatham*, 1 A. & E. 3.

(*l*) *Doe* v. *Earl of Derby*, 8 A. & E. 783.

The statements of absent witnesses are frequently tendered in the form of depositions by persons who have been examined, either in this kingdom or abroad, on interrogatories pursuant to commissions issued out of the Courts of Chancery or Common Law. Their admissibility will be discussed in a subsequent part of this work.

A question has often arisen, and has never yet been satisfactorily decided, as to how far a judge's notes are evidence of what took place at a former trial, and whether the judge himself may be made a witness. It would appear from the *dictum* of Mansfield, C. J., in *Mayor of Doncaster* v. *Day*, already cited, that a judge's notes at a former trial are evidence on a subsequent trial; and although, strictly speaking, this cannot, perhaps, be regarded as included in the principle by which courts take cognizance of the acts and signatures of public officers, inasmuch as judges, *virtute officii*, are not required to take notes of the cases before them, but do so merely for their own personal convenience and satisfaction; yet, considering that their notes have all the authenticity and value of public documents, there seems to be no reason why, even without the aid of a statute, such notes, purporting to be signed by the judge, should not be received as good evidence. Since, also, it appears to be the more established doctrine that the judge himself cannot be made a witness as to what took place at the former trial, and, even if this were allowed, his presence would only serve the purpose of authenticating his notes, to which he would necessarily refer, and which he

would follow literally, every argument of public policy seems to be in favour of receiving such notes as evidence *per se*. But there appears to be no express English decision on the point.

It appears that a judge cannot be called to give evidence of the substance of a former trial, but that he may be called to prove anything collateral or incidental to it (*m*). In *R.* v. *Gazard*, Patteson, J., recommended the grand jury not to examine one of their number, who had been chairman at the quarter sessions on the trial in which the prisoner had committed an alleged perjury. His Lordship said:—"It is a new point, but I should advise the grand jury not to examine [the gentleman]; he is the president of a court of record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court." But in a trial for perjury, under a committal by a county court judge, Byles, J., held that the judge ought to have been called to prove the perjury from his notes; and that the rule prohibiting the calling of judges as witnesses is confined to judges of the superior courts. His Lordship said:—"If you had called me, I should

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(*m*) *R.* v. *Gazard*, 8 C. & P. 595; *R.* v. *Earl of Thanet*, 27 How. St. Tr. 845. The Indian rule is (sect. 121 of Indian Evidence Act), that no judge or magistrate can (except by special order of a higher jurisdiction than his own) be compelled to answer any questions as to his own conduct in such capacity, nor as to anything which came to his knowledge in court, but he may be examined as to other matters occurring in his presence while so acting.

not have come" (*n*). In an action on an award under the Lands Clauses Consolidation Act, the arbitrator is an admissible witness, to show what matters were included by him in the compensation which he has given, but he must not be asked his reasons for awarding any particular item; nor can he be asked questions to explain or contradict his award (*o*). In the Divorce Court the notes of the Judge Ordinary are evidence on an appeal (*p*).

The 11th Rule of Order 58, under the Judicature Act, 1875, provides, that where any question of fact is involved in an appeal, the evidence given orally in the court below shall be brought before the court of appeal by the production of a copy of the judge's notes, or such other materials as the court may deem expedient. Shorthand writer's notes will now be admissible under the head of other materials, whereas, heretofore, they have only been admissible by consent (*q*).

It is sufficient that evidence of what occurred at a former trial, when admissible, should be substantially without being literally correct, except where actual words are the gist of the issue. Thus, on an indictment for perjury, evidence of the words spoken, coupled with a confident conviction on the part of the witness that they were all that was material to

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(*n*) *R.* v. *Harvey*, 8 Cox, Crim. Cas. 99.

(*o*) *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R., 5 E. & I. 418; 41 L. J., Ex. 137.

(*p*) *Austin* v. *Austin*, 28 L. J., P. & M. 8.

(*q*) *Ex parte Gelibrand*, L. R., 10 Ch. 52; 23 W. R. 174.

the pending inquiry, and that they were not qualified by other expressions, was held by all the judges to be sufficient (*r*).

By the practice of the Court of Chancery the depositions of witnesses taken in a former suit might, with the other proceedings, be read at the hearing of a subsequent cause, provided that the issue was the same, that the parties were the same, or that the parties in the second suit were privy to or had a community of interest with the parties in the first suit, and that the individual against whom the depositions were offered, or the person through whom he claimed, or with whom he had a community of interest, had an opportunity of cross-examining the witness (*s*). An order for leave to read the depositions had to be obtained (*t*), which was made on petition or motion, of course "saving all just exceptions," and the benefit thereof enured also to the opposite party unless otherwise restricted (*u*). It appears that the depositions could be read during the lifetime of the witnesses on the authority of the *City of London* v. *Perkins* (*x*), which was a case on appeal from the Exchequer to the House of Lords. Knight Bruce, V.-C., in *Blagrave* v. *Blagrave* (*y*), expressed an opinion that when the point was substantially the same it would be necessary to follow that case, but in

(*r*) *R.* v. *Rowley*, 1 Moo. 111.
(*s*) *Nevil* v. *Johnson*, 2 Vern. 447.
(*t*) Consol. Order xix. 4.
(*u*) Ibid. 5.
(*x*) 3 Bro. P. C., ed. Toml. 602.
(*y*) 1 De G. & S. 252.

the last-mentioned case he refused to allow the depositions of witnesses taken in a suit by a tenant for life in remainder under a will, to be used in a suit by a tenant in tail in remainder under the same will without proof of the death or inability to be examined of such witnesses, although both suits were instituted for the preservation of the settled property. But in a suit by a legatee under a will against the executor, the depositions in a previous suit against the same executor by another legatee, have been allowed to be read (*z*); the second suit being *in pari materia* with the first. It is hardly necessary to observe, that the depositions to be admissible in the subsequent suit must have been admissible in the first; so that when a bill was dismissed for irregularity, depositions taken for the purposes of that suit were not admissible in a subsequent suit (*a*). With regard to the use of affidavits made in a previous suit, the rule was stated by V.-C. Kindersley in *Laurence* v. *Maule* (*b*), as follows:—"The general rule with regard to the admission of evidence is, that where an issue has been raised between certain parties and evidence has been adduced upon that issue by one of those parties which could be used by him as against the other party, and in a subsequent proceeding the same issue is raised between the same parties and the witness who gave evidence in the former proceeding has died, the court will

(*z*) *Coke* v. *Fountain*, 1 Vern. 413; cf. *Nevil* v. *Johnson*, 2 Vern. 447.

(*a*) *Backhouse* v. *Middleton*, 1 Ch. Ca. 173—175.

(*b*) 4 Drew. 472.

admit the evidence given by the deceased witness in the former as evidence in the subsequent proceeding. But the evidence is not admissible unless the issue is the same and the parties are the same in both proceedings." Nor was it an objection that the witness died or became a lunatic before he could be cross-examined (*c*). Affidavits made in proceedings in a winding-up order have been held admissible in another suit between the same parties (*d*). Where evidence was given *vivâ voce* in a former suit, then if the same issue was raised between the same parties what the witnesses said might be proved by any one who could swear to the words, it not being sufficient apparently to swear to the effect (*e*).

Finally, it may be remarked, that when two cases strongly resemble each other in point of fact, but the allegations of fact are not the same in each, the record in one cannot be referred to for the purpose of explaining or supplying anything doubtful in the other (*f*).

(*c*) Per Kindersley, V.-C., *Williams* v. *Williams*, 12 W. R. 663.

(*d*) *Ernest* v. *Weiss*, 1 N. R. 6.

(*e*) Vide *R.* v. *Jollife*, 4 T. R. 290.

(*f*) *Gann* v. *Johnson*, L. R., 4 E. & I. 265; *secus* in India, see Act VIII. of 1859, s. 138.

CHAPTER XVI.

ON ADMISSIONS.

When a party to an action or suit has either expressly, or by necessary implication, admitted the case of an opposite party, the latter is not required to prove it.

Admissions (*a*), properly so called, can be made only in civil, and are not allowed in criminal proceedings. They are regarded as being a waiver of proof on the part of their makers, rather than as evidence against them. They are *potius ab onere probandi relevatio, quam proprie probatio.* They are not conclusive unless they assume the form of estoppels.

In *Heane* v. *Rogers* (*b*), Bayley, J., said:—"There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence—and strong evidence—against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them, unless another person has been induced by them to alter his condition: in such a case the party is estopped

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(*a*) The provisions of the Indian law as to admissions are contained in the Ind. Ev. Act, ss. 17—23.

(*b*) 9 B. & C. 586.

from disputing their truth with respect to that person (and those claiming under him) and that transaction; but as to third persons he is not bound. It is a well-established rule of law that estoppels bind parties and privies, not strangers." This rule, it may be observed, applies to all admissions, and not to estoppels only. There are three classes of privies, viz., privies by blood (heir to ancestor), privies by law (executor to testator, husband to wife), and privies by estate or interest (purchaser to vendor, donee to donor) (*c*). The estate or interest in the last case may be either legal or equitable. Therefore the admissions of a party to the record are receivable to defeat the interest of a third person, although the person is only a nominal party and trustee for the latter, for the court will not look on any party to the record as a cipher (*d*). But it is doubtful how far the admission of a *cestui que trust* can be received to defeat the claim of the trustee on the record (*e*). There is no privity between a landlord and his tenant, and as the tenant cannot derogate for his landlord's title, the admission of a tenant is no evidence against his landlord. Therefore a declaration by a tenant that he was not entitled to a right of common in respect of his farm, has been held to be no evidence that such right did not belong to the reversioner (*f*).

(*c*) 2 Sm. L. C. 706.
(*d*) *Bauerman* v. *Radenius*, 1 T. R. 663; 2 Sm. L. C. 362.
(*e*) *Doe* v. *Wainwright*, 8 A. & E. 691.
(*f*) *Papendick* v. *Bridgwater*, 5 E. & B. 166.

"An estoppel," it has been said, "is an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature,—so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it, though he may show that the person relying on it is estopped from setting it up, since that is not to deny its conclusive effect as to himself, but to incapacitate the other from taking advantage of it. Such being the general nature of an estoppel, it matters not what is the fact thereby admitted, nor what would be the ordinary and primary evidence of that fact, whether matter of record, or specialty, or writing unsealed, or mere parol; * * and this is no infringement on the rule of law requiring the best evidence, and forbidding secondary evidence to be produced till the sources of primary evidence have been exhausted; for the estoppel professes not to supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted; and so, too, has it been held, that an admission which is of the same nature as an estoppel, though not so high in degree, may be allowed to establish facts, which, were it not for the admission, must have been proved by certain steps appropriated by law to that purpose" (*g*).

(*g*) 2 Sm. L. C. 693

Estoppels are of three kinds; I., by matter of record; II., by deed; III., by matter in pais.

N.B. The first two are reciprocal, the last is not necessarily so.

I. The highest species of estoppel is that by matter of record on the principle "*interest reipublicæ ut sit finis litium*": but judgments are of two kinds, viz. judgments *in rem*, and judgments *in personam*, the respective effects of which by way of estoppel are very different. A judgment *in rem* is, according to Lord Coke, one which is pronounced by a competent tribunal upon the *status* of some particular subject-matter, either a thing or a person. No perfectly satisfactory definition of a judgment *in rem* has, however, yet been given (*h*). The chief instances in modern times are to be found in the Ecclesiastical, Admiralty, Probate, and Prize Courts (*i*), and upon

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(*h*) Institutes of Justinian by Sandars, L. iv. tit. vi. s. 1. Ditto by Ortolan, s. 1954. See the judgments of Mr. Justice Holloway in *Yarakalamma* v. *Annakala Naramma*, 2 Mad. H. L. Rep. 276, and of Sir Barnes Peacock in *Kunhya Lal* v. *Radnachurn*, 7 Cal. W. R. 339. The Ind. Ev. Act, s. 41, virtually defines a judgment *in rem* as "a final judgment, order or decree of a competent court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing not as against any specified person, but absolutely."

(*i*) *Hughes* v. *Cornelius*, 2 Shower, 232.

questions of legitimacy (*m*), marriage, and the like. A certificate of a judge under the Parliamentary Elections Act, 1868, finding that a person claiming a seat has been duly elected is a judgment *in rem* (*n*). A judgment in bankruptcy proceedings has the effect of a judgment *in rem*, but this effect it owes to the Bankruptcy Act. Judgments *in rem* are binding not only on the parties to the proceedings but upon all the world, and not only on the tribunals of the country where pronounced, but on the tribunals of other countries: but this doctrine is subject to the qualification, that such a judgment to operate by way of estoppel must not have been obtained by fraud, must not carry a manifest error on its face, and must not be contrary to natural justice.

A judgment *in personam*, or more correctly *inter partes*, is conclusive, however, only between the parties to the record and their privies, upon the maxim "*Res inter alios acta alteri nocere non debet.*" The rule, therefore, is this, that as between the parties to the record and their privies, the facts, actually decided by a court of competent jurisdiction, cannot be litigated again (*o*), and are conclusive evidence of the state of the issue between them (*p*).

The Court of Common Pleas, in a recent case, applied this principle to the judgment of a county

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(*m*) A decision on adoption under Hindu law is not a judgment *in rem*. *Kunhya Lal* v. *Radnachurn*, 7 Cal. W. R. 339.

(*n*) *Waygood* v. *James*, 38 L. J., C. P. 195; L. R., 4 C. P. 361.

(*o*) Cf. Act VIII. of 1859, s. 2.

(*p*) *Boileau* v. *Rutton*, 2 Exch. 665.

court (*q*); but in bankruptcy the consideration for a judgment debt can always be inquired into (*r*).

The tests whether this rule, which is founded on the maxim "*Res judicata pro veritate accipitur*" applies are—1st, that the *thing* must be the same; and one of the *criteria* of the identity of two suits on considering a plea of *res judicata* is the inquiring whether the same evidence would support both (*s*); 2nd, that the *person* to be affected by the judgment must be party or privy to the proceedings in which it was given. Therefore the judgment against a man in a civil suit is not evidence against him on a criminal trial, and *vice versâ*. So a judgment against a man in his individual character is not evidence against him when suing in a representative character, and *vice versâ*. In an administration suit, a judgment recovered against executors, who were also trustees of the real estate, was held to be only *primâ facie* evidence of a debt against the persons interested in the real estate (*t*). It has been held, in the Divorce Court, that a decree founded upon the evidence of the parties does not estop them from controverting the facts so found in another suit, where their evidence is inadmissible (*u*). A judgment only operates by

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(*q*) *Flitters* v. *Allfrey*, L. R., 10 C. P. 29; 44 L. J., C. P. 73; 23 W. R. 442.

(*r*) *Ex parte Kibble, Re Onslow*, 44 L. J., Bank. 65; L. R., 10 Ch. 373; 23 W. R. 433.

(*s*) See Lord Westbury's judgment in *Hunter* v. *Stewart*, 4 De G., F. & J. 168.

(*t*) *Harvey* v. *Wild*, L. R., 14 Eq. 438; 41 L. J., Ch. 698.

(*u*) *Stoate* v. *Stoate*, 2 S. & T. 233.

way of estoppel upon the point actually decided, and is not even evidence of any matter which came collaterally in question, although within the jurisdiction of the court, or of any matter to be inferred by argument from the judgment (*x*). Thus, a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forging in an action on the bill (*y*). It is also important to bear in mind that the validity of a judgment of a court of competent jurisdiction upon parties legally before it may be questioned on the ground that it was pronounced through fraud, connivance or covin of any description, or not in a real suit, or if pronounced in a real and substantial suit between parties who were really not in contest with each other (*z*).

It is unnecessary to give evidence of facts which are admitted in pleading; nor can evidence be received to dispute such admissions. The 17th Rule of the 19th Order provides, that every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition;

(*x*) Per De Grey, C. J., in *The Duchess of Kingston's case*, 2 Smith's L. C. 680.

(*y*) Per Blackburn, J., *Castrique* v. *Imrie*, 4 L. R., E. & I. 434.

(*z*) *Earl of Bandon* v. *Becher*, 2 Cl. & Fin. 510.

and by the 22nd Rule of the same Order, the denial must not be evasive, but must answer the point of substance. By the 23rd Rule, the bare denial of a contract is only a denial of the making of the contract in fact, and not of its legality or sufficiency in law, whether with reference to the Statute of Frauds or otherwise. In a chancery suit, if a defendant stated in his answer that "he believes," or "has been informed and believes," that a fact is true, this was an admission; but where he stated that he "has been informed," without any statement as to his belief, there is no admission (*a*). It has been held that such admissions of a fact on the record amount only to a waiver of proof of that fact; and that if the adverse party seeks to have any inference drawn from the fact so admitted he must prove it like any other fact (*b*).

On the general principle, a verdict and conviction for non-repair of a highway estops the convicted party or parish from disputing subsequently their liability to repair the highway (*c*). But a conviction for obstructing a highway does not estop the convicted person from maintaining trespass against a prosecutor in respect of the same highway; for the proceedings are not between the same parties in respect of the same right (*d*).

Not only are the majority of foreign judgments *in rem*, but all foreign judgments *in personam* are,

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(*a*) Daniell's Chancery Practice, vol. i. p. 742.

(*b*) *Edmunds* v. *Groves*, 2 M. & W. 642; cf. *Brown* v. *Newall*, 2 M. & C. 576.

(*c*) *R.* v. *Haughton*, 1 E. & B. 501.

(*d*) *Petrie* v. *Nuttall*, 11 Ex. 569.

for the purposes of estoppel, on a footing analogous to home judgments (*d*). It is an important and interesting question how far a foreign judgment is liable to examination in a home tribunal. It was finally decided by the House of Lords in *Castrique* v. *Imrie* (*e*), and the Judicial Committee of the Privy Council in *Messina* v. *Petrococchino* (*f*), that the home tribunal cannot act as a court of appeal from the foreign tribunal, *i. e.*, a foreign judgment cannot be impeached as being erroneous on the merits or founded on a mistake either of fact or law. Even where the law applied is English law, and a mistake of English law is apparent on its face, the judgment of the foreign court is still binding (*g*). There still remains one possible question—supposing the foreign court to have wilfully refused to apply English law, when by the comity of nations it is applicable, is its judgment then impeachable in an English court? Lord Hatherley is evidently of opinion that it is (*h*), and this opinion is probably correct.

Where a settlement was made in England on a marriage between a Turk domiciled in England and an English lady, the former promising to reside always in England, Hall, V.-C., held that a Turkish court could not, by a decree of divorce pronounced without notice to the wife or other persons interested

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(*d*) *Duchess of Kingston's case*, 2 Smith's L. C. 679; *Riccardo* v. *Garcias*, 12 Cl. & Fin. 368.

(*e*) L. R., 4 E. & I. 415; 39 L. J., C. P. 350; 19 W. R. 1.

(*f*) L. R., 4 P. C. 150; 41 L. J., P. C. 27; 20 W. R. 451.

(*g*) See *Godard* v. *Gray*, 19 W. R. 349; L. R., 6 Q. B. 139.

(*h*) See *Simpson* v. *Fogo*, 1 J. & H. 18.

under the settlement, make void the settlement (*i*). But an English composition deed made before a colonial judgment is no defence to an action on such judgment in an English court (*k*).

The judgment of a Court of Domicile is binding on the Courts of Nationality as to any question of nationality arising between the same parties (*l*).

II. The next species of estoppel is by instruments under seal; and this kind of estoppel, as in the case of estoppel by record, is equally binding on the parties to the deed and those who claim under them (*m*). "The principle is, that where a man has entered into a solemn engagement by deed under his hand and seal, as to certain facts, he shall not be permitted to deny any facts which he has so asserted" (*n*). But this only applies in an action or proceeding based on the deed in question; in a collateral action there is no such estoppel (*o*). A lease is evidence for and against a lessee of the terms on which he holds, and also for an assignee who claims under him (*p*). So,

(*i*) *Colliss* v. *Hector*, L. R., 19 Eq. 334; 23 W. R. 485; 44 L. J., Ch. 267.

(*k*) *Ellis* v. *M'Henry*, L. R., 6 C. P. 228; 40 L. J., C. P. 109; 19 W. R. 503.

(*l*) *Doglioni* v. *Crispin*, L. R., 1 E. & I. 301; 35 L. J., P. & M. 129.

(*m*) With a few exceptions estoppel by deed does not apply in India. See *Donzelle* v. *Kedarnath Chuckerbutty*, 7 Bengal, L. R. 729.

(*n*) Per Taunton, J., *Bowman* v. *Taylor*, 2 A. & E. 291.

(*o*) See judgment of Wood, V.-C., in *Carter* v. *Carter*, 3 K. & J. 644.

(*p*) *Houghton* v. *Kœnig*, 18 C. B. 235.

a recital in a deed is evidence against him who executed the deed, and against every person claiming under him (*q*). It may be here remarked, that the substance of a recital carries with it the context; and, in a record, is conclusive evidence of collateral matter which was necessary to support the groundwork of the judgment (*r*). In construing recitals in deeds, and determining how far they operate as estoppels on the parties, the effect must be gathered from the apparent intention of the instrument (*s*). The recital in a deed of a former deed between the same parties proves, as between such parties, so much of the former deed as is recited, and no more (*t*).

A recital is conclusive evidence against parties only where it is distinctly antecedent to, and related to, the substance of the deed. The law on this point is thus laid down by Parke, B., in *Carpenter* v. *Buller* (*u*). "If a distinct statement of a particular fact is made in the recital of an instrument under seal, and a contract is made with reference to that recital, it is clear that as between the parties to such instrument and in an action upon it, it is not competent for the party bound to deny the recital." The same learned judge also lays down that a recital, even in an instrument not under seal, may be conclusive to the same extent. In other cases recitals are treated

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(*q*) Com. Dig. Evid. (B. 5); *Gwyn* v. *Neath*, 37 L. J., Ex. 122; L. R., 3 Ex. 209; 16 W. R. 1209.

(*r*) *R.* v. *Hartington*, 4 E. & B. 780.

(*s*) *Stronghill* v. *Buck*, 19 L. J., Q. B. 209.

(*t*) *Gillett* v. *Abbott*, 7 A. & E. 783.

(*u*) 8 M. & W. 212; cf. *Lainson* v. *Tremere*, 1 A. & E. 792.

as *primâ facie* evidence which may be rebutted. A party to a deed is not estopped from showing that it is void from fraud or illegality, or from having been executed by him while under duress or while a minor. When an educated person, who, by very simple means, might have ascertained what are the contents of a deed, is induced to execute it by a false representation of such contents, it is doubtful whether he may not, by executing it negligently, be estopped between himself and a person who innocently acted upon the faith of the deed being a valid one (*x*). Infants are not bound by recitals in deeds executed by their guardians (*y*), but married women are estopped by recitals in deeds by which they are bound (*z*), and *à fortiori* by such deeds. The engrossment of a deed tendered for execution will operate as an admission by, but not as an estoppel against, the party tendering it (*a*).

III. Estoppels by matter of *pais*. In *Lyon* v. *Reed* (*b*), Parke, B., says of such estoppels:—"They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as livery of seisin, entry, acceptance of an estate, and the like. Whether a

(*x*) Per Mellish, L. J., *Hunter* v. *Walters*, 20 W. R. 220; 41 L. J., Ch. 175; L. R., 7 Ch. 75.

(*y*) See *Milner* v. *Lord Harewood*, 18 Vesey, 274.

(*z*) *Jones* v. *Frost*, L. R., 7 Ch. 776; 20 W. R. 793.

(*a*) *Bulley* v. *Bulley*, L. R., 9 Ch. 739; 44 L. J., Ch. 79; 22 W. R. 779.

(*b*) 13 M. & W. 309.

party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed." But the courts, both of law and equity, have extended the doctrine to cases where the notoriety is less solemn and formal. Hence the doctrine, "when one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time"(*c*). By the term "wilfully" in the above rule it has been laid down (*d*), that "we must understand if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon and that it is acted upon accordingly, and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it, and does act upon it as true, the party making the representation would be equally precluded from contesting its truth and conduct by negligence or omission where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing part-

(*c*) Per Lord Denman, *Pickard* v. *Sears*, 6 A. & E. 474; cf. *Attorney-General* v. *Stephens*, 1 K. & J. 724.

(*d*) Per Parke, B., *Freeman* v. *Cooke*, 2 Exch. 663.

ners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorized." Some of the "recognized propositions of an estoppel in *pais*" were mentioned by the Court of Common Pleas in a recent case (*e*). One of them was thus laid down:—"If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist." In this case it was held that the defendants were not, under the circumstances, estopped from showing that certain goods alleged to have been delivered to them as carriers had never reached their hands, although the plaintiff had received from them advice notes for such goods. These doctrines do not however apply to a statement of a fact not yet in existence, nor to a matter of future intention (*f*).

The six following are the most important kinds of estoppels by matter of *pais*:—(1) A tenant, during his possession of the premises, cannot deny that the landlord under whom he has entered, or to whom he

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(*e*) *Carr* v. *London and North Western Railway*, L. R., 10 C. P. 316; 44 L. J., C. P. 109; 23 W. R. 747.

(*f*) *Bank of Louisiana* v. *Bank of New Orleans*, 43 L. J., Ch. 269.

has paid rent, had title at the time of his admission (*g*), and this extends to the case of lodgers. "The security of landlords would be infinitely endangered if such a proceeding were allowed" (*h*); and even if a tenant consents to give up possession to a person claiming to be the landlord, such person is estopped as the tenant would have been from disputing the landlord's title (*i*). So, where a person had dealt with property as an executor *de son tort*, his payment of rent to the superior landlord was held to estop him from denying his liability as assignee to perform the covenants in the lease (*k*). Nevertheless a tenant, although he cannot be permitted to prove that his landlord had no title, at the time of entry, may show that his title has expired (*l*). So, too, a person who enters on land by the licence of the party in possession is estopped from denying the title of such party to such possession (*m*). Conversely, a landlord who has granted a lease is estopped from alleging his want of title, and this—whether the lease is by deed or not. Payment of rent and receipt of rent alike raise strong presumptions of tenancy, but do not operate by way of estoppel; for, "when a tenancy is attempted to be established by mere pay-

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(*g*) Ind. Ev. Act, s. 116.

(*h*) Per Lord Ellenborough, *Balls* v. *Westwood*, 2 Camp. 12.

(*i*) *Doe* v. *Mills*, 2 B. & Ad. 17.

(*k*) *Williams* v. *Heales*, L. R., 9 C. P. 171; 43 L. J., C. P. 80; 22 W. R. 317.

(*l*) *England* v. *Slade*, 4 T. R. 682; cf. *Langford* v. *Selmes*, 3 Kay & J. 220.

(*m*) *Doe* v. *Baytop*, 3 A. & E. 188.

ment of rent, without any proof of an actual demise or of the tenant's having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent and to show on whose behalf such rent was received" (*n*).

(2) A bailee (*o*) is estopped from denying that his bailor had, at the time the bailment was made, authority to make it (*p*). But when the bailee is evicted by title paramount he can set up that title against the bailor (*q*).

(3) A licensee (*r*) is estopped from denying the title of the licensor to grant the licence. Thus, a licensee of a patent cannot dispute the title of the patentee. This, like the two preceding kinds of estoppel in *pais*, rests, according to Lord Westbury, on the principle that, to say "that could be disputed is a proposition inconsistent with the law, and would be equally inconsistent with the ordinary reason and good sense of mankind" (*s*).

(4) An agent is estopped from denying the title of his principal (*t*).

(5) The acceptor of a bill of exchange (*u*) is estopped from denying the capacity of the drawer to

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(*n*) Per Patteson, J., *Doe* v. *Francis*, 2 M. & R. Sc. App. 57.
(*o*) Ind. Ev. Act, s. 117.
(*p*) *Gosling* v. *Birnie*, 7 Bing. 338.
(*q*) *Biddle* v. *Bond*, 6 B. & S. 225.
(*r*) Ind. Ev. Act, s. 117.
(*s*) See *Crossley* v. *Dixon*, 10 H. L. Cas. 304.
(*t*) *Dixon* v. *Hammond*, 3 B. & Ald. 310.
(*u*) Ind. Ev. Act, s. 117.

draw (*x*) or indorse (*y*) the bill, and from denying the genuineness of the drawer's signature (*z*); and both the acceptor and drawer of an accommodation bill are estopped from denying its validity (*a*). But when the acceptor of a bill, drawn and indorsed in the name of a firm of solicitors, had assented to its being drawn by one member of a firm for a purpose not connected with the partnership and without the authority of the other partner, it was held that, in an action on the bill, such acceptor was still not estopped from traversing the indorsement by authority of the firm (*b*).

A subsequent acknowledgment of a forged signature to a bill cannot operate as an estoppel (*c*), nor does the payment of a bill upon which a man's acceptance has been forged make him liable to pay a second similarly forged acceptance, even without notice of repudiation (*d*). However, when the defendant accepted a bill of exchange, which by agreement was both drawn and indorsed in the name of a deceased person, it was held that he was estopped from denying the indorsement (*e*).

(6) Where a party, having an interest in property,

(*x*) *Sanderson* v. *Collman*, 4 M. & G. 209.

(*y*) *Pitt* v. *Chappelow*, 8 M. & W. 616.

(*z*) *Sanderson* v. *Collman*, ubi supra.

(*a*) *Phillips* v. *Im Thurn*, 18 C. B., N. S. 694.

(*b*) *Garland* v. *Jacomb*, L. R., 8 Ex. 216.

(*c*) *Brook* v. *Hook*, 40 L. J., Ex. 50; L. R., 6 Ex. 89; 19 W. R. 508.

(*d*) *Morris* v. *Bethel*, L. R., 5 C. P. 47; 19 W. R. 137.

(*e*) *Ashpitel* v. *Bryan*, 3 B. & S. 474; 5 B. & S. 723.

stands by and permits another to deal with such property, as if he were the absolute owner, and as if there were no such secret equity, he will not be permitted to assert such secret equity against those with whom the apparent owner has dealt. This doctrine was discussed at length, in the case of *Ramsden* v. *Dyson* (*f*) in the House of Lords, when the following valuable canons were laid down by the law Lords:—(1). "If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land. (2). But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it. (3). So if a tenant builds on his landlord's land he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined." Lord Kingsdown, affirming the principles of the case of *Gregory* v. *Michell* (*g*), laid down the following rule:—"If a man under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land

(*f*) L. R., 1 E. & I. 129.
(*g*) 18 Ves. 328.

with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord and without objection by him lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation." Nor is this doctrine restricted, apparently, to cases where the party standing by is aware of his title (*h*). So, where a wife allows her husband to spend the income of her separate estate, he is not accountable to her afterwards for it (*i*), nor can she receive any portion thereof after his death. When an insurer of a ship has accepted notice of abandonment, with full knowledge of the facts of the loss, he is estopped from afterwards denying a total loss or relying on a breach of warranty (*k*).

As connected with this subject we may notice the extensive ground for relief in equity which arises from the principle, that where a party is drawn into a contract by misrepresentation, he has his option of avoiding or enforcing the contract. This doctrine affects not only the parties to the agreement, but all who induce others to enter into it, and applies not only where statements were made which are false in fact, but where, although false in fact, they were believed to be true by the person making them, if such person in the due discharge of his duty ought to have known, or formerly knew and ought to have remembered, that they were false. The law upon this head

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(*h*) *Teasdale* v. *Teasdale*, 1 Macn. Select Cases in Equity, 170.
(*i*) *Smith* v. *Lord Camelford*, 2 Ves. jun. 716.
(*k*) *Provincial Insurance Co.* v. *Leduc*, 22 W. R. 939.

was compendiously stated by Lord Romilly, M.R., in *Pulsford* v. *Richards* (*l*), as follows:—"In the case, where the false representation is made by one who is no party to the agreement, entered into on the faith of it, the contract may be avoided, and all that equity can then do is to compel the person who made the representation to make good his assertion as far as may be possible. In cases, however, where the false misrepresentation is made by a person who is party to the agreement, the power of equity is more extensive; there the contract itself may be set aside, if the nature of the case and condition of the parties will admit of it, or the person who made the assertion may be compelled to make it good. The distinction between the cases where the person deceived is at liberty to avoid the contract, or where the court will affirm it—giving him compensation only, are not very clearly defined. This question usually arises on the specific performance of contracts for the sale of property; and the principle which I apprehend governs the cases, although it is in some instances of very difficult application, and leads to refined distinctions, is the following, namely,—that if the representation made be one which can be made good, the party to the contract shall be compelled or may be at liberty to do so; but if the representation made be one which cannot be made good, the person deceived shall be at liberty, if he please, to avoid the contract. Thus, if a man misrepresents the tenure or situation of an estate, as if he sell an

(*l*) 17 Beav. 95; cf. *Smith* v. *Kay*, 7 H. L. Cas. 750.

estate as freehold which proves to be copyhold or leasehold, or if he describes it as situate within a mile of some particular town, when, in truth, it is several miles distant, such a misrepresentation, as it cannot be made true, would, at the option of the party deceived, annul the contract; but if the property be subject to incumbrances concealed from the purchaser, the seller must make good his statement and redeem those charges; and even in the cases where the property is subject to a small rent not stated, or the rental is somewhat less than it was represented, the court does not annul the contract, but compels the seller to allow a sufficient deduction from the purchase-money. It does so on this principle, that by this means he in fact makes good his representation, and that the statement made was not such as in substance deceived the purchaser as to the nature and quality of the thing he bought. With respect to the character or nature of the misrepresentation itself, it is clear that it may be positive or negative, that it may consist as much in the suppression of what is true as in the assertion of what is false; and it is almost needless to add, that it must appear that the person deceived entered into the contract on the faith of it. To use the expression of the Roman law (much commented upon in the argument before me), it must be a representation '*dans locum contractui*;' that is, a representation giving occasion to the contract, the proper interpretation of which appears to me to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable

to infer that he would not have entered into it; or the suppression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether." The fraud of a married woman binds her separate estate in equity (*m*).

Acts, conduct, manner, demeanour, and acquiescence will operate as admissions, some of which are rebuttable, others are not.

Thus, the assumption of a character is evidence to create a liability for acting in it, so also the tacit recognition of it waives objections to its validity. On this ground executors *de son tort* are liable for interfering with the property of a deceased person. When a person by holding himself out as a shareholder induces a company to register him as such, he cannot deny that he is a shareholder, in an action on such shares (*n*). And where shares were allotted to a person, in pursuance of an authority signed by him to have his name entered as a shareholder, and he paid calls and received a dividend on such shares, it was held that he was a shareholder (*o*). Where a company, under circumstances which made it doubtful whether the agreement was binding on its shareholders, transferred its business to a new company, one of the terms of the agreement being

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(*m*) *Vaughan* v. *Vanderstegen*, 2 Drew. 363.
(*n*) *Sheffield Railway Co.* v. *Woodcock*, 7 M. & W. 574.
(*o*) *Sewell's case*, L. R., 3 Ch. 131; 15 W. R. 1031.

that the shareholders in the old company should receive shares in the new company, and share certificates were sent to all the shareholders in the old company, it was held, that a shareholder who had acknowledged the receipt of and retained the certificates, was a shareholder in the new company; but that one who had taken no notice of the communication was not a shareholder (*p*). In this, Lord Hatherley said:—"No authority can be found for holding that a person, by simply doing nothing, may be rendered liable. The mere fact of standing by and being told there is something done which you have not authorized, cannot fix you with the heavy liabilities which shares in a joint stock company would create." Conversely, a purchaser of shares in a company from a person who had become the registered holder of them by means of a forged transfer, has been held to be entitled to receive compensation from the company in the event of his being compelled to re-transfer the shares to their proper owner; since, by holding out the seller as the registered owner of the shares, they are estopped from denying him to be so after the purchaser has acted upon such representation (*q*). And a similar rule applies if a person, after receiving a certificate of the registration of his shares, has repaid to the

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(*p*) *Challis's case*, 40 L. J., Ch. 431; 19 W. R. 453; L. R., 6 Ch. 266; cf. *Bank of Hindustan* v. *Alison*, L. R., 6 C. P. 222; 40 L. J., C. P. 117; 19 W. R. 505.

(*q*) *Re Bahia, &c. Railway Co.*, 16 W. R. 862; 37 L. J., Q. B. 176.

vendor the amount of a previous call upon them (*r*). Again, where commissioners were empowered by a local act to issue mortgage securities, it was held that they could not, as against a *bonâ fide* holder for value, set up an illegality in the original issue of any security, but were estopped from denying its validity (*s*). And a company cannot rely on an informality in the issue of their debentures as an answer to a petition for winding-up (*t*). Where a company had registered an assignment of debentures, it was held that they could not equitably set off against the transferee any claim which they had against the transferor (*u*). This last doctrine has been recently extended to a case where there was no registration; for, a company having received notice of an assignment for value of one of their debentures, and acknowledged the receipt by stamping the duplicate notice, Malins, V.-C., held, that this stamping estopped them from setting up against the transferee any equities attaching between themselves and the transferor (*v*). Where a person held himself out as a physician, he could not formerly main-

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(*r*) *Hart* v. *Frontino Mining Co.*, L. R., 5 Ex. 111; 39 L. J., Ex. 93.

(*s*) *Webb* v. *Herne Bay Commissioners*, L. R., 5 Q. B. 642; 40 L. J., Q. B. 221; 19 W. R. 241.

(*t*) *Re Exmouth Dock Co.*, 43 L. J., Ch. 110; L. R., 17 Eq. 181; 22 W. R. 104.

(*u*) *Higgs* v. *North Assam Tea Co.*, L. R., 4 Ex. 87; 17 W. R. 1125; followed by Lord Romilly in *Re North Assam Tea Co.*, L. R., 10 Eq. 465; 18 W. R. 126; cf. *In re General Estates Co.*, L. R., 3 Ch. 758; 16 W. R. 919.

(*v*) *Brunton's case*, L. R., 19 Eq. 302; 23 W. R. 286.

tain an action for fees as a surgeon; but where, in such an action, it appeared that the defendant had paid money into court, it was held that this amounted to a recognition of the plaintiff's right to sue (*x*). A collector of turnpike tolls, although not legally appointed, has been held capable of maintaining an action for them on a count for an account stated, where the defendant had paid part and promised the remainder (*y*). And the title of an assignee in bankruptcy, if not formally disputed, has been held sufficiently established by proof that the defendant had treated with him as such (*z*). But, where the plaintiff professes to sue in a particular capacity, it must be strictly proved, in the absence of such admission (*a*). And an admission by a person in one character is no evidence against him in another. Thus, declarations by a person before becoming an executor are not evidence against him in that office (*b*). Generally, however, it is a rule, as laid down by Lord Ellenborough, that any recognition of a person standing in a given relation to others is *primâ facie*, but not conclusive, evidence against the person making the recognition, that such relation exists (*c*). The value of such evidence will depend entirely on the circumstances (*d*). In a

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(*x*) *Lipscombe* v. *Holmes*, 2 Camp. 441.
(*y*) *Peacock* v. *Harris*, 10 East, 104.
(*z*) *Dickinson* v. *Coward*, 1 B. & Ald. 677.
(*a*) *Collins* v. *Carnegie*, 1 Ad. & El. 695.
(*b*) *Legge* v. *Edmonds*, 25 L. J., Ch. 125.
(*c*) *Dickinson* v. *Coward*, 1 B. & Ald. 679.
(*d*) Ibid.

recent case, it was held by the Court of Queen's Bench, that the mere filing of an affidavit of proof against the estate of an insolvent agent to an undisclosed principal, after that principal is known to the creditor, is not a conclusive election by the creditor to treat the agent as his debtor (*e*).

It has been said: "A declaration, in the presence of a party to a cause, becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth. Such an acquiescence, indeed, is worth very little where the party hearing it has no means of personally knowing the truth or falsehood of the statement" (*f*). The declaration must, however, have been made on an occasion when a reply from the party might be properly expected (*g*). Where a notice of dishonour, in an action on a bill, had been put by the plaintiff's attorney into the letter-box of the defendant's attorney, and the latter, shortly after, called on the former, in consequence, as he said, of what the former had written; it was held, there was sufficient evidence for a jury of an admission that notice had been given (*h*). But a merely conditional acknowledgment of liability in such a case, in the event of a party primarily liable not paying, will not dispense with the necessity of

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(*e*) *Curtis* v. *Williamson*, L. R., 10 Q. B. 57; 23 W. R. 236; 44 L. J., Q. B. 27.

(*f*) Per Parke, J., *Hayslep* v. *Gymer*, 1 A. & E. 163; cf. *Neile* v. *Jakle*, 2 C. & K. 709.

(*g*) *Boyd* v. *Bolton*, Ir. R., 8 Eq. 113.

(*h*) *Curlewis* v. *Corfield*, 1 Q. B. 814.

formal notice (*i*). Where, however, the indorser of a bill, being told that the holders are about to take proceedings against him, said he would pay if time was given him, it was held that he had waived his right to notice of dishonour (*k*).

In settlement cases, proof that a parish has relieved for seven years has been held to be evidence that the pauper was settled in the parish (*l*). So, evidence of relief given to a pauper residing out of the relieving parish admits a settlement (*m*). But mere relief of casual paupers is no evidence of a settlement (*n*). Nor even where the relieving parish has enabled the pauper to remove to another parish (*o*).

Proof that a party to an action (though not himself examined) has requested others to give false evidence, is evidence against him as an admission against his own case (*p*).

Acquiescence in an act is evidence of an admission; but, to make it so, it has been said that it must exhibit some act of the mind, and amount to voluntary demeanour or conduct of the party. Thus, if an account be delivered and retained for any time without objection, it is presumed to be

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(*i*) *Hicks* v. *Duke of Beaufort*, 4 Bing. N. C. 229.

(*k*) *Wood* v. *Dean*, 3 B. & S. 101.

(*l*) *R.* v. *Bamsley*, 1 M. & S. 377.

(*m*) *R.* v. *Edwinstowe*, 8 B. & C. 671.

(*n*) *R.* v. *Chatham*, 8 East, 498.

(*o*) *R.* v. *Trowbridge*, 7 B. & C. 252.

(*p*) *Moriarty* v. *London, Chatham & Dover Railway Co.*, L. R., 5 Q. B. 314; 39 L. J., Q. B. 109; 18 W. R. 625.

correct (*q*). So, where an account has been stated, and a bill given for the amount, the debtor cannot, in an action on the bill, impeach the charges (*r*). And an objection to one of several items in an account, without remark as to the others, is evidence of an admission that they are correct (*s*). A banker's pass book is evidence of acquiescence by the customer of the principles on which the accounts are made up (*t*). An account sent by a creditor to a debtor has been held in equity evidence of a contract (*u*); and even where the account, although made out, was not sent in, a contract was implied (*x*). In an action by a surety against his principal, it has been held that the uncontradicted statement by the former to the latter, that he had paid a debt by cheque, is slight evidence of payment (*y*). A notice to quit lands, which has been served and not objected to, is evidence against the tenant that the tenancy commenced at the season of the year when the notice to quit expires (*z*). So, in use and occupation, payment of rent is evidence of a holding, and of its terms (*a*).

It is held that a party's own statements are evidence against himself, whether they corroborate the contents

(*q*) *Willis* v. *Jernegan*, 2 Atk. 252.
(*r*) *Knox* v. *Whalley*, 1 Esp. 159.
(*s*) *Chesman* v. *Court*, 2 M. & G. 307.
(*t*) *Williamson* v. *Williamson*, 17 W. R. 607; L. R., 7 Eq. 542.
(*u*) *Morland* v. *Isaac*, 20 Beav. 392.
(*x*) *Bruce* v. *Garden*, 17 W. R. 990.
(*y*) *Price* v. *Burva*, 6 W. R. 40.
(*z*) *Thomas* v. *Thomas*, 2 Camp. 647.
(*a*) *Harden* v. *Hesketh*, 4 H. & N. 175.

of a deed, or other written instrument, or not (*b*). In such a case it has been decided that an abstract or affidavit used by a person on a reference before a Master to prove title in himself may be received against him in a subsequent litigation (*c*). But the statement relied on must be distinctly a statement of fact, and not merely an opinion or inference of law by the deponent; for in the latter case he will not be estopped (*d*). This doctrine seems to have been slightly extended in the case of *Richards* v. *Morgan* (*e*), in which a question was raised relative to the admissibility of certain depositions, which the defendant had used in a Chancery suit, wherein the same facts were in issue. Crompton, J., said, "A document knowingly used as true, by a party in a court of justice, is evidence against him as an admission even for a stranger to the prior proceedings, at all events, when it appears to have been used for the very purpose of proving the very fact, for the proving of which it is offered in evidence in the subsequent suit." So it was held, that an examined copy of answers to interrogatories, filed in the usual way, may be read in evidence against the person making them in a subsequent action to which he is a party, without proof of his handwriting or production of the interrogatories themselves (*f*).

Admissions are implied from the form of judges'

(*b*) *Slatterie* v. *Pooley*, 6 M. & W. 664.
(*c*) *Pritchard* v. *Bagshawe*, 11 C. B. 457.
(*d*) *Morgan* v. *Couchman*, 14 C. B. 100.
(*e*) 4 B. & S. 641.
(*f*) *Fleet* v. *Perrins*, 37 L. J., Q. B. 233; L. R., 3 Q. B. 536.

orders (*g*); from the attornments inferred from the relation of landlord and tenant (*h*); and from submission to a distress (*i*); and in many cases unanswered letters are evidence of the statements which they contain (*k*). But their value will depend entirely on special circumstances. The mere fact of their not having been answered will amount to no recognition of their accuracy; but they will be receivable in conjunction with subsequent statements made with reference to them by the party to whom they are addressed (*l*).

It should be remembered that—

> Admissions, whether written or oral, which do not operate by way of estoppel, constitute only *primâ facie* and rebuttable evidence against their makers, and those claiming under them, as between them and others.

Thus, although the acknowledgment in a deed of consideration money received is conclusive between the parties (*m*), a receipt not under seal, and only indorsed on the deed, is only *primâ facie* evidence that the money has been paid (*n*). So, a receipt, indorsed on a bill, and generally all parol receipts are

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(*g*) 14 Q. B. 202.

(*h*) *Stafford* v. *Till*, 4 Bing. 75.

(*i*) *Crowley* v. *Vitty*, 7 Ex. 219.

(*k*) *Lucy* v. *Mouflet*, 5 H. & N. 229; but see the remarks of Lord Hatherley, quoted supra p. 248.

(*l*) *Gaskill* v. *Skene*, 14 Q. B. 664.

(*m*) *Baker* v. *Dewey*, 1 B. & C. 704.

(*n*) *Stratton* v. *Rastall*, 2 T. R. 366; *Farrars* v. *Hutchinson*, 1 P. & D. 439.

only *primâ facie* evidence of payment. It has been held, indeed, in an action by assignees in a bankrupt's name, that a receipt in full of all demands by the nominal plaintiff is conclusive against his assignees (*o*); but it seems that this case is not law (*p*); and it has been held that a plaintiff who had given the defendant a receipt for sold goods with a view to defraud his creditors was not estopped from showing that no money had passed, and that no sale had ever taken place (*q*). Entries of monies received are *primâ facie* evidence against the maker; but entries of payments are not, as a general rule, evidence in his favour, yet entries of payments might be so connected with entries of receipts, that if the latter are read against the maker, the former would be admissible in his favour (*r*).

The admission of a partner is evidence against his co-partners; that of an agent is evidence against his principal; and that of one of several parties jointly interested is evidence against the others or other of them.

Thus, the admission by one of several plaintiffs who sued as partners, that the subject-matter of the action was his own personal contract, has been received as evidence to bar the action (*s*). And gene-

(*o*) *Alner* v. *George*, 1 Camp. 392.
(*p*) *Bowes* v. *Foster*, 2 H. & N. 779.
(*q*) *Bowes* v. *Foster*, sup.
(*r*) Per Kindersley, V.-C., *Reeve* v. *Whitmore*, 2 Dr. & S. 450.
(*s*) *Lucas* v. *De La Cour*, 1 M. & S. 249.

rally, in partnership transactions, the representations, although tortious or fraudulent, of a partner are binding on his co-partners (*t*). So, the admission of a retired partner as to a partnership transaction while he was in the firm, is evidence in an action against a continuing partner (*u*), and admissions made by one partner after dissolution are admissible to prove payment of a partnership debt after dissolution (*x*).

When there is a joint interest, the admissions of one party concerning a material fact within his knowledge, are generally evidence against another party (*y*). Thus, an admission by one in his character of executor is evidence against his co-executor (*z*); and a receipt by one of two trustees is evidence against both (*a*).

In *Whitcomb* v. *Whiting* (*b*), it was held that payment of interest by one of several drawers of a joint and several promissory note takes it out of the Statute of Limitations as against the others; and that such payment may be given in evidence in a separate action against any one of the others. It was also stated by Lord Mansfield in that case, that "an admission by one is an admission by all." By Lord Tenterden's Act, 9 Geo. 4, c. 14, it was

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(*t*) *Rapp* v. *Latham*, 2 B. & Ald. 795.
(*u*) *Wood* v. *Bradelech*, 1 Taunt. 104.
(*x*) *Pritchard* v. *Draper*, 1 R. & M. 191.
(*y*) Per Le Blanc, J., *R.* v. *Hardwicke*, 11 East, 589.
(*z*) *Fox* v. *Waters*, 12 A. & E. 43.
(*a*) *Scaife* v. *Johnson*, 3 B. & C. 421.
(*b*) Dougl. 652; 1 Sm. L. C. 574.

enacted, that no joint contractor shall lose the benefit of the statute by the written acknowledgment or promise of another: but the effect of payment by one of such joint contractors is expressly reserved to continue as before the statute (*c*). But by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 14), no co-contractor or co-debtor, whether liable jointly only, or jointly and severally, will lose the benefit of the Statutes of Limitation, by reason only of payment of any principal, interest, or other money by any other co-contractor or co-debtor.

Before the acts or acknowledgment of one party can be made evidence against another, it must be proved that such a joint interest existed as creates an express or implied authority to bind (*d*). It is not enough that there should be a mere community without an actual privity of interest. Thus, the court have refused to extend the doctrine of *Whitcomb* v. *Whiting* to the case of a payment by one of two joint and several makers of a promissory note as against the executors of the other; and have held that such a payment does not take the note out of the Statute of Limitations as against the latter (*e*). So, payment by an executor of one of two such makers will not take the note out of the statute as against the other (*f*).

In actions of tort, the admissions of one defendant will not affect another.

(*c*) *Bradfield* v. *Tupper*, 7 Ex. 27.
(*d*) *Dickinson* v. *Valpy*, 10 B. & C. 128.
(*e*) *Atkins* v. *Tredgold*, 2 B. & C. 23.
(*f*) *Slater* v. *Lawson*, 1 B. & Ad. 396.

In settlement cases it has been held that the declarations of a rated parishioner are evidence against his own parish (*g*).

In cases of principal and agent, the ordinary rule applies, *qui facit per alium facit per se:* and the principal will be affected by the admissions of his agent so far as they are within the scope of his authority; but not when they exceed it (*h*). Thus, it has been said:—"When it is proved that A. is agent of B., whatever A. does, or says, or writes in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and therefore binds B" (*i*); and the principal's liability towards third parties cannot be restricted by any private arrangement between him and his agent (*k*). Evidence of an interpreter's version of an agent's language is *primâ facie* correct, and is evidence against the principal without calling the interpreter (*l*).

In the language of a well-known writer (*m*), "the representation, declaration, and admission of the agent does not bind the principal if it is not made at the very time of the contract but upon another occasion, or if it does not concern the subject-matter of the contract, but some other matter in no degree

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(*g*) *R.* v. *Inhabitants of Hardwicke*, 11 East, 578.

(*h*) *Great Western Railway* v. *Willis*, 18 C. B., N. S. 748.

(*i*) Per Gibbs, C. J., *Langhorn* v. *Allnutt*, 4 Taunt. 519.

(*k*) *Maddick* v. *Marshall*, 18 C. B., N. S. 829; *Edmunds* v. *Bushell*, 35 L. J., Q. B. 20; L. R., 1 Q. B. 97; 14 W. R. 1.

(*l*) *Reid* v. *Hoskins*, 6 E. & B. 953.

(*m*) Story on Agency, § 135.

belonging to the *res gestæ*." Therefore a letter from an agent to his principal, containing merely an account of his transactions, is not evidence against the latter (*n*). But where an agent, within the scope of his authority, wrote to his principals that he had received a sum of money on their account, and they replied, giving directions as to its disposition, it was held that the agent's statement so recognized was evidence that the principals had received the money (*o*).

Of course a principal will not be prejudiced by the unauthorized admission of his agent. Thus, in detinue for goods against a pawnbroker, to prove possession, evidence was rejected of a statement by the defendant's shopman, that "it was a hard case on his master, who had advanced money on the goods." It was held that such a statement was not within the scope of the shopman's authority, and Tindal, C. J., said:—"It is dangerous to open the door to declarations by agents beyond what the cases have already done. The declaration itself is evidence against the principal, not given upon oath: it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation, or any question put to the agent. . . . . Evidence of such a nature ought always to be kept within the strictest limits to which the cases have confined it."

It is not necessary to call the agent to prove his

(*n*) *Langhorn* v. *Allnutt*, 4 Taunt. 511.

(*o*) *Coates* v. *Bainbridge*, 5 Bing. 58.

admissions (*p*); and in tort the statements of an authorized agent of the defendant as to the subject-matter of the action, have been received without the agent being called (*q*).

Joint-stock companies are bound by the contracts of their directors and other agents acting within the scope of their authority; but when a contract entered into by the directors of a company is *ultra vires* of that company, not only is it not binding on that company, but it cannot be made binding by being ratified by the general body of shareholders (*r*). A company cannot ratify a contract entered into on its behalf previous to its registration (*s*).

Agency must be proved before the admissions can be received. But comparatively slight evidence is received as *primâ facie* evidence of authority. Thus, to prove authority to sign a guarantee, evidence that the agent, the defendant's son, had signed for the defendant in three or four instances and accepted bills, was held sufficient *primâ facie* evidence of agency (*t*). So, production of a writ, purporting to be signed by the plaintiff's town agent, coupled with a receipt for the sum claimed, purporting also to be signed by such agent, has been received to prove a plea of payment (*u*).

(*p*) *Irving* v. *Motley*, 7 Bing. 543.

(*q*) *Peyton* v. *St. Thomas's*, 4 M. & Ry. 625, n.

(*r*) *Riche* v. *Ashbury Railway Carriage Co.*, House of Lords, 1875; W. N. 1875, 123; reversing the Exch. Cham., L. R., 9 Ex. 224; 43 L. J., Ex. 177; 23 W. R. 7.

(*s*) *Kelner* v. *Baxter*, L. R., 2 C. P. 174; 15 W. R. 278.

(*t*) *Watkins* v. *Vince*, 2 Stark. 368.

(*u*) *Weary* v. *Alderson*, 2 M. & Rob. 127.

The admissions of agents are receivable in criminal cases, but only to create a civil liability in the principal. Thus, on Lord Melville's trial for embezzlement, evidence was received of a receipt of public money by an authorized agent, to show that the money was actually received. Erskine, C., said:— "The first steps in the proof of the charge must advance by evidence applicable alike to civil and criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a civil or criminal consequence; but it is a totally different question, in the consideration of criminal justice, as distinguished from civil, how the noble person now on trial may be affected by the fact, when so established. The receipt by the paymaster would in itself involve him civilly, but could, by no possibility, convict him of a crime" (*x*).

The instructions of a principal to his agent are not evidence in an action on a contract against a third party, unless it be shown that they were communicated to the latter (*y*).

The admissions of an infant are not evidence against him (*z*); nor, generally, are the admissions of a guardian, or next friend, evidence against an infant who sues by him (*a*).

A solicitor is presumed to have authority for whatever he may say or do on behalf of his client:

(*x*) 29 How. St. Tr. 746 to 764.

(*y*) *Smethurst* v. *Taylor*, 12 M. & W. 545.

(*z*) *Holden* v. *Hearn*, 1 Beav. 455.

(*a*) *Cowling* v. *Ely*, 2 Stark. 366; s. v. *James* v. *Hatfield*, 1 Stra. 548.

and his authority to make admissions in an action will be implied when he has been proved to be the solicitor on the record (*b*). In *Young* v. *Wright* (*c*), Lord Ellenborough said:—"If a fact is admitted by the attorney on the record with intent to obviate the necessity of proving it, he must be supposed to have authority for the purpose, and his client will be bound by the admission; but it is clear that whatever the attorney says in the course of conversation is not evidence in the cause" (*d*).

Where an attorney on the record gave the following undertaking: "I hereby undertake to appear for A. and B., joint owners of the sloop *Arundel*," &c., this was held sufficient *primâ facie* evidence that A. and B. were such joint owners (*e*).

But an admission before action commenced, by an attorney who afterwards appeared on the record, has been held insufficient, without proof that he was authorized at the time to make the admission (*f*).

An admission by a solicitor's clerk or agent, is as valid as an admission by the solicitor (*g*).

Where the defendant's attorney, after a controversy had arisen, admitted in conversation with the plaintiff's attorney that his client's title was under B., and ended with B., and the plaintiff claimed as

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(*b*) *Gainsford* v. *Grammar*, 2 Camp. 9.
(*c*) 1 Camp. 159.
(*d*) See *Petch* v. *Lyon*, 9 Q. B. 147.
(*e*) *Marshall* v. *Cliff*, 4 Camp. 133.
(*f*) *Wagstaff* v. *Wilson*, 4 B. & Ad. 339.
(*g*) *Taylor* v. *Williams*, 2 B. & Ad. 845.

a remainderman after B., this was held to be a good admission of B.'s title (*h*). So, in an action on a bill, an admission by the defendant's attorney that the acceptance was in his client's handwriting, is evidence of acceptance without production of the bill (*i*).

It has been said that if the parties have a particular controversy, and it seems plain that a certain fact is admitted, the jury, as men of common sense, may draw the same conclusion as to that fact as if it were formally proved before them (*k*). Accordingly, it seems to have been considered in a Nisi Prius case, that if counsel open statements which he does not prove, the opposite party may treat them as admissions: but this doctrine has been disputed in a later case (*l*). But generally counsel have authority to make all admissions, in civil cases, which they may think proper in the conduct of a case: and accordingly a special case signed by counsel on each side, at a former trial, has been held evidence of all the facts therein stated, at a subsequent trial (*m*). But ordinary and less formal admissions by counsel at a former trial are not evidence on a subsequent trial (*n*). In criminal cases it appears that solicitors

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(*h*) *Dorrett* v. *Meux*, 15 C. B. 142.

(*i*) *Chaplin* v. *Levy*, 9 Ex. 531.

(*k*) Per Alderson, B., *Stracy* v. *Blake*, 1 M. & W. 173.

(*l*) *Duncombe* v. *Daniell*, 8 C. & P. 222; cont. *Machell* v. *Ellis*, 1 C. & K. 682; *Darby* v. *Ousley*, 1 H. & N. 1.

(*m*) *Van Wart* v. *Woolley*, Ry. & M. 4; *Swinfen* v. *Swinfen*, 18 C. B. 485.

(*n*) *Colledge* v. *Horn*, 3 Bing. 119.

have no authority to make admissions; and it seems that not even counsel have such authority (*o*).

A wife has no implied authority to make admissions in prejudice of her husband's rights, even though he possess such rights *jure uxoris* (*p*). Nor can her admission of a tort committed by her be given in evidence to affect her husband in an action in which he is liable for costs and damages (*q*). Accordingly, where a wife was carrying on business at a distance from her husband, it was held that her admission as to the amount of rent, and the terms of tenancy, was not evidence of the facts against him, in replevin by him against his landlord. Alderson, B., said:—"A wife cannot bind her husband by her admissions, unless they fall within the scope of the authority which she may be reasonably presumed to have derived from him; and where she is carrying on a trade, if it be necessary for that purpose that she should have such a power, she may be his agent to make admissions with respect to matters connected with the trade. . . . Here it could not be necessary, for the purpose of carrying on the business of the shop, that she should make admissions of an antecedent contract for the hire of the shop" (*r*). But, whenever it can be inferred, from the antecedents of a case, that a wife had an express or implied authority, as an agent, to bind her husband,

(*o*) *R.* v. *Thornhill*, 8 C. & P. 575.
(*p*) *Alban* v. *Pritchett*, 6 T. R. 681.
(*q*) *Denn* v. *White*, 7 T. R. 112.
(*r*) *Meredith* v. *Footner*, 11 M. & W. 202.

her admissions will affect him (*s*). Accordingly, in actions against a husband for goods supplied to his wife, the jury ought not only to be asked whether the goods were necessaries, but also, whether the wife had authority to buy (*t*), for a wife has no original authority to pledge her husband's credit at all (*u*).

Where the business is such as is usually transacted by women, a wife's admission concerning it has been received against her husband (*x*).

As regards her separate property the admissions of a married woman are in equity on the same footing as if she were unmarried. And in India, where under the Indian Succession Act, 1865 (*y*), in the absence of a settlement, marriage has no effect upon a woman's proprietary rights, her admissions will of course universally bind her property.

Admissions by a principal are not evidence against a surety, unless connected and contemporaneous with the original transaction. Thus, a surety by bond for the conduct of a clerk has been held not bound by the admissions of the clerk that he had embezzled money (*z*). Nor, on a guarantee to pay for goods, is the surety bound by the admissions of his principal as to delivery (*a*). But receipts in the books of

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(*s*) *Manby* v. *Scott, &c.*, 2 Sm. L. C. and notes.

(*t*) *Reid* v. *Teakle*, 13 C. B. 627; cf. *Jolley* v. *Rees*, 15 C. B., N. S. 628.

(*u*) *Reneaux* v. *Teakle*, 8 Ex. 680.

(*x*) *Anon.*, 1 Str. 527.

(*y*) Act X. of 1865, ss. 4, 44.

(*z*) *Smith* v. *Whittingham*, 6 C. & P. 78.

(*a*) *Evans* v. *Beattie*, 1 C. & P. 394.

a deceased collector or clerk are evidence against a surety, as declarations in the course of business or against interest (*b*).

Finally, it is to be observed that the whole of a statement, whether verbal or in writing, containing an admission is to be received together. It will not be inadmissible, because portions of it contain hearsay; but the fact will be matter of comment by the judge to a jury, and he will also remind them that it is their duty to consider the whole statement, although an omission in this respect will not vitiate a verdict, if it appear that the whole admission has been otherwise brought fairly before them.

Payment into Court (*c*).

It is said, that payment of money into court admits everything which the plaintiff would be obliged to prove in order to recover the money (*d*). But this doctrine is controlled by later cases, which have settled that payment into court upon the *indebitatus* counts admits only a liability, to the extent of the money paid in, on one or more of the contracts in the declaration; and it would appear that, practically, the contract must be proved (*e*). But if in a statement of claim the claim is based upon a special contract, payment into court is an admission of such contract (*f*),

(*b*) *Middleton* v. *Melton*, 10 B. & C. 317; *Whitmarsh* v. *George*, B. & C. 556.
(*c*) See Order XXX. of the Rules under the Judicature Act, 1875.
(*d*) Per Cur., *Dyer* v. *Ashton*, 1 B. & C. 3.
(*e*) *Kingham* v. *Robins*, 5 M. & W. 94.
(*f*) *Archer* v. *English*, 1 M. & G. 876.

to the extent to which it is obligatory upon the plaintiff to prove it (*g*), and an admission of the specific breach in respect of which the payment in is made (*h*). In actions of tort the law was thus laid down by Jervis, C. J., in *Perren* v. *Monmouthshire R. Co.* (*i*). If "the declaration is general and unspecific, the payment of money into court, although it admits *a* cause of action, does not admit *the* cause of action sued for; and the plaintiff must give evidence of the cause of action sued for before he can recover larger damages than the amount paid into court. On the other hand, if the declaration is specific, so that nothing would be due to the plaintiff from the defendant unless the defendant admitted the particular claim made by the declaration, we think that the payment of money into court admits the cause of action sued for, and so stated in the declaration."

Admissions without Prejudice.

An admission cannot be given in evidence against a party who has made it with a declaration or intimation that it is to be regarded as confidential, or without prejudice (*k*), nor can the answer to such a communication, even though not guarded by similar

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(*g*) *Cooper* v. *Blick*, 2 Q. B. 915.

(*h*) *Rucker* v. *Palsgrave*, 1 Camp. 557.

(*i*) 11 C. B. 863.

(*k*) The Ind. Ev. Act provides (s. 23), that "in civil cases no admission is relevant if it is made upon the express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

words (*l*); for when a correspondence begins with a letter written "without prejudice" that covers the whole (*m*). But it must appear distinctly, that the communication was meant to be confidential; and an offer of compromise, unaccompanied by any such qualification, is strictly receivable in the nature of an admission (*n*). It has been held, however, that a communication of this kind may be used on the question of costs (*o*). And when an offer is made in a letter written without prejudice, and such offer is accepted (*p*), or when an admission is made in such a letter subject to a condition, and such condition has been performed (*q*), then the letter can be used in evidence against the writer, notwithstanding that it was written "without prejudice."

Admissions before Hearing or Trial.

In order to save expense and facilitate proceedings, it is now usual and right for each party, previous to trial, to call on the opposite party to make various admissions, by which the party so admitting cannot be prejudiced, and to which therefore he cannot reasonably object. These admissions are now regu-

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(*l*) *Paddock* v. *Forrester*, 3 M. & G. 903.
(*m*) *Re Harris*, 44 L. J., Bkcy. 33.
(*n*) *Wallace* v. *Small*, M. & M. 446.
(*o*) *Williams* v. *Thomas*, 2 Dr. & S. 29.
(*p*) *In Re River Steamer Co.*, L. R., 6 Ch. 822; 19 W. R. 1130.
(*q*) *Holdsworth* v. *Dimsdale*, 19 W. R. 798.

lated and required by Order XXXII. of the Rules under the Judicature Act, 1875, which provides that—

(1) "Any party to an action may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the statement of claim, defence, or reply of any other party."

(2) "Either party may call on the other party to admit any document, saving all just exceptions; and, in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the action may be; unless at the hearing or trial the court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense."

(4) "An affidavit of the solicitor, or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents, and annexed to the affidavit, shall be sufficient evidence of such admissions."

The phraseology of Rules 2 and 3 is almost identical with that of ss. 117 and 118 of the Common Law Procedure Act, 1852, the 119th section of which enacts that—

"An affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce, in respect of which notice to admit shall have been given, and of the time when it was served, with a

copy of such notice to produce annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice, and of the time when it was served."

The form of notice to admit, under the 2nd Rule, cited above, is regulated by the 3rd Rule, which provides, that it may be in the form set out in the Appendix. Notice to admit must be given even when the genuineness of the document itself is in issue, and although the opposite party have intimated that the admission will not be made (*r*). Where the judge granted a certificate that the refusal to admit was reasonable, four months after the trial and after taxation of the costs the court refused to set it aside (*s*).

The form of admission under the Common Law Procedure Act, 1854, and rules was the same as that which was previously in force under the now repealed rules of Hilary Term, 4 Will. 4. Various decisions under these rules have established the principle, that a party, by admitting a document, does not thereby in any way recognize its legal validity, but merely enables the opposite party to dispense with the usual evidence which would otherwise be necessary to bring it before the court. Thus, when a party admitted his signature to a bill of exchange, he was still allowed to object to the insufficiency of the stamp (*t*). And an admission on notice

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(*r*) *Spencer* v. *Barrough*, 9 M. & W. 425.
(*s*) *Day* v. *Vinson*, 33 L. J., Ex. 171.
(*t*) *Vane* v. *Whittington*, 2 Dowl. (N. S.) 757.

of certain documents which were described as copies of, or extracts from, certain original documents, was held not to make such copies evidence, in the absence of sufficient reason for the nonproduction of the originals (*u*). But an admission of a bill of exchange drawn by the plaintiff, directed to the defendants, "and accepted by one H. B. for the defendant," has been held to estop the defendants from disputing H. B.'s authority to accept (*x*). So it has been held that, after admission of a deed, no objection can be taken to an erasure or interlineation which may afterwards appear. In such a case, where the defendant objected at trial to an unexplained interlineation which had been admitted without objection, Coleridge, J., said:—"Before a party admits a deed it is produced to him for the very purpose of enabling him to inspect it, and say whether he objects to its admission in the form in which it appears to be written. Here it must be considered, either that the defendant really admitted that the deed was correct, and the interlineation no objection, or that the admission was made with the dishonest intention of entrapping the plaintiff; and as it must be presumed that the defendant acted upon the inspection of the deed upon which he had a right to act, I think the objection has been waived under the notice to admit" (*y*).

Where there is a variance in date between the document admitted and that which is produced, it

(*u*) *Sharpe* v. *Lambe*, 11 A. & E. 805.
(*x*) *Wilkes* v. *Hopkins*, 1 C. B. 737.
(*y*) *Freeman* v. *Steggal*, 14 Q. B. 202.

will be immaterial, unless the opposite party have been misled by it (*z*); but it ought to be shown that the document admitted and that produced are the same (*a*).

The courts will not sanction any agreement for an admission by which any of the known principles of law are evaded. No effect, therefore, will be given to an agreement to waive an objection arising from a deed not having been stamped (*b*).

(*z*) *Field* v. *Fleming*, 5 Dowl. 450.
(*a*) *Clay* v. *Thackrah*, 9 C. & P. 47.
(*b*) *Owen* v. *Thomas*, 3 M. & K. 357.

CHAPTER XVII.

ON CONFESSIONS.

As in civil controversies the admissions of parties are received against their makers, so in criminal trials the confession of a prisoner is held to be evidence against him of a high nature. But since a person charged with a crime may be induced by his situation either to criminate himself untruly, under the influence of excitement and terror, or trusting to a promise of forgiveness by a prosecutor, or other person who may be presumed to have a power of pardoning; it has long been the policy of the criminal law to reject evidence of every confession or statement by a prisoner, which has been made under the pressure of any species of physical or moral duress. Whenever, therefore, at a criminal trial, there appears to be ground of reasonable suspicion that a confession of guilt has been elicited from a prisoner by a threat of punishment, in the event of a refusal to confess, or by a promise of forgiveness, on condition of confessing, the court will inquire strictly into the antecedent circumstances of the statement which is to be tendered and will not receive it unless it appear to have been the free and voluntary declaration of the prisoner. The rule, as now recognized, is the following:—

The statement of a prisoner as to the cir-

> cumstances of a crime with which he is charged is evidence against himself, unless it have been elicited from him by a person who had at the time, actually or presumably, power to forgive; and who, in that capacity, induced the prisoner to confess, by holding out to him an offer, or prospect of, forgiveness.

Such is the existing rule (*a*) as confirmed by the latest decisions; but it is right to observe that it must be regarded as still comparatively unsettled, and in a state of transition. There appears to be a growing conviction in the minds of many learned judges that it has been limited too much, and that it has so been made the technical instrument of excluding much valuable and unobjectionable evidence. The tendency, therefore, seems to be rather towards an extension than a contraction of the rule; and the latest authorities are remarkable for the strong language in which the judges have reprobated even the principle of its limitation (*b*).

(*a*) The provisions of the Indian Evidence Act as to confessions are contained in ss. 24—30. It will be noticed that the "inducement, threat, or promise," which renders a confession inadmissible, must have reference to the charge, must proceed from a person in authority, and must give the accused reasonable grounds for supposing that by making it he would gain any advantage, or avoid any evil of a temporal nature in reference to the proceedings against him. It will also be noticed that a confession to a police officer is inadmissible, as also is every confession by a person in custody of a police officer, unless made in the immediate presence of a magistrate.

(*b*) *R.* v. *Baldry*, 2 Den. 430.

In *R.* v. *Baldry* (*c*), Lord Campbell, C. J., said:—"The rule seems to be this:—If there be any worldly advantage held out to the accused to be obtained by confession, or any harm threatened to him if he refuses to confess, any statement made by him in consequence of any such inducement must be rejected. The reason for this rule I take to be, not that the law supposes that what is said after such inducement is false, but that the prisoner may have said something under a bias, and that it is not a purely voluntary confession." And Pollock, C. B., in the same case, said:—"By the law of England every confession to be used against a prisoner must be a voluntary confession. Every inducement held out by a person in authority will render a confession inadmissible; and the cases have gone very far as to who are persons in authority."

Accordingly, a confession will be inadmissible when it has been obtained by any threat or promise of favour held out by a prosecutor or his wife (*d*); by the prisoner's master or mistress when the crime has been committed against either of them, but not otherwise (*e*); by the attorney of such person in authority; by a constable, or any one acting under a constable (*f*); and especially by a magistrate (*g*). But the mere presence of a constable is not enough,

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(*c*) 2 Den. 430.
(*d*) *R.* v. *Spencer*, 7 C. & P. 776.
(*e*) *R.* v. *Moore*, 2 Den. 522.
(*f*) *R.* v. *Enoch*, 5 C. & P. 535.
(*g*) *R.* v. *Drew*, 8 C. & P. 140.

if he does not interfere in giving the advice or holding out the inducement (*h*).

The inducement must be held out by a person who is in authority, and who has presumably power to forgive. Accordingly, where a maid-servant was indicted for child murder, a confession elicited from her by her mistress was held admissible, because the crime was in no way connected with the management of the house, and there was, therefore, no probability that the mistress or her husband would prosecute in it (*i*). So, too, when a confession is elicited by an inducement held out by a non-resident daughter of a prosecutor, it appears that she is not a person in authority competent to hold out an inducement, and that the confession is admissible (*k*).

But if the inducement be made in the presence of a person in authority, such as a prosecutor, or one who is likely to be a prosecutor, who stands by and does not object, his silence is treated as a tacit acquiescence in the inducement, and the confession will be rejected (*l*). But where one of two prisoners said to the other in the presence of the prosecutor and a policeman, "you had better tell him the truth," and neither the prosecutor nor the policeman spoke, a confession made by the prisoner

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(*h*) *R.* v. *Jarvis*, L. R., 1 C. C. R. 96; 37 L. J., M. C. 1; 16 W. R. 111; *R.* v. *Reeve*, L. R., 1 C. C. R. 362; 41 L. J., M. C. 92; 20 W. R. 631.

(*i*) *R.* v. *Moore*, 2 Den. 522.

(*k*) *R.* v. *Sleeman*, Dears. 269.

(*l*) *R.* v. *Luckhurst*, Dears. 245.

so addressed was held admissible (*m*); and so was a confession in a case where the mother of one of the prisoners (who were young boys) said to them, in the presence of a constable and of the mother of the other boy, "you had better, as good boys, tell the truth" (*n*).

When the inducement is held out by a person who has no authority in the matter, a confession will be admissible. Thus, when a prisoner's neighbours, who were not connected with the prisoner, advised her to tell the truth for the sake of her family, the confession was received (*o*).

When the inducement has been once held out by a person in authority, no subsequent confession to such person will be admissible, unless it appear clear that the impression, which it was calculated to make, has been removed from the mind of the prisoner (*p*). If the judge discover that a confession has been improperly received, he will strike it from his notes, and direct the jury that it is to have no weight with them (*q*).

Great uncertainty still prevails as to the precise words which are sufficient to exclude a confession. But a confession will generally be excluded if a prisoner be told that it will be better for him if he

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(*m*) *R.* v. *Parker*, L. & C. 42.

(*n*) *R.* v. *Reeve*, L. R., 1 C. C. R. 362; 41 L. J., M. C. 92; 20 W. R. 631.

(*o*) *R.* v. *Rowe*, R. & R. 153; *R.* v. *Taylor*, 8 C. & P. 733.

(*p*) 2 Russ. Cr. 833, 835.

(*q*) *R.* v. *Garner*, 2 C. & K. 920.

confess, or worse for him if he do not confess (*r*); and the following are instances of inducement where a subsequent confession has been rejected:—

"If you do not tell me who your partner was I will commit you to prison" (*s*).

"Tell me where the things are, and I will be favourable to you" (*t*).

"If you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; pray tell me if you did it" (*u*).

"If you do not tell me all about it, I will send for a constable" (*x*).

"You had better tell all you know" (*y*).

In a case at Taunton (Spring Assizes, 1855), Erle, J., held that these last words addressed by a constable to a prisoner did not exclude a subsequent confession; apparently on the ground that the inducement held out no distinct prospect of a temporal benefit. But a constable telling a prisoner, "Anything you can say in your defence we shall be ready to hear," has been held to exclude (*z*).

"It would have been better if you had told at first" (*a*).

In one case these words excluded; but in a precisely similar case on the Western Circuit (Spring

(*r*) 2 East, P. C. 659.
(*s*) *R.* v. *Parratt*, 4 C. & P. 570.
(*t*) *R.* v. *Cass*, 1 Lea. C. C. 293, n.
(*u*) *R.* v. *Upchurch*, R. & M. 465.
(*x*) *R.* v. *Richards*, 5 C. & P. 318.
(*y*) 6 C. & P. 353.
(*z*) *R.* v. *Morton*, 2 M. & R. 514.
(*a*) *R.* v. *Walkley*, 6 C. & P. 175.

Assizes, 1853), Crompton, J., admitted a confession, on the ground that the words contained no present inducement to confess.

"I should be obliged to you if you would tell us what you know about it; if you will not, of course we can do nothing for you"(*b*).

"It will be best for you if you tell how it was transacted"(*c*).

It appears that a statement made by a prisoner in expectation of a reward, and a pardon which have been offered by the Crown, is inadmissible(*d*).

On the other hand, confessions have been received, notwithstanding the following apparent inducements:—

"You had better tell the truth;" or "Be sure to tell the truth"(*e*).

"If you will tell where the property is you shall see your wife"(*f*).

In *R.* v. *Court*, Littledale, J., said:—"It can hardly be said that telling a man to be sure to tell the truth is advising him to confess what he is really not guilty of. The object of the rule relating to confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed."

(*b*) *R.* v. *Partridge*, 7 C. & P. 551.
(*c*) *R.* v. *Warringham*, 2 Den. 447.
(*d*) *R.* v. *Blackburn*, 6 Cox, C. C. 333.
(*e*) *R.* v. *Court*, 7 C. & P. 486.
(*f*) *R.* v. *Lloyd*, 6 C. & P. 393.

A confession obtained by mere official questions, without threat or promise, is admissible (*g*); thus, where one member of the firm by whom the prisoner was employed called the latter into the counting-house, and said, in the presence of another member of the firm and two policemen, "I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two police officers; and I should advise that to any question that may be put you will answer truthfully, so that if you have committed a fault you may not add to it by saying what is untrue;" and he then produced a letter (which the prisoner denied having written), and added, "Take care; we know more than you think we know;" and the prisoner thereupon made a confession: the court held, that the above words did not operate as an inducement or a threat, but were only in the nature of a warning, and admitted the evidence (*h*).

In *R.* v. *Baldry* (*i*), the policeman who apprehended the prisoner told him, at the time of the apprehension, that "he need not say anything to criminate himself; what he did say would be taken down and used in evidence against him." The prisoner then confessed, and the Court of Criminal Appeal held that these words did not contain any inducement. So, where a magistrate, after examining witnesses, said to the prisoner, "Be sure you

(*g*) *R.* v. *Thornton*, R. & M. 27.

(*h*) *R.* v. *Jarvis*, L. R., 1 C. C. R. 96; 37 L. J., M. C. 1; 16 W. R. 111.

(*i*) 2 Den. 430.

say nothing but the truth, or it will be taken against you and may be given in evidence against you at your trial"(*k*); the confession was received. But it is the duty of a magistrate to caution the prisoner in the language prescribed by the 11 & 12 Vict. c. 42, s. 18.

It is also necessary, in order to exclude a confession, that the inducement held out should contain some promise or prospect of a temporal benefit. Accordingly, if it amount to no more than a moral or religious exhortation, it will be admitted. Thus, where a person said to a boy of fourteen, who had been apprehended on a charge of murder, "Now kneel you down by the side of me and tell me the truth;" and, on the boy doing so, added, "I am now going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty;" the confession which followed was admitted by the judges(*l*). So the words, "Do not run your soul into more sin, but tell the truth," have been held not to contain an inducement(*m*).

A confession will not be inadmissible merely because it has been obtained by deception. Even when the prisoner has made it only on receiving a preliminary oath of secrecy from the person trusted, such person will be competent and compellable to reveal it(*n*); and a confession made by a prisoner while drunk will be received (*o*).

(*k*) *R.* v. *Holmes*, 1 C. & K. 247.
(*l*) *R.* v. *Wild*, R. & M. 452.
(*m*) *R.* v. *Sleeman*, Dears. 269.
(*n*) *R.* v. *Shaw*, 6 C. & P. 372.
(*o*) *R.* v. *Spilsbury*, 7 C. & P. 187.

Voluntary statements made by a prisoner before a committing magistrate are strictly admissible against him; but before a magistrate asks a prisoner if he wishes to make any statement, he is bound to caution him in the language of 11 & 12 Vict. c. 42, s. 18. By that section it is provided that, after the examinations of all the witnesses on the part of the prosecution shall have been completed, the justice of the peace, or one of the justices by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read, or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect:—"Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" and whatever the prisoner shall then say, in answer thereto, shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him, and give him clearly

to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to any admission or confession of his guilt; but whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession, or other statement of the person accused or charged." A voluntary statement by a prisoner before the depositions are complete, and before the statutory caution has been given is admissible (*p*).

When a confession is inadmissible, every statement or act, which, presumably and reasonably, flows from it will be also inadmissible in evidence; for it is held that the influence which produces a groundless confession, may also produce groundless conduct (*q*). But although a confession be inadmissible, a witness may be asked whether, in consequence of something which the prisoner had said, he has made any discovery of other facts which bear on the case (*r*).

If two persons be charged jointly, the confession of one will not be evidence against the other; for a prisoner is called upon to answer depositions on oath, but not to make any answer to the statement

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(*p*) *R.* v. *Stripp*, Dears. 648; *R.* v. *Sansome*, 1 Den. 545.
(*q*) *R.* v. *Jenkins*, R. & R. 492.
(*r*) *R.* v. *Gould*, 9 C. & P. 364.

of another prisoner (*s*). But the record of the conviction of a principal in a felony, who has pleaded guilty, is evidence against an accessory of the commission of the principal felony (*t*). And on trials for conspiracy, where the conspiracy has been proved, the acts of one conspirator are evidence against the other conspirators. So it was held in Hardy's trial (*u*), that the statements in the letters addressed by one conspirator to another, are evidence against the latter.

Principals and agents are not criminally liable, as such, for their respective acts, and, therefore, cannot be affected by each other's confessions. Thus, on Lord Melville's trial for embezzlement, it was held, that the admissions of his agent that the latter had received money on account of his principal only affected the principal with a civil liability, and that it could by no possibility convict him of a crime (*x*). But there is an exception to this rule in the case of a libel published in a newspaper, where the proprietor is *primâ facie* liable for the insertion by his agent (*y*).

A prisoner may be convicted on proof of a confession without other evidence; but judges are unwilling to direct a conviction in such cases (*z*). Instances

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(*s*) Per Patteson, J., *R.* v. *Swinnerton*, C. & M. 593; *R.* v. *Appleby*, 3 Stark. 33.

(*t*) *R.* v. *Blick*, 4 C. & P. 377.

(*u*) 24 How. St. Tr. 475.

(*x*) 29 How. St. Tr. 764. Sup. p. 262.

(*y*) *R.* v. *Gutch*, 1 M. & M. 433.

(*z*) See *Queen* v. *Runjit Sontal*, 6 Cal. W. R. Cr. Rul. 73.

are common in which prisoners, under the influence of a morbid sentiment, have confessed crimes which they have never committed; and there are others in which the confession seems to have been prompted by the full, but unfounded belief in the confessing party, that he had committed the crime. It has also been observed by Mr. Baron Parke, that "too great weight ought not to be attached to evidence of what a party has been supposed to have said; as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say" (*a*).

A confession before magistrates must be proved at trial by the depositions, unless it be clearly shown that the statement was not taken down at the time (*b*).

(*a*) *Earle* v. *Picken*, 5 C. & P. 542, n.

(*b*) 2 Russ. Cr. 825, notes.

CHAPTER XVIII.

ON THE BURDEN OF PROOF (*a*).

HAVING considered the principles by which evidence is admitted or excluded in courts of justice, we have next to consider the rules by which admissible evidence is applied to prove or disprove the issues in a cause. The first question in this inquiry is—On whom does the *onus probandi*, or burden of proof, rest, when an issue between two parties is before a court? The answer to this question includes the answer to another point, which causes frequently great controversy, as preliminary to the opening of a case, viz., which party has the privilege, or incurs the duty, of beginning? Practically, no point in the law of evidence involves more subtle principles of law; and none contains more important advantages and disadvantages, according to the circumstances, to the contending parties. It is needless to insist on the importance which necessarily attaches to the order in which parties are allowed to state their cases to the court.

The general rule of the civil law has been adopted in England by courts of equity, as well as courts of law. *Ei incumbit probatio qui dicit, non qui negat.* The issue must be proved by the party who states

(*a*) The Indian law is substantially the same, and is contained in the Ind. Ev. Act, ss. 101—111.

an affirmative; not by a party who states a negative. In other words, it is a legal maxim that a negative cannot be proved. But this rule is subtler in substance than it is in form. Thus, a legal affirmative is by no means necessarily a grammatical affirmative; nor is a legal negative always a grammatical negative. A legal affirmative comes often in the shape of a grammatical negative; and a legal negative as often appears as a grammatical affirmative.

The rule may, therefore, more correctly be laid down that—

> The issue must be proved by the party who states the affirmative in substance, and not merely the affirmative in form.

There are two tests for ascertaining on which side the burden of proof lies: first, it lies on the party who would be unsuccessful if no evidence were given on either side (*b*); secondly, upon the party who would fail if the particular allegation in question were struck out of the pleading (*c*). We may here note that Erle, J., said in *Wheelton* v. *Hardisty* (*d*): "Modern cases have established, that where the party on whom the *onus* lies of proving the allegation gives evidence as consistent with one view of the case as the other, he fails in his proof." The general rule is, however, subject to exceptions. Thus—

Where there is a disputable presumption

(*b*) *Amos* v. *Hughes*, 1 M. & Rob. 464.
(*c*) *Mills* v. *Barber*, 1 M. & W. 427.
(*d*) 8 E. & B. 263; cf. *Cotton* v. *Wood*, 8 C. B., N. S. 568.

tion of law in favour of one party, it will be incumbent on the other to disprove it.

The following will serve as instances of the working of this principle. Inasmuch as the law will not presume the commission of a crime or tort, the party alleging the commission of an act amounting thereto must prove it; therefore, in *Amos* v. *Hughes* (*e*), the court would not presume the work to have been done in an unworkmanlike manner; and in an action for putting combustible goods on board the plaintiff's ship without due notice, it was held that the plaintiff was bound to prove the negative (*f*). So, in an action for breach of a covenant or promise to repair, if the plaintiff declare that the premises were not kept in repair, and the defendant pleads that they are, the plaintiff must begin, and prove the non-repair (*g*). So, in an action by executors on a life policy, in which the declaration set out that the assured was not afflicted with rupture or any other disease at the time of assurance; and the plea stated that he was suffering from rupture at the time, and had concealed the fact; the court held, that this was a substantial affirmative on the part of the plaintiffs, and that they should have begun (*h*). So, in ejectment by a landlord, on a breach of covenant by defendant to insure the premises, the burden of proof

(*e*) 1 M. & Rob. 464.
(*f*) *Williams* v. *East India Co.*, 3 East, 193.
(*g*) *Soward* v. *Leggatt*, 7 C. & P. 613.
(*h*) *Ashby* v. *Bates*, 15 M. & W. 589.

lies on the plaintiff, because the object of the action is to defeat the estate granted to a lessee (*i*).

The maxim *omnia præsumuntur ritè esse acta* has also considerable effect in shifting the burden of proof. For instance, since Bills of Exchange are presumed to be given for good consideration, it lies on the party who denies the fact to prove the negative: but, if the defendant can show that there has been something of fraud in the previous steps of the transfer of the instrument, it throws upon the plaintiff the necessity of showing under what circumstances he became possessed of it (*k*). Thus, in an action by indorsee against acceptor, if the defendant plead that the bill was obtained from him by fraud, and that the plaintiff gave no consideration for it, proof of the fraud is held to throw on the plaintiff the *onus* of showing that he gave consideration for the bill (*l*): and the same rule applies in the case of a bill accepted in the name of a firm, when the acceptance is proved to be by one of the partners in fraud of the partnership and contrary to the partnership articles (*m*): for although a bill is presumed to have been given for a good consideration, yet, as soon as fraud is proved, a contrary presumption arises (*n*). But a mere absence of consideration will

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(*i*) *Doe* v. *Whitehead*, 8 A. & E. 571.

(*k*) *Smith* v. *Braine*, 16 Q. B. 244; *Hall* v. *Featherstone*, 3 H. & N. 284.

(*l*) *Harvey* v. *Towers*, 6 Ex. 656.

(*m*) *Hogg* v. *Skeen*, 18 C. B., N. S. 426.

(*n*) *Berry* v. *Alderman*, 13 C. B. 674; *Mather* v. *Lord Maidstone*, 1 C. B., N. S. 273.

not create any such presumption (*o*). On the same principle that where an act is tainted apparently with illegality, the party justifying it must disprove its illegality; a defendant in libel, who pleads a fair report of proceedings in a court of justice, must prove the correctness of the report (*p*). And in actions for malicious prosecution the *onus probandi* is of course on the plaintiff, who must show that the proceeding was entirely groundless, and it is not sufficient for him to prove the dismissal of the charge (*q*).

When a person, who is able to exercise dominion over another, takes a benefit from him, such person must prove that the transaction was a righteous one (*r*), and that the gift was intended to be given (*s*). This is not confined to cases of parent and child, guardian and ward, solicitor and client, and the like, but extends to every case in which two persons are so situated that one may obtain considerable influence over the other (*t*). If a married woman, who has purported to charge her separate property for money advanced to her husband, alleges undue influence, she must prove it (*u*). And where a married woman,

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(*o*) *Fitch* v. *Jones*, 5 E. & B. 238.
(*p*) *Lewis* v. *Levy*, E. B. & E. 557.
(*q*) Per the Judicial Committee of the Privy Council, *Baboo Ramesh Dutt* v. *Mugneeram Chowdry*, 11 Beng. L. R. 321.
(*r*) *Cooke* v. *Lamotte*, 15 Beav. 240.
(*s*) *Walker* v. *Smith*, 29 Beav. 396; cf. *Turner* v. *Collins*, L. R., Ch. 329; 41 L. J., Ch. 558; 20 W. R. 305; and vide supra, p. 75.
(*t*) *Cooke* v. *Lamotte*, ubi supra.
(*u*) *Field* v. *Sowle*, 4 Russ. 112.

living apart from her husband, contracts debts, the Court of Chancery will impute to her an intention to deal with her separate property (*v*), and throw upon her the *onus* of proving the contrary.

An important general principle was laid down in the opinion of the judges upon the case submitted to them by the House of Lords in the *Banbury Peerage case* (*x*) thus, "where there is *primâ facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question." So a court always treats a deed or instrument, which is *primâ facie* good, as what it purports to be (*y*), and the *onus* of proving that it is not what it purports to be, or that it is invalid, rests upon the party impeaching it (*z*).

In criminal proceedings the burden of proof, as a general rule, rests on the prosecution, on account of the presumption of the innocence of the accused, but in a variety of cases the legislature has thrown the burden of proving authority, consent and lawful excuse on the defendant in criminal proceedings; thus, when a person is charged with making or possessing coining tools, under 24 & 25 Vict. c. 99, s. 24, without lawful authority or excuse, the burden of proving that he had such authority or excuse rests

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(*v*) *Johnson* v. *Gallager*, 3 D., F. & J. 521; approved by the Judicial Committee of the Privy Council in the *London Chartered Bank of Australia* v. *Lempriere*, L. R., 4 P. C. 572.

(*x*) 1 S. & S. 155.

(*y*) *Jacobs* v. *Richards*, 18 Beav. 303.

(*z*) *Nichol* v. *Vaughan*, 1 Cl. & F. 49.

on him. And where proceedings were taken for the contravention of an order of the Privy Council under the Contagious Diseases (Animals) Act, 1869 (*a*), ordering that a person having in his possession animals affected with any contagious disease should with all practicable speed give notice of the fact to a police constable, it was held by the Court of Common Pleas that, on proof of the existence of the disease to the defendant's knowledge, the *onus* lay upon him of showing that he gave the necessary notice (*b*).

In an action for goods sold and delivered, with a plea of infancy, the *onus probandi* lies upon the defendant; as the law presumes that, when a man contracts, he is of proper age to contract, until the contrary be shown (*c*). So, negligence in carriers (*d*), legitimacy of children born in wedlock (*e*), duration of life (*f*), insanity (*g*), are all issues in which the *onus probandi* is regulated by the legal presumption as to the fact: and the party who disputes the truth of the presumption in the particular case is bound to show that it does not apply (*h*). In a late case it was held, that where a man and woman

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(*a*) 32 & 33 Vict. c. 70.

(*b*) *Huggins* v. *Ward*, 21 W. R. 914.

(*c*) *Hartley* v. *Wharton*, 11 A. & E. 934.

(*d*) *Marsh* v. *Horne*, 5 B. & C. 322.

(*e*) *Plowes* v. *Bossey*, 2 D. & S. 145; *Banbury Peerage case*, 1 S. & S. 155.

(*f*) See Chap. V.

(*g*) Ibid.

(*h*) *Hall* v. *Warren*, 9 Ves. 611.

have cohabited for several years as man and wife, and separated on the same footing, the presumption that they were married is so strong that it can be rebutted only by the strongest and most distinct evidence to the contrary by the party impugning the marriage (*i*); and the presumption of the legitimacy of a child born during wedlock, can only be rebutted by evidence so conclusive as to produce judicial conviction that the child was not procreated by the husband (*k*).

Another exception to the above stated general rule arises from the principle that—

> In every case the *onus probandi* lies on the person who wishes to support his case by a particular fact which lies peculiarly within his knowledge, or of which he is reasonably cognizant (*l*).

Thus, generally, in summary proceedings before magistrates, the defendant, who claims a qualification, and not the informer who charges the want of it, must prove the fact; for this is peculiarly within the knowledge of the former (*m*). This principle has been expressly imported into the Game Act, 1 & 2 Will. 4, c. 32, s. 42, which enacts that "it shall not be necessary, in any proceeding under that act, to negative by evidence any certificate, licence, &c., or

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(*i*) *Haviland* v. *Mortiboy*, 32 L. T. 343.
(*k*) *Atchley* v. *Sprigg*, 33 L. J., Ch. 345.
(*l*) Per Holroyd, J., *R.* v. *Burdett*, 4 B. & Ald. 140.
(*m*) *R.* v. *Turner*, 5 M. & S. 206.

other matter of exception or defence; but the party seeking to avail himself of such certificate shall be bound to prove the same"(*n*). But it seems that where a penal statute contains a certain exception, the *onus* of showing that the offence is not within the exception is on the informer; for it was held that on an information before magistrates against a licensed victualler under the 11 & 12 Vict. c. 49, for opening his house on a Sunday, otherwise than for the refreshment of *travellers*, it was for the complainant to show that the person supplied with refreshment was not a traveller (*o*). Under the Licensing Act, 1872 (*p*), the burden of proving that the person supplied was a *bonâ fide* traveller, rests on the defendant; but, by the Licensing Act, 1874 (*q*), if he fails in such proof, but the justices are satisfied that the defendant truly believed that the purchaser was a *bonâ fide* traveller, and further that the defendant took all reasonable precautions to ascertain whether or not the purchaser was such a traveller, the justices shall dismiss the case as against the defendant.

The burden of proving that he did not know that a ship, built by order of or on behalf of any foreign state when at war with a friendly state, was intended to be used and employed in the military and naval service of such foreign state, is thrown upon the

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(*n*) Supra, p. 73; cf. *Doe* v. *Whitehead*, 8 A. & E. 571.
(*o*) *Taylor* v. *Humphries*, 17 C. B., N. S. 539.
(*p*) 35 & 36 Vict. c. 94.
(*q*) 37 & 38 Vict. c. 49.

builder of such ship by the Foreign Enlistment Act, 1870 (*z*); and by the Elementary Education Act, 1873 (*a*), when a child is apparently of the age alleged for the purposes of any legal proceedings under that act, or the Elementary Education Act, 1870 (*b*), it shall lie on the defendant to prove that the child is not of such age.

When a plaintiff takes an enquiry as to damages arising from the use of his trade mark by the defendant, the *onus* of proving some special damage by loss of custom or otherwise rests upon him (*c*); and in suits to restrain the sale of a patented article, it is incumbent on the plaintiff, not only to prove the sale, but to prove that the article was not made by himself or his agents (*d*).

As to the right to begin. In practice the plaintiff generally begins, because, to quote the words of Lord Denman in *Mercer* v. *Whall* (*e*):—"It appears expedient that the judge, the jury, and the defendant himself should know precisely how the claim is shaped. This disclosure may convince the defendant that the defence which he has pleaded cannot be established. On hearing the extent of the demand, the defendant may be induced at once to submit to it rather than persevere. Thus the affair reaches its

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(*z*) 33 & 34 Vict. c. 90.

(*a*) 36 & 37 Vict. c. 86.

(*b*) 33 & 34 Vict. c. 75.

(*c*) *Leather Cloth Co.* v. *Hirschfield*, L. R., 1 Eq. 299; 14 W. R. 78.

(*d*) *Bells* v. *Willmott*, L. R., 6 Ch. 239; 19 W. R. 369.

(*e*) 5 Q. B. 447.

natural and best conclusion. If this does not occur, the plaintiff, by bringing forward his case, points his attention to the proper object of the trial; and enables the defendant to meet it with the full understanding of its nature and character."

The strict rule, however, is that—

The party on whom the *onus probandi* lies, as developed by the record, must begin.

But at common law it is considered that the plaintiff must begin in actions of libel, slander, and injuries to the person, and in all other actions in which the plaintiff seeks to recover unliquidated damages, and wherever the record contains several issues, and the burden of proving any one of them lies on the plaintiff, he is entitled to begin, provided he undertakes to give evidence on such issue.

CHAPTER XIX.

ON JUDICIAL NOTICE AND THE PROOF OF FOREIGN LAWS.

THE courts take judicial notice of numerous facts, which it is therefore unnecessary to prove (*a*).

They notice all the public statutes of the realm (*b*); their own course of procedure and practice (*c*); the maritime law of nations (*d*); and a war in which the country is engaged, but not a war between foreign countries (*e*); the great and privy seals (*f*); royal proclamations; the preamble of an act (*g*); and now, by 8 & 9 Vict. c. 113, s. 3, all copies of royal proclamations, purporting to be printed by the Queen's printer, are made evidence thereof in all courts, without proof being given that such copies were so printed; and by the Documentary Evidence Act, 1868 (*h*), the principle was extended to orders or regulations in council, and to proclamations, orders,

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(*a*) Of what judicial notice is taken in India, see Ind. Ev. Act, s. 57.

(*b*) Bull. N. P. 222.

(*c*) *Pugh* v. *Robinson*, 1 T. R. 116.

(*d*) *Chandler* v. *Grieves*, 2 H. Bl. 606, n.

(*e*) *Dolder* v. *Huntingfield*, 11 Ves. 292.

(*f*) 29 How. St. Tr. 707.

(*g*) *R.* v. *Sutton*, 4 M. & S. 532.

(*h*) 31 & 32 Vict. c. 37.

and regulations issued by any of the government departments or officers specified in the act. The act provides that *primâ facie* evidence of any such proclamation, order or regulation may be given in any of the modes specified in the act (*i*).

By the 8 & 9 Vict. c. 113 (s. 1), it is enacted that, whenever by any act then in force or thereafter to be in force, "any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding; the same shall be respectively admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp where a seal or stamp is necessary; or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence." And also (sect. 2), "that all courts, judges, justices, masters in Chancery, masters of

(*i*) See the act in the schedule. And see *Huggins* v. *Ward*, 21 W. R. 914.

courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document."

By 14 & 15 Vict. c. 49, s. 10, judicial notice is to be taken in England and Wales of documents admissible in evidence of any particular in any court of justice in Ireland.

By 18 & 19 Vict. c. 42, s. 3, "any document purporting to have affixed, impressed or subscribed thereon or thereto the seal and signature of any British ambassador, envoy, minister, chargé d'affaires, secretary of embassy or of legation, consul-general, consul, vice-consul, acting consul, pro-consul or consular agent, in testimony of any such oath, affidavit, affirmation or act having been administered, sworn, affirmed, had or done by or before him, shall be admitted in evidence without proof of any such seal and signature being the seal and signature of the person whose seal and signature the same purports to be, or of the official character of such person."

The Companies Act, 1862 (*e*), provides by sect. 125, that in all proceedings under that act, judicial notice shall be taken of the signature of any officer of the Courts of Chancery or Bankruptcy in England, or in Ireland, or of the Court

(*e*) 25 & 26 Vict. c. 89.

of Session in Scotland, or of the registrar of the Court of the Vice-Warden of the Stannaries, and also of the official seal or stamp of the several officers of such courts respectively.

By the 61st section of the Supreme Court of Judicature Act, 1873, judicial notice is to be taken of the seals of district registries.

By the 15 & 16 Vict. c. 86, s. 22, it is provided that judicial notice shall be taken of, among other things, the seal or signature of a notary public attached to affidavits and other documents in Scotland, Ireland, the Channel Islands, or any colony, island, plantation or place under the dominion of her Majesty in foreign parts. But where an affidavit is sworn before a foreign notary, the signature of such notary requires verification, and the Court of Chancery has refused to take judicial notice of the seal of such a notary (*f*).

In the case of *Cole* v. *Sherrard* (*g*), the Court of Exchequer took judicial notice of the seal of a notary public in the Channel Islands, independently of any statutory provision. It would appear on the whole to be the rule that the seal of a notary public in any part of her Majesty's dominions will be judicially noticed, but not the seal of a foreign notary public. It may here be remarked that the certificate of a notary public of a protest abroad of a foreign bill of exchange is evidence of that fact, but neither

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(*f*) *Re Earl's Trust*, 4 K. & J. 300.
(*g*) 11 Exch. 482.

notarial or consular certificates are evidence of any other fact certified, *e. g.* the mere production of the certificate of a notary public stating that a deed had been executed before him will not in any way dispense with the proper evidence of the execution of the deed (*k*).

The courts will also notice the almanacs and the divisions of the year (*l*), and the London Gazette (*m*).

Courts, of course, take judicial notice not only of the law of the land, but of their own rules of practice; they will not, however, notice the laws or customs of foreign states; and such laws must be proved like facts by skilled witnesses (*n*). It is held that the witness must either be a professional man, such as an advocate or a judge; or connected in such a way with the profession, or to have had such daily experience of the law in question, as to create a reasonable presumption that he has a competent knowledge of it (*o*). No witness will be competent unless he appear either to have filled an official position, or to be connected manifestly with the legal profession, or to have been in some position in which it is probable that he would

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(*k*) *Nye* v. *Macdonald*, L. R., 3 P. C. 343.

(*l*) *Brough* v. *Parkins*, Lord Raym. 993.

(*m*) *R.* v. *Forsyth*, R. & R. 274.

(*n*) By 24 & 25 Vict. c. 11, the courts are empowered to remit a case to a court of any foreign state to ascertain the law of such state, provided a convention has been entered into with such state, but no such convention is believed to have been yet entered into.

(*o*) *Sussex Peerage case*, 11 Cl. & Fin. 134.

have acquired a practical acquaintance with the law (*p*). But a person who formerly carried on business as a merchant and commissioner of stocks at Brussels has been allowed to prove what the usage in Belgium is as to the presentment of promissory notes there (*q*). A person who has acquired, by study in one country, a merely theoretical knowledge of the laws of another country, is not competent to prove the laws of such country (*r*). But the certificate of a foreign ambassador, under the seal of the legation, has been held in the Court of Probate evidence of the law of the country by which he was accredited (*s*). Foreign law cannot be proved in England (*t*), as it can in India (*u*), by books printed or published under the authority of the government of a foreign country, and purporting to contain the statutes, code or other law of such country, nor by printed or published books of reports of decisions of the courts of such country, nor by books proved to be commonly admitted in such courts as evidence of the law of such country. But a witness called to prove foreign law may refer to laws or treaties to aid his memory (*x*). A question

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(*p*) *Van Der Doucht* v. *Thelluson*, 8 C. B. 2.

(*q*) Ibid.

(*r*) *Bristow* v. *Secqueville*, 5 Exch. 275.

(*s*) *In the goods of Klingemam*, 3 S. & T. 18; 32 L. J., P. M. & A. 16.

(*t*) *Sussex Peerage case*, 11 Cl. & F. 134.

(*u*) Ind. Ev. Act, s. 38.

(*x*) Per Lord Langdale, M. R., in *Nelson* v. *Bridport*, 8 Beav. 538.

of foreign law being one of fact must in every action be decided on evidence adduced in that action, and not by a previous decision, or on evidence adduced in another action (*y*). Colonial laws (*z*) and the laws of Scotland are regarded as foreign law for the purposes of proof. But in order to afford facilities for the more certain ascertainment of the law administered in one part of her Majesty's dominions, when pleaded in the courts of another part thereof, it has been enacted that, "if in any action depending in any court within her Majesty's dominions, it shall be the opinion of such court, that it is necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case, as administered in any other part of her Majesty's dominions on any point on which the law of such other part of her Majesty's dominions is different from that in which the court is situate, it shall be competent to the court in which such action may depend to direct a case to be prepared setting forth the facts as these may be ascertained by verdict of a jury or other mode competent, or may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the court for that purpose in the event of the parties not agreeing, and upon such case being approved of by such court or a judge thereof, they shall settle the question of law arising out of the same, on which they desire to have the opinion of another court, and shall pro-

(*y*) *M'Cormick* v. *Garnett*, 5 De G., M. & G. 278.
(*z*) *Wey* v. *Galley*, 6 Mod. 194.

nounce an order remitting the same, together with the case, to the court in such other part of her Majesty's dominions, being one of the superior courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of this act; and it shall be competent to any of the parties to the action to present a petition to the court, whose opinion is to be obtained, praying such last-mentioned court to hear parties or their counsel, and to pronounce their opinion thereon in terms of this act, or to pronounce their opinion without hearing parties or counsel; and the court to which such petition shall be presented shall, if they think fit, appoint an early day for hearing parties o. their counsel in such case, and shall thereafter pronounce their opinion upon the questions of law as administered by them which are submitted to them by the court; and in order to their pronouncing such opinion, they shall be entitled to take such further procedure thereupon as to them shall seem proper" (*a*). When an opinion has been thus obtained, the court in which the action is pending "shall apply such opinion to such facts," or "shall order such opinion to be submitted to the jury, with the other facts of the case as evidence, or conclusive evidence as the court may think fit, of the foreign law therein stated" (*b*). Under this act the law of

(*a*) 22 & 23 Vict. c. 63, s. 1.
(*b*) Ibid. s. 3.

Scotland has been ascertained by a case remitted to the Court of Session in Scotland (*c*), and the law of Bengal by a case remitted to the Supreme Court of Bengal (*d*).

(*c*) *Lord* v. *Colvin*, 1 Dr. & S. 24.
(*d*) *Login* v. *Coorg*, 30 Beav. 632.

PART II.

ON WRITTEN EVIDENCE.

CHAPTER I.

In the first part of this work the general principles of evidence, and their application to the issue, have been considered, chiefly in the form of oral evidence. In this second part, the principles of written, or documentary evidence, will be discussed. It will be first desirable to add a few more remarks upon a branch of the subject which has been already touched upon; and to show generally in what cases written instruments are treated as primary and best evidence, and in what cases as secondary and inferior evidence.

When a writing purports to be in the nature of a public or judicial record, the deliberate solemnities with which its settlement and recognition are presumed to have been accompanied render it clearly the best and primary evidence of the matters to which it refers. So, where a contract is required by the law to be in writing or has been voluntarily put into writing by the parties, all controversy as to its purport and effect ought clearly to be determined by the inspection of the written instrument, consequently

the written contract must as a general rule be produced, and although oral evidence may be given to explain such a written contract, it cannot be given to vary it, except when in equity relief is sought on the ground of mistake or surprise (*a*). Similarly, where a writing is the very matter in issue, as in libel, oral evidence of the words of the libel is inadmissible as long as the writing, or print, is producible. So, where it appears that a representation or statement by a witness was made in writing, his own act operates against him in the nature of an estoppel in pais; and he will not be allowed to say what the statement was, but the writing must be produced, and declare it. Thus, a witness cannot be asked whether his name is written in a book; but the book must be produced, or its non-production be excused according to the principles under which secondary evidence is admissible (*b*). Neither can he be examined as to the contents of a letter, but the whole of it must be read (*c*). In all such cases oral evidence will be inadmissible, until it be proved that every endeavour has been used, without success, to produce the writing.

An anomalous exception to the rule that parol secondary evidence is inadmissible where there is parol primary evidence which ought strictly to be produced, is found in the principle that, "whatever a party says, or his acts amounting to admissions,

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(*a*) *Price* v. *Ley*, 32 L. J., Ch. 530; cf. infra, Chaps. VI. and VII.
(*b*) *Darby* v. *Ouseley*, 1 H. & N. 1.
(*c*) *Queen's case*, 2 B. & B. 286.

are evidence against himself, though such admissions must involve what must necessarily be contained in some deed or writing; for instance, a statement by a party, or one under whom he claims, that an estate had been conveyed to or from such person, or that such person filled the character of assignee—which could only be by deed." The learned judge who laid down this principle as above added that "the reason why such statements are admissible, without notice to produce or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources when the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth from the very nature of the case, when better evidence is withheld; whereas what a party himself admits to be true, may reasonably be presumed to be so. The weight and value of such testimony is quite another question" (*d*). Thus, in the case of *Slatterie* v. *Pooley* (*e*), in which this judgment was given, it was necessary to show that a certain debt was included in an insolvent's schedule. The schedule itself was tendered and rejected, because it was not duly stamped. Evidence was then tendered and rejected of a verbal admission by the defendant that the debt was included in the schedule. On a rule for a new trial, for improper rejection of this evidence, the court held that it ought to have been

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(*d*) Per Parke, B., *Slatterie* v. *Pooley*, 6 M. & W. 668; and see *R.* v. *Basingstoke*, 14 Q. B. 611.

(*e*) Ubi supra.

received, on the principle stated above. The decision in *Slatterie* v. *Pooley* has been severely attacked both in England and Ireland (*f*), and its principle has not been adopted in India (*g*).

On the same principle, where, on an action for contribution towards money paid on a written contract, there was evidence of the express authority of the defendant to enter into the contract, of the execution thereof, and that the defendant, when informed of the amount paid, did not dispute his liability, it was held that the contract need not be put in evidence (*h*). This exception has excited much controversy, and, if fully carried out, would act perhaps as a virtual abolition of the general rule with which it professes to be consistent; but it was sanctioned by the Court of Exchequer, although it is limited to cases in which the admission has been voluntary by the party making it; for he cannot be compelled to make such admissions, nor ought questions which tend to elicit them to be allowed (*i*).

Where a party gives a portion of a writing in evidence, the adverse party is entitled to have read all other passages which are "connected with, or construe, control, modify, qualify, or explain the passages which have been read;" but not distinct passages, or passages which are irrelevant to, or not explanatory of, such first-mentioned passages (*k*).

(*f*) See *Lawless* v. *Queale*, 8 Ir. C. L. Rep. 382.
(*g*) Ind. Ev. Act, s. 22.
(*h*) *Chappell* v. *Bray*, 6 H. & N. 145.
(*i*) *Darby* v. *Ouseley*, 1 H. & N. 1.
(*k*) Per Pollock, C. B., ibid.; cf. Ind. Ev. Act, s. 39.

Where the writing is merely in the nature of a personal memorandum, which has been drawn up by a witness for his own convenience, it is inadmissible as a writing, but may be used by the witness to refresh his memory. Thus, letters to a party are only received on the presumption that, by answering them, or acting on them, or even by the bare act of receiving them, he has connected them with the controversy between himself and the writer; but a mere written statement, not made on oath by one party, and not shown to have come to the knowledge and to have been recognized or adopted in some way by another party, is no evidence against the latter.

Therefore depositions, which have been taken on oath in the presence of a party whom they affect, and who has had an opportunity of cross-examining, are inadmissible at common law as long as the deponent can be produced at trial. Such depositions are merely personal statements which have not been in any way recognized, or acquiesced in, by the party against whom they are tendered. They contain none of the elements of a contract, or an admission; and therefore, in this case, the deponent must state his evidence again, where it is possible by word of mouth; and his written deposition can only be used by him to refresh his memory, or be made the means of establishing a contradiction between his original and subsequent statements. In short, the general rule for determining whether a writing is primary or secondary evidence, is to consider whether it contains the substance of the issue, and is in the nature of a contract or an admission by the parties, or

whether it is only a personal and *ex parte* memorandum. In the former case it must be produced as the best evidence; in the latter, it is admissible only to refresh and guide the memory of the witness in his oral depositions. Thus, records are in the nature of a contract between parties, which has been settled and ratified by public consent, as expressed in a judicial act; they are therefore primary evidence: but a public act of parliament is in the nature of a memorandum, for judges and the public, of laws which every one is presumed to have engraven in his memory (*l*).

Writings are either public or private; and public writings are either judicial or non-judicial. These will now be treated in order.

(*l*) See *R.* v. *Sutton*, 4 M. & S. 532.

CHAPTER II.

OF PUBLIC JUDICIAL DOCUMENTS.

THE proof of the most important public judicial documents will now be treated of.

ACTS OF PARLIAMENT.

These are either public or private. The former are, theoretically, not proved, as the court takes cognizance of them; but, practically, they are generally proved by copies purporting to be printed and published by the Queen's printer; and this course seems to be implied from the terms of 41 Geo. 3, c. 90, s. 9, which enacts that the statutes of England and of Great Britain, printed and published by the King's printer, shall be received as conclusive evidence in the Irish courts; and the statutes of Ireland prior to the Union, so printed and published, shall be received in like manner in any court of civil or criminal jurisdiction in Great Britain. If there be ground for supposing the printed copy inaccurate, reference should be had to the Parliament Roll (*a*).

Private, local, and personal acts, which are not public acts, are proved under the Documentary Evidence Act (8 & 9 Vict. c. 113, s. 3), by copies purporting to be printed by the Queen's printer,

(*a*) *Price* v. *Hollis*, 1 M. & S. 105.

without necessarily any further proof that they were so printed. But even this proof is unnecessary if the act contains a clause declaring it to be a public act, and that it shall be taken notice of as such without being specially pleaded (*b*). But such a clause will not render it evidence against third parties (*c*).

The 3rd section of the last-mentioned act also declares that all copies of the journals of either house of parliament, and of royal proclamations, purporting to be printed by the printers to the Crown or of either house, shall be admitted in all cases as evidence thereof without proof of their being copies so printed.

RECORDS.

Where the existence of a record is in issue on a plea of *nul tiel record*, either the record itself must be produced, or it may be proved by exemplification under the great seal, or by any examined or sworn copy. But when the validity of the record is not in issue, it may always be proved by an examined or sworn copy.

By the 1 & 2 Vict. c. 94, the Master of the Rolls is made superintendent of the general records of the realm, and is empowered to make rules for the admission of such persons as ought to be admitted

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(*b*) *Woodward* v. *Cotton*, 1 C. M. & R. 44.
(*c*) *Brett* v. *Beales*, M. & M. 421.

to the use of such records: and he is authorized personally, or by deputy, to allow copies to be made of such records. It is also declared to be expedient "to allow the free use of any public records as far as stands with their safety and integrity, and with the public policy of the realm." By sect. 13, a certified copy of any record, sealed with the seal of the Record Office, is evidence in every case in which the original record would be admissible; and by the 12th section, any person desirous of procuring such a copy may do so at his own cost by permission of the Master of the Rolls: but such copy shall be admissible to prove the record, only after examination and certificate, under seal, by the Deputy Keeper of the Records, or one of the assistant record keepers. The proceedings of the Petty Bag Office, the Enrolment Office in Chancery, and the common law side of the Court of Chancery, are also proved by sealed and certified copies issuing out of such respective offices (*d*).

By the 9 & 10 Vict. c. 95, s. 111, the clerks of County Courts are required to enter notes of all proceedings in such courts, in a book belonging to the court: "and such entries in the said book, or a copy thereof, bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted, in all courts and places whatsoever, as evidence of such entries, and of the proceeding referred to by

(*d*) 12 & 13 Vict. c. 109, ss. 13 and 17.

such entry or entries, and of the regularity of such proceeding, without any further proof."

But, although all judicial proceedings, which are regulated as to the mode of proving them by the above statutes, should be proved conformably to them, yet as their language is declaratory and directory, not compulsory, the records of superior and inferior courts may nevertheless be proved, by means of examined copies, when they are attainable. An examined copy must be proved to be such by a witness who has compared the copy word for word with the original; or who has examined the copy while another person read the original: and it will not be necessary to call the latter person, nor to prove that the witness also read the original while the other person compared the copy; for it will not be presumed that a person has wilfully misread a record (*d*). But the copy must be complete and accurate, and not contain abbreviations (*e*); and it must appear that the record was in the custody of the proper officer at the time when the copy was taken.

A decree in Chancery may be proved by an exemplification under the seal of the court; or by an examined copy, or by a decretal order, or paper, with proof of the bill and answer (*f*).

If it be required only to show that a decree was

(*d*) *Read* v. *Margison*, 1 Camp. 469; s. v. *Slane Peerage case*, 5 Cl. & Fin. 23.

(*e*) *R.* v. *Christian*, C. & M. 388.

(*f*) *Trowell* v. *Castle*, 1 Keb. 21.

made, or that it has been reversed, the enrolled and sealed decree is sufficient, without producing the bill and answer (*g*).

A bill or answer is no evidence of the facts contained in it, not even of those on which the prayer of relief is founded (*h*). But where the parties to a suit are parties in an action in which the same matters are in issue, the statements of either, in a bill or answer, are evidence against the maker in the nature of admissions (*i*). And where a witness at the trial gives evidence at variance with statements which he has made in an answer in Chancery, an examined copy of such answer will be admissible to contradict him (*k*).

A decree cannot be received as evidence except against the party against whom it was made on those claiming under him, but it may be read as a precedent.

If it is desired to prove proceedings in Chancery in any criminal proceedings, the original record should be procured (*l*), but in civil proceedings a certified or examined copy is sufficient.

The minutes of a judgment, or a copy of such minutes from which the record is to be made up, are not evidence of the record; but the record is complete only when made up and engrossed. So, a

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(*g*) B. N. P. 735.
(*h*) *Doe* v. *Sybourn*, 7 T. R. 2.
(*i*) *Hodgkinson* v. *Willis*, 3 Camp. 401.
(*k*) *Ewer* v. *Ambrose*, 4 B. & C. 25.
(*l*) See *Jervis* v. *White*, 8 Vesey, 313.

decree or other preceeding in Chancery is not a record until it has been signed and enrolled (*m*).

A former conviction or acquittal may now be proved under the 14 & 15 Vict. c. 99, s. 13, by a certificate purporting to be "under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of indictment, trial, conviction, and judgment, or acquittal, as the case may be, omitting the formal parts thereof."

On trials for perjury it is enacted by the 14 & 15 Vict. c. 100, s. 22, that such a certificate, "containing the substance and effect only, omitting the formal portion of the indictment and trial for any felony or misdemeanor," shall be sufficient evidence of the same. But the mere fact of the trial may be proved by the officer of the court on production of his minutes; or apparently by any one who was present at the first trial (*n*).

VERDICTS.

A verdict may be proved by producing the *postea*, indorsed on the Nisi Prius record, when it is only required to show that a trial took place (*o*). But

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(*m*) *R* v. *Smith*, 8 B. & C. 341.
(*n*) *R.* v. *Newman*, 2 Den. 390.
(*o*) *Pitton* v. *Walter*, 1 Stra. 162.

the whole record and a copy of the judgment will be necessary to establish the finding of any substantial fact.

FOREIGN JUDGMENTS, ETC.

These are now regulated by 14 & 15 Vict. c. 99, s. 7, which enacts, that "all proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy, to be admissible in evidence, must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having

no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court; and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but, if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be received in evidence without any proof of the seal where a seal is necessary, or of the signature or of the statement attached thereto, where such statement or signature are necessary, or of the judicial character of the person appearing to have made such signature and statement."

But foreign judgments and other proceedings may still be proved as before the statute by examined copies (*p*). A foreign proclamation may be proved by production of a copy proved to be similar; but evidence of a verbal proclamation is inadmissible as hearsay.

CONVICTIONS.

Convictions before magistrates are proved by examined copies, which are made out, on application, by the clerk of the peace. In many cases also, under particular statutes, copies certified by the proper officer are sufficient evidence.

A conviction is presumed to be unappealed against till the contrary is shown (*q*); and it is conclusive

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(*p*) *Appleton* v. *Braybrooke*, 6 M. & G. 34.

(*q*) 24 & 25 Vict. c. 96, s. 112.

evidence against the plaintiff in an action for malicious prosecution, even where no appeal lies (*r*).

In trespass against justices, a conviction, unappealed against and unreversed, cannot be controverted in evidence (*s*); and, until quashed, it is conclusive evidence of the facts contained in it in favour of the justice against whom it is tendered (*t*).

ORDERS.

The original order, as in cases of removal, must be produced if possible; but secondary evidence may be given of it, if it appear that the party, whose duty it is to produce it, has been served with notice (*u*). But where the order refers to proceedings which are not strictly judicial, and which are also extrinsic to the controversy between the parties, the person in whose custody such documentary evidence is must be subpœnaed to produce it; and, if he refuse to appear, secondary evidence cannot be given, but the recusant witness may be attached (*x*).

INQUISITIONS

Are in the nature of judicial inquiries into matters of public importance; and they are admissible under the

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(*r*) *Basébé* v. *Matthews*, L. R., 2 C. P. 684; 36 L. J., M. C. 93; 15 W. R. 839.

(*s*) *Fawcett* v. *Fowler*, 7 B. & C. 394.

(*t*) *Strickland* v. *Ward*, 7 T. R. 633.

(*u*) *R.* v. *Justices of Peterborough*, 18 L. J., M. C. 79.

(*x*) *R.* v. *Llanfaethly*, 2 E. & B. 940.

limitations which have been already discussed in the chapters on public or general interests, and ancient possession.

An inquisition of lunacy is evidence for a prisoner to show that he was insane when he committed the offence.

ORDERS AND RULES OF THE HIGH COURT.

The orders of the judges of the High Court are proved by the production of the original order, signed by the judge. The court takes judicial notice of the signature. The rules of the High Court may be proved by an office copy, made out by the proper officer (*y*).

But a judge's order will not justify a party in tendering secondary evidence, merely because the order refers to it as if it were primary. Thus, where a judge's order required a party to admit "a copy of a letter," it was held that such party could not give it in evidence, without accounting first for the non-production of the original. "The judge's order," Lord Denman said, "secures the accuracy of the secondary evidence, but does not give it the effect of primary evidence" (*z*).

By the 12 & 13 Vict. c. 109, s. 13, office copies of all records and documents belonging to the common law side of the Court of Chancery are admissible and

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(*y*) See *Duncan* v. *Scott*, 1 Camp. 101.
(*z*) *Sharp* v. *Lamb*, 11 A. & E. 805.

sufficient evidence. This section enacts, "that every document sealed" with the common law seal of the Court of Chancery, and purporting to be a copy of any record or document of any description, shall be deemed to be a true copy, "and shall, without further proof, be admitted as evidence before all courts and persons, in like manner, and to the same extent and effect, as the original record or document would be admissible, as well for the purpose of proving the contents of such record or document, as of proving that such record or document belongs to the Court of Chancery, but not further or otherwise."

CERTIFICATES.

A copy of a record of any public fact made by an officer in a public or judicial capacity, and strictly within the course of his duty (but not otherwise), is generally, and in many cases specially by statute, evidence of the facts which it purports to record. But a mere certificate of an extra-judicial fact, or of a fact which the officer was not bound to record, is inadmissible.

In criminal law, various certificates containing the substance of the original record are evidence. Thus, by 7 & 8 Geo. 4, c. 18, s. 11, and 24 & 25 Vict. c. 96, s. 116, it is substantially enacted that whenever a prisoner shall be charged with a felony or misdemeanor, after a previous conviction for a felony or misdemeanor, the first offence and conviction may be proved by a certificate, containing the substance

of the original record, and purporting to be signed by the clerk of the court, or other officer having the custody of the records. The 24 & 25 Vict. c. 99, s. 37, has a similar provision for offences against the coin.

So the 14 & 15 Vict. c. 99, s. 13, enacts that whenever it may be necessary to prove a formal conviction or acquittal of a prisoner, it shall not be necessary to produce the original record or a copy; but it shall be sufficient to produce a certificate of such former conviction or acquittal, purporting to contain the substance of the original record, and signed by the clerk of the court or other proper officer.

The 14 & 15 Vict. c. 100, s. 22, enacts that in trials for perjury or subornation of perjury, or a trial of any indictment for felony or misdemeanor, a certificate of the trial of such indictment, purporting to be signed by the clerk of the court or of the records, shall be sufficient evidence of the former trial.

A multitude of other documents, in the nature of copies or certificates, are admissible in substitution for originals, or *per se*, by virtue of special acts; but the limits of this work permit only a general reference to them. They are generally admissible under the Documentary Evidence Act, but are also in many cases made specially admissible by statute. Thus, certificates of the chargeability of paupers purporting to be signed and sealed by the chairman of the board, and countersigned by the clerk, are *primâ facie* evidence of such chargeability (*x*). Certificates

(*x*) 7 & 8 Vict. c. 101, s. 69.

of settlement, purporting to be allowed and subscribed by two justices of the county in which the parish lies, and otherwise formally executed, are receivable under 8 & 9 Will. 3, c. 30, s. 1.

A certificate by two justices that a charge of assault and battery had been heard and dismissed, is admissible, under 24 & 25 Vict. c. 100, ss. 44 and 45, to bar all subsequent civil and criminal proceedings for the same cause (*y*).

So, under the Juvenile Offenders Act (*z*), ss. 1 and 3, a similar certificate of dismissal or conviction by two justices, is evidence in bar of all subsequent proceedings. And under the Larceny Jurisdiction Act (*a*), s. 12, a similar certificate has a similar effect.

WRITS AND WARRANTS,

It is said, must be proved, until they are returned, by actual production; after their return they become matters of record, and are provable by copies (*b*).

ORDERS AND RULES OF INFERIOR COURTS.

Where these are in the nature of a record, they will be subject to the usual rule, and may generally be proved by a certified exemplification (*c*). But

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(*y*) *Tunnicliffe* v. *Tedd*, 5 C. B. 553.
(*z*) 10 & 11 Vict. c. 82.
(*a*) 18 & 19 Vict. c. 126.
(*b*) Bul. N. P. 234.
(*c*) *Woodcraft* v. *Kynaston*, 2 Atk. 317.

where the court is not of record, the books containing the proceedings must be produced and proved by the proper officer, who ought to be subpœnaed to attend with them; but if he do not attend, or if he refuse to produce the book or document containing the order or rule, secondary evidence cannot be given, but the officer may be attached (*d*).

PROVING RECORDS AND OTHER PROCEEDINGS IN THE COURT OF CHANCERY.

Office copies of the records of the Court of Chancery might have been proved, as exhibits, in that court, and the court would not compel the production of the original without being satisfied by affidavit that there was a necessity to do so (*e*).

When the proceedings in another cause were ordered to be read it was sufficient to produce office copies of them signed by the proper officer (*f*).

Records of other courts were proved in the Court of Chancery by exemplifications under the great seal or the seals of the courts themselves, and required no extrinsic proof of their genuineness.

The proceedings in a cause pending before the Court of Chancery were proved in that cause by those copies, generally though not strictly spoken of

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(*d*) *R.* v. *Llanfaethly*, 2 E. & B. 940.

(*e*) *Anon.* 13 Beav. 620.

(*f*) *Att.-Gen.* v. *Milward*, 1 Cox, 437; cf. 18 & 19 Vict. c. 134, s. 6.

as office copies, which it is the duty of proper officers, appointed by law, to furnish for general use.

JOURNALS OF THE HOUSES OF LORDS AND COMMONS.

The journals of the House of Lords, it being a court of record, have always been provable by copies (*g*); but a question was formerly raised whether the journals of the House of Commons were records or not (*h*), but it was decided that copies of them might be tendered in evidence. Under the Documentary Evidence Act, copies of the journals of either House are admissible, provided they purport to be printed by the Queen's printer.

BANKRUPTCY PROCEEDINGS

Are proved according to the provisions of the Bankruptcy Act, 1869 (*i*), ss. 10, 18, 47, 49, 81, 106—109, 127, for which see the Appendix. The 10th section provides that the production of a copy of the London Gazette containing an order of the court adjudging the debtor to be bankrupt, shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt, and of the date of the adjudication.

Where a person had been adjudicated a bankrupt

(*g*) See *Lord Dufferin's case*, 4 Cl. & F. 368.
(*h*) *Wynne* v. *Middleton*, Doug. 593.
(*i*) 32 & 33 Vict. c. 71.

by a county court, and it afterwards appeared that he was a trader within the London district (which circumstance would in the outset have taken away the jurisdiction of the county court), it was held that the copy of adjudication in the Gazette was conclusive evidence of the bankruptcy, but that it was still open to the trustee to show that the bankrupt was a trader in London (*k*).

PROBATES—WILLS.

A probate of a will is in the nature of a judicial proceeding or record of the Court. It constitutes the proper legal proof of title in an executor to his testator's personalty, and is conclusive against all the world (*l*). It is a copy of the will, sealed with the seal of the Court of Probate, and attached to a certificate which states that the will has been proved and registered, and that administration of the goods of the deceased has been granted to one or more of the executors named therein. The will itself is not evidence (*m*); but if the probate be lost, it either may be proved by an examined copy, or the court will grant an exemplification, but not another probate (*n*); or a certified copy of the entry in the act

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(*k*) *Revell* v. *Blake*, 41 L. J., C. P. 129.

(*l*) *Allen* v. *Dundas*, 3 T. R. 125. By Ind. Ev. Act, s. 91, ex. 2, as amended by Act XVIII. of 1872, wills admitted to probate in British India may be proved by the probate.

(*m*) *Pinney* v. *Pinney*, 8 B. & C. 335.

(*n*) *Shepherd* v. *Shorthose*, 1 Stra. 412.

book, under 14 & 15 Vict. c. 99, s. 14, is sufficient. The act book itself will also be evidence, without accounting for the non-production of the probate (*o*). And under 14 & 15 Vict. c. 100, s. 14, an unstamped copy of the act book has been received as evidence of probate, to prove an executor's title (*p*). Where no act book is kept, or other record of probates, it appears that the will itself, indorsed with the appointment of the executor, will be evidence (*q*). The same remarks apply to letters of administration (*r*).

By 20 & 21 Vict. c. 77, s. 22, probates, &c., purporting to be sealed with the seal of the new Court of Probate, shall in all parts of the United Kingdom be received as evidence thereof.

If the will relate to lands, or any description of realty, it was necessary formerly to produce the original will (*s*). But now a devise of real estate may be proved by probate, or a sealed office copy from the Court of Probate. In this case the person tendering the evidence must give ten days' notice before trial to the other party, who may, in four days after receipt of such notice, give a counter-notice that he disputes the validity of the devise, and that the original must be produced (*t*). But even in the

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(*o*) *Cox* v. *Allingham*, Jacob, 514.
(*p*) *Dorret* v. *Meux*, 15 C. B. 142.
(*q*) *Doe* v. *Mew*, 7 A. & E. 240.
(*r*) *Noel* v. *Wells*, 1 Lev. 352.
(*s*) *Doe* v. *Calvert*, 2 Camp. 389.
(*t*) 20 & 21 Vict. c. 77, ss. 64, 65.

absence of a counter-notice the probate is only *primâ facie* evidence (*u*).

To prove a will of land one of the witnesses must be called who can speak to the attestation (*x*); and who can testify either that he saw the testator sign, or that he heard him acknowledge to the witness, or in his presence, that the will is his (*y*). The witnesses must also appear to have subscribed either actually in the presence of the testator, or so near to him that, although he did not see them sign, he might have seen them without the necessity of locomotion. Thus, where the witnesses were in one room, and the testator in another; and the latter, although he did not see them sign, might have seen them through a window; the will was held good (*z*): but not so where the testator could not have seen them without changing his position (*a*).

It was the rule of the Court of Chancery that, where it was sought to establish the will against the heir, all the witnesses must be called (*b*), unless one of them was dead or abroad, or insane, or had not been heard of for many years, when his evidence would be dispensed with, or unless the heir admitted it, when the court would establish it without declaring it to be well proved. But where the suit was

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(*u*) *Barraclough* v. *Greenhough*, L. R., 2 Q. B. 612; 36 L. J., Q. B. 251.

(*x*) B. N. P. 264.

(*y*) *Stonehouse* v. *Evelyn*, 3 P. Wms. 113.

(*z*) *Shires* v. *Glascock*, 2 Salk. 688.

(*a*) *Doe* v. *Manifold*, 1 M. & S. 294.

(*b*) *Bootle* v. *Blundell*, 19 Ves. 494.

by the heir against the devisee, the latter was not required to produce all the witnesses (*c*).

If the witnesses be dead, their handwriting must be proved, unless the will be thirty years old, in which case it is said to prove itself (*d*); that is, if it be produced from the proper custody, and be otherwise apparently authentic, it will be presumed to be so, even though there are circumstances which would lead to the inference that it has been cancelled (*e*). The thirty years are computed from the date of the will (*f*). In such a case it is not necessary to call any one of the alleged witnesses, even though they appear to be living (*g*).

The Court of Chancery would establish a will made and proved in the colonies, if the due execution and attestation were proved by the attesting witnesses (*h*).

If all the witnesses swear that the will was not duly executed, other evidence may be adduced to support it (*i*); but where one witness gives evidence against execution, the other witness must be called (*k*).

AWARDS.

An award is conclusive evidence of all the substantial matters to which the submission refers, as

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(*c*) *Tatham* v. *Wright*, 2 R. & M. 1.
(*d*) *Rancliff* v. *Perkins*, Dow. 202.
(*e*) *Andrews* v. *Mottley*, 12 C. B., N. S. 526.
(*f*) *M'Kenire* v. *Fraser*, 9 Ves. 5.
(*g*) *Doe* v. *Walley*, 8 B. & C. 22.
(*h*) *Rand* v. *MacMahon*, 12 Sim. 536.
(*i*) See *Wright* v. *Rogers*, 17 W. R. 833; L. R., 1 P. & M. 678.
(*k*) *Owen* v. *Williams*, 32 L. J., P. M. & A. 159; 11 W. R. 808.

between the parties to the submission, but not as to third parties (*l*).

In proving an award, the first step is to prove the submission to the reference. If the submission be a written agreement, the execution by all the parties, including the party who relies on it, must be strictly proved (*m*); but if the submission be by a rule of court, or judge's order in an action, it will be sufficient to produce the rule or order, and then to prove the award (*n*). When the submission contains any special powers which have been exercised, *e. g.*, to enlarge the time, or appoint an umpire, the instrument by which such power has been exercised must be proved, in addition to the submission and prior to the proof of the award; and a recital in the award of the exercise of the power will not be sufficient (*o*). The award must also be proved to have been duly executed. When there are several arbitrators, it should be shown that all signed in the presence of each other; and even where the award is to be valid, although signed by only one, or less than the actual number of arbitrators, it should appear that all who have not signed have been required to attend (*p*).

Awards by public officers are received with less

(*l*) *Lady Wenman* v. *Mackenzie*, 5 E. & B. 447.

(*m*) *Ferris* v. *Oven*, 7 B. & C. 427; *Brazin* v. *Jones*, 8 B. & C. 124.

(*n*) *Gisborne* v. *Hart*, 5 M. & W. 50.

(*o*) *Still* v. *Halford*, 4 Camp. 17.

(*p*) *Stalworth* v. *Inns*, 13 M. & W. 466; *Wright* v. *Graham*, 3 Exch. 131.

stringent proof, on the principle *omnia præsumuntur ritè esse acta* (*q*). Also, under several of the Inclosure Acts, awards made by the commissioners are to be conclusive evidence that all statutory preliminaries have been observed (*r*).

(*q*) *R.* v. *Haslingfield*, 2 M. & S. 558; sup. p. 80.

(*r*) See 41 Geo. 3, c. 109, s. 35; 3 & 4 Vict. c. 31, s. 1; 8 & 9 Vict. c. 118, s. 105.

CHAPTER III.

ON PUBLIC NON-JUDICIAL WRITINGS.

PUBLIC writings, which are not of a judicial character, are evidence of the matters which they purport to declare; provided they appear to have been obtained from proper custody, *i. e.*, from a place where it is reasonable to presume that they would be deposited, if authentic.

The question of proper custody under this head applies more exclusively to the case of such ancient documents as were considered incidentally in the ninth and tenth chapters of this work; and it will be sufficient to refer to those chapters for the principles which regulate the admissibility and effect of ancient charters, grants, terriers, inquisitions, or surveys. On the general question as to what constitutes a proper place of custody, see *supra*, p. 172.

The proof of public non-judicial documents is now chiefly regulated by the Law of Evidence Amendment Act (14 & 15 Vict. c. 99, s. 14), which enacts, that "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by a copy; any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice, or

before any person now or hereafter having by law or consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted; and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

On this section it has been decided that an unstamped copy of an act-book of the Ecclesiastical Court is evidence of probate to prove executorship (*a*). So the journals of the House of Lords, entries in the books of tax-collectors, commissioners of the excise or customs, secretaries of state, municipal or parliamentary electors, which were provable before the act by examined copies, may now be proved either by examined or certified copies under the act. So charters, letters-patent, grants from the Crown, pardons, and commissions, may be proved either by originals, or examined or certified copies; or also, as it seems, by exemplifications under the great seal. As to the journals of the Houses of Parliament and royal proclamations, see *supra*, p. 314. As to proclamations, treaties, &c., of foreign states or colonies, *supra*, p. 319.

The 14 & 15 Vict. c. 19, s. 14, cited above, has virtually superseded the 8 & 9 Vict. c. 113, s. 1 (the Documentary Evidence Act), as far as it refers to

(*a*) *Dorret* v. *Meux*, 15 C. B. 142.

public documents: but, as the two acts are construed cumulatively, and as the earlier act extends to some private documents, it is subjoined.

The 8 & 9 Vict. c. 113, s. 1, provides that—"Whenever by any act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register, or other book, or of any other proceeding, shall be receivable in evidence in any judicial proceeding, the same shall respectively be admitted in evidence, provided they purport to be sealed or impressed with a stamp, or sealed or signed alone, as required, or impressed with a stamp and signed as directed by the acts made or hereafter to be made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof, in every case in which the *original record* would have been received in evidence."

The effect of these enactments, as to documents of a public nature, is to allow the substitution of certified or examined copies in all cases in which the original, if produced, would be evidence.

Whenever, therefore, it is proposed to tender an examined or certified copy of a public document in the place of an original, the practical question is, whether the original is such a public document as is intrinsically evidence *per se* (*b*).

(*b*) *Linsey* v. *Linsey*, 29 L. J., P. & M. 128.

It must be remembered that notwithstanding the Documentary Evidence Act, and the 14 & 15 Vict. c. 88, s. 14, there are numerous cases in which the originals of documents, apparently of a public nature, must still be produced; and of which neither certificates nor examined copies are admissible. A considerable degree of vagueness still attaches even to many of those cases in which certified or examined copies are clearly admissible; and it should be remembered that, whenever a doubt exists as to whether a document is public or private, the prudent and the right course will be to be provided with the originals.

Where a public document or mark requires to be authenticated, it may be proved by any expert and credible witness. Thus the Post-Office mark may be proved by any post-master, or by any one who is in the habit of receiving letters by the post (*c*).

The more important and practical description of public documents will now be considered. First:—

REGISTERS OF BIRTHS, MARRIAGES AND DEATHS (*d*).

"Parish registers are in the nature of records, and need not be produced, or proved by subscribing witnesses" (*e*). They are therefore provable under the

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(*c*) *Abbey* v. *Lill*, 5 Bing. 299.

(*d*) The Ind. Ev. Act, s. 35, provides that entries in public or official books, registers or records, stating a fact relevant or in issue, and made by a public servant in discharge of official duty, or any other person in performance of a duty enjoined by law, are relevant facts.

(*e*) Per Lord Mansfield, C.J., *Birt* v. *Barlow*, Doug. 172.

14 & 15 Vict. c. 19, s. 14, by copies purporting to be signed by the incumbents of the parishes (*f*).

It should appear that the original is in the proper custody, which, in the case of marriage, baptismal, and death registers, is with the incumbent, and not the parish clerk (*g*). But the register, or the copy, as the case may be, is only proof of the fact of a marriage, or a birth, or a death, of a person or persons therein named. It is no evidence of the identity of a party; nor is a baptismal registry evidence of the date of the birth (*h*), but it is of age (*i*). Identity must be shown extrinsically; in the case of a marriage, either by proving the handwriting of the parties, or by calling a witness who was present at the marriage (*k*); but the handwriting may be spoken to without producing the register (*l*).

By the 52 Geo. 3, c. 146, verified copies of all registers of baptisms and burials are to be sent yearly by all ministers to the registrar of their diocese; and by the 6 & 7 Will. 4, c. 86, s. 38, "the Registrar-General shall cause to be sealed or stamped" with the seal of his office, "all certified copies of entries given in his said office: and all certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as

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(*f*) *Re Neddy Hall's Estate*, 9 Hare, App. xvi.

(*g*) *Doe* v. *Fowler*, 19 L. J., Q. B. 151.

(*h*) *Re Wintle*, L. R., 9 Eq. 373; 18 W. R. 394.

(*i*) *R.* v. *Weaver*, 43 L. J., M. C. 13; L. R., 2 C. C. R. 85; 22 W. R. 190.

(*k*) *Birt* v. *Barlow*, Doug. 272.

(*l*) *Sayer* v. *Glossop*, 2 Exch. 409.

evidence of the birth, death or marriage to which the same relates, without any further or other proof of such entry; and no certified copy purporting to be given in the said office shall be of any force or effect which is not sealed or stamped as aforesaid." The same act (s. 36), directs "every rector, vicar, or curate," and every registered officer, to allow searches to be made in "any register book in his keeping," and to give certified copies of entries for a stated fee. Similar provisions are established with regard to non-parochial registers, by the 3 & 4 Vict. c. 92, s. 9, subject to regulations as to notice; but in criminal cases the original register or record must be produced (s. 17). As to Scotch marriages since 1856, see 19 & 20 Vict. c. 96. As to Irish marriages, see 7 & 8 Vict. c. 81, incorporated with and amended by 26 & 27 Vict. c. 27, 33 & 34 Vict. c. 110, and 36 & 37 Vict. c. 16. As to marriages before British consuls, see 12 & 13 Vict. c. 68, and 31 & 32 Vict. c. 61. As to Indian marriages, see 14 & 15 Vict. c. 40.

By the Registration of Burials Act, 1864 (*m*), register books kept under the act, or copies, are evidence of the burials entered therein.

By s. 38 of the Births and Deaths Registration Act, 1874 (*n*), it is provided that an entry or certified copy of an entry of a birth or death under the Registration Acts, 1836 and 1874, is not to be evidence of a birth or death unless it purports to be signed by

(*m*) 27 & 28 Vict. c. 97.
(*n*) 37 & 38 Vict. c. 88.

some person professing to be the informant, and to be a person required by law to give information to the registrar concerning the birth or death, or purports to be made on a coroner's certificate, or in pursuance of the provisions of the act as to registration of births and deaths at sea.

LETTERS-PATENT,

Specifications, disclaimers, memoranda of alterations, and all documents filed with the Commissioners of Patent of Inventions, or in the Court of Chancery, may be proved by printed or manuscript copies, or by extracts certified and sealed by the commissioner or other proper officer (*o*). Copies of drawings, &c., similarly certified, are evidence throughout the British dominions.

COPYRIGHT.

The 5 & 6 Vict. c. 45, s. 11, enacts, that a register of "the proprietorship in the copyright of books and assignment thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright, shall be kept at the Hall of the Stationers' Company," and shall be open to inspection of any person, on the payment of one shilling for every entry searched for. And the proper officer is empowered to give a certified copy under his hand,

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(*o*) 16 & 17 Vict. c. 115, s. 4.

and impressed with the stamp of the company, of any such entry; which copy shall be received as evidence in all courts, and as *primâ facie* proof of the proprietorship or assignment of copyright or licence, as therein expressed, but subject to be rebutted by other evidence; and, in cases of dramatic or musical pieces, such copy shall be *primâ facie* proof of the right of representation or performance, subject to be rebutted as aforesaid.

By sect. 24, no proprietor of a copyright in any book first published after the passing of the act, can take any legal proceedings for infringement of such copyright, unless it is registered.

"Book" includes "map" (*p*). The name of the author or composer must be correctly stated on the register (*q*), and so must the day of publication, and the names of the publishers, or their firm (*r*).

REGISTRATION OF DESIGNS.

Copies of any registration, entry, drawing, print or document, certified and sealed by the registrar, are evidence in all courts of the purport, contents, &c., of such entry, drawing, &c. (*s*).

(*p*) *Stannard* v. *Lee*, L. R., 6 Ch. 346; 40 L. J., Ch. 489; 19 W. R. 615.

(*q*) *Wood* v. *Boosey*, L. R., 3 Q. B. 223; 37 L. J., Q. B. 84; 16 W. R. 485.

(*r*) *Low* v. *Routledge*, 33 L. J., Ch. 717; 12 W. R. 1069.

(*s*) 13 & 14 Vict. c. 104, s. 14.

REGISTER OF VOTERS AND POLL BOOKS.

The Registration Act (*t*) provides (sect. 79), that the register of voters under that act shall be conclusive evidence that the persons named therein continue to have the qualifications which are annexed to their names. It has been recently held by the Court of Common Pleas that, notwithstanding that the Ballot Act has repealed sect. 98 of the Registration Act, the register is conclusive not only on the returning officer, but also on every tribunal which has to inquire into elections, except only in the case of persons prohibited from voting by any statute or the Common Law of Parliament (*u*).

Office copies of poll books, issued by the clerk of the Crown, or his deputy, are evidence in all courts of law, in actions for bribery or personation, or for any other purpose whatsoever (*v*).

SHIPPING REGISTERS.

Shipping registers, or declarations made in pursuance of the Shipping Act, with regard to the ownership, registry, &c., of British ships, may be proved under the Merchant Shipping Act, 1854 (*x*), *primâ facie*, either by original or examined copies,

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(*t*) 6 & 7 Vict. c. 18.

(*u*) *Stowe* v. *Jolliffe*, L. R., 9 C. P. 734; 22 W. R. 911; 43 L. J., C. P. 265.

(*v*) 6 & 7 Vict. c. 18, s. 94.

(*x*) 17 & 18 Vict. c. 104.

or copies certified by the registrar or other proper officer. By the 277th section of the act, all shipping masters and officers of customs are to take charge of all documents, which they receive under the act, and transmit them, if required, to the Registrar-General of Seaman, who may either be required to produce the same, or may give certified copies, which are to have all the effect, in evidence, of originals. So, all entries in official log-books are admissible under the same act.

CORPORATIONS.

These are not strictly societies of a public nature, for the purposes of evidence; but they will be conveniently considered here as being of a *quasi* public nature, and as connected with the principles of joint-stock company evidence.

Corporation books are evidence to prove entries of a public character (*y*), but not to prove transactions of the corporation with the public (*z*). They appear to be evidence in the nature of admissions between members of the corporation (*a*); but not of the rights and privileges of the corporation against strangers (*b*). Where such books are tendered as evidence, under the 14 & 15 Vict. c. 99, s. 14, they

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(*y*) *Marriage* v. *Lawrence*, 3 B. & A. 144.
(*z*) *Gibbon's case*, 17 How. St. Tr. 810.
(*a*) *Hill* v. *Manchester Waterworks*, 2 B. & Ad. 544.
(*b*) *Lord Mayor of London* v. *Lynn*, 2 H. Bl. 214, n.

must appear to be of such a public nature as the act intends, in order to admit of the substitution of examined or certified copies for the production of the original; but, generally, they appear to be inadmissible unless rendered admissible by statute.

By the Municipal Corporations Evidence Act, 1873 (*c*), s. 3, "any minutes of proceedings at meetings of the council, or of committees of the council, if signed by any person purporting to be the mayor of the borough, or the chairman of a meeting of the council, or committee of the council, either at the meeting of the council or committee of the council at which such proceedings took place, or at the next ensuing meeting of the council, or committee of the council, shall be receivable in evidence in all legal proceedings without further proof; and, until the contrary is proved, every meeting of the council, or committee of the council, in respect of the proceedings of which minutes have been so made, shall be deemed to have been duly convened and held, and all the members thereof to have been duly qualified, and when such proceedings are proceedings of committees, that such committees have been duly and regularly constituted, and had power to deal with the matters referred to in such proceedings."

JOINT-STOCK COMPANIES.

The proceedings, contracts, &c., of public companies in reference to the law of evidence, are sub-

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(*c*) 36 & 37 Vict. c. 33.

ject to the provisions of several recent statutes, of which the principal is the Companies Act, 1862 (*d*).

For the sections of this act dealing with evidence, see the Appendix.

It may be observed that where a document is tendered, purporting to be sealed by the seal of a company or corporation, the genuineness of the seal must be proved by some one who knows it (*e*), unless it be the seal of the Corporation of London, which proves itself (*f*), or the seal of the Apothecaries Company, which also proves itself under 14 & 15 Vict. c. 99, s. 8.

BYE-LAWS.

These are *quasi* public documents, which are generally regulated by particular statutes or charters. They appear to be generally within the spirit of the Documentary Evidence Act, and the 14 & 15 Vict. c. 99. Their validity depends primarily, either on their conformity to the powers given by special acts, or to the provisions of 8 & 9 Vict. c. 16, which empowers (sect. 12) a company "from time to time to make such bye-laws as they think fit for the purpose of regulating the conduct of the officers and servants of the company and for providing for the due management of the affairs of the company in all respects whatsoever, and from time to time to alter or repeal any such bye-laws and make others,

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(*d*) 25 & 26 Vict. c. 89.

(*e*) *Moises* v. *Thornton*, 8 T. R. 207.

(*f*) *Doe* v. *Mason*, 1 Esp. 53.

provided such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special act; and such bye-laws shall be reduced into writing and shall have affixed thereto the common seal of the company, and a copy of such bye-laws shall be given to every officer and servant of the company affected thereby." And it is provided (sect. 127) that the production of a written or printed copy of the bye-laws of the company, having the common seal of the company affixed thereto, shall be sufficient evidence of such bye-laws in all cases of prosecution under the same.

A railway bye-law will not be binding on strangers, unless it have been approved by the Board of Trade or Commissioners of Railways, or other proper officer (*g*), nor generally, unless it be proved to have come actually or constructively to the notice of the party who is to be affected by it (*h*). Where such bye-law is good, or where a statutory notice has been affixed under the Carriers Act, it will be sufficient, apparently, to prove that such a bye-law or notice was duly affixed, and then to prove an examined copy, for it will then be a public document within 14 & 15 Vict. c. 99, s. 14 (*i*).

By the Municipal Corporations Evidence Act, 1873 (*k*), s. 2, "the production of a written or printed copy of any bye-laws made by the council of

(*g*) 3 & 4 Vict. c. 97, ss. 7, 10; *s. v.* 8 & 9 Vict. c. 20, ss. 108—111.

(*h*) *Great Western Railway* v. *Goodman*, 12 C. B. 313.

(*i*) *Motteram* v. *Eastern Counties Railway*, 7 C. B., N. S. 58.

(*k*) 36 & 37 Vict. c. 33.

a borough either under the Municipal Corporations Act or the 5 & 6 Will. 4, c. 73, or under any present or future general or local act of parliament authenticated by the common seal of the borough, shall be evidence, until the contrary is proved, of the due making and existence of such bye-laws, and, if so stated in such copy, of the same bye-laws having been approved and confirmed by the authority whose approval or confirmation is or shall be required to the making or enforcing of such bye-laws in all legal proceedings, without further proof of the making of such bye-laws or of such approval or confirmation or of the said common seal."

So, too, by the Salmon Fishery Act, 1873 (*l*), s. 45, "the production of a written or printed copy of any bye-law purporting to have been confirmed, authenticated by the common seal of the board, shall be conclusive evidence of the existence and due making of such bye-law in all legal proceedings; and the production of a copy of any newspaper or newspapers containing the notice of the making of any such bye-law shall be taken and received in all legal proceedings as evidence that all things required by this act for the making and publication of the bye-law therein advertised have been duly done, performed and published."

BILLS OF LADING.

By the 18 & 19 Vict. c. 111, ss. 1 and 2, every consignee of goods named in a bill of lading, and

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(*l*) 36 & 37 Vict. c. 71.

every indorsee of a bill of lading, becomes the absolute owner, with all the personal rights and liabilities of ownership, subject to the consignor's right of stoppage in transitu, and claims for freight. By sect. 3, "every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same, that the goods had not been in fact laden on board: provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom he claims."

But it has been held that this section does not estop the owners of a ship from showing the incorrectness of the bill of lading signed by the ship's agent as to the weight of goods actually shipped (*m*); and in an action for freight the master is not estopped from denying the amount of goods actually received, though he would be estopped in an action against the owners for non-delivery (*n*).

(*m*) *Jessel* v. *Bath*, 36 L. J., Ex. 149; L. R., 2 Ex. 267.

(*n*) *Blanchette* v. *Llantivit Colliery Co.*, L. R., 9 Ex. 77; 43 L. J., Ex. 50; 22 W. R. 490.

FRIENDLY SOCIETIES.

For the provisions of the Friendly Societies Act, 1875, on the subject of evidence, see the Appendix.

NATURALIZATION.

For the provisions of the Naturalization Act, 1870, as to evidence, see the Appendix.

HISTORIES

Are said to be admissible to prove a matter relating to the kingdom at large (*o*), such as the death of a sovereign or the time of his accession; but not to prove a particular or local custom. Maps are inadmissible except under the circumstances mentioned in Part I. ch. 9 (*p*). Thus, in an Irish case (*q*) the maps of the Ordnance Survey in Ireland were rejected. Still less are peerages, army and navy lists, directories, calendars, or other non-official publications, admissible.

(*o*) Bull. N. P. 248.

(*p*) By the Ind. Ev. Act, s. 36, "statements of facts in issue or relevant facts in published maps or charts generally offered for public sale, or in maps or plans made under the authority of government as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts."

(*q*) *Swift* v. *M'Tiernan*, 11 Ir. Eq. 632.

CHAPTER IV.

ON SECONDARY EVIDENCE. — PROOF OF HAND-WRITING. — ATTESTING WITNESSES. — WRITINGS THAT REFRESH THE MEMORY.

When a party has done everything in his power to bring before the court primary evidence of his case, as by searching for documents in places where it was most reasonable to expect them to be deposited, or by giving an opposite party notice to produce them, he will then, and not till then, if he be unsuccessful in his exertions, be permitted by the court to give secondary evidence of such documents.

The search must be *bonâ fide* and diligent (*a*). It is not necessary to call a person of whom inquiries have been made as to a deed, but his declarations may be given in evidence (*b*). If there are several places of probable deposit, all must be searched (*c*).

There are no degrees in secondary evidence; and, therefore, when the absence of primary evidence is explained satisfactorily, any species of admissible secondary evidence may be substituted for the original. Thus, a lost deed may be proved, either by an attested copy or an examined copy, or by oral

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(*a*) *R.* v. *Denio*, 7 B. & C. 620.
(*b*) *R.* v. *Kenilworth*, 7 Q. B. 642.
(*c*) *Doe* v. *Lewis*, 11 C. B. 1035.

evidence of any one who can swear positively to the contents of the original. Accordingly, where it appeared that a party held a copy of an original, which was not produced, it was held that he was not obliged to produce the copy, but might give oral evidence of the original (*d*). "As soon as a party has accounted for the absence of the original document, he is at liberty to give any kind of secondary evidence. The rule is, that no evidence is to be adduced which *ex naturâ rei* supposes still greater evidence behind in the party's own power and possession" (*e*); and, therefore, it was held in *Doe* v. *Ross*, that oral evidence of an original might be substituted for an attested copy, which was tendered but rejected for want of a stamp. It is not, however, to be supposed that oral evidence of a document, although equally admissible with an attested or examined copy, is therefore entitled to the same credibility; and it will be for a jury to place their own estimate on the value of the witness's memory.

Although either a copy or oral proof of an original will be equally admissible as secondary evidence, the copy of a copy, although compared with it, will be inadmissible, notwithstanding that the first copy is also proved to have been compared carefully with the original (*f*).

It will be presumed, in the absence of contrary evidence, that the original was properly stamped, if

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(*d*) *Brown* v. *Woodman*, 6 C. & P. 206.
(*e*) Per Parke, B., *Doe* v. *Ross*, 7 M. & W. 102.
(*f*) *Liebman* v. *Pooley*, 1 Stark. 167.

it required to be stamped (*g*), and an unstamped copy will be good secondary evidence (*h*); but neither at law (*i*) nor in equity (*k*) can secondary evidence of the contents of an unstamped agreement be given, even though it be destroyed by the wrongful act of the party objecting to such evidence. When the destruction of a document is alleged to have been by the opposite party, notice to produce is necessary to let in secondary evidence (*l*).

When a copy is tendered as secondary evidence, it must be proved to be accurate by a witness who made it, or who actually read it and compared it with the original (*m*). But the drafts from which, by indorsements upon them, it appeared that certain deeds were engrossed, have been held good secondary evidence of the contents of such deeds (*n*).

All originals must be accounted for before secondary evidence can be given of any one (*o*).

If a witness attend on a *subpœna duces tecum*, with a document which he refuses to produce on the ground of privilege, secondary evidence will be admissible. But if he do not attend on such a subpœna, or attend and refuse to produce the writing on any

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(*g*) *Crisp* v. *Anderson*, 1 Stark. 35. But see *Marine Investment Co.* v. *Haviside*, L. R., 5 E. & I. 624; 42 L. J., Ch. 173.

(*h*) Same in India; see Ind. Ev. Act, s. 89.

(*i*) *Rippiner* v. *Wright*, 2 B. & Al. 478.

(*k*) *Smith* v. *Henley*, 1 Phil. 391.

(*l*) *Doe* v. *Morris*, 3 A. & E. 46.

(*m*) *Fisher* v. *Samuda*, 1 Camp. 193.

(*n*) *Waldy* v. *Gray*, L. R., 20 Eq. 250; 23 W. R. 676; 44 L. J., Ch. 394.

(*o*) Per Parke, B., *Alevon* v. *Furnival*, 1 C. M. & R. 292.

other ground but that of privilege, secondary evidence will not be admissible, but the witness will be punishable for contempt (*p*).

ON THE PROOF OF HANDWRITING.

The proof of signatures, or handwriting, is the essential part of the proof of private writings. There are various admissible kinds of such proof.

1. Handwriting may be proved by calling the party who wrote or signed. This is the most satisfactory evidence.

2. By a witness who actually saw the party write or sign.

3. By a witness who has seen the party write on other occasions, even if it be but once only. Such witness must swear to his *belief* that the writing produced is the writing of the person, and it is not sufficient for him to swear that he *thinks* that it is (*q*).

4. By a witness who has seen documents, purporting to be written by the same party, and which, by subsequent communications with such party, he has reason to believe the authentic writings of such party.

5. Under the Common Law Procedure Act, 1854, s. 27 (*r*), in civil cases, and under the Criminal Evidence and Practice Amendment Act, 1865 (*s*), in

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(*p*) *R.* v. *Llanfaethly*, 2 E. & B. 940.
(*q*) *Eagleton* v. *Kingston*, 8 Ves. 473.
(*r*) 17 & 18 Vict. c. 135, s. 27.
(*s*) 28 & 29 Vict. c. 18, s. 8.

criminal cases, a witness may give his opinion as to the authenticity of a disputed document by comparing the handwriting with any document which has been proved to the satisfaction of the judge to be the genuine writing of the party (*t*).

The practical principles of this department of evidence are well illustrated in the subjoined judgment of Patteson, J., in *Doe* v. *Suckermore* (*u*). He said, "All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired, either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods and other circumstances under which the witness has seen the party write; but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname; or

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(*t*) As to the proof of handwriting in India, see the Ind. Ev. Act, ss. 47 and 73. To the former section is appended the following explanation:—"A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself, or under his authority, and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him."

(*u*) 5 A. & E. 730.

the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards personally communicated with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate; or by any other mode of communication between the party and the witnesses, which in the ordinary course of transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party; evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him. These are the only modes of acquiring a knowledge of handwriting which have hitherto, as far as I have been able to discover in our law, been considered sufficient to entitle a witness to speak as to his belief in a question of handwriting. In both the witness acquires his knowledge by his own observation upon facts coming under his own eye, and as to which he does not rely on the information of others; and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may say so, unintentionally, without reference to any particular object, person, or document."

Where it is desired to prove the handwriting of an ancient document, it may be proved by the evidence of a witness who has in the course of business examined documents admitted to be written by the same party, but not by a witness who has merely

inspected some such documents for the purpose of giving evidence (*x*).

On these common law principles, the Common Law Procedure Act, 1854, and the Criminal Evidence and Practice Amendment Act, 1865, have engrafted the principle numbered 5, *supra*. The 27th section of the former act and the 8th of the latter enact, that—"Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." Before any writing is admissible under these sections as a standard of comparison, its genuineness must be proved to the satisfaction of the judge (*y*), but it need not be relevant to the issue (*z*).

Where the handwriting of any part of a document provable by a copy is in dispute, the original must be produced (*a*).

ON PROOF BY ATTESTING WITNESSES (*b*).

It was a common law principle, that where a writing was attested, the witnesses, or one of them, must be called to prove the execution of the instrument; and

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(*x*) *Fitzwalter Peerage case*, 10 Cl. & F. 193.
(*y*) *Hughes* v. *Lady Dinorben*, 32 L. T. 271.
(*z*) *Birch* v. *Ridgway*, 1 F. & F. 270.
(*a*) *Auriol* v. *Smith*, 18 Ves. 198.
(*b*) For the Indian law on this subject, see Ind. Ev. Act, ss. 68–72.

it was not competent to a party to prove it even by the admission of the person by whom it was executed. But by the 26th section of the Common Law Procedure Act, 1854, it is enacted, that "it shall not be necessary to prove, by the attesting witness, any instrument, to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto." The 103rd section of the act confines this principle to courts of civil judicature in England or Ireland: but by the Criminal Evidence and Practice Amendment Act, 1865, s. 7, it has been extended to criminal proceedings.

In determining, therefore, whether it will be necessary under these acts to call the attesting witness to an instrument, the practical and simple question is, whether the instrument is one which requires attestation to give it validity. If the instrument would be void without attestation, the subscribing witness must still be called; but, if attestation be unnecessary, the witness need not be called. Thus, in numerous statutory instruments, attestation is essential to their validity: *e.g.*, wills; warrants of attorney and cognovits; bills of sale, and indentures of apprenticeship under the Merchant Shipping Act, 1854; instruments executed in pursuance of powers requiring attestation, conveyances to charitable uses, &c. On the other hand, ordinary bonds, deeds and agreements of every kind, which are equally binding whether attested or not, are clearly provable without the production necessarily of a subscribing witness.

There are also several common law exceptions to

the reservation contained in the act. Thus it is a rule that an attesting witness need not be called to prove an instrument which is more than thirty years old; or when the original is withheld by an adverse party, who refuses to produce it after notice (*c*); so when the adverse party, in producing it after notice, claims an interest under it; or when the adverse party has recognized the authenticity of the instrument by acts in the nature of an estoppel in a judicial proceeding. When the attesting witness is proved to be dead, insane, beyond the jurisdiction of the court, or otherwise not producible after due endeavours to bring him before the court, evidence of his handwriting is sufficient.

In such cases it will generally be sufficient to prove the handwriting of the attesting witness. It is also held, that where an instrument requires to be attested by several witnesses, it may be proved by calling any one of them (*d*); except in the case of wills, which, under certain circumstances, can be proved in courts of equity only by the production of all the producible witnesses (*e*).

An instrument, which is required to be attested by several witnesses, may be proved by evidence of the handwriting of one of such witnesses, coupled with proof of his identity, as soon as the absence of all the witnesses has been explained satisfactorily, but not otherwise (*f*).

(*c*) *Poole* v. *Warren*, 8 A. & E. 588.
(*d*) *Holdfast* v. *Dowring*, 2 Str. 1254.
(*e*) *M'Gregor* v. *Topham*, 3 H. L. Cas. 132; cf. sup. p. 330.
(*f*) *Nelson* v. *Whittall*, 1 B. & Ald. 19.

Where a witness, called to prove the execution of an instrument, sees his signature to the attestation, and says that he is therefore sure that he saw the party execute the deed, that is a sufficient proof of the execution of the instrument, though the witness adds that he has no recollection of the fact of the execution of the instrument (*g*).

Where an attesting witness is blind he must be called to give evidence from recollection (*h*).

If the attesting witness be called, and can recollect nothing, then the execution of the deed may be proved *aliunde* (*i*).

If all the witnesses are dead, the handwriting of one of them must be proved, and then the statement in the attestation clause will be presumed to be correct (*k*). But where an attesting witness lived abroad, it seems that stricter proof of his death ought to be required (*l*).

ON WRITINGS WHICH REFRESH THE MEMORY.

A document which may be inadmissible intrinsically and *per se* as primary or secondary evidence, either because it does not embody the substance of the issue, or because it is in the nature of hearsay, will often be admissible to refresh the memory of a

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(*g*) Per Bayley, J., *Maugham* v. *Hubbard*, 8 B. & C. 16; cf. *Burling* v. *Pattison*, 9 C. & P. 579.

(*h*) *Rees* v. *Williams*, 1 Dr. & Sm. 314.

(*i*) *Talbot* v. *Hodson*, 7 Taunt. 251.

(*k*) *Adam* v. *Kerr*, 1 B. & P. 360; cf. sup. p. 331.

(*l*) *Henley* v. *Philips*, 2 Atk. 48.

witness, and to enable him to speak to the matters to which it refers (*m*).

It appears that such a document may be handed to a witness for inspection, and that the witness may give oral evidence accordingly, after a perusal of its contents:

1st. When the writing actually revives in his mind a recollection of the facts to which it refers.

2nd. When, although it fail to revive such a recollection, it creates a knowledge or belief in the witness that, at the time when the writing was made, he knew or believed it to contain an accurate statement of such facts.

3rd. When, although the writing revives neither a recollection of the facts, nor of a former conviction of its accuracy, the witness is satisfied that the writing would not have been made unless the facts which it purports to describe had occurred accordingly.

It is not necessary that the memorandum should have been actually made by the witness, if he can otherwise make it an original source of personal recollection. Thus, a witness has been allowed to refresh his memory from a paper which he remembers to have recognized as a correct narrative when the facts were fresh in his memory (*n*).

(*m*) For the Indian law on this subject, see Ind. Ev. Act, ss. 159—161.

(*n*) *Duchess of Kingston's case*, 20 How. St. Tr. 619.

In this way a writing, which is inadmissible for want of a stamp, may practically be made evidence, as a memorandum to prompt the oral statement of a witness; but this case can only arise where the writing is not in itself primary or best evidence, and where a party has his option of resorting either to written or oral evidence. Thus, a writing which is void as an agreement may be equally serviceable as a memorandum; again, a memorandum of the receipt of money, which was void as a receipt for want of a stamp, has been held strictly admissible to refresh the memory of a witness, and to enable him to say, from the fact of his signature, that he had received money which he had no recollection of having received (*o*). Lord Tenterden, C.J., said, "In order to make the paper itself evidence of the receipt of the money, it ought to have been stamped. The consequence of its not having been stamped might be, that the party who paid the money, in the event of the death of the person who received it, would lose his evidence of such payment. Here the witness, on seeing the entry signed by himself, said that he had no doubt that he had received the money. The paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh his memory; and, when he said that he had no doubt he had received the money, there was sufficient parol evidence to prove the payment."

According to the third principle, *supra*, a person who is shown his name on a writing may depose to

(*o*) *Maugham* v. *Hubbard*, 8 B. & C. 482.

the genuineness of the document, although he has no recollection of it, or of affixing his name to it (*p*).

Generally, the memorandum from which a witness speaks need not be produced in court; but, if produced, it becomes evidence for the party producing (*q*), and the opposite party will be entitled to see it, and to cross-examine from it (*r*). He may cross-examine upon such part of the memorandum as is referred to by the witness, without making the memorandum evidence *per se* for the opposite party, but if he cross-examines upon other parts, he makes them portions of his own evidence (*s*). Where a document is put into a witness's hand, but nothing is done upon it, the opposite party is not entitled to see it (*t*); and where a diary was used by a witness to refresh his memory, it was held that the opposite party was only entitled to see such portions as referred to the subject-matter of the suit (*u*). Where the witness derives his knowledge of a fact *solely* from his reliance on the accuracy of the memorandum, it must be produced (*x*), and his evidence is not, of course, conclusive (*y*).

There is no precise time within which a writing must be shown to have been made, before it can be

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(*p*) *R.* v. *St. Martin's, Leicester*, 2 A. & E. 210.
(*q*) *Payne* v. *Ibbotson*, 27 L. J., Ex. 41.
(*r*) *R.* v. *Hardy*, 24 St. Tr. 824.
(*s*) Per Gurney, B., *Gregory* v. *Tavernor*, 6 C. & P. 281.
(*t*) *Sinclair* v. *Stevenson*, 1 C. & P. 585.
(*u*) *Burgess* v. *Bennett*, 20 W. R. 720.
(*x*) *Doe* v. *Perkins*, 3 T. R. 754.
(*y*) *Duprey* v. *Truman*, 2 Y. & C. 341.

used by a witness. It is not necessary that it should have been made contemporaneously with the occurrence of the fact; but it ought to have been made soon afterwards, or at least within such a subsequent time as will support a reasonable probability that the memory of the witness had not become impaired when the statement was committed to paper.

It appears to be only necessary that the witness should swear positively that the memorandum was made at a time when he had a distinct recollection of the facts, and *ante litem motam* (*z*).

The memorandum must either have been made by the witness, or recognized by him, at or about the time when it was made, as a correct account. It must not contain any of the elements of hearsay, and it will therefore be inadmissible if it appear to be the statement of a third person (*a*), as where it had been drawn up by such a person from the witness's own memoranda; or even if it be a copy made by the witness himself from his own original memoranda (*b*). This rule is consistent with the general principles of secondary evidence, by which the copy of a copy, unless in the nature of a duplicate original, is entirely inadmissible, and corresponds with the express dictum of Patteson, J., in *Burton* v. *Plummer* (*c*), that "the copy of an entry, not made by the witness con-

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(*z*) *Wood* v. *Cowper*, 1 C. & K. 646.

(*a*) *Anon.* Ambler, 252.

(*b*) *Jones* v. *Stroud*, 2 C. & P. 196. Such a copy would be admissible in India; Ind. Ev. Act, s. 159.

(*c*) 2 A. & E. 343.

temporaneously, does not seem to be admissible for the purpose of refreshing a witness's memory." The cases where such a privilege appears to have been conceded, as where the author of a written report(*d*), or an article in a newspaper (*e*), has been allowed to refer to the printed versions, are cases where such printed versions appear to have been treated as originals, and not as copies.

(*d*) *Horne* v. *Mackenzie*, 6 Cl. & Fin. 628.
(*e*) *Topham* v. *M'Gregor*, 1 C. & K. 320.

CHAPTER V.

ON MATTERS WHICH ARE REQUIRED TO BE PROVED BY WRITING — THE STATUTES OF FRAUDS — OF LIMITATIONS—OF PRESCRIPTION.

MANY matters can be proved only by deed or other writing; and, in such cases, oral evidence, however distinct and direct, is wholly inadmissible.

INCORPOREAL RIGHTS,

Such as advowsons, rents, remainders, reversions, *profits à prendre*, and easements, can be created or assigned only by deed, and must therefore be proved by deed. Thus, a ticket of free admission to a theatre or a race course is insufficient evidence of a title to enter, unless it be by deed (*a*).

CONTRACTS BY CORPORATIONS.

Contracts and acts done by corporations must generally be by deed, and can therefore be proved only by a deed bearing the corporate seal (*b*).

This rule is an ancient principle of the common law, and still remains abstractedly unmodified; but, prac-

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(*a*) *Wood* v. *Leadbitter*, 13 M. & W. 842.
(*b*) *Arnold* v. *Mayor of Poole*, 4 M. & G. 860.

tically, a large class of exceptions has been engrafted on it, and their accumulative result appears to be that minor contracts, when there is a paramount convenience such as to amount almost to a necessity, or contracts connected with the objects for which the corporation was established, may be proved without being under the seal of the corporation. Thus, it has been said by Rolfe, B., "A corporation which has a head may give a personal command and do small acts; as, it may retain a servant; it may authorize another to drive away cattle, damage feasant, or make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or so little admitting of delay, that, to require in every such case the previous affixing of the seal would be greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object. In such matters, the head of the corporation seems from the earliest times to have been considered as delegated by the rest of the members to act for them" (*c*). Although, as a general rule, an inferior servant can be retained even by a non-trading corporation by parol, the same principle does not apply to all such servants, for the Court of Common Pleas recently held that the contract for the engagement of a clerk to a master of a workhouse by a board of guardians must be under seal (*d*).

The practical question in such cases is, was the

(*c*) *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 821.

(*d*) *Austin* v. *Guardians of Bethnal Green*, L. R., 9 C. P. 91; 43 L. J., C. P. 100; 22 W. R. 406; cf. *Dyte* v. *Guardians of St. Pancras*, 27 L. T., N. S. 342.

transaction incidental or foreign to the objects and daily business of the corporation? If it be incidental, as to repair the premises of the corporation (*e*); or a contract to buy or sell such goods as the corporation is formed to buy and sell (*f*), or to purchase goods for the purposes of the corporation (*g*), such a matter does not require to be proved by the corporation seal. So, the East India Company has been held liable upon bills of exchange accepted on its behalf although its seal was not on them (*h*). When the goods to be supplied are not such as those in which the corporation usually deals (*i*); or when the contract is of such a magnitude, and of such an unusual description, as to require reasonably the formal and express assent of the corporation, the fact must be proved by writing under the corporate seal (*k*); but magnitude *per se* is not an element in deciding whether a contract not under seal is binding on the corporation (*l*). It may be remarked, that the tendency of recent decisions is to restrict the general principle that corporations can only contract under seal. The courts are unwilling to hold such contracts void, merely because they are not evidenced by the corporate seal; and are more and more inclined to hold cor-

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(*e*) *Saunders* v. *St. Neot's Union*, 8 Q. B. 810.

(*f*) *Church* v. *Imperial Gaslight and Coke Co.*, 6 A. & E. 846.

(*g*) *South of Ireland Colliery Co.* v. *Waddle*, L. R., 3 C. P. 463; L. R., 4 C. P. 617; 37 L. J., C. P. 211; 38 L. J., C. P. 338.

(*h*) *Murray* v. *East India Co.*, 5 B. & A. 204.

(*i*) *Copper Miners Co.* v. *Fox*, 16 Q. B. 229.

(*k*) *Homersham* v. *Wolverhampton Railway Co.*, 6 Exch. 137.

(*l*) Per Erle, J., *Henderson* v. *Australian Steam Navigation Co.*, 5 E. & B. 409.

porations bound by them when they are entered into by duly appointed agents; but the agents of a corporation have no power to bind it by any act which the corporate body has not power to do. So, also, corporations will be bound by the misrepresentations of their agents (*m*). It is said by a pre-eminent authority, that, "although corporations can only contract under seal, they are bound by their conduct, and by the acts of their solicitors, after their contract, just as an individual would be" (*n*). So, in torts, corporations are liable for the acts of their servants, although they have not been appointed under the corporation seal (*o*); and use and occupation may be maintained by a corporation against a tenant who has entered, but who has not been constituted by a demise under seal (*p*). Entry, occupation and payment of rent for corporate property under a demise not under seal will constitute a yearly tenancy (*q*).

It has been doubted how far a non-trading corporation is bound by an executed contract, not under seal, but of which the corporation has received the benefit; but the effect of the latest cases seems to be that the corporation will be bound if it has accepted the benefit of the contract. Thus, where goods which a corporation has contracted by parol to buy have been received by it, or after work is

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(*m*) *Conybeare* v. *New Brunswick Co.*, 8 Jur., N. S. 375.

(*n*) Per Lord St. Leonards, *Eastern Counties Railway Co.* v. *Hawkes*, 5 H. L. Cas. 376.

(*o*) *Eastern Counties Railway Co.* v. *Brown*, 6 Exch. 314; *Goff* v. *Great Northern Railway Co.*, 3 E. & E. 672.

(*p*) *Mayor of Stafford* v. *Till*, 4 Bing. 77.

(*q*) *Ecclesiastical Commissioners* v. *Morrall*, L. R., 4 Ex. 162.

done and adopted for the purposes of the corporation, the objection that the contract was not under seal cannot be taken (*r*). The doctrines of acquiescence and part performance are applied by courts of equity to contracts by corporations or incorporated companies as well as to those by private individuals. Thus, where the directors of a railway company entered into an informal agreement, upon the faith of which certain works were executed on a spot where the company was constructively present, the company was held to the agreement (*s*). Even where the contract is *ultra vires*, and one which a corporation or incorporated company cannot lawfully enter into, still, if any benefit has been derived by the corporation or incorporated company from the contract, they are liable to the extent of such benefit. Thus, where a life assurance company granted marine policies, and the policies so granted were held void as being *ultra vires*, the holders were held entitled to recover from the company the amount of the premiums paid by them (*t*).

CONTRACTS BY COMPANIES

Under the Companies Clauses Consolidation Act (*u*), are provable under the following section :—Sect. 97.

(*r*) *Sanders* v. *St. Neot's Union*, 8 Q. B. 810.

(*s*) *Laird* v. *Birkenhead Railway Co.*, John 500; cf. *Crook* v. *Corporation of Seaford*, L. R., 6 Ch. 551; 18 W. R. 1147; and see *Mayor of Kidderminster* v. *Hardwick*, L. R., 9 C. P. 13; 43 L. J., C. P. 9; 22 W. R. 160.

(*t*) *Re Phœnix Life Assurance Co.*, 2 J. & H. 441.

(*u*) 8 & 9 Vict. c. 16.

"The power which may be granted to any committee to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows; that is to say—

"With respect to any contract which, if made between private persons, would be by law required to be in writing, and under seal, such committee or the directors may make such contracts on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge the same:

"With respect to any contract which, if made by private persons, would be by law required to be in writing, and signed by the parties to be charged therewith; such committee or the directors may make such contract on behalf of the company in writing, signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary or discharge the same:

"With respect to any contract, which if made between private persons would by law be valid, although made by parol only, and not reduced into writing, such committee or the directors may make such contract on behalf of the company, by parol only, without writing, and in the same manner may vary or discharge the same:

"And all contracts, made according to the provisions herein contained, shall be effectual in

law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be:

"And on any default in the execution of any such contract, either by the company, or any other party thereto, such action or suit may be brought, either by or against the company, as might be brought had the same contracts been made between private persons only."

On this section it has been held, that where a company has had the benefit of a contract made by an agent, there will be evidence for a jury of such a contract (*v*).

By the 98th section, the directors are to cause minutes to be made of all contracts entered into by them, which minutes are to be signed by the chairman of the meeting, and in this form they are to be *primâ facie* evidence that the meeting has been duly convened, and that the persons attending were directors, &c., as the entry describes them (*x*).

The above act applies to contracts made by companies which are incorporated by special acts, and placed under its provisions, and therefore does not apply to contracts made by ordinary joint-stock companies after complete registration. These are regulated by several acts, of which the principal is the Companies Act, 1862 (*y*). But this act does not

(*v*) *Pauling* v. *London and North Western Railway*, 8 Exch. 867.

(*x*) Cf. ss. 1, 21—28, 98.

(*y*) 25 & 26 Vict. c. 89.

contain any clauses similar to those which were contained in the Joint Stock Companies Act, 1856, and which are substantially re-enacted in the Companies Act, 1867, and therefore under this act contracts by joint stock companies were on the footing of contracts by corporations except as provided by sect. 47 of the Act of 1862, which enacts, that "a promissory note or bill of exchange shall be deemed to have been made, accepted or endorsed on behalf of any company under this act if made, accepted or endorsed on behalf of any company under this act, if made, accepted or endorsed in the name of the company by any person acting under the authority of the company, or if made, accepted or endorsed by or on behalf or on account of the company by any person acting under the authority of the company." But now by the 37th section of the Companies Act, 1867 (*z*), which is, so far as is consistent with the tenor thereof, to be construed as one with the 25 & 26 Vict. c. 89, therein called "the Principal Act," it is enacted, that "contracts on behalf of any company under the Principal Act may be made as follows: (that is to say)—

"(1). Any contract which if made between private persons would be by law required to be in writing, and if made according to *English* law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged.

(*z*) 30 & 31 Vict. c. 131.

"(2). Any contract which if made between private persons would be by law required to be in writing and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged.

"(3). Any contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged.

And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors and all other parties thereto, their heirs, executors or administrators as the case may be."

TRANSFER OF SHARES.

The 8 & 9 Vict. c. 16, s. 14 (Companies Clauses, &c., Act), enacts, that every tranfer of shares under this act "shall be by deed duly stamped, in which the consideration shall be truly stated;" and a form of transfer is given in the schedule B. to the act. The Companies Act, 1862, by sect. 8, enacts, that

instruments of transfer are to be executed both by transferor and transferee, and that the transferor is to be deemed to remain the holder of a share until the name of the transferee has been entered in the company's register.

SALE OF SHIPS.

The 17 & 18 Vict. c. 104, s. 55, enacts, that "a registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale; and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and shall be according to the form E marked in the schedule hereto, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of and be attested by one or more witnesses."

It appears that this provision extends to all vessels not propelled by oars.

CONTRACTS BY URBAN AUTHORITIES.

By the 174th section of the Public Health Act, 1875 (*a*), "every contract made by an urban authority whereof the value or amount exceeds fifty pounds, shall be in writing and sealed with the common seal of such authority."

(*a*) 38 & 39 Vict. c. 55.

WARRANTS OF ATTORNEY.

The Debtors Act, 1869 (*b*), enacts, by sect. 24, that after its commencement (1st July, 1870), "a warrant of attorney to confess judgment in any personal action or cognovit actionem given by any person shall not be of any force, unless there is present some attorney of one of the superior courts on behalf of such person expressly named by him, and attending at his request to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney."

The preceding cases are the more important practical instances in which recent legislation has interfered to substitute exclusively written evidence, generally under seal, for merely oral evidence. But the basis of that department of English law which requires written evidence, and excludes oral evidence in numerous cases, is found in the

STATUTE OF FRAUDS.

(29 *Car.* 2, *c.* 3.)

The chief object of this statute (*c*) is to lessen

(*b*) 32 & 33 Vict. c. 62, s. 24.

(*c*) The Statute of Frauds had a limited operation in India until repealed, so far as India is concerned, by the Indian Contract Act, 1872 (IX. of 1872). For matters which must be proved by writing in India, see Cunningham and Shephard's Commentaries on the Indian Contract Act, p. 33.

the temptations to perjury which exist when a person is permitted to give oral evidence of an agreement in dispute between himself and another person; it therefore designates a number of cases in which none but written evidence of such a disputed agreement shall be received. Such agreements, when not proved by writings which embody their terms, and unless rendered void by the statute, still exist in contemplation of law, but are yet, virtually, null and non-existent, because they cannot be substantiated and established by the only species of evidence, viz., written evidence, which the legislature has declared to be admissible proof of their existence. The contract may still be good, and the relative legal rights of the parties may be constituted abstractedly by word of mouth; but the statutory inadmissibility of oral evidence to prove the contract leaves the legal right unsupported by a legal remedy.

There is no branch of practical evidence of more constant and immediate importance than that which treats of contracts which fall within this statute, and which, therefore, can generally be proved only by written evidence. The cases are endless on the subject; but the limits of this work permit only a careful selection of such as bear prominently on the principal provisions of the act.

INTERESTS IN LAND.

Sect. 1. "All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements,

or hereditaments, made and created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates to the contrary notwithstanding."

Sect. 2. "Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at least of the full improved value of the thing demised."

Under this section, any lease, extending not more than three years from the time of its creation, and commencing from the date of the lease, and not from a future date; or, if commencing from a future date, not extending more than three years from the date of the lease; may still be proved, as before the statute, by evidence of an oral lease (*d*). But it seems that such a lease confers a right of action against a lessee only when he has entered, and not for a non-entry (*e*).

Sect. 3. "No leases, estates, or interests, either of freehold or terms of years, or any uncertain inte-

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(*d*) *Rawlins* v. *Turner*, 1 Lord Raym. 736; *Riley* v. *Hicks*, 1 Stra. 651.

(*e*) *Edge* v. *Strafford*, 1 Tyr. 293.

rest, not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act or operation of law."

If a person enters into possession of land and pays rent under a lease or agreement for a lease void under these provisions, he becomes tenant from year to year, upon such of the terms of the lease or agreement as are applicable to such a tenancy (*f*).

All the above interests in land, if created or assigned since October 1, 1845, are now required to be evidenced by deed, for it is enacted by 8 & 9 Vict. c. 106, s. 3, that "a feoffment, made after the said 1st day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law unless evidenced by deed, and that a partition and an exchange of any tenements or hereditaments not being copyhold, and a lease required by law to be in writing, made after the said 1st day of October, 1845, shall also be void at law unless made by deed."

The 4th section enacts (*inter alia*) that "no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them . . . . . unless the agreement upon

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(*f*) *Ness* v. *Savage*, 4 E. & B. 36.

which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the person to be charged therewith, or some other person thereunto by him lawfully authorized."

The subject-matter, the terms, and the parties must appear in the agreement (*g*). The agreement need not consist of a single paper, but may be gathered from several connected papers (*h*). Where a person seeks to prove the terms of a contract by a series of letters, he must take the whole of each letter, and cannot pick out part and reject the rest (*i*). Correspondence and telegrams taken together may constitute a contract (*k*).

The parties need not be specified by name; but an adequate description is sufficient. Thus, where a sale was stated to be "by the direction of the proprietor," it was held by Jessel, M. R., that this was a sufficient description of the vendor (*l*). But the mere description of the vendor as vendor was held by the same judge to be insufficient (*m*).

An authority to sign need not be in writing. A telegram sent by a purchaser may constitute a sufficient memorandum within the statute (*n*). The

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(*g*) *Williams* v. *Lake*, 2 E. & E. 349.

(*h*) *Bauman* v. *James*, L. R., 3 Ch. 108.

(*i*) *Nesham* v. *Selby*, L. R., 13 Eq. 191; 43 L. J., Ch. 173; affirmed, L. R., 7 Ch. 406; 43 L. J., Ch. 551.

(*k*) *Coupland* v. *Arrowsmith*, 18 L. T., N. S. 755.

(*l*) *Sale* v. *Lambert*, L. R., 18 Eq. 1; 43 L. J., Ch. 470; 22 W. R. 470.

(*m*) *Potter* v. *Duffield*, L. R., 18 Eq. 4; 43 L. J., Ch. 472; 22 W. R. 585.

(*n*) *Godwin* v. *Francis*, L. R., 5 C. P. 293; 39 L. J., C. P. 121.

memorandum need only be signed by the party charged; and, if so signed, is good against him, though not against the other party; and where a written proposal signed by one contracting party is verbally assented to by the other, it is a memorandum within the statute sufficient to charge the party signing (*o*).

Courts of equity enforce specific performance of a parol contract within the Statute of Frauds, (1) where it is set out in the plaintiff's pleadings and admitted by the defendant; (2) where the reduction of the contract to writing was prevented by the fraud of one of the parties; (3) where it is a completed agreement, and has been partly carried into execution, and is definite in its terms (*p*).

CONTRACTS BY EXECUTORS, ETC.

Sect. 4. "No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate . . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The agreement must embody the consideration for

(*o*) *Reuss* v. *Pickley*, L. R., 1 Ex. 342; 4 H. & C. 588.

(*p*) Smith's Manual of Equity, 10th edition, p. 248. As to what constitutes part performance, *vide id.* p. 250.

the promise, and be signed by the executor or the administrator, or his agent (*q*).

GUARANTIES.

Sect. 4. "No action shall be brought . . . . whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person . . . . unless the agreement," &c. (as in the case of executors, *supra*).

The agreement must rest on a valid consideration (*r*), which must be new and executory, except where it is the embodiment of verbal terms on which the contract has been executed, and the guaranty subsequently given in writing (*s*). But it is the essence of a guaranty that the original debtor should continue liable; and, therefore, if his liability be extinguished, and the surety be the only party liable for the debt, his liability will not require to be evidenced by writing. If the person for whose use the goods are furnished is liable at all, any promise by a third person, upon sufficient consideration, to pay that debt, must be in writing (*t*). It is also held that a promise to pay the debt of another requires to be proved by writing only where the promise is given to the original creditor, and not

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(*q*) *Rann* v. *Hughes*, 7 Bro., P. C. 556; 7 T. R. 350, n.

(*r*) *Semple* v. *Pink*, 1 Exch. 74.

(*s*) *Eastwood* v. *Kenyon*, 11 A. & E. 438.

(*t*) 1 Wms. Saund. 211 *a*; note 2; *Birkmyr* v. *Darnell*, 1 Smith, L. C. 274; *Fitzgerald* v. *Dressler*, 7 C. B., N. S. 374.

where it is given to the debtor or a third person, that the promisor will be answerable to the creditor (*u*). Therefore, a promise to indemnify is not within the statute (*x*). And where the chairman of a board of health virtually promised a contractor that he would see him paid for certain extra work, it was held by the House of Lords, affirming the Court of Exchequer Chamber, that the chairman's words were evidence to sustain a claim against him personally, *i. e.*, that they did not constitute a promise to pay the debt of another within the Statute of Frauds (*y*). The plaintiff's name must appear on the document (*z*). Formerly it was necessary that the guaranty should disclose a consideration on the face of it; but this is no longer required (*a*); but though parol evidence is admissible to prove the consideration, it is inadmissible to explain the promise (*b*).

MARRIAGE.

Sect. 4. "No action shall be brought whereby . . . to charge any person upon any agreement made upon consideration of marriage, unless the agreement," &c. (as in the case of executors, *supra*).

(*u*) *Eastwood* v. *Kenyon*, 11 A. & E. 446.

(*x*) Per Byles, J., *Reader* v. *Kingham*, 13 C. B., N. S. 344; cf. *Wildes* v. *Dudlow*, 23 W. R. 435; 44 L. J., Ch. 341.

(*y*) *Lakeman* v. *Mountstephen*, L. R., 7 E. & I. 17; 44 L. J., Q. B. 188; 22 W. R. 617.

(*z*) *Williams* v. *Lake*, 2 E. & E. 349.

(*a*) 19 & 20 Vict. c. 97, s. 3.

(*b*) *Holmes* v. *Mitchell*, 7 C. B., N. S. 361.

This provision does not extend to promises to marry (*c*), but only to cases where something collateral to and dependent upon the event of the marriage is the substance of the contract; as, where A. promises B. so much money in the event of B. marrying A.'s daughter (*d*). But an oral contract, if complete, will be enforced in equity (*e*).

CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR.

Sect. 4. "No action shall be brought whereby to charge .... any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement," &c. (as in the case of executors, *supra*).

The statute does not apply where the contract is capable of being performed by either party within a year from the date of its making (*f*). It applies only when the contract, from its terms, must necessarily extend beyond the year. Thus, an agreement to serve for two years certain is within the statute, but not when coupled with a condition that the agreement may be determined at any time by reasonable notice; and a contract for the maintenance of a child, at the defendant's request, to enure so long as the defendant shall think proper, need not

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(*c*) *Cock* v. *Baker*, 1 Str. 34.

(*d*) *Harrison* v. *Cage*, 1 Lord Raym. 386.

(*e*) See *Lady E. Thynne* v. *Earl of Glengall*, 2 H. L. Cas. 131.

(*f*) *Cherry* v. *Heming*, 4 Exch. 631; *Smith* v. *Nesle*, 2 C. B., N. S. 67.

be in writing. This was the decision in *Gouch* v. *Strawbridge* (*g*), wherein Tindal, C. J., expressed his opinion that when the consideration for a contract is executed it is taken out of the statute. But this opinion is now treated as erroneous, at all events as regards all contracts falling within the fourth section (*h*).

DECLARATIONS OR CREATIONS OF TRUSTS.

Sect. 7. "All declarations or creations of trust or confidence of any lands, tenements or hereditaments shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

But it is provided by section 8 "that when any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything hereinbefore contained to the contrary notwithstanding."

In a recent case the plaintiff had conveyed an estate to the defendant without consideration, on the

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(*g*) 2 C. B. 808.

(*h*) See *Sanderson* v. *Graves*, 23 W. R. 697; L. R., 10 Ex. 234.

understanding that the defendant should in certain events re-convey it to him. On the plaintiff applying for a re-conveyance, the defendant pleaded the Statute of Frauds; but the Court of Chancery made a decree for a re-conveyance, on the ground that the Statute of Frauds was never intended to prevent a court of equity from giving relief in a case of a plain, clear and deliberate fraud (*i*).

In *Foster* v. *Hale* (*k*), Lord Alvanley said, "It is not required by the statute that a trust should be created by writing, and the words of the statute are very particular in the clause respecting declarations of trust. It does not by any means require that all trusts shall be created only by writing, but that they shall be manifested and proved by writing; plainly meaning that there should be evidence in writing proving that there was such a trust. Therefore, unquestionably, it is not necessarily to be created by writing, but it must be evidenced by writing, and then the statute is complied with; and indeed the great danger of parol declarations, against which the statute was intended to guard, is entirely taken away. I admit that it must be proved *in toto* not only that there was a trust, but what it was."

CONTRACTS FOR THE SALE OF GOODS FOR 10*l.* AND UPWARDS.

Sect. 17. "No contract for the sale of any goods, wares or merchandises, for the price of ten pounds

(*i*) *Haigh* v. *Kaye*, L.R., 7 Ch. 469; 41 L. J., Ch. 567; 20 W. R. 597.
(*k*) 3 Vesey, 707; cf. *Smith* v. *Matthews*, 6 W. R. 644.

sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

Under this section there are three statutory modes of proving a contract for the sale or purchase of goods for the price of 10*l.* and upwards:

1st. By showing that the buyer accepted, and actually received, part of the goods.

2nd. By showing a payment and receipt of earnest money.

3rd. By showing that the contract, containing the consideration for it, was reduced to writing, and signed at least by the party who is charged upon it (*l*).

Under this section the contract is void, as well as the right of action gone, if its formalities are not observed (*m*).

The acceptance may be implied from the buyer's conduct in dealing with the goods (*n*), and it may precede the actual receipt (*o*); but it cannot be implied without some consent (*p*).

(*l*) *Egerton* v. *Matthews*, 6 East, 307.

(*m*) *Laythoarp* v. *Bryant*, 2 Bing., N. C. 735.

(*n*) *Currie* v. *Anderson*, 2 E. & E. 592; *Kershaw* v. *Ogden*, 3 H. & C. 717.

(*o*) *Cusack* v. *Robinson*, 1 B. & S. 299.

(*p*) *Smith* v. *Hudson*, 6 B. & S. 431.

The writing must be signed by the party charged, or by his agent, who, under the seventeenth as well as under the fourth section of the act, may be appointed without writing (*q*). Such agent must be a third person, and not one of the contracting parties (*r*). Under this, as well as under the fourth section, the contract may be proved by several sufficiently connected writings (*s*).

Where, after a long correspondence, the defendants wrote to the plaintiff, offering to purchase at a certain price, adding the words, "waiting your reply," and the plaintiff afterwards accepted the offer verbally, it was held that there was a binding contract within the statute (*t*). But where the defendants, in reply to a letter from the plaintiff, wrote accepting the offer therein contained, but stating "there are, however, some details necessary to be introduced in the contract which I will prepare," this was held insufficient to satisfy the statute (*u*).

A letter from the purchaser, referring to the terms of the contract, but declining to accept the goods because they were damaged, has been held a sufficient memorandum (*x*); and letters between the purchaser and his agent employed to purchase, if they

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(*q*) *Acebal* v. *Levy*, 10 Bing. 378.
(*r*) *Farebrother* v. *Simmons*, 3 B. & Ald. 333.
(*s*) Supra, p. 379.
(*t*) *Watts* v. *Ainsworth*, 1 H. & C. 83.
(*u*) *Ball* v. *Bridges*, 30 L. T., N. S. 430; 22 W. R. 552.
(*x*) *Bailey* v. *Sweeting*, 9 C. B., N. S. 843; cf. *Wilkinson* v. *Evans*, 1 H. & R. 552.

contain the terms of the contract, are sufficient to support an action by the vendor (*y*).

The names of the parties or their agents must appear in the agreement; and the Court of Exchequer, in *Vandenburgh* v. *Spooner* (*z*), held in effect that it must be collected from the agreement which of the parties is the seller. But the same court, in *Newell* v. *Radford* (*a*), held that parol evidence was admissible to prove which of the parties named is the seller.

The 17th section of the Statute of Frauds is extended by 9 Geo. 4, c. 14, s. 7, "to all contracts for the sale of goods of the value of ten pounds and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery; or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

Contracts within both sections may be signed, either with both the christian and surname, or with the initials of the christian name prefixed to the whole surname (*b*), or with the surname alone; but not with merely the initials of the christian and surname (*c*).

(*y*) *Gibson* v. *Holland*, 1 H. & R. 1.
(*z*) L. R., 1 Exch. 316; 4 H. & C. 519.
(*a*) L. R., 3 C. P. 52; 37 L. J., C. P. 1; 16 W. R. 79.
(*b*) *Lobb* v. *Stanley*, 5 Q. B. 574.
(*c*) *Sweet* v. *Lee*, 3 M. & G. 452.

WILLS.

Under the 5th section of the Statute of Frauds, which affects all wills up to the 1st of January, 1838, "all devises and bequests of any lands or tenements" are to be void, unless "in writing and signed by the party so devising the same, or by some other person in his presence, and by his express directions, ... and attested and subscribed in the presence of the devisor by three or four credible witnesses."

Since the 1st of January, 1838, by the Wills Act, 7 Will. 4 & 1 Vict. c. 26, all wills and testaments, except such as fall within the few cases in which nuncupative wills are allowed, must "be in writing, and be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

A subsequent act, 15 & 16 Vict. c. 24, regulates the requisites of the signatures of wills, and substantially provides that no will shall be invalidated by the mere circumstance that the signature does not follow closely on the end of the will, or that a blank intervenes between the concluding words and the signature (*d*).

(*d*) The Indian Succession Act, 1865, as to the wills of persons domiciled in British India, or relating to immovable property in British India, made since the 31st of December, 1865, provides as

By the Wills Act, a will can be revoked by codicil, or other writing, only when such writing has been executed with the formalities prescribed in the case of ordinary wills.

REVIVAL OF DEBTS BARRED BY THE STATUTES OF LIMITATION (*e*).

Simple contract debts barred by the Statutes of Limitation cannot be revived except by an acknowledgment or promise in writing, for by the 1st section of Lord Tenterden's Act (*f*) it is enacted, that

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follows: "Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or a mariner at sea, must execute his will according to the following rules:—

"First. The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

"Second. The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

"Third. The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

(*e*) For the Indian Law, see the Indian Limitation Act, 1871 (IX. of 1871), s. 20.

(*f*) 9 Geo. 4, c. 14.

"no acknowledgment or promise by word only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby."

Under this act it was held that signature by an agent was insufficient, but now by the 13th section of the Mercantile Law Amendment Act, 1856 (*g*), signature by a duly authorized agent has the same effect as the signature of the party to be charged. The promise to pay must be express, or there must be an unconditional acknowledgment sufficient to support a reasonable inference of a promise to pay (*h*). A letter written "without prejudice" is insufficient (*i*). The amount due may be proved by extrinsic oral evidence (*k*).

As to the liability of joint contractors, Lord Tenterden's Act, sect. 1, enacts, that "where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided

(*g*) 19 & 20 Vict. c. 97.
(*h*) *Tanner* v. *Smart*, 6 B. & C. 303.
(*i*) *Re River Steamer Co.*, L. R., 6 Ch. 822; 19 W. R. 1130.
(*k*) *Cheslyn* v. *Dalby*, 4 Y. & Col. 238.

always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever;" and by the 14th section of the Mercantile Law Amendment Act, 1856 (*l*), it is provided, that "no co-contractor or co-debtor, or executor or administrator of any contractor, shall lose the benefit of the Statutes of Limitation so as to be chargeable in respect or by reason only of payment of any principal, interest or other money by any other or others of such co-contractors or co-debtors, executors or administrators."

In the case of specialty debts, 3 & 4 Will. 4, c. 42, s. 5, enacts, "that if any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing, or part payment or part satisfaction as aforesaid." This applies not only to cases where one person is liable, but to cases where several persons are liable (*m*). But part payment of principal or interest by one of several debtors only keeps a specialty alive against the payee since the Mercantile Law Amendment

(*l*) 19 & 20 Vict. c. 97.

(*m*) *Roddan* v. *Morley*, 1 De G. & J. 1; cf. *Pears* v. *Laing*, L. R., 12 Eq. 42.

Act, 1856 (*n*). An acknowledgment to be sufficient within the 5th section of the act of Will. 4 need not amount to a promise to pay, and need not be made to the creditor.

REVIVAL OF RIGHTS TO REAL PROPERTY BARRED BY THE STATUTE OF LIMITATIONS.

(3 & 4 *Will.* 4, *c.* 27.)

As a general rule, title to land is barred after a lapse of twenty years from the time when the right of action accrued to the claimant, or to the party through whom he derives title (sect. 2).

But by sect. 14,—"When any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same; and the right of such last-mentioned person, or any person claiming through him, to make an entry of distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

(*n*) *Moodie* v. *Bannister*, 4 Drewry, 432.

In such a case the statute runs again from the time when the acknowledgment was executed or signed, and not from the period at which it bears date (*o*). The acknowledgment, which must be made to the person entitled or his agent (and not to any third person), need not be any particular form provided an admission of ownership can be fairly implied. An answer in Chancery is a sufficient admission by its maker (*p*), so also is an affidavit or a schedule (*q*).

REVIVAL OF CHARGES AND LEGACIES.

(3 & 4 *Will.* 4, *c.* 27.)

The 28th section of this act is as follows:—"When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or the person claiming through him; and in such case no such suit shall

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(*o*) *Jaynes* v. *Hughes*, 10 Ex. 430.
(*p*) *Goode* v. *Job*, 1 E. & E. 6.
(*q*) *Blair* v. *Nugent*, 3 Jones & Lat. 677.

be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, were given."

The 40th section is as follows:—"After the said thirty-first day of December, one thousand eight hundred and thirty-three, no action or suit, or proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action, or suit or proceeding, shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given." By the 13th section of 23 & 24 Vict. c. 38, these principles were extended to claims to the property of persons dying intestate.

By the 42nd section of the act it is enacted, that "after the said 31st day of December, 1863, no arrears of rent or of interest in respect of any money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered

by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent."

PRESCRIPTIVE RIGHTS.

(2 & 3 *Will.* 4, *c.* 71.)

By the 1st section of this act it is provided, that no claim by custom, prescription, or grant, to any right of common or profit *à prendre* from or upon any lands belonging to the Crown, or any corporation aggregate or sole, shall, with certain exceptions, be defeated after thirty years' uninterrupted enjoyment, by showing title prior to that period; and, after sixty years, such enjoyment shall constitute an indefeasible title, unless it be proved to have been under an express agreement by deed or writing.

The 2nd section provides that, in similar cases of disputed easements issuing out of similar demesnes, a title shall not be barred by evidence only that it began at a time prior to twenty years previously; and makes the prescription indefeasible after forty years of uninterrupted enjoyment, unless it be shown to have been under an agreement by deed or writing.

The 3rd section makes a right of user of light similarly indefeasible after twenty years of actual enjoyment, unless under an agreement by deed or in writing.

REPRESENTATIONS OF CHARACTER.

(9 *Geo.* 4, *c.* 14, *s.* 6.)

"No action shall be brought whereby to charge any person upon or by reason of any representation or assurance, made or given, concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

Many other cases might be cited, in which the legislature has made written evidence the only admissible kind of evidence, to the total exclusion of even the most direct oral evidence. But the above enactments are those which are of the most constant practical recurrence, and which have therefore been selected, on due deliberation, as the most suitable for the dimensions of the present work.

CHAPTER VI. (*a*)

ON THE INADMISSIBILITY OF EXTRINSIC EVIDENCE TO CONTRADICT OR VARY WRITTEN EVIDENCE.

WHEN written evidence is primary, and not merely substitutionary, in character—or, in other words, when it is made by statute or common law the best evidence—it is clear that the principle of a fundamental rule would be destroyed if a party were allowed to contradict such evidence, or to vary it substantially by the introduction of oral or other extrinsic evidence.

Therefore it is an established and inflexible rule that—

> Extrinsic evidence is inadmissible to contradict, add to, subtract from, or vary, the terms of a written instrument.

Thus, where a contract is required by statute to be in writing, or where it has been reduced to writing by the voluntary act of the parties to it; as long as the writing is producible, it is the only admissible evidence of the terms of the contract.

(*a*) The provisions of the Indian Law corresponding to this and the following chapter will be found in the Indian Evidence Act, ss. 92—100, coupled with ss. 62—72 of the Indian Succession Act, 1865 (X. of 1865).

Neither party can show that, before the contract was reduced to writing, the parties agreed to a term which does not appear in the writing, and which is clearly repugnant to its provisions; for all such antecedent oral terms are merged in the express language of the writing. Similarly, neither party can show that, after the contract was reduced to writing, the parties agreed to a new term, which is also repugnant to the terms of the written agreement, unless such subsequent agreement amount to an entire or partial dissolution of the former contract, or to a new contract founded on a new consideration.

The general rule (*b*) operates thus:—A contract, which is valid without writing, will, if put into writing, be construed strictly according to the terms of such writing. No new term can be annexed to it, as impliedly contained in it before it was reduced into writing, or while it was being reduced into writing, if such parol term contradict or vary a written term; but the written contract may be wholly or partially waived before breach, and a new written or verbal contract substituted for the erased term of the original contract; and then the residue of the original contract will be construed cumulatively with the new subsequent contract. Thus, there will be no contradiction or variance of the original contract, but merely, first, the erasure of a term; and, secondly, not the insertion, but the annexation, of a new contract. In short, the original contract does not suffer

(*b*) Cf. *Goss* v. *Lord Nugent*, 5 B. & Ad. 64.

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a contradiction, but first loses a term, and then gains a consistent addition and supplement.

But where the subsequent contract incorporates portions of the original contract, and amounts to a waiver of the rest, the subsequent contract is the only one subsisting between the parties, and if dealing with a subject matter, where the law requires a writing, such subsequent contract must be in writing. Therefore, where the plaintiffs agreed in writing with the defendant to let him a public-house, as tenant from year to year, with the option on his part to call for a lease for twenty-eight years, upon the terms, among others, that if he sold the lease for more than 1,200*l.* he was to give the plaintiffs half the excess, and subsequently, by verbal agreement, a lease was granted, the terms of which differed materially from those stipulated for in the written agreement, but the parties never abandoned the agreement as to the division of the excess of the purchase-money, and the defendant having sold the lease for 2,500*l.* the plaintiff sued him for a moiety of the 1,300*l.*, the excess of the purchase-money over the 1,200*l.*, it was held by the Court of Exchequer that the original agreement in writing was entirely superseded, and that the agreement under which the lease was taken was the verbal one of which one term was the stipulation in the original contract as to the excess of the purchase-money; and that as the agreement was not in writing, as required by the Statute of Frauds, the plaintiffs were not entitled to recover (*c*). Parol evidence is admissible to show

(*c*) *Sanderson* v. *Graves*, 23 W. R. 797; L. R., 10 Ex. 234.

that after signing a document the defendant assented to certain alterations made by the plaintiff before it was signed by the latter, for such evidence does not vary the contract, but only proves the condition of the document when it first became a contract (*d*).

It is an undoubted principle that extrinsic evidence is inadmissible to contradict or vary a written instrument, but it is impossible to lay down as a general rule that extrinsic oral evidence is inadmissible to prove either the entire or partial dissolution of the original contract; or the substitution or annexation of a new verbal contract. But wherever it is attempted to superadd an oral to a written contract, there must be clear evidence of the actual words used (*e*).

With regard to any contract which the parties have voluntarily put into writing, it is competent to them "at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement" (*f*). But with regard to contracts which the law requires to be in writing, it is necessary to consider the language of the particular statute. Thus, it has often been questioned whether a con-

(*d*) *Stewart* v. *Eddowes*, L. R., 9 C. P. 311; 43 L. J., C. P. 204; 22 W. R. 534.

(*e*) Per James, L. J., *Thomson* v. *Simpson*, 18 W. R. 1091.

(*f*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 58.

tract, within the Statute of Frauds, can be waived and abandoned, before breach, by a subsequent agreement not in writing. It may be desirable to trace concisely the curious uncertainty of the law on this head.

The point arose soon after the statute was passed, and was decided shortly by the Lord Keeper in the affirmative (*g*); but the facts of the case are wanting; and no reasons are assigned, nor does the point seem to have received due consideration. Lord Hardwicke, in two cases, expressed a strong opinion that an interest in land, under a written contract within the statute, could not be waived by naked parol without writing; for an agreement to waive a purchase contract is as much an agreement concerning lands as the original contract (*h*). But this doctrine has been impugned by later authorities. Thus, in *Goss* v. *Lord Nugent* (*i*), where the point arose, although it was not necessary to decide it, Lord Denman, in commenting on the 3rd section of the Statute of Frauds, said:—"As there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing."

(*g*) *Gorman* v. *Sailsbury*, 1 Vern. 239.

(*h*) *Buckhouse* v. *Crossby*, cited 3 T. R. 591; *Bell* v. *Howard*, 9 Mod. 305.

(*i*) 5 B. & Ad. 58.

But, in a later case, his lordship appears to have doubted the accuracy of his earlier opinion (*k*); and in a case, shortly subsequent, in the Common Pleas, Tindal, C. J., showed a disposition to adopt, to its full extent, the reasoning of Lord Hardwicke (*l*). It appears also, from a still later case, that Lord Denman himself had qualified or abandoned the view which he held in *Goss* v. *Lord Nugent*. This case is that of *Stead* v. *Dawber* (*m*), where the action was on a contract for the sale of goods within the 17th section of the Statute of Frauds; and the plaintiff declared on a written agreement, by which the goods were to be delivered on a day certain, and then went on to aver an oral agreement that the delivery should be postponed to a later day, and breach the non-delivery on such later day. The defendant pleaded the want of a written agreement; and the point for the court was, whether the oral agreement was to be regarded as a variation of the written agreement, or as the introduction of an immaterial term. The court gave judgment for the defendant, on the ground that time was of the essence of the contract, and therefore could not be varied by parol; but it seems also to have been understood that neither could the original contract have been waived by parol. Lord Denman said:—"Independently of the statute, there is nothing to prevent the total waiver or the partial alteration of a written contract, not under seal, by parol agreement; and, in contem-

(*k*) *Harvey* v. *Grabham*, 5 A. & E. 74.
(*l*) *Stowell* v. *Robinson*, 3 Bing. N. C. 937.
(*m*) 10 A. & E. 57.

plation of law, such a contract so altered subsists between these parties; but the statute intervenes, and, in the case of such a contract, takes away the remedy by action." It is right to observe that this case has been cited with general approbation by Parke, B. (*n*).

In a later case the Court of Exchequer Chamber held that a subsequent oral agreement cannot be "allowed to be good," within the 17th section, for any purpose whatever (*o*).

The doctrines of the courts of equity in rectifying mistakes in deeds, so as to make them accord with the real agreement between the parties, may here be alluded to as an exception to the general rule under consideration. Thus, a lease which contained a larger quantity of land than was intended to be demised has been rectified as to the overplus (*p*). So also "where (*q*) a settlement purports to be in pursuance of articles entered into before marriage, and there is any variance, then no evidence is necessary in order to have the settlement corrected; and although the settlement contains no reference to the articles, yet if it can be shown that the settlement was intended to be in conformity with the articles, yet if there is clear and satisfactory evidence showing

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(*n*) *Marshall* v. *Lynn*, 6 M. & W. 109.

(*o*) *Noble* v. *Ward*, L. R., 1 Ex. 117; 14 W. R. 397; 4 H. & C. 149; cf. *Moore* v. *Campbell*, 10 Ex. 233.

(*p*) *Mortimer* v. *Shortall*, 2 Dru. & War. 363; *Murray* v. *Parker*, 19 Beav. 305.

(*q*) Per Lord Cranworth, *Bold* v. *Hutchinson*, 5 De G. M. & G. 568.

that the discrepancy had arisen from a mistake, the court will reform the settlement and make it conformable to the real intention of the parties." Even where there are no articles the court will interfere to reform a settlement so as to make it correspond with the intention of the parties (*r*), if there has been a mistake common to both, and if it can be proved to the satisfaction of the court in what the mistake consists. It has been said that the rectification of a settlement "is a question of evidence, and evidence alone" (*s*): and this applies equally to other deeds. The real agreement between the parties "must be established by evidence, whether written or parol; if there be no previous agreement in writing, parol evidence is admissible to show what the agreement really was; if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly; if ambiguous, parol evidence may be used to explain it in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument" (*t*). But it seems that there is a disinclination to act upon parol evidence alone (*u*), and an opinion has been expressed that it would be dangerous to set aside a portion of a deed, which deed has, as to the rest, been

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(*r*) *Marquis of Exeter* v. *Marchioness of Exeter*, 3 My. & Cr. 321.

(*s*) Per Lord Romilly, M. R., *Earl of Bradford* v. *Earl of Romney*, 10 W. R. 416; 30 Beav. 438.

(*t*) Per Lord Romilly, M. R., *Murray* v. *Parker*, 19 Beav. 308.

(*u*) *Mortimer* v. *Shortall*, 2 Dru. & War. 374.

acted upon for a considerable time, upon no other testimony than that of the persons who are bound by the deed, who executed the deed, and who are to benefit by the deed being altered (*y*). Where there is a mistake in a will caused by the inadvertence of those who prepared it, and it does not in consequence carry out the testator's intentions, still the court will not correct it (*z*). Wherever there is an equitable presumption *donec in contrarium probetur*, extrinsic evidence is admissible to rebut the presumption; but when the presumption arises from the construction of the words of an instrument, *quà* words, no extrinsic evidence can be admitted (*a*). As to equitable presumptions, *vide supra*, pp. 74—77.

In returning to the general question of the admissibility of extrinsic evidence to affect written instruments, it is to be observed that a written instrument not under seal may be released or avoided by evidence of an intrinsically inferior nature; but a deed must be released by deed, and cannot be avoided by parol (*b*). A will must be revoked with the same solemnities which are required to give it validity originally.

The completion of a contract under a written

(*y*) *Bentley* v. *Mackay*, 10 W. R. 595.

(*z*) *Newburgh* v. *Newburgh*, 5 Mad. 364.

(*a*) Per Wood, V.-C., *Barrs* v. *Fewkes*, 33 L. J., Ch. 522; 2 H. & M. 60; citing *Coote* v. *Boyd*, 2 Bro. C. C. 321; cf. *Weal* v. *Rea*, 2 Russ. & M. 267.

(*b*) *Unumquodque ligamen dissolvitur eodem ligamine quo et ligatur.*

agreement may be proved by oral evidence of performance, or of a discharge from performance. The payment of money, under such a contract, may be shown either by a written receipt, or oral evidence of payment. Both modes of proof are primary in their nature, and therefore, in the absence of any rule which requires written proof, are concurrently and equally admissible forms of *primâ facie* evidence. It is to be observed, also, that performance of a contract under seal is proveable by parol. Such evidence does not release or avoid the original contract; it merely shows that it has been satisfied, and leaves its original validity unimpeached.

Although as a general rule there is no release of a debt in equity unless released in law, and mere voluntary declarations indicating the intention of a creditor to forgive or release a debt, if they are not evidence of a release at law, do not constitute a release in equity (*c*); yet there may be considerations which would prevent the debt from being enforced in a court of equity, although it might be subsisting at law (*d*); and where a voluntary declaration by a creditor has been acted upon by the debtor, the former will be bound to make his representation good (*e*).

On similar principles, it is allowable to show that a written contract, whether under seal or not, never existed legally; or that it was formed under circum-

(*c*) *Cross* v. *Sprigg*, 6 Hare, 552.

(*d*) Per Turner, L. J., *Taylor* v. *Manners*, L. R., 1 Ch. 56; 33 L. J., Ch. 128.

(*e*) *Yeomans* v. *Williams*, L. R., 1 Eq. 184; 33 L. J., Ch. 283.

stances which rendered it void *ab initio*. Thus, a defendant in an action on a written contract, may plead that it was void, as being made under circumstances of fraud, duress, or for illegal consideration; and he may prove such a plea by any species of parol evidence (*f*). He may also show that a bill or promissory note, on which he is liable *primâ facie*, was obtained from him without consideration, for the purpose of being discounted by the plaintiff or by a third party, between whom and the plaintiff there is a privity; or he may show any other similar failure of consideration; but he may not give parol evidence, which goes merely to limit his liability (*g*). Generally, on all written contracts not under seal extrinsic evidence will be admissible to support a plea of failure, or want of consideration: but in a deed a consideration is, in the absence of fraud, conclusively presumed.

Where it is distinctly stated in a deed that it is made in consideration of a sum of money paid down at the time of execution, a party is estopped from showing that no money passed (*h*); although he may show that a different consideration passed (*i*); but, where the payment of the consideration is not stated conclusively and unambiguously in the deed, the non-payment may be proved by extrinsic evidence. Thus, where a deed recited that a releasee had agreed to pay a certain sum, and then referred to it as "the

(*f*) *Robinson* v. *Lord Vernon*, 7 C. B., N. S. 231.
(*g*) *Abrey* v. *Crux*, 39 L. J., C. P. 9; 18 W. R. 63.
(*h*) *Rowntree* v. *Jacob*, 2 Taunt. 141.
(*i*) *Smith* v. *Battams*, 26 L. J., Ex. 232.

said sum being now so paid as hereinbefore mentioned;" then followed words of reference which were equally applicable to the sum in question and other sums mentioned; then an acknowledgment in the body of the deed of the receipt of such sums; and a receipt for the first sum was indorsed on the deed: it was held that the acknowledgment in the recital was ambiguous; that the receipt in the body of the deed was equally ambiguous; and that the indorsed receipt constituted only *primâ facie* evidence. On these grounds, a plaintiff in assumpsit was held not to be estopped by the deed from showing by parol evidence that the sum in question, the substantial consideration money, had never been paid (*k*).

It is also allowable to prove, by extrinsic evidence, a larger or supplementary consideration; provided it be not inconsistent with the consideration named in the deed (*l*). Thus, a deed purporting to be founded on a money consideration may be proved to have been founded also on any other good consideration, such as marriage (*m*); or, not purporting to be founded on any consideration it may be shown to have been founded on a valuable consideration (*n*); or, purporting to be founded on natural affection, it may be shown to have been founded also on a valuable consideration, at least to rebut a charge of fraud (*o*). In

(*k*) *Lampon* v. *Cooke*, 5 B. & Ald. 606.
(*l*) *Clifford* v. *Turrell*, 1 Y. & C. (Ch.), 138.
(*m*) *Villen* v. *Beaumont*, 2 Dyer, 146 *a*.
(*n*) *Peacock* v. *Monk*, 1 Ves. sen. 128.
(*o*) *Gale* v. *Williamson*, 8 M. & W. 405.

all such cases the rule which does not permit written evidence to be contradicted or varied by extrinsic evidence remains unaffected, because the extrinsic evidence is received only to annex an incident which is not clearly excluded by the written instrument.

In *R.* v. *Scammonden* (*p*), the court held it clear that a "party might prove other considerations than those expressed in the deed;" and allowed extrinsic parol evidence to be given to show that the actual consideration paid was thirty pounds, although the consideration named in the deed and the indorsed receipt was twenty-eight pounds. So, in *R.* v. *Inhabitants of London* (*q*), the same court held that parol evidence was admissible to import a consideration which converted an agreement of hiring as a servant into an agreement to serve as an apprentice. But, in the former case, the parol consideration appears to have been treated as explanatory of, and not as additional to, the expressed consideration; and in the latter case, Lord Kenyon stated that "the parol evidence was not offered to contradict the written agreement, but to ascertain an independent fact." Accordingly, it has been stated that in both these cases the parol evidence was received, not to contradict a written agreement, but to ascertain an independent fact explanatory of it (*r*).

So, it seems to have been assumed, as it is stated

(*p*) 3 T. R. 474.
(*q*) 8 T. R. 379.
(*r*) Per Williams, J., *R.* v. *Stoke-upon-Trent*, 5 Q. B. 308.

in an equity case, that "a deed, apparently voluntary, may be supported by collateral evidence showing a contract for value" (*s*).

It has been held that parol evidence of a valuable consideration, not named in the deed, is admissible to rebut a charge that it was obtained on gratuitous consideration, with intent to defraud creditors; but it seems to have been thought, in this case, that it would not have been admissible to annex an unexpressed consideration under ordinary circumstances (*t*). Alderson, B., referred to the rule as laid down by Lord Hardwicke, in *Peacock* v. *Monk* (*u*), that "where any consideration is mentioned as of love and affection only, if it is not also said, 'and of other considerations,' you cannot enter into any proof of any other: the reason is, because it would be contrary to the deed, for, when the deed says it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other."

A policy of insurance cannot be contradicted by an antecedent written agreement, as where a defendant attempts to show, by such an agreement, that the risk was to begin at a place and date subsequent to those which are named in the policy (*x*); nor can a charter party be varied by a parol agreement, sub-

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(*s*) *Pott* v. *Todhunter*, 2 Collyer, 84.
(*t*) *Gale* v. *Williamson*, 8 M. & W. 405.
(*u*) 1 Ves. sen. 128.
(*x*) *Kame* v. *Knightley*, Skin. 54.

stituting one place of destination for another (*y*), unless such an agreement can be treated, not as a new term, but as a new and distinct contract (*z*).

Where the fact sought to be added is formal, and not of the essence of the contract, the rule does not appear to apply. Thus, a deed may be proved to have been delivered either before or after the day on which it purports to have been delivered (*a*), and parol evidence is admissible to show that there was a mistake in the date of a charter party (*b*), a deed (*c*) or a will (*d*). But the day appointed in a written contract for the performance of a certain act, such as the completion of a purchase, cannot be altered by extrinsic evidence (*e*).

Parol evidence is admissible to prove that there has been no default within the meaning of a mortgage deed (*f*).

The admissibility of extrinsic evidence to affect wills will be treated in the following chapter. Some instances will now be given of the application of the rule at present under discussion to ordinary written instruments not under seal.

(*y*) *Leslie* v. *De la Torre*, cited in *White* v. *Parker*, 12 East, 383.

(*z*) *White* v. *Parker*, ib.

(*a*) *Goddard's case*, 2 Rep. 4 *b*.

(*b*) *Hall* v. *Cazenove*, 4 East, 476.

(*c*) *Payne* v. *Hughes*, 10 Ex. 430.

(*d*) *Reffell* v. *Reffell*, 35 L. J., P. & M. 121; L. R., 1 P. & D. 139.

(*e*) *Stowell* v. *Robinson*, 3 Bing., N. C. 928.

(*f*) *Albert* v. *Grosvenor Investment Co.*, L. R., 3 Q. B. 123; 37 L. J., Q. B. 24.

Where the printed conditions of sale at an auction, signed by the auctioneer, described the time and place of the sale, and the number and kind of timber sold, but said nothing about the weight, evidence of the auctioneer's statements at the sale was held inadmissible to prove that a certain weight had been warranted. Lord Ellenborough, C. J., said: "There is no doubt that the parol evidence was properly rejected. The purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, I know of no instance where a party may not by parol testimony superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect. There is no doubt that the warranty as to the quantity of the timber would vary the agreement contained in the written conditions of sale (*g*).

This case is general in its application; but the rule was probably stated and observed more inflexibly, because the agreement was clearly within the Statute of Frauds; but it is distinguishable from a later case, which decided that unsigned conditions of sale are only in the nature of a personal memorandum, which may be varied at any time before the sale by an express notice to a purchaser (*h*).

Extrinsic evidence may be given of a collateral oral agreement which constitutes a condition upon

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(*g*) *Powell* v. *Edmunds*, 12 East, 6.
(*h*) *Eden* v. *Blake*, 13 M. & W. 614.

which the performance of a written agreement is to depend (*i*); and where there is a distinct collateral oral agreement between the parties, it is immaterial whether it precedes or is contemporaneous with the written agreement (*k*).

Where a contract for the sale of goods specified no time for removing them, it was held that oral evidence could not be given of a condition that they should be removed immediately (*l*).

Again, a written contract to supply flour of X. S. quality, cannot be varied by parol evidence to show that by X. S. quality, the parties intended X. S. S. quality (*m*). So, a written contract to supply foreign refined oil cannot be varied by oral evidence that the parties agreed to consider an inferior kind of oil a foreign refined oil (*n*). So, a policy of insurance cannot be varied by evidence of oral or written declarations which were made to the insurer, but not embodied in the policy (*o*). And the valuation of a ship in a valued policy cannot, in the absence of fraud or wagering, be questioned (*p*).

Where a deed conveys Blackacre, as specified in a schedule and map annexed, parol evidence will not be received to show that Whiteacre, which is not

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(*i*) *Wallis* v. *Littell*, 11 C. B., N. S. 369.

(*k*) Per Erle, C. J., *Lindley* v. *Lacey*, 17 C. B., N. S. 586.

(*l*) *Greaves* v. *Ashlin*, 3 Camp. 426.

(*m*) *Harnor* v. *Groves*, 15 C. B. 667.

(*n*) *Nichol* v. *Godts*, 10 Exch. 191.

(*o*) *Halhead* v. *Young*, 6 E. & B. 312.

(*p*) *North of England Ship Insurance Co.* v. *Armstrong*, 39 L. J., Q. B. 81; L. R., 5 Q. B. 244; 22 W. R. 520.

mentioned in the schedule or map, has always been part of Blackacre (*q*).

Where several classes of goods, of superior and inferior quality, are comprised under one generic name, and a written contract is made to supply goods of that name, the contract will be fulfilled by a supply of any goods to which that name is applicable; and parol evidence will not be received to show that the parties intended that goods of the superior quality should be supplied (*r*).

A person who appears on the face of a written contract to have contracted as a principal, cannot show by extrinsic evidence that he contracted as an agent (*s*); nor can he show that a contract, signed by him expressly as a principal, was made by him as an agent for the party to the action (*t*). But, if the contract appear to have been made merely in his own name, without addition, it may be shown that he was in fact an agent for another (*u*); and this when the name of the principal is disclosed at the time (*v*). This is an exceptional case; for generally extrinsic evidence is inadmissible to show that a person not a party to a written instrument on the face of it, was, in fact, a party (*x*). On the same

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(*q*) *Barton* v. *Dawes*, 10 C. B. 261.
(*r*) *Smith* v. *Jeffryes*, 15 M. & W. 561.
(*s*) *Higgins* v. *Senior*, 8 M. & W. 834.
(*t*) *Humble* v. *Hunter*, 12 Q. B. 310.
(*u*) Per Patteson, J., ibid.
(*v*) *Calder* v. *Dobell*, L. R., 6 C. P. 439; 40 L. J., C. P. 89; 19 W. R. 409.
(*x*) *Robinson* v. *Rudkins*, 26 L. J., Ex. 56.

principle, evidence of a custom cannot be received to vary the express language of a contract (*y*).

Writings within the Statute of Frauds are construed still more stringently; and parol evidence is still more inadmissible, than even in cases at common law, to contradict or vary the terms of the written contract. The principles by which such contracts are governed have been considered at length; and it is therefore unnecessary to prolong this chapter by a more elaborate treatment of them (*z*).

(*y*) *Hudson* v. *Clementson*, 18 C. B. 213.

(*z*) Supra, pp. 375 and 402, and see *Goss* v. *Lord Nugent*, 5 B. & Ad. 58; *Stead* v. *Dawber*, 10 A. & El. 17.

CHAPTER VII.

ON THE ADMISSIBILITY OF EXTRINSIC EVIDENCE TO EXPLAIN WRITTEN EVIDENCE.

THE second branch of the principle of evidence, which was discussed in the preceding chapter, is contained in the rule that extrinsic evidence is admissible to explain written evidence (*a*).

First, parol evidence is admissible to prove that that which purports to be a deed or writing of a certain kind has been made under circumstances which deprive it of all such effect. Thus it may be shown that a written instrument purporting to be a contract between the parties was not so intended (*b*), or that it was made subject to a condition through the non-fulfilment of which no contract has ever arisen (*c*); and on the same principle Sir J. Wilde held that it might be shown that a duly executed codicil was not intended by the testator to be operative (*d*). So it may be shown that an instrument, which appears to be a binding one to take effect immediately, was delivered as an escrow, and was not intended to

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(*a*) As to the law in India, see supra, p. 398.

(*b*) *Rogers* v. *Hadley*, 2 H. & C. 227.

(*c*) *Pym* v. *Campbell*, 6 E. & B. 370; *Thomas* v. *Clarke*, 18 C. B. 662.

(*d*) *Lister* v. *Smith*, 3 S. & T. 282.

operate until certain things were done (*e*); and if an oral arrangement was made as a mere suspension of a written agreement, it will be admissible in evidence (*f*); and, on the same principle, when an agreement does not declare the time from which and to which it is to operate, parol evidence is receivable to supply the ambiguity (*g*). If a written agreement has been treated as incomplete, parol evidence of a subsequent further and fuller agreement may be given (*h*).

Evidence is admissible to show that immediately before the written agreement was signed a distinct oral arrangement was made, adding to, but not inconsistent with, the former (*i*). Whether the oral agreement precede or be contemporaneous with the written agreement is of no consequence, provided it be on a distinct collateral matter (*k*). Thus a consignor of goods may prove any additional contract which does not contradict or vary the written one (*l*).

The law recognizes, according to the authority of Lord Bacon, two kinds of ambiguity in written instruments, viz., patent and latent. A patent ambiguity is said to exist when the instrument, on its face, is unintelligible, as where a devise is made, and

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(*e*) *Davis* v. *Jones*, 17 C. B. 625.

(*f*) *Wallis* v. *Littell*, 11 C. B., N. S. 369.

(*g*) *Davis* v. *Jones*, 17 C. B. 625.

(*h*) *Johnson* v. *Appleby*, L. R., 9 C. P. 158; 43 L. J., C. P. 146; 22 W. R. 515.

(*i*) *Lindley* v. *Lacey*, 17 C. B., N. S. 578.

(*k*) Per Erle, C. J., ibid.

(*l*) *Malpas* v. *London and South Western Railway*, H. & R. 227.

a blank appears in the place of the name of the devisee. In such a case, extrinsic evidence is wholly inadmissible to show who was intended to be the devisee; for, if it were admissible, it would be tantamount to permitting wills to be made verbally, and would also be a violation of the principle, that where a contract, or other substantial matter of issue, has been reduced to writing, the writing is the only admissible proof of such contract or transaction; but intrinsic evidence is admissible in the case of patent ambiguities (*m*).

Where a written instrument is intelligible on its face, but a difficulty arises from extrinsic circumstances in understanding and carrying out its terms, the ambiguity is said to be latent, and extrinsic evidence will be strictly admissible to explain and apply those circumstances, so as to reconcile them to the terms of the writing. Such evidence, however, is admissible only to explain, and not to vary. Thus, in *Goldshede* v. *Swan* (*n*), Parke, B., said: "You cannot vary the terms of a written instrument by parol evidence: that is a regular rule; but if you can construe an instrument by parol evidence, when that instrument is ambiguous, in such a manner as not to contradict, you are at liberty to do so."

These introductory remarks may be appropriately closed by quoting the following remarks of Sir James Wigram (*o*): "A written instrument is not

(*m*) *Edmunds* v. *Waugh*, 4 Drew. 275.

(*n*) 1 Ex. 158.

(*o*) On Extrinsic Evidence in aid of the Interpretation of Wills, 2nd ed. p. 130.

ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who cannot read, nor can they be ambiguous merely because the court which is called upon to explain them may be ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used."

The leading principles of the general rule will now be considered under those subdivisions which occur most frequently in practice.

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1. Where a written instrument is in a foreign language, or where it contains technical words of trade or custom, the ambiguity will be treated as latent; and oral or other extrinsic evidence will be received to inform the court of the sense of the instrument. Thus, in *Shore* v. *Wilson*, Parke, B., said: "I apprehend that there are two descriptions of evidence . . . which are clearly admissible for the purpose of enabling a court to construe any written instrument, and to apply it practically. In the first place, there is no doubt that not only when the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent where technical

words or peculiar terms, or, indeed, any expressions are used, which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes. . . . This description of evidence is admissible in order to enable the court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate" (*p*).

Accordingly, extrinsic evidence was received in this case to explain the meaning of the phrase, "Godly preachers of Christ's Holy Gospel," and to show that according to the usage of a sect to which the grantor belonged, the grant was intended for that sect. So, such evidence has been received to explain the meaning of the phrase "across a country" in a steeplechase transaction (*q*); that "close," by local usage, signified "a farm" (*r*); that "a thousand" means a hundred dozen (*s*); that a contract to pay an actor so much a week was a contract to pay only during the theatrical season (*t*). So, also, it is received to explain the local meaning of "good" or "fine" barley (*u*); of a month, whether lunar or calendar (*x*); the amount indicated under a contract to buy "your wool" from

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(*p*) 9 Cl. & F. 555.
(*q*) *Evans* v. *Pratt*, 3 M. & G. 759.
(*r*) *Richardson* v. *Watson*, 4 B. & Ad. 799.
(*s*) *Smith* v. *Wilson*, 3 B. & Ad. 278.
(*t*) *Grant* v. *Maddox*, 15 M. & W. 737.
(*u*) *Hutchinson* v. *Bowker*, 3 B. & Ad. 278.
(*x*) *Simpson* v. *Margitson*, 11 Q. B. 32.

a party (*y*); and, generally, in all cases where the signification of a particular phrase is unsettled and variable in its nature, and where it is liable to have different senses attached to it in different places. But it is essential in all such cases that the peculiar sense should be of a public and popular kind; and it will not be allowable to show that a party used the term in a sense opposed to its local and conventional usage. Thus, where a testatrix was in the habit of treating certain shares as "double shares," evidence of this was not allowed to influence the construction of her will, Page Wood, V.-C., saying, "I must take things to be as I find them, and cannot allow particular expressions, said to have been made use of by this testatrix, to prevail, when they are not the general language universally applicable to the subject-matter" (*z*).

2. Extrinsic evidence is admissible to explain a latent ambiguity which is raised, not by any intrinsic obscurity of language, but by a difficulty created by extrinsic circumstances in applying the terms of a written instrument to such extrinsic circumstances. Thus, where it is shown that words apply equally to two different things or subject-matters, extrinsic evidence is admissible to show which of them was the thing or subject-matter intended (*a*). A familiar illustration of this doctrine is cited from Lord Bacon,

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(*y*) *Macdonald* v. *Longbottom*, 28 L. J., Q. B. 293; 29 L. J., Q. B. 256.

(*z*) *Millard* v. *Bailey*, L. R., 1 Eq. 382; 35 L. J., Ch. 312.

(*a*) Per Alderson, B., *Smith* v. *Jeffryes*, 15 M. & W. 562.

where a man devises his manor of S. to J. F., and it turns out that he has two manors answering the description, *e.g.*, North S. and South S. In such cases it may be shown by extrinsic evidence, and even by declarations of the testator, which manor was intended to pass (*b*). But it is only in such cases that extrinsic evidence of a testator's intentions is admissible to explain; for, generally, all extrinsic evidence of a testator's intentions is inadmissible to aid the construction of his will (*c*). Where declarations of the testator are admissible, it is immaterial that they are made some time after the execution of the will (*d*), or before it (*e*), but they are never admissible to prove the contents of a will not before the court (*f*). Verbal statements made by a testator in and about the making of his will when accompanying acts done by him in relation to that subject, have been held admissible in evidence (*g*). A letter written to a testator by his solicitor, whether by way of advice or statement, is inadmissible for the purpose of construction of the will (*h*).

A witness cannot be asked what a testator said about property, not distinctly devised, in order to show it was intended to pass with other property

(*b*) *Doe* v. *Needs*, 2 M. & W. 129; *Ricketts* v. *Turquand*, 1 H. L. Cas. 472.

(*c*) *Doe* v. *Hiscock*, 5 M. & W. 369; cf. *Stanley* v. *Stanley*, 2 J. & H. 491.

(*d*) *Doe* v. *Allen*, 12 A. & E. 455.

(*e*) *Langham* v. *Sandford*, 19 Ves. 649.

(*f*) *Quick* v. *Quick*, 3 S. & T. 442.

(*g*) *Johnson* v. *Lydford*, L. R., 1 P. & M. 546; 16 W. R. 1130.

(*h*) Per James, L. J., *Wilson* v. *O'Leary*, L. R., 7 Ch. 456; 41 L. J., Ch. 342; 20 W. R. 501.

devised (*i*). Where the testator was in the habit of calling persons by nicknames or wrong names, and these names appear in his will, they can only be explained and construed by the aid of evidence to show the sense in which he used them, just as if his will was written in cipher or in a foreign language (*k*). Therefore, a bequest to Mrs. G. was upheld by evidence that the testator was in the habit of calling a Mrs. Gregg, Mrs. G. (*l*). Here the evidence was a fact, not a declaration. So, parol evidence is admissible to show what lands of the testator were reputed to lie in a parish, in order to construe a devise of lands in the parish (*m*). But where a testatrix, after a specific devise to "my niece, A. B." (who was in fact her husband's niece), left her residue to "all my nephews and nieces," Jessel, M. R., refused to admit A. B. to participate in the residue (*n*). Where a testator appointed his "nephew A. B." executor and his own nephew and his wife's nephew both bore that name, extrinsic evidence was admitted to show that the latter was the person designated (*o*). To identify the person or thing intended as the object or subject of the testator's bounty the court may enquire into every material fact, and all extrinsic circumstances known to the testator as to his family

(*i*) *Doe* v. *Hubbard*, 15 Q. B. 228.

(*k*) Per Lord Abinger, *Doe* v. *Hiscock*, 5 M. & W. 368.

(*l*) *Abbott* v. *Morice*, 3 Ves. 148; cf. *Lee* v. *Pain*, 4 Hare, 251.

(*m*) *Anstee* v. *Nelms*, 1 H. & N. 225.

(*n*) *Wells* v. *Wells*, L. R., 18 Eq. 204; 43 L. J., Ch. 381; 22 W. R. 893.

(*o*) *Grant* v. *Grant*, 39 L. J., P. & M. 17; L. R., 2 P. & D. 8; 18 W. R. 330; followed in *Grant* v. *Grant*, 39 L. J., C. P. 272; L. R., 5 C. P. 381; 18 W. R. 951.

and affairs: but extrinsic evidence of the testator's intention is admissible only in the event of there being more than one person or thing answering to the description he has used (*p*).

In an action arising out of a contract to accept goods which were to arrive by a particular ship, it appeared that there were two ships of the same name, and parol evidence was admitted to show which ship was meant (*q*). So, too, it has recently been held by the Court of Common Pleas, that extrinsic evidence is admissible to prove who is the buyer and who the seller in a memorandum or note under the 17th section of the Statute of Frauds (*r*).

In all cases where extrinsic evidence has been received to explain written evidence, it will appear that it has been received, not in the form of declarations of intention by parties, but in the form of collateral and surrounding facts, which, like every other species of presumptive evidence, may reasonably be connected with the substantial issue, and so form data to aid the court or jury (*s*). They must be related to the written evidence, and yet independent of it. They must not be personal declarations of a party, but distinct incidents, which may be presumed to have been present to the mind of the party, without wearing the suspicious form of oral statements. Thus the strict sense of a word is its legal sense; and if it be intelligible in this sense, it

(*p*) *Charter* v. *Charter*, 43 L. J., P. & M. 73 (House of Lords).
(*q*) *Raffles* v. *Wichelhaus*, 2 H. & C. 906.
(*r*) *Newell* v. *Radford*, L. R., 3 C. P. 52; 37 L. J., C. P. 1; 16 W. R. 79.
(*s*) *Smith* v. *Thompson*, 8 C. B. 44.

cannot be varied or explained by evidence that it was used by the party in a popular, still less in a peculiar sense. Therefore, if a man devise to his "children" and he has both legitimate and illegitimate children, only the former will take. Extrinsic evidence cannot be received to show that he intended that his illegitimate children should also take. But where there are no legitimate children to take, the illegitimate will take; or where there is a devise to children, and the evidence shows only one legitimate child, and children who are illegitimate, the latter will take equally with the former (*u*). In such a case the extrinsic evidence as a collateral fact is strictly admissible to explain a written instrument which would otherwise be insensible.

3. Usage or custom is also admissible to explain and control, but not to contradict, a written instrument, such as a contract. "It is admissible to explain what is doubtful; it is never admissible to contradict what is plain"(*x*). Therefore, wherever the language of a written instrument is so clear that there can be no reasonable ground for construing it as subject to a custom; or where, although the language is ambiguous, the custom itself is uncertain, the writing must be construed strictly according to its literal terms (*y*).

On the general principle, it has been held allowable to show that, by the custom of the country, a pro-

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(*u*) *Gill* v. *Shelley*, 2 Phill. 373; *supra*, p. 424.

(*x*) *Hall* v. *Janson*, 4 E. & B. 500; *Blackett* v. *Royal, &c. Company*, 2 C. & J. 244.

(*y*) *Re Stroud*, 8 C. B. 502; *Hurst* v. *Usborne*, 18 C. B. 144.

vision in a lease as to ten thousand rabbits, signified twelve hundred to the thousand (*z*); that "acre" and "perch" mean one quantity in one county, and another quantity in another county (*a*). So usage is admissible to explain the phrase "regular turns of loading" (*b*). In such cases the customary meaning of an ambiguous term is for the jury; as where the question is whether "a month" signifies a lunar or calendar month by the custom of the district (*c*). But, unless such a custom be proved, a judge ought not to leave it to the jury to pronounce on the sense in which the term was used, but should himself construe the term according to its fixed legal or popular signification. Thus, in *Simpson* v. *Margetson* (*d*), where an auctioneer sued for a sum he was to receive by a written contract, only if he sold "within two months," it was held that, in the absence of admissible extrinsic evidence, this meant in point of law two lunar months, and that, unless the context, or the circumstances of the contract, showed that the parties meant two calendar months, "the conduct of the parties to the written contract alone was not admissible to withdraw the construction of a word therein, of a settled primary meaning, from the judge and transfer it to the jury."

So, generally, where there are two alternative

(*z*) *Smith* v. *Wilson*, 3 B. & Ad. 728.
(*a*) *Barksdale* v. *Morgan*, 4 Mod. 186.
(*b*) *Leidemann* v. *Schultz*, 14 C. B. 38.
(*c*) 11 Q. B. 23.
(*d*) *Fleming* v. *Fleming*, 1 H. & C. 242.

constructions, usage will be received to determine which is the right one (*e*).

Where a doubt is raised by evidence upon the meaning of a written contract, or where the contract contains words which have more than one meaning (*f*), extrinsic evidence is admissible of the usage or course of trade at the place where the contract is made, or where it is to be carried into effect, to explain or remove such doubt. So, also, where a similar doubt arises as to the *lex loci* by which such a contract is to be construed, evidence of usage will be received to determine the place. Thus, where the question was whether goods were to be liable to freight according to their weight at the place of shipment, or according to their expanded weight at the place of consignment, the terms of the charter-party were construed by extrinsic evidence that the usage was to measure the goods according to their weight at the place of shipment (*g*). In order to admit extrinsic evidence the phrase need not be on the face of it ambiguous (*h*).

Extrinsic evidence is also admissible to annex incidents to a written instrument, where such incidents are consistent with the reasonable intention of the writing. Such incidents fall generally within the definition of express or implied usage. In such cases the notoriety of the usage makes it an element

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(*e*) *Blackett* v. *Royal, &c. Company*, 2 C. & J. 250.

(*f*) *Buckle* v. *Knoop*, 36 L. J., Ex. 49 ; L. R., 2 Ex. 125; 15 W. R. 588.

(*g*) *Bottomley* v. *Forbes*, 5 Bing. N. C. 121.

(*h*) Per Blackburn, J., *Myers* v. *Sarl*, 3 E. & E. 319.

of the writing. Thus, where a written contract contained a stipulation that a party should "lose no time on his own account, and do his work well and behave himself in all respects as a good servant," extrinsic evidence was received to show that, by the custom of his trade, such a party was entitled to certain holidays (*i*). "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages" (*k*). "Mercantile contracts are very commonly framed in a language peculiar to merchants; the intention of the parties, though perfectly well known to themselves, would often be defeated, if the language were strictly construed according to its ordinary import in the world at large. Evidence, therefore, of mercantile custom and usage is admitted in order to expound it, and arrive at its true meaning. Again, in all contracts as to the subject-matter of which a known usage prevails, parties are found to proceed with the tacit assumption of those usages; they commonly

(*i*) *R.* v. *Stoke-upon-Trent*, 5 Q. B. 303.
(*k*) Per Parke, B., *Hatton* v. *Warren*, 1 M. & W. 475.

reduce into writing the special particulars of their agreement, but omit to specify those known usages which are included, however, as of course, by mutual understanding; evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing; partly implied or understood and unwritten. But in these cases a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to or inconsistent with the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less; neither in the construction of a contract among merchants, tradesmen, or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words, perfectly unambiguous in their ordinary meaning, are used by the contractors in a different sense from that. What words more plain than 'a thousand,' 'a week,' 'a day'? Yet the cases are familiar in which 'a thousand' has been held to mean twelve hundred; 'a week' only a week during the theatrical season; 'a day' a working day. In such cases the evidence neither adds to, nor qualifies, nor contradicts, the written contract—it only ascertains it by expounding the language"(*l*). So, there being in every

(*l*) Per Coleridge, J., *Browne* v. *Byrne*, 3 E. & B. 703.

voyage policy of insurance an implied warranty of seaworthiness, parol evidence is admissible to show the amount of seaworthiness required (*m*).

A few more illustrations will complete the outline of this doctrine. In *Browne* v. *Byrne*, a bill of lading specified a certain sum as payable for freight, and it was held that an indorsee, in an action for the amount, might give evidence of a customary deduction. The extrinsic evidence in this case, although bordering on repugnancy, was received because the bill of lading merely specified a sum certain for freight, without stipulating that it was to be free of all deductions. "If the bill of lading had expressed, or if from the language of it the intention of the parties could have been collected, that the freight at the specified rate should be paid free from all deductions, customary or otherwise, then it would have been repugnant to it to set up the usage (*n*).

So, under a contract to carry a full and complete cargo of molasses from London to Trinidad, evidence has been received to qualify the contract by showing that a cargo is full and complete, if the ship be filled with casks of the standard size, although there be smaller casks of other produce freighted in the same vessel (*o*).

So, where the defendants bought as brokers for a principal, whose name they did not disclose at the time of contract, it has been held that evidence of a custom will be admitted to show that in this case the

(*m*) *Burges* v. *Wickham*, 3 B. & S. 669.
(*n*) 3 E. & B. 703; cf. *Phillipps* v. *Briard*, 1 H. & N. 21.
(*o*) *Cuthbert* v. *Cumming*, 11 Ex. 405.

broker is personally liable on the contract (*p*). It may be shown that by the usage of trade an inferior kind of palm oil answers to the description of "best palm oil" (*q*); or that by the custom of the building trade the words "weekly accounts" refer to regular day work only (*r*); or that credit "for six or eight weeks" does not necessarily give the whole eight weeks for payment for goods (*s*).

Evidence of surrounding circumstances is admissible to show that a guarantee was intended to be a continuing one (*t*).

Similarly, it is a leading principle that an agricultural custom, as that a tenant shall have an away-going crop, is good if not repugnant to the terms of a lease, although the lease says nothing about it; but not if the custom be repugnant to the express or implied terms of the lease (*u*). If the custom appear to be in a high degree unreasonable it will be strong evidence for a jury that it does not exist (*x*).

When the usage is inconsistent with the express or implied terms of the written contract, it will be inadmissible to control it, on the principle *expressum facit cessare tacitum* (*y*). Where parties have come

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(*p*) *Humfrey* v. *Dale*, 7 E. & B. 266; E., B. & E. 1004.

(*q*) *Lucas* v. *Bristow*, E., B. & E. 907.

(*r*) *Myers* v. *Sarl*, 3 E. & E. 306.

(*s*) *Ashwell* v. *Retford*, L. R., 9 C. P. 20; 43 L. J., C. P. 57.

(*t*) *Heffield* v. *Meadows*, L. R., 5 C. P. 595.

(*u*) *Wigglesworth* v. *Dallison*, Dougl. 201; 1 Smith L. C. 539, and notes.

(*x*) *Bottomley* v. *Forbes*, 5 Bing. N. C. 128.

(*y*) *Blackett* v. *Royal Exchange Company*, 2 Tyrw. 266; *Suse* v. *Pompe*, 8 C. B., N. S. 538.

to an express contract, none can be implied; and, therefore, where a person contracts by writing in express terms, he cannot sue on an implied contract (*z*). And it seems that no usage will be binding on a party unless the circumstances raise a sufficient presumption that he knew of its existence, and contracted with reference to it (*a*).

The mere habit of affixing a special meaning to words in one class of contracts cannot amount to a custom of trade so as to control a written agreement (*b*).

Extrinsic evidence is not only admissible, but necessary to explain any alteration or interlineation that may appear in a written instrument. Generally the party tendering it in evidence must account for the alteration (*c*). If it appear to have been made contemporaneously with the instrument, or if it be made subsequently to its execution, with the privity of the parties, and there be no fraud on or evasion of the stamp laws, its validity may be maintained. But if the alteration be material (*d*), as if the date (*e*), or amount, or time of payment of a bill of exchange be altered (*f*), or a joint responsibility converted into a joint and several responsibility (*g*);

(*z*) *Cutter* v. *Powell*, 2 Smith L. C. 1.
(*a*) *Kirchner* v. *Venus*, 12 Moo. P. C. 361.
(*b*) *Abbott* v. *Bates*, 43 L. J., C. P. 150; 22 W. R. 488.
(*c*) *Clifford* v. *Parker*, 2 M. & G. 909.
(*d*) *Gardner* v. *Walsh*, 5 E. & B. 83.
(*e*) *Clifford* v. *Parker*, 2 M. & G. 905.
(*f*) *Warrington* v. *Early*, 2 E. & B. 763.
(*g*) *Alderson* v. *Langdale*, 3 B. & Ad. 660.

the instrument will be void, unless the alteration was made by consent of the parties; and equally so, although made with consent, if the stamp laws are infringed (*h*). So, where a bill has been altered with the privity of an indorser and his indorsee, but without the privity of the acceptor, the latter is discharged (*i*). The same rule holds when the alteration is accidental (*k*), or by a stranger without the privity of either party (*l*). Parol evidence may be called to show that a variation between a bought note and a sold note is immaterial (*m*).

The last case requiring notice in this chapter is when a contract is partly in writing and partly verbal; or when terms are offered in writing, and accepted verbally. At common law, such a combination of written and verbal evidence is strictly admissible to prove a complete contract, but not where the contract or other transaction is required to be in writing (*n*). Thus, a contract, required by the Statute of Frauds to be in writing, must be wholly in writing; and such a contract cannot be proved by writings which require oral evidence to complete or connect them (*o*).

(*h*) *Perring* v. *Hone*, 4 Bing. 28.

(*i*) *Master* v. *Miller*, 1 Smith L. C. 796, and notes.

(*k*) *Burchfield* v. *Moore*, 3 E. & B. 683.

(*l*) *Davidson* v. *Cooper*, 11 M. & W. 778; S. C. 13 M. & W. 352; *Crookwit* v. *Fletcher*, 1 H. & N. 293.

(*m*) *Holmes* v. *Mitchell*, 7 C. B., N. S. 361.

(*n*) *Kempson* v. *Boyle*, 3 H. & C. 363.

(*o*) *Boydell* v. *Drummond*, 11 East, 142; but see *Bauman* v. *James*, L. R., 3 Ch. 508; 16 W. R. 877.

PART III.

CHAPTER I.

ON THE ATTENDANCE OF WITNESSES.

PROCESS.

THE attendance of witnesses in the High Court, and, when such process is necessary, in the criminal courts, is obtained by serving the witness with a *subpœna ad testificandum*. If the witness is required to produce a document he is served with a *subpœna duces tecum* (*a*).

PENALTY FOR NON-ATTENDANCE.

(*5 Eliz. c. 9, s. 12.*)

"If any person upon whom any process out of a court of record shall be served to testify concerning any cause or matter depending there, and having tendered to him, according to his countenance or

(*a*) For India, cf. Act viii. of 1859, ss. 149, 159 and 160, and Act x. of 1872, ch. xxvi.

calling, such reasonable sum of money for his costs and charges, as with regard to the distance of the place is necessary to be allowed, do not appear according to the tenor of the process, not having a lawful and reasonable cause to the contrary, he shall forfeit for every such offence 10*l.*, and yield such further recompense to the party grieved as by the discretion of the judge of the court, out of which the process issues, shall be awarded." This was made perpetual by 26 & 27 Vict. c. 125.

If a witness do not attend on his subpœna, he may be proceeded against in either of three ways:—

1st. Under the above statute he may be sued for the penalty of 10*l.*, and further recompense; or,

2nd. In an action for damages (*b*); or,

3rd. He may be attached for contempt of court: but, on the motion for an attachment, it must be shown distinctly on affidavit that the witness was served; that his expenses were paid or tendered to him at the time of service; and that everything reasonable has been done to secure his attendance (*c*).

ATTENDANCE IN CRIMINAL PROCEEDINGS.

Generally the witnesses for a prosecution are bound over, by the committing magistrate or coroner, on recognizances conditioned to be forfeited if the witness do not appear to give evidence on the trial

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(*b*) *Pearson* v. *Isles*, Dougl. 561.

(*c*) *Garden* v. *Cresswell*, 2 M. & W. 319.

of the prisoner; but, if a witness be not so bound over, his attendance may, and ought to be, secured at the trial by serving him previously with a subpœna to appear and give evidence, on the prosecution of the prisoner, at the trial. A magistrate or coroner may bind over a person to appear as a witness at the trial, at any time before the trial, and may commit him if he refuse to be bound over. If the witness do not appear, the recognizance is forfeited and the penalty levied. A subpœna may be obtained at the Crown Office in London, from the clerk of assize at the assizes, and the clerk of the peace at quarter sessions. If a subpœnaed witness do not attend he may be attached, or indicted. A prisoner may subpœna witnesses for his defence (*d*). By 30 & 31 Vict. c. 35, s. 3, prisoners are to be asked by magistrates if they wish to call witnesses; if they do, the depositions are to be taken, and signed, and transmitted to the court of trial in the same way as the depositions of the witnesses for the prosecution; and the magistrate may bind over by recognizance to give evidence at the trial such witnesses as in their opinion give evidence material to the case, or tending to establish the innocence of the accused; such witnesses are to be liable to all the laws in force relating to witnesses for the prosecution. This provision does not extend to witnesses to character. And by the 5th section, where witnesses are bound over to appear on behalf of the prisoner at his trial, the court may allow their expenses.

(*d*) 1 Anne, c. 9, s. 3.

ATTENDANCE IN THE BANKRUPTCY COURTS

Is enforced by subpœna issued by the court at the instance of a trustee, creditor, debtor, or respondent in any matter (*e*). The subpœna may be *duces tecum*.

ATTENDANCE IN THE COUNTY COURTS.

The County Courts Act, 1875 (*f*), provides (sect. 2) that "either of the parties to an action, or any other proceeding, may obtain of the registrar of the court summonses, &c., to witnesses, with or without a clause requiring the production of books, deeds, papers and writings, in the possession or control of the person summoned as a witness, and such summonses, and any summonses which are now or may be required to be served personally, may, under such regulations as may be prescribed by rules of court, be served by a bailiff of the court, or otherwise"; and (sect. 3) "where any summons or other process of the court is served by a bailiff of any county court, the service may be proved by endorsement on a copy of the summons or process, under the hand of such bailiff, showing the fact and mode of the service of such summons or process, and any such bailiff wilfully or corruptly endorsing any false statement on the copy of a summons or other process, shall be guilty of a misdemeanor, and, on con-

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(*e*) General Rules of Procedure in Bankruptcy, 166—170.

(*f*) 38 & 39 Vict. c. 50.

viction thereof, shall be removed from his office or employment, and shall incur the same penalties as are or may be incurred by persons convicted of wilful and corrupt perjury."

"Every person on whom any such summons shall have been served, either personally or in such other manner as shall be directed by the court, and to whom at the same time payment, or a tender of payment, of his expenses shall have been made on such scale of allowance as shall be from time to time settled by the general rules of practice of the court, and who shall refuse or neglect, without sufficient cause, to appear or to produce any books, papers, or writings required by such summonses to be produced, and also every person present in court who shall be required to give evidence, and who shall refuse to be sworn and give evidence, shall forfeit and pay such fine not exceeding ten pounds as the judge shall set on him; and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect, and the remainder thereof shall form part of the general fund of the court in which the fine was imposed." (9 & 10 Vict. c. 95, s. 86).

Where the witness is beyond the jurisdiction of the court, the summons is sent by the bailiff to the bailiff of the court of the district in which the witness resides.

ATTENDANCE IN MAGISTERIAL PROCEEDINGS.

At common law magistrates may summon any person to attend as a witness on a criminal charge, and, on non-attendance, may issue a warrant for his apprehension (*g*). When the proceeding is in the nature of a civil proceeding, as in settlement cases, it appears that the proper process is by writ of *subpœna* or *subpœna duces tecum*, issuing from the Crown Office (*h*). In cases within the 11 & 12 Vict. c. 43, magistrates are empowered by section 17 either to issue a summons in the first instance, and a warrant for the apprehension of the witness in the event of disobedience; or, if the magistrate be satisfied that it is probable the witness will not attend, he may issue his warrant in the first instance. On indictable charges magistrates have a statutory power to summon witnesses (*i*).

ATTENDANCE IN OTHER CASES.

Revising barristers may summon in their own names any assessor, collector of taxes, or overseer of a past year, to attend before him and give evidence on oath (*k*). Arbitrators, under a reference by rule of court, may similarly order the attendance of witnesses; and non-attendance, after such an order and

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(*g*) *Evans* v. *Rees*, 12 A. & E. 55.
(*h*) *R.* v. *Orton*, 7 Q. B. 120.
(*i*) 11 & 12 Vict. c. 42, s. 16.
(*k*) 6 & 7 Vict. c. 18, s. 30.

a tender of expenses, is a contempt of court (*l*). If the witness be in prison on civil process, a *habeas corpus ad testificandum* may issue to bring him up (*m*). In the House of Lords the summons is by an order of the House, signed by the assistant clerk of the Parliament; in the House of Commons, by an order of the House, signed by the clerk; in select committees, by an order of the chairman.

WHERE A WITNESS IS BEYOND THE JURISDICTION OF THE COURT.

In this case the process of the courts does not, as a general rule, reach a witness; and the examination must be by means of a commission, the proceedings of which will be regulated by the law of the country to which it issues (*n*). Where the commission issues to a part of the realm which is subject to different laws from that part in which the commission issues, the commissioner may, by a written notice, signed by him, require the attendance of a witness, and, on his refusing to attend, may apply to the local courts for an order to compel attendance; and the witness will then be subject to the ordinary penalty for disobeying a subpœna, or a writ in the nature of

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(*l*) 3 & 4 Will. 4, c. 42, ss. 39, 40.

(*m*) *Graham* v. *Glover*, 5 E. & B. 591; *Marsden* v. *Overbury*, 18 C. B. 34.

(*n*) Cf. Part III., Ch. VI.; and *Lumley* v. *Gye*, 3 E. & B. 114.

a subpœna (*o*). This extends to the examination of witnesses in any of her Majesty's dominions, colonies, or possessions (*p*).

But, by 17 & 18 Vict. c. 34, s. 1, the judges, or a judge of the superior courts of common law at Westminster or Dublin, or the Court of Session of Exchequer in Scotland, may, at discretion, in any action pending in any such court, issue a *subpœna ad testificandum*, or *duces tecum*, or warrant of citation, commanding a witness in any part of the United Kingdom to attend the trial; and in default of attendance, after due service of the writ and tender of travelling expenses, the court from which the writ issued may certify the default to the other superior courts, and so render the defaulting witness liable to all the penalties which he would have incurred by disobeying a similar writ issued within the jurisdiction in which he resides. This act is not to affect the power of courts to issue commissions, and its operation is confined to process from the superior courts of common law. Under this section a rule has been granted to compel a plaintiff resident in Ireland to appear as a witness for the defendant (*q*). A rule under this act is absolute in the first instance (*r*).

(*o*) 6 & 7 Vict. c. 82, ss. 5, 6.
(*p*) 22 Vict. c. 20, s. 1.
(*q*) *Harris* v. *Barber*, 25 L. J., Q. B. 98.
(*r*) *Readman* v. *Broers*, 19 Jur. 1052.

WHEN A WITNESS IS IN PRISON.

An application may be made to a judge of the High Court at chambers, on affidavit, stating the imprisonment of the witness if detained on civil process; that his evidence is material to the applicant, and that he cannot proceed safely to trial without securing his attendance. The judge, if satisfied with the substance of the application, will then grant the applicant a writ of *habeas corpus ad testificandum*, directed to the governor of the gaol in which the prisoner is confined, and commanding him to bring up the prisoner for examination at the trial. Similarly, the secretary of state, or a judge of the High Court has power, on a similar application, to issue a warrant or order to bring up, as a witness in any court or criminal proceeding, any prisoner undergoing imprisonment on a criminal charge or conviction (*s*).

MANNER AND TIME OF SERVICE.

The service must be on the witness personally (*t*); and where several witnesses are included in one writ, the practice is to serve each witness with a ticket containing a copy, or the substance of the writ, showing him at the same time the original (*u*). The service

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(*s*) 16 & 17 Vict. c. 30, s. 9.
(*t*) *Re Pyne*, 1 D. & L. 703.
(*u*) *Wadsworth* v. *Marshall*, 1 Cr. & M. 87.

must be a reasonable time before trial; and, generally, service on the day of trial, even when the witness resides in the town, is insufficient (*x*), unless the witness receive the service without objection (*y*).

During his attendance the witness is privileged from arrest on civil process, and he is allowed a reasonable time in going and returning from court (*z*). If he be arrested during the time, it is a contempt of court (*a*). The privilege does not extend to an arrest on criminal process (*b*), nor where the witness is retaken by his bail, after he has finished his evidence. The privilege exists whether the process be compulsory or the attendance voluntary (*c*), but not in cases in which the witness attends rather as an unprofessional adviser than as an attorney or witness (*d*).

EXPENSES OF WITNESSES.

By 5 Eliz. c. 9, s. 12, a witness is substantially rendered liable to penalties if he do not attend at the trial, after having been served with process out of a court of record, "and having tendered to him,

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(*x*) *Barber* v. *Wood*, 2 M. & R. 172.

(*y*) *Maunsell* v. *Ainsworth*, 8 Dowl. P. C. 869.

(*z*) *Montague* v. *Harrison*, 3 C. B., N. S. 292.

(*a*) *Kimpton* v. *London and North Western Railway Company*, 9 Ex. 766.

(*b*) *Re Douglas*, 3 Q. B. 825.

(*c*) *Meekins* v. *Smith*, 1 H. Bl. 636.

(*d*) *Jones* v. *Marshall*, 2 C. B., N. S. 615.

according to his countenance or calling, such reasonable sum of money for his costs and charges, as with regard to the distance of the place is necessary to be allowed, . . . not having a lawful and reasonable cause to the contrary."

Accordingly, in civil proceedings, no witness, although served with a subpœna, is bound to attend at trial unless his reasonable expenses are tendered to him when he is served, or a reasonable time before trial. But in equity no witness residing within the Bills of Mortality, except he be a professional man, is entitled to any expenses (*e*). The sum tendered should be a reasonable compensation for his travelling expenses and subsistence during the attendance (*f*). The amount allowed in the superior courts of common law was fixed by the scale approved by the judges. A witness will be entitled to his expenses, although a party to the cause, if he be a material and necessary witness (*g*). If the witness be a married woman her expenses should be tendered to her and not to her husband. If a witness be subpœnaed by both parties he is entitled to be paid all his expenses by the party calling him before giving evidence (*h*). The witness may waive his right to demand payment of his expenses either expressly or by implication (*i*). In criminal cases a witness for the prosecution is not

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(*e*) Cf. *Turner* v. *Turner*, 7 W. R. 573.

(*f*) *Dowdell* v. *R. A. &c. Co.*, 3 E. & B. 902; *Brocas* v. *Lloyd*, 23 Beav. 129.

(*g*) *Howes* v. *Barber*, 18 Q. B. 588.

(*h*) Per Parke, B., *Allen* v. *Yoxall*, 1 C. & K. 316.

(*i*) See *Newton* v. *Harland*, 1 M. & G. 956.

entitled absolutely to his expenses, and he cannot refuse to attend or give evidence on the ground that his expenses have not been tendered or paid; but in courts of final jurisdiction they are generally allowed by the court under various acts. When the witness lives out of the jurisdiction of the court, and in a distinct part of the United Kingdom, as in Scotland or Ireland, by the 45 Geo. 3, c. 92, s. 3, he is not bound to appear to give evidence in a criminal prosecution unless his reasonable expenses be paid or tendered to him at the time when he is served with the subpœna (*k*). In any other case a witness, subpœnaed on a criminal trial, is bound to attend without any tender of expenses, and will be liable to attachment for non-attendance; although, if it appeared that he could not defray the expenses of his journey, the court would probably refuse to attach.

If a witness appear on his subpœna in a civil proceeding, he will not be compellable to give evidence until his reasonable expenses have been paid him, or tendered by the party who subpœnas him (*l*). If he do not arrive before a cause has been referred, he will be entitled to costs in the reference, but not in the cause (*m*).

A successful party may pay a witness his costs, and recover them from the defeated party (*n*). But

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(*k*) *R.* v. *Brownell*, 1 A. & E. 602.
(*l*) *Newton* v. *Harland*, 1 M. & G. 956.
(*m*) *Fryer* v. *Sturt*, 16 C. B. 218.
(*n*) *Hale* v. *Bates*, E., B. & E. 575.

an immaterial witness who has been rejected by a judge or arbitrator, cannot claim his costs as between party and party (*o*). No costs are allowed between party and party for expenses incurred in improving the mind of the witness and qualifying him to give evidence (*p*).

If the witness, after being subpœnaed, be not required to attend, and has incurred no expense, he must refund (*q*).

(*o*) *Galloway* v. *Kenworth*, 15 C. B. 228.
(*p*) *Nolan* v. *Copeman*, W. N., 25th Jan. 1873.
(*q*) *Martin* v. *Andrews*, 7 E. & B. 1.

CHAPTER II.

ON THE EXAMINATION OF WITNESSES (*a*).

WHEN a witness has been placed in the witness box, and no objection taken or sustained against his competency by the adverse party, he must be sworn by the officer of the court, or, when an affirmation is allowed, he must declare on affirmation (*b*). He may then be submitted to three distinct kinds of examination as to his knowledge of the facts which he is called to prove. 1st. He may be examined in chief by the party who calls him. 2nd. He may be cross-examined by the adverse party. 3rd. He may then be re-examined by the party who calls him. Although it is obvious that the regulation of the examination of the witnesses in any given trial must

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(*a*) The provisions of the Indian law corresponding to this chapter are to be found in the Indian Evidence Act, ss. 137—158. It may be interesting to observe that ss. 146 to 152 are the sections substituted for those originally inserted in the bill as brought into the Legislative Council of India with the view of imposing considerable restrictions on the right of cross-examination to shake the credit of a witness by injuring his character. This portion of the bill was so strongly objected to out of doors, that sections 146 to 152 were substituted for it. The intention of these sections has been stated to be to lay down in the most distinct manner the duty of counsel on examining witnesses with a view to shaking their credit by damaging their character.

(*b*) Cf. supra, p. 30.

be left mainly to the discretion of the presiding judge, yet certain general rules have been established for the conduct of such examination, and it is the purpose of this chapter to state and explain them.

THE EXAMINATION IN CHIEF.

The object of the examination in chief is to elicit from the witness all the material facts which tend to prove the case of the party who calls the witness. In such a case, as the presumption and the ordinary fact are that the witness, having been chosen by the party who calls him, is favourable to his cause, and therefore likely to overstate or misstate the circumstances which conduce to establish the party's case, it is a principal rule that—

On an examination in chief, a witness must not be asked leading questions.

The simple meaning of this rule is that a party, who calls a witness to prove a case, must not suggest answers to the witness, nor frame his questions in such a manner that the witness by answering merely "Yes," or "No," shall give the reply and the evidence which the party wishes to elicit. A question is said to be leading when the words, which the witness is expected and required to utter, are put into his mouth, or when it suggests to the witness the answer which the examiner wishes or expects to have; and such a question is inadmissible, because the object of calling witnesses and examining them

vivâ voce in open court is, that the judge and jury may hear them tell their own unvarnished tale of the circumstances which they are called to attest. If, therefore, a party or his counsel were allowed to put a question to their own witness which the latter might answer by a mere affirmative or negative, it is apparent that the evidence would be the statement of the party, and not that of the witness. Such a course would strike radically at the credibility of all oral evidence, and therefore it is a sound and established rule that, on the examination in chief, leading questions must not be asked.

The rule may be exemplified thus: A. B. is charged with stealing a watch, the property of C. D. E. F. saw A. B. take the watch from the counter in C. D.'s shop. Now, if the counsel for the prosecution, in order to prove the theft, were to call E. F., and ask him "whether at such a time he saw A. B. enter C. D.'s shop, and take the watch from the counter," it is plain that such a question would be leading, because it would at once suggest to the witness the answer which he was expected to make, and the prisoner would be convicted by an answer simply in the affirmative. The answer to the latter branch of the question involves the whole question of guilt, and the substance of the charge. The witness ought, therefore, to be asked, not whether he saw the prisoner commit the offence, but what he saw the prisoner do at the time when and at the place where it is alleged that the offence was committed. It is also to be noticed, that questions are not objectionable as leading questions while the examination is only

introductory to what is material (*c*). Thus, in the above example, it would be quite proper, for the purpose of saving the time of the court, to ask the witness whether at a specified time he entered C. D.'s shop, and even whether at that time he saw the prisoner there, and near the counter. Such questions are quite immaterial, and may therefore be put in the shortest and most direct manner possible, because the answer cannot inculpate the prisoner in any proximate degree, nor even at all. But when the real issue is approached, and when it is sought to fix guilt on the prisoner, the witness must be asked, not whether he saw the prisoner do a certain act, but what he saw the prisoner do. Such a course of examination is clearly necessary to prevent, at least in some measure, the possibility of collusion between a prosecutor, or a party, and his witness.

It may be noticed in this place, that where an adverse party has reason to suspect collusion between his opponent's witnesses, or even where he is without any ground of reasonable suspicion, he may apply to the court, in any civil or criminal proceeding, to order all such witnesses, or any of them, with the exception of the one under examination, to leave the court; and such an order, although apparently not

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(*c*) In India, by section 142 of the Indian Evidence Act, it is provided that "leading questions must not, if objected to by the opposite party, be asked in an examination in chief or in a re-examination, except with the permission of the court. The court shall permit leading questions as to matters which are introductory or undisputed, or which have in its opinion been already sufficiently proved."

absolutely a matter of right, is never refused to the applicant (*d*). The order does not usually extend to an attorney in the cause, nor to scientific witnesses. If a witness remain in court after such an order, it seems that he may be attached; but his evidence will be received, although subject to strong observation (*e*).

The rule that leading questions must not be asked on an examination in chief is neither inflexible nor universal. The conduct of all *vivâ voce* examination is at all times subject to the discretion and direction of the judge; and, although he will enforce vigilantly the general rule, yet there are also various cases in which he will suffer it to be relaxed. The foundation of the rule is, that the witness is favourable to the party who calls him. Whenever, therefore, it appears that the witness is hostile, or that his evidence cannot be extracted by general questions as to his knowledge of material facts, the judge may, and will, permit the party, or his counsel, to put a leading question to him point blank as to a material fact, and require him to answer it in the affirmative or negative. In such a case an examination in chief frequently assumes the form of a cross-examination.

So, also, where a question from its nature cannot be put except in a leading form, the judge will allow it to be put. Thus, where an offence is proved, a prisoner may be pointed out to a witness, and the

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(*d*) *Southey* v. *Nash*, 7 C. & P. 632; *R.* v. *Murphy*, 8 C. & P. 307; s. v. *R.* v. *Cook*, 13 How. St. Tr. 348.

(*e*) *Chandler* v. *Horne*, 2 M. & R. 423.

latter may be asked whether the prisoner was the man whom the witness saw commit the offence (*f*).

So, also, where a witness has manifestly or apparently forgotten a circumstance, and all indirect attempts to recall it to his mind have failed, the circumstance may be put to him in a leading form, and he may be asked whether he remembers it. Thus, where a witness stated that he could not remember the names of certain persons, but that he should remember and be able to identify them if they were read to him, Lord Ellenborough allowed this to be done (*g*).

On this principle it is allowable to hand a witness a memorandum in his own writing, containing an account of the disputed facts, and to ask him to peruse it and give his evidence from his memory, as refreshed by his own memorandum. Where such a memorandum is used, the opposite counsel has a right to inspect it, and to cross-examine the witness on it (*h*).

The next important rule, under the head of the examination in chief, is that—

A witness must be asked only questions of fact which are relevant and pertinent to the issue; and he cannot be asked irrelevant questions, or questions as to his own inferences from, or personal opinion of, facts.

(*f*) *R.* v. *Watson*, 2 Stark. 128.

(*g*) *Acerro* v. *Petroni*, 1 Stark. 100.

(*h*) *Doe* v. *Perkins*, 3 T. R. 749; supra, p. 362.

The latter part of this rule, and the exception to it in the case of skilled or scientific witnesses, was considered in the sixth chapter of the first part of this treatise; and it is sufficient in this place to refer to it.

THE RIGHT OF A PARTY TO DISCREDIT HIS OWN WITNESSES.

The 22nd section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), determines the conditions under which a party to a civil proceeding may contradict by other evidence the statement of a witness who has proved unexpectedly adverse to the party who calls him. That section enacts that a "party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but, before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." In order that a party may have the benefit of this section, the evidence of the witness must not only be unfavourable, but hostile, to the party who calls him. In other words, the judge must hold not only that the result of the evidence is unfavourable to the party who calls the witness, but that the mode

and tone in which the evidence is given indicate that the witness has a hostile feeling towards the party who has called him, believing the witness to be friendly (*i*). The two statements need not be directly contradictory (*k*).

The above enactment, by section 103 of the Common Law Procedure Act, 1854, extends to every civil court in England and Ireland: and by the Criminal Evidence and Practice Amendment Act, 1862, a similar provision is made as to criminal cases (*l*).

Where a prisoner calls a witness who criminates another prisoner, the latter has a right to cross-examine. But it is doubtful whether the latter has such a right when the evidence is not criminatory (*m*).

THE CROSS-EXAMINATION.

When a witness has been examined in chief by the party who calls him, the opposite party, or his counsel, has a right to cross-examine him. This right is discretionary, and when the examination in chief has resulted in clear, conclusive, or unimpeachable evidence, it will be prudent for the adverse party not to claim his privilege; for cross-examination in such a case, instead of weakening the evidence, generally strengthens and confirms it. So,

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(*i*) *Greenhough* v. *Eccles*, 5 C. B., N. S. 786.
(*k*) *Jackson* v. *Thomason*, 1 B. & S. 745.
(*l*) 28 & 29 Vict. c. 18, s. 3.
(*m*) *R.* v. *Burdett*, Dears. 431.

where the adverse party does not dispute the truth of his opponent's case, but relies on a justification or an excuse, he will not think it desirable, generally, to cross-examine a witness.

As the object of the examination in chief is to lay all the material evidence of a case before the court, so the object of cross-examination is to impeach the accuracy, credibility, and general value, of that evidence; to sift, detect, and expose, discrepancies, or to elicit suppressed facts, which weaken or qualify the case of the examining party, and support the case of the cross-examining party. It is therefore, generally, a rule that on cross-examination an adverse witness may be asked leading questions (*n*).

The reason for excluding leading questions on the examination in chief, on which the witness is generally favourable to the examiner, does not usually apply to cross-examination, on which the witness is as generally hostile to the cross-examiner. Accordingly, on cross-examination, a witness may be asked in direct words as to the truth or falsehood of a matter which bears substantially on the issue. Thus, in debt for goods, when the defence is an unexpired term of credit, a witness who proves the sale and the debt could not properly be asked whether he sold a particular description of goods to the defendant at a certain price, and for present payment; but he should be asked separately whether he sold any goods at all, and, if so, what they were, and what were the terms of payment. But on cross-examination he might be

(*n*) *R.* v *Hardy*, 24 How. St. Tr. 755.

asked about the goods specifically and by name, and whether it was not understood between the parties that the purchaser was to have a specific time, such as a year, of credit. But the rule under consideration appears to be, and is practically, subject to the restriction that a witness, even on cross-examination, can be asked leading questions only if he be, or appear to be, adverse to the cross-examiner; and where the witness appears to be favourable to him, the court will sometimes, and even frequently, not suffer even a cross-examiner to lead his opponent's witness. Thus, on Hardy's trial, a witness for the prosecution, on evincing a favourable disposition towards the prisoner, was asked by his counsel whether, at a meeting, certain persons had not used certain specified expressions which, if uttered, would have been favourable to the defence. But the court held that in such a case counsel could not put words into the witness's mouth; and Buller, J., said: "You may lead a witness upon a cross-examination to bring him directly to the point as to the answer; but you cannot go the length of putting into the witness's mouth the very words which he is to echo back again" (*o*).

In examining in chief, the object of the party should be to elicit from the witness all the material facts which he is called to prove, and to take especial care that the witness does not stand down before the latter has proved that part of the case which he is expected to prove. Generally, it is desirable and

(*o*) 24 How. St. Tr. 659.

proper to ask him only such questions as will confine him to the matter in issue, and such as will elicit his own personal and independent account of it. Unless he deviate into hearsay or other inadmissible kinds of evidence, or unless he ramble into utterly irrelevant matters, it is always the right, as it is generally the prudent, course not to interrupt a witness when examining him in chief. If he be hostile or dishonest, a more stringent style of examination may be adopted; but if he be favourable, or even adverse, but honest, a party will seldom lose anything by suffering a witness to give his own ungarbled version of a circumstance; and such a course will always be most satisfactory to the court, and most conducive to the administration of justice. In criminal cases, especially where a prisoner is not defended, it is the practice, and probably the duty, of a prosecuting counsel, to ask a witness questions which are favourable in their object to the prisoner; for the duty of a prosecuting counsel is to lay all material evidence impartially before the court, and not to press for a conviction.

In all such cases, and in cross-examination as on the examination in chief, the court will exercise its discretion as to how far it is desirable and consistent with the ends of justice to allow a question to be put in a leading form. It has been stated, however, by Alderson, B., that the right to lead on cross-examination exists whether the witness be favourable or not (*p*).

Great latitude is allowed in the questions which a

(*p*) *Parker* v. *Moon*, 7 C. & P. 408.

party is permitted and entitled to ask on cross-examination, and he will seldom be stopped by the court unless the question be manifestly irrelevant to the case, and calculated neither to qualify the examination in chief nor to impeach the credit of the witness. It is manifest that questions, which would be clearly irrelevant on the examination in chief, may be of the highest importance when asked on cross-examination. Generally, on cross-examination a witness may be asked any question, the answer to which may have a tendency to affect his credit; but he will not always be obliged to answer such questions; and, generally, he may be asked questions which affect his veracity or his memory; such as whether he has been convicted on a trial on a criminal charge; whether he is a relation, or intimate friend, or under any special obligation, to the party who calls him; whether he be not identified or connected with him in interest; whether he has not been on terms of enmity with the adverse party; and whether his memory is not defective generally, or, as to the particular transaction. Such questions are within the circumference of the issue, although not within that inner circle to which the examination in chief is confined.

When the cross-examination is rambling, prolix, or irrelevant, the court may and will properly interfere to stop it. But where it is apparently irrelevant, and the cross-examiner undertakes to show subsequently that the question is material, it will generally be allowed (*q*).

(*q*) *Haigh* v. *Belcher*, 7 C. & P. 389.

Generally a cross-examination will be held irrelevant where it tends neither to contradict nor to qualify the result of the examination in chief, nor to impeach the credit of the witness. It is also irrelevant in civil proceedings, when it is sought to infer an act of a party from his dealings with a third party. Thus, in an action for a nuisance, the defendant's witness cannot be asked on cross-examination whether compensation for a similar nuisance has not been paid by the defendant to a third person in the same position as the plaintiff (*r*). So, evidence of the mode in which a party has contracted with third parties is no evidence of the mode in which he contracted with the adverse party in a similar transaction; and the latter cannot ask a witness on cross-examination as to the terms on which the party contracted with such third parties (*s*). Neither can a witness be asked as to the statement or admission of a third person, to show that a liability belongs to such third person, and not to the party charged; for such evidence would be hearsay (*t*). But he may be asked whether such a third person is not the person to whom a credit was given, or who was dealt with as the party originally liable. And it seems that he might be asked such a question as the foregoing, in order to test his memory or credibility (*u*).

(*r*) *Tennant* v. *Hamilton*, 7 Cl. & F. 122.
(*s*) *Hollingham* v. *Head*, 4 C. B., N. S. 388.
(*t*) *Watts* v. *Lyons*, 6 M. & G. 1047.
(*u*) *Hollingham* v. *Head*, 4 C. B., N. S. 388.

ON IMPEACHING THE CHARACTER OF A WITNESS.

In order to impeach the character of a witness, he may be asked on cross-examination whether he has committed any crime, or been guilty of other immoral conduct; but generally, if he answer in the negative, the fact cannot be proved by the cross-examiner unless it be material to the issue. In other cases the answer of the witness is conclusive (*x*). Generally, evidence of bad character cannot be given; but an exception to this general rule in civil proceedings was instituted by the Common Law Procedure Act, 1854, which enacts that "a witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor; and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall upon proof of the identity of the person be sufficient evidence of the said conviction, without proof of the signature or official character of the person appear-

(*x*) *Feret* v. *Hill*, 15 C. B. 207.

ing to have signed the same" (*y*). This provision has been extended to criminal trials by the Criminal Evidence and Practice Amendment Act, 1865 (*z*), and has been substantially adopted in India (*a*).

If a witness be asked on cross-examination whether he ever made a formal verbal statement, as to matters connected with the issue, different to that which he has made at the trial, and if he answer in the negative, evidence may be given that he has made such a former statement; but it is necessary to lay a foundation for such evidence by first stating to the witness all the circumstances under which he is supposed to have made such a former and contradictory statement, in order that he may have an opportunity of refreshing his memory, and explaining the discrepancy (*b*). To quote the words of Alderson, B., "A witness may be asked any question which, if answered, would qualify or contradict some previous part of that witness's testimony, given on the trial of the issue, and, if that question is put to him and answered, the opposite party may then contradict him. . . . . You may ask him any question material to the issue, and if he denies it you may prove that fact, as you are at liberty to prove any fact material to the issue" (*c*). This principle has also been extended by the Common Law Procedure Act, 1854, s. 23, and the Criminal Evi-

(*y*) 17 & 18 Vict. c. 125, s. 25.
(*z*) 28 & 29 Vict. c. 18, s. 6.
(*a*) Ind. Ev. Act, s. 153.
(*b*) *Crowley* v. *Page*, 7 C. & P. 791.
(*c*) *Att.-Gen.* v. *Hitchcock*, 1 Ex. 102.

dence and Practice Amendment Act, 1865, s. 4, which enact that "if a witness upon cross-examination as to a former statement made by him, relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but, before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

In other cases, where a witness is asked on cross-examination a question which is not material to the subject-matter of the case, and which is intended merely to impeach his veracity, it was long doubted, and is still doubtful in some measure, how far evidence can be given to contradict an answer to such immaterial matter. There are authorities both ways; but the modern doctrine appears to be that, although such evidence cannot be received to disprove a statement of the witness as to an irrelevant fact, it may be given in some cases to contradict an answer to a question which tends to impeach his general veracity.

When it is sought to impeach the veracity of a witness, evidence cannot be given of any particular acts of falsehood or dishonesty, because it is presumed that a witness does not attend prepared to rebut particular charges, nor to justify the whole course and details of his private life. A witness, therefore, who is called, as is allowable, to impeach the veracity of another witness, cannot be asked as

to particular acts in the life of the impeached witness, but generally only whether he would believe him on his oath (*d*). In such a case the party calling the impeached witness may re-establish his character by calling witnesses to his general good character (*e*).

When it is proposed to contradict a former statement in writing by a witness, the existing rule under the Common Law Procedure Act, 1854, s. 24, for courts of civil judicature, and under the Criminal Evidence and Practice Amendment Act, 1865, s. 5, for criminal courts, is the following: "A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him; provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purpose of the trial as he shall think fit" (*f*).

In criminal cases, where a prisoner calls witnesses only to character, it is not usual for the prosecuting

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(*d*) *R.* v. *Bropham*, 4 C. & P. 392; *R.* v. *Brown*, 36 L. J., M. C. 59.

(*e*) *Annesley* v. *Anglesea*, 17 How. St. Tr. 1430.

(*f*) See *Darby* v. *Ouseley*, 1 H. & N. 1.

counsel to cross-examine them, although strictly he has the right to do so, and he may adduce evidence to rebut such evidence of good character (*g*).

THE RE-EXAMINATION.

When the cross-examination of the witness is concluded, the party who called him has the right to re-examine him on all matters arising out of the cross-examination, for the purpose of reconciling any discrepancies that may exist between the evidence on the examination in chief, and that which has been given on cross-examination; or for the purpose of removing, or diminishing, any suspicion that the cross-examination may have cast on the evidence in chief. But the re-examining counsel cannot ask the witness as to new matter; in other words, the questions which may be asked must be exclusively such as are connected with, and arise out of, the cross-examination; and no questions can be asked on re-examination which tend to introduce new evidence which might have been given on the examination in chief (*h*). Accordingly, in the *Queen's case*, Lord Tenterden, in delivering the judgment of the court, said: "I think that counsel has a right upon re-examination to ask all questions which may be proper to draw forth an explanation of the sense

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(*g*) *R.* v. *Rowton*, L. & C. 520.
(*h*) *Queen's case*, 2 B. &. B. 297.

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 I think he has no right to go further, and to introduce matter new in itself, and not wanted for the purpose of explaining either the expressions or the motives of the witness." It is therefore held that a witness who has been cross-examined as to a conversation with a party, cannot be re-examined as to parts of the conversation not connected with the portion to which the cross-examination referred (*i*). But where a party has omitted to put a question on the examination in chief, a judge will usually put it, if requested to do so by counsel. The judge has also a discretionary power to recall a witness at any time for the purpose of putting a question to him.

The re-examination practically closes the examination of a witness; although, in rare cases, witnesses may be, and are, called to justify the character of an impeached witness, or to impeach the character of an impeaching witness.

The party who calls a witness, or who produces any kind of evidence, gives the adverse party the right of reply, and he will have no right to re-examine a witness if the adverse party decline to cross-examine. In civil proceedings, before the common law courts, counsel, or a party, have a right to sum up the evidence of their witnesses whenever they would not otherwise have a right of

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(*i*) *Prince* v. *Samo*, 7 A. & E. 627.

reply. This is now the practice under the Common Law Procedure Act, 1854, the eighteenth section of which enacts that—"Upon the trial of any cause the addresses to the jury shall be regulated as follows:—The party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing, at the close of the case of the party who begins, his intention to adduce evidence, to address the jury a second time at the close of the case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence, if any; and the right to reply shall be the same as at present."

Under this section, when the judge rules that there is no evidence to go to the jury, a party has no right to sum up (*j*). Unless, at the close of the plaintiff's case, the defendant announce his intention to adduce evidence, it seems that he loses the right to do so (*k*).

The Criminal Evidence and Practice Amendment Act, 1865 (*l*), regulates the procedure in all trials for felony or misdemeanor by the second section as follows:—"If any prisoner or prisoners, defendant or defendants, shall be defended by counsel (*m*), but

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(*j*) *Hodges* v. *Ancrum*, 11 Ex. 214.

(*k*) Per Alderson, B., *Darby* v. *Ouseley*, 1 H. & N. 3.

(*l*) 28 & 29 Vict. c. 18.

(*m*) "Counsel" includes "attorneys" in all cases where attorneys are allowed by law or by the practice of any court to appear as advocates (s. 9).

not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel, whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, defendant or defendants; and upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each or every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded, to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present."

It may be noticed before concluding this chapter, that no action will lie against a witness for what he says or does in giving evidence before a court of justice; public policy requiring that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true

or false, that they acted from malice. The House of Lords recently held that this privilege extends to a witness compellable and required to attend and give evidence before a court of inquiry, held under the Queen's Regulations (*n*).

(*n*) *Dawkins* v. *Lord Rokeby*, 23 W. R. 931

CHAPTER III.

ON THE SUBSTANCE OF THE ISSUE.

It is enough if only the substance of the issue be proved.

In other words, a party will have proved sufficiently his case if he establish substantially his allegations; and he will not be prejudiced by failing to prove matter which is unnecessary to support his claim, and which may therefore be disregarded as surplusage. Generally, allegations which are introductory and explanatory may be treated as matter of mere inducement, and consequently as surplusage (*a*). But it is not every unnecessary allegation which may be treated as surplusage; for irrelevant matter may be so connected and incorporated with essential matter, as to render them legally inseparable; and where this is so the irrelevant matter must be proved.

If words which are without meaning, or which have been introduced by mistake, be inserted in pleadings, they have been struck out as surplusage at common law (*b*). So, in tort involving a claim for a sum certain, it is immaterial that the sum due, as

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(*a*) *Ricketts* v. *Salway*, 3 B. & Ald. 323.
(*b*) *King* v. *Pippett*, 1 T. R. 235.

proved, is less than the sum claimed (*c*): but where a contract is set out by the plaintiff in his pleadings, unless it be truly stated, he cannot recover: and so, if a plaintiff profess to set out a title, he must set it out correctly (*d*). It is also held, that a contract is entire in its nature, and must be proved as laid (*e*). These principles are best illustrated by the leading case of *Bristow* v. *Wright* (*f*), which was an action by a landlord against sheriffs, for taking in execution the goods of his tenant without satisfying him for a year's rent, which was due; and the declaration stated a demise for a year on reservation of a rent payable quarterly; but at the trial there was no evidence of the times of payment. It was urged that the contract was not the gist of the action, and that the plaintiff was entitled to retain a verdict, on having shown, as he had, that a year's rent was in arrear. But the Court directed a judgment of nonsuit; and Lord Mansfield, in delivering it, although he had thought the plaintiff's case sufficiently established on trial, expressly abandoned that opinion. He said:— "I am convinced that it is better for the sake of justice that the strict rule should in this case prevail. I have always thought, and often said, that the rules of pleading are founded on good sense. Their objects are precision and brevity. It is easy for a party to state his cause of action. If it is founded on a deed, he need not set forth more than that part which is

(*c*) *Gwinnett* v. *Phillips*, 3 T. R. 643.
(*d*) Per Lord Kenyon, 3 T. R. 643.
(*e*) Per Buller, J., 3 T. R. 643.
(*f*) Dougl. 665; 1 Sm. L. C. 223.

necessary to entitle him to recover. . . It certainly was not necessary to allege this part of the lease that relates to the time of payment, in order to maintain the action. But since it has been alleged, it was necessary to prove it. The distinction is between that which may be rejected as surplusage, and what cannot. When the declaration contains impertinent matter, foreign to the cause, and which the master on a reference to him would strike out (irrelevant covenants for instance), that will be rejected by the court, and need not be proved. But if the very ground of the action is misstated, as where you undertake to recite that part of a deed on which the action is founded, and it is misrecited, that will be fatal. For then the case declared on is different from that which is proved, and you must recover *secundum probata et allegata*. . . In the present case the plaintiff undertakes to state the lease, and states it falsely." This doctrine has been further stated by Lord Ellenborough:—"With respect to what averments are necessary to be proved, I take the rule to be that, if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, though the averment may be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover" (*g*).

Accordingly, where an averment can be got rid of

(*g*) *Williamson* v. *Allison*, 2 East, 452.

without injury to the pleadings, and where it can be treated as merely a statement involving needless particularity, it may be struck out in civil or criminal pleadings (*h*). Thus, where a plaintiff, declaring in tort on a warranty, alleged that the defendant knew the goods sold to be unfit for sale, the court held that the warranty alone entitled the plaintiff to recover, without proof that the defendant knew the goods to be unfit, &c. (*i*). So, in tort against a surgeon for mistreating the plaintiff, it has been held unnecessary to prove an averment that the defendant was employed by the plaintiff, on evidence that the plaintiff submitted to the defendant's treatment (*k*). But in contract it would be necessary, as already stated, to prove the averment.

A plea of tender is proved sufficiently by evidence of tender of a larger sum than that mentioned in the plea (*l*); but if the plaintiff reply that, after the cause of action accrued, and before the tender, he demanded the sum, a demand of the precise sum tendered must be proved (*m*). So, a plea of payment in accord and satisfaction is proved by proof of payment of a sum sufficient to cover the plaintiff's real demand (*n*).

In slander it is enough to prove the material words on the record: and where there are several

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(*h*) Per Coleridge, J., *Shearm* v. *Burnard*, 10 A. & E. 596.
(*i*) *Williamson* v. *Allison*, 2 East, 446.
(*k*) *Gladwell* v. *Steggel*, 5 Bing. N. C. 733.
(*l*) *Dean* v. *James*, 4 B. & Ad. 546.
(*m*) *Rivers* v. *Griffiths*, 5 B. & Ald. 630.
(*n*) *Falcon* v. *Benn*, 2 Q. B. 314.

actionable words it is enough to prove some of them (*o*). But it is not enough to prove merely equivalent words (*p*).

In case for disturbing the plaintiff's commonable rights by putting cattle on the land, the defendant pleaded common appurtenant, and the plaintiff replied that all the said cattle were not commonable, &c., it was held that the plea was supported by proof that some of the defendant's cattle on the land were commonable, and that the plaintiff could not insist on a surcharge (*q*). But where, in trespass to a close, the defendant pleaded a licence to erect and maintain a wall on the *locus in quo*, and proved a licence to erect but not to maintain, the verdict was directed against him (*r*). And where to an action on a bill it was pleaded that it was accepted for hops which were to be delivered according to sample, and that plaintiff had not delivered them according to sample, *nor any hops whatever*, the words in italics were struck out (*s*).

It will be seen from the above cases that the doctrine as to what is, or what is not, of the substance of the issue is partly obscure and unsatisfactory; but the large powers of amendment which judges now have, and which will be considered in the next chapter, render the question less important than it

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(*o*) *Compagnol* v. *Martin*, 2 W. Bl. 790.
(*p*) Per Lawrence, J., *Williamson* v. *Allison*, 2 East, 447.
(*q*) *Brown* v. *Jenkins*, 6 A. & E. 911.
(*r*) *Alexander* v. *Bonin*, 4 Bing. N. C. 799.
(*s*) *Wells* v. *Hopkins*, 5 M. & W. 7.

was. But since amendments are conceded *ex gratiâ*, and not *ex debito justitiæ*, it still deserves attention.

A similar rule exists in Equity, where it has been held that only the substance of the case as made by the pleadings need be proved. Therefore a plaintiff need only prove so much of the allegations in his bill as would entitle him to a decree; *e. g.*, in a bill for an account, it is only necessary to prove that the defendant is an accounting party, without any evidence as to the items of the account (*t*). But a Court of Equity will sometimes, instead of dismissing the bill when the plaintiff has from negligence or inadvertence omitted to prove some fact which is necessary to support his case, permit him to supply the defect by proving that fact, and will give leave for that purpose previous to the hearing (*u*), or order the cause to stand over (*x*), or make a decree as to the part of the case which is ready for decision, giving liberty to prove the rest (*y*), or make a decree subject to the production of proper evidence to the registrar (*z*). The cases on the subject of defective evidence are collected in Seton on Decrees, p. 1117. But, as Lord Cottenham observed in *Marten* v. *Whichelo* (*a*), it is next to impossible to reconcile them or to extract any principle upon which any fixed rule can be founded.

(*t*) *Law* v. *Hunter*, 1 Russ. 100.
(*u*) *Douglas* v. *Archbutt*, 23 Beav. 293.
(*x*) *Davidson* v. *Foley*, 3 B. C. C. 604.
(*y*) *Lechmere* v. *Brasier*, 2 J. & W. 289.
(*z*) *Owen* v. *Thomas*, 3 M. & K. 353.
(*a*) Cr. & Ph. 261.

The rule that it is enough to prove the substance of the issue holds still more strongly in criminal than in civil cases. Thus, where a defendant was indicted for that he had composed, printed, and published a libel, only publication was proved; but Lord Ellenborough said that this warranted a conviction, and added: "If an indictment charges that a defendant did, and caused to be done, a particular act, it is enough to prove either. This distinction runs through the whole of the criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified" (*b*). So, on an indictment for two connected felonies, the prisoner may be acquitted of one and convicted of the other; as, where he is charged with burglary and stealing, he may be acquitted of the burglary and convicted of the stealing, and *vice versâ* (*c*); or on a charge of murder, he may be convicted of manslaughter, for the unlawful killing is the substance of the charge, and the malice is only matter of aggravation (*d*). So, if a prisoner be charged with killing with a dagger, it will be sufficient if the evidence prove a killing with a stick; or if he be charged with killing with one kind of poison, and the evidence prove a killing with another. But if the charge be for killing by poison, and the evidence prove death by a weapon or a blow, this will be a fatal variance; for

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(*b*) *R.* v. *Hunt*, 2 Camp. 583.
(*c*) 2 Hale, P. C. 302.
(*d*) *Mackalley's case*, 9 Rep. 676.

a prisoner cannot be expected to be prepared with evidence to refute a charge so totally distinct from that which is laid in the indictment. So, where A. is charged with giving a mortal blow; and B. and C. being present, aiding and abetting; the indictment will warrant a conviction, although the evidence prove B. to have given the blow, and A. and C. to have been present, aiding and abetting; for all are principals, and the blow is the blow of them all. But if two are charged as principals, and one appear to be only an accessory, he must be acquitted, for the legal offences in this case are different.

If an averment be essentially descriptive of the substantial charge, it must be proved. Thus, on an indictment for stealing live turkeys, a prisoner cannot be convicted of stealing dead turkeys (*e*). And on an indictment for obtaining money or goods by false pretences, the pretence which really operated on the prosecutor's mind must be alleged in the indictment (*f*).

(*e*) *R.* v. *Edwards*, R. & R. 497.
(*f*) *R.* v. *Bulmer*, L. & C. 476.

CHAPTER IV.

ON VARIANCES AND AMENDMENTS.

Not only is it necessary that the substance of the case made by each party should be proved, but that the case proved should be substantially the same as that stated on the record. When this rule is violated, the party on whom the burden of proof lies must submit to an adverse decision. In this case there is said to be a variance between the matter alleged and the matter proved; and whenever the matter so alleged was not proved and could not at common law be struck out, or passed over as surplusage, the consequences were those which have just been stated. Therefore the same agreement as stated upon the record must be proved by the evidence, for if it differs the variance is a fatal one (*a*); but equity would sometimes, in special cases when an agreement is admitted by the answer different to the one alleged in the bill, permit the plaintiff to abandon the latter agreement and adopt the former (*b*). The rule previously alluded to still remains the same, having been established to check the carelessness and laxity of pleaders, to save the time of the courts, and to

(*a*) *Legh* v. *Haverfield*, 5 Ves. 452.
(*b*) Per Lord Redesdale, *Lindsey* v. *Lynch*, 2 Sch. & L. 1.

prevent parties who came prepared with evidence to meet one kind of issue from being prejudiced by being suddenly called on to meet a different issue, therefore a material variance between the issue and the evidence will be fatal to the party who is responsible for the proof of the issue. But as the operation of this rule was found to work great hardship in its original shape, even when qualified by the principles of surplusage, several statutes have been passed within the last forty years, by which, ultimately, almost unlimited powers of amending records were given to the Common Law Judges whenever they are of opinion that the justice of the case requires such intervention.

The first of these acts (9 Geo. 4, c. 15), commonly called Lord Tenterden's Act, gave judges a discretionary power of amending a record at trial only where there was a variance between the record and writings, or printed matter, adduced in evidence. It was followed by the 3 & 4 Will. 4, c. 42, which, after referring in the preamble to the previous act, extended the privilege of amending in civil cases by giving the judges power of amending where the variance is between the record and the proof, whether written or oral, of civil issues, or on quo warranto or mandamus, or in any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of the court, not material to the merits of the case. Then came the Common Law Procedure Act of 1852, which, after reciting that "the power of amendment now vested in the courts and the judges thereof, is insufficient to

enable them to prevent the failure of justice, by reason of mistakes and objection of form," enacts that—

"It shall be lawful for the Superior Courts of Common Law, and every judge thereof, and any judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made" (*c*).

A similar provision, in nearly the same words, is found in the Common Law Procedure Act, 1854, by which the superior courts and judges sitting at Nisi Prius are empowered "at all times to amend all defects and errors in any proceedings under the provisions of this act;" and it is also directed that such amendments "as may be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties, shall be so made, if duly applied for"(*d*), and this provision is repeated in the Common Law Procedure Act, 1860 (*e*).

These three statutes do not appear to have had

(*c*) 15 & 16 Vict. c. 76, s. 222.
(*d*) 17 & 18 Vict. c. 125, s. 96.
(*e*) 23 & 24 Vict. c. 126, s. 36.

the effect of repealing the previous statutes, but they virtually rendered them unnecessary.

The rules of the Court of Chancery as to amendments of pleadings were shortly as follows:—The plaintiff might obtain an order as of course to amend his bill at any time before answer, without notice to the defendant. He might, also, within four weeks after answer, where there was but one, or after the last of the answers, if there were several, obtain *one* order of course to amend; but in all other cases, if he desired to amend his bill after answer, he must obtain a special order to amend by summons at chambers, the application being supported by affidavit. After the evidence was closed, no new allegation could be introduced or material fact put in evidence which was not so before. Sometimes the court, at the hearing, would order a cause to stand over, with liberty to the plaintiff to perfect his case by amendment, or would permit the prayer of the bill to be amended so as to be more consistent with the case as stated. A plaintiff was not permitted to take advantage of the order to amend to change his case entirely (*f*), nor to strike out any portion of the bill so as to occasion costs to the defendant, which could not be awarded to him at the hearing, under the penalty of being ordered to pay such costs when taxed. Nor could he, if he had no title to maintain the suit at the time he filed

(*f*) *Smith* v. *Smith*, G. Cooper, 141; and cf. *Allen* v. *Spring*, 3 Beav. 615.

his bill, but acquired one subsequently, introduce such new title by amendment (*g*).

So when a good ground of defence was disclosed by a plea, but was informally pleaded, the court would give leave to amend the plea, and sometimes to plead *de novo* (*h*).

An answer in Chancery being put in on oath would not be allowed to be amended unless under exceptional circumstances (*i*). The modern practice was to allow a supplemental answer to be put in. When there was a clerical error, or a mistake in a name, or a mistake as to fact, or when any important matter had come subsequently to the knowledge of the defendant, the answer has been allowed to be amended, or a supplemental one put in.

For the future practice as to amendments of pleadings we must look to Order XXVII. of the new Rules of Court, the first six rules of which Order are as follows:—

"(1.) The court or a judge may at any stage of the proceedings allow either party to alter his statement of claim, or defence, or reply; or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass, or delay

(*g*) *Evans* v. *Bagshaw*, L. R., 5 Ch. 340; 39 L. J., Ch. 145; 1[illegible] W. R. 657.

(*h*) Dan. Ch. Prac. ch. xv. s. 9.

(*i*) Ibid. ch. xvii. s. 6.

the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.

"(2.) The plaintiff may, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply, and before replying; or where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared.

"(3.) A defendant who has set up in his defence any set-off or counter claim may, without any leave, amend such set-off or counter claim at any time before the expiration of the time allowed him for pleading to the reply, and before pleading thereto, or in case there be no reply, then at any time before the expiration of twenty-eight days from the filing of his defence.

"(4.) Where any party has amended his pleading under either of the last two preceding rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the court or a judge to disallow the amendment, or any part thereof, and the court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it, subject to such terms as to costs or otherwise as may seem just.

"(5.) Where any party has amended his pleading under Rules 2 or 3 of this Order, the other party may apply to the court or a judge for leave to plead

or amend his former pleading, within such time and upon such terms as may seem just.

"(6.) In all cases not provided for by the preceding rules of this Order application for leave to amend any pleading may be made by either party to the court or a judge in chambers, or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may seem just."

As some guide to forming an opinion upon what amendments are likely to be permitted under these rules, it will be desirable to give some of the cases decided under the previous statutes.

In the following cases amendments were allowed under 3 & 4 Will. 4, c. 42:—

In *Hanbury* v. *Ella*(*n*), shortly after the passing of this statute, the plaintiff declared on a promise by the defendant to pay for goods supplied to C., and the evidence proved only that the defendant guaranteed the payment. This was held a variance, but leave to amend was given by substituting a promise to guarantee in the place of the promise to pay. It was argued against the amendment, that this was prejudicing the defendant by calling on him to disprove a totally different contract from that alleged. But the court supported the amendment, and held that the variance was not material to the merits of the case. So, in slander, where the plea was not guilty, and the declaration charged the defendant with affirming

(*n*) 1 A. & E. 61.

the slander; and the evidence proved only that the defendant had stated that he had heard that the substance of the slander was in circulation; the variance was amended, and Tindal, C. J., laid down the general spirit of the statute in the following words (*o*):—"I do not agree that the 23rd section of the 3 & 4 Will. 4, c. 42, is to be strictly construed. I should rather say that it ought to receive a liberal interpretation. The object of the Legislature in passing the statute being to prevent the necessity of multiplying counts, it would be unjust to tie a plaintiff down to the restrictions imposed by the new rules of pleading, if he were not at the trial to have the full benefit of the power of amendment intended to be conferred by this section. It may be difficult to give any precise meaning to the words 'merits of the case,' when applied to an action like the present; but they seem to intend the substantial matter which the parties come to try. The other words, 'prejudiced in the conduct of his action' are capable of a clearer explanation. Here, I cannot see how the defendant could possibly be prejudiced in his defence by allowing this amendment to be made; for any witness called in support of the plea of not guilty, might disprove the one form of expression as well as the other. If the defendant wished to plead a justification, or if he were taken by surprise, the judge was authorized to postpone the trial. It cannot be said that the defendant was prejudiced in respect of the amount of the damages by the words laid in the declaration; for it

(*o*) *Smith* v. *Knowelden*, 2 M. & G. 563.

was the words proved which were left to the jury. It seems to me that this case is clearly within the statute, and that the amendment should be allowed, on payment of costs."

Accordingly, where the declaration stated a promise to lay out money on an annuity, and the evidence proved a promise to lay out on government security, the court held that the defendant could not be prejudiced by an amendment (*p*). So, a plea to an action on a bill which set up that it was given for a gambling consideration has been amended by substituting the name of another game for that alleged in the plea (*q*). In this case, Rolfe, B., stated the test of the propriety of an amendment to be this:—"Supposing the party comes with evidence that would enable him to meet the case as it stands on the record unamended, would the same enable him to meet it as amended?" If so, the judge ought to allow the amendment; but not otherwise. "The only guide which a judge at Nisi Prius can have as to making an amendment, is that pointed out by the act, namely, whether the amendment is or is not to correct a misstatement, not material to the merits of the case, and by which the opposite party cannot have been prejudiced" (*r*).

Amendments have been allowed at trial, under this act, even when the variance involved a point on which an opposite party had previously given notice

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(*p*) *Gurford* v. *Bagley*, 3 M. & G. 781.
(*q*) *Cooke* v. *Stratford*, 13 M. & W. 379.
(*r*) Per Rolfe, B., 13 M. & W. 387.

that he should insist, and oppose any amendment (*s*). The judge in such a case only considered whether or not the merits of the case were affected by the alteration (*t*).

A count on a warranty that a horse was absolutely sound, has been amended by adding the words "except in one foot" (*u*).

In breach of promise of marriage, the declaration stated, that in consideration that the plaintiff would go from T. to L., and marry the defendant, the defendant promised, &c.; no evidence of the transit from T. to L. It was held, that the declaration was rightly amended into a promise to go to L., and that the evidence of the consideration was sufficient (*x*).

A contract to carry has been altered into a contract to transmit as a wharfinger (*y*).

Where the declaration stated a demise executed by B. and L., and the evidence was that B. and L. had been parties to the deed, but that L. had died before it was executed; the Court held that the record was rightly amended by striking out L.'s name (*z*).

In false imprisonment, the defendant pleaded that certain property had been stolen from him by some person unknown, and had been found in the plaintiff's house; that defendant had probable cause to

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(*s*) *Gayler* v. *Farrant*, 4 Bing., N. C. 286.
(*t*) *Whitwill* v. *Scheen*, 8 A. & E. 301.
(*u*) *Hemming* v. *Parry*, 6 C. & P. 580.
(*x*) *Harvey* v. *Johnston*, 6 C. B. 295.
(*y*) *Parry* v. *Fairhurst*, 2 C. M. & R. 190.
(*z*) *Gregory* v. *Delf*, 13 Q. B. 608.

suspect, &c. The evidence showed a larceny by P. The plea was held to be rightly amended according to the fact (*a*).

Where the variance was between the amount of goods declared for, and the amount proved to have been ordered; the court sanctioned an amendment which the judge had directed, unless the defendant's attorney would produce an affidavit that the defendant would be prejudiced by the amendment (*b*).

In the following cases amendments were refused under 3 & 4 Will. 4, c. 42:—

When an amendment would introduce a new contract or a new breach, and so require the pleadings to be substantially remodelled, it would not be allowed (*c*). Neither would it be granted where it would introduce an essentially new fact into the case, or import a new term into the agreement (*d*). This statute, in short, gives a judge no power to supply a material omission in the pleadings. Nor can he amend where there is no real answer put forward on the merits of the case; nor where an amendment would occasion a different set of issues (*e*).

An amendment would be refused of a plea which is an answer to part only of a declaration (*f*). In *Boucher* v. *Murray*, the declaration was on a breach

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(*a*) *Pratt* v. *Hanbury*, 14 Q. B. 190.

(*b*) *Jones* v. *Hutchinson*, 10 C. B. 515.

(*c*) *Brashier* v. *Jackson*, 6 M. & W. 554.

(*d*) *Boucher* v. *Murray*, 6 Q. B. 362.

(*e*) Per Tindal, C. J., and Erskine, J., *Callandar* v. *Districh*, 4 M. & G. 68.

(*f*) Ibid.

of a guarantee, and stated that, in consideration the plaintiff would make an advance or loan to B., defendant would guarantee, &c.: plea, that plaintiff did not make the advance. The judge, according to the evidence, amended the declaration by inserting a statement that the defendant promised, in consideration that the plaintiff would procure the British and Australasian Company, in which plaintiff was a partner, to make the advance; and the plea, by a statement that the plaintiff did not procure the said bank to make the said advance. But the Court held the amendment wrong, as it introduced a new term into the declaration by virtually transferring the promise of repayment from the plaintiff to the bank. So, in an action on a promissory note, the defendant pleaded that another note, signed by an additional party, had been received in satisfaction of the first. The evidence proved the second note to have been received in satisfaction of an intermediate note, not mentioned in the plea, which had been given in satisfaction of the first. The judge amended by inserting in the plea a description of the intermediate note; but the Court held he had gone too far in so doing, because the effect of the amendment was not merely to alter the description of the note in the plea, but to introduce new matter (*g*).

In an action for goods sold, the plea averred that the plaintiff authorized A. to trade as A. and Co., and sell the goods as his own proper goods; and

(*g*) *David* v. *Preece*, 5 Q. B. 440.

then claimed a set-off due from A. The evidence disclosed an authority from the plaintiff to A. and B. to trade as A. and Co. The court held the judge right, in refusing to amend by inserting that A. and B. were authorized; and in directing the facts to be found specially (*h*).

So, in slander, the words set out in the declaration were: "That is the man" (the defendant) "I mean: he is a thief." The evidence only went to show that the defendant had told a witness that he, the defendant, had told the plaintiff that he was a thief; and that when a third person, who imagined that the defendant meant him, asked for an explanation, the defendant then uttered the words charged in the declaration. Jervis, C. J., held the variance material; and, refusing an amendment, directed a nonsuit, on the ground that the words proved were strictly true, and merely historical (*i*).

The following cases refer to amendments under the Common Law Procedure Acts:—

The principles therein embodied were fully considered in *Wilkin* v. *Reed* (*k*). There, the declaration charged the defendant with having fraudulently misrepresented to the plaintiff, that the reason why he had dismissed P. (a servant whom the plaintiff engaged, on the recommendation of the defendant to try him) was the alleged diminution of the defendant's

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(*h*) *Addington* v. *Magan*, 10 C. B. 576.
(*i*) *Camfield* v. *Bird*, 3 C. & K. 56.
(*k*) 15 C. B. 192.

business; whereas he had dismissed P. on account of dishonesty. The evidence proved that P. had committed dishonest acts while in the defendant's service, and that the defendant had not communicated this fact; but that the immediate cause of the dismissal was that which had been assigned on the plaintiff's inquiry. The plaintiff applied to amend by substituting an allegation that the defendant had suppressed the fact of dishonesty, in the place of that which charged a fraudulent misrepresentation. But the court held the judge right in refusing the application, on the principle that it would entirely vary the original ground and substance of the action. Maule, J., said:—

"The 3 & 4 Will. 4, c. 42, allowed amendments only in matters not material to the merits of the case; and the proposed amendment, if made at all, can only be made under the Common Law Procedure Act; and that enables the judge to make 'such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties.' Now, what is the real question in controversy is a matter of fact, and that matter of fact is to be decided by the judge. The framers of the Common Law Procedure Act intended to extend the powers of amendment given by the act of 3 & 4 Will. 4, which only applied to matters not material to the merits; and they provided for the determination of the real matter in issue in the suit; for there may be, and often are, cases where the real matter is, by some mistake or oversight, not raised by the pleadings. Now, under

the new act in such cases, that may be put upon the record which was not put upon the record before, but which must be shown to the satisfaction of the judge to exist. Now, what was the controversy which existed in the present case, and which was not raised by the record? That there was a controversy as to the true cause of dismissal is clear; but there was no dispute as to whether Pargeter had been guilty of dishonesty; nor whether the fact of his having been guilty of dishonesty had been fraudulently suppressed. Certainly, neither of these two latter questions were raised by the record; but I, as a judge, did not suppose they were ever in controversy, and therefore decided that they ought not to be raised upon the record. It was not intended by the framers of the Common Law Procedure Act that amendments should be made to raise questions never in controversy between the parties. All questions are to be excluded, and intentionally so, except those which the parties hoped and intended to try in the cause; and, as to them, amendments are to be made so as 'the real question in controversy' may be determined. In the present case there was nothing to show that the question sought to be raised by the proposed amendment was ever in controversy between the parties; on the contrary, it was clear that it was never intended to be raised by the record, nor ever existed in fact."

Where the declaration charged the defendant with falsely representing that the business of his public-house produced 100*l.* per month (as to which amount there was no dispute), an amendment adding the

words "over the counter" was held to have been rightly made, the question to be considered being not the amount of the receipts but the nature of the representation (*m*). And where in an action for a breach of contract to ship coals, the description of the coals in the declaration was contradictory, it was held that the judge could amend the description, so as to raise the question really at issue, and that, as the declaration had not misled the defendant as to the matter in dispute, he was not entitled to the costs of the amendment (*n*).

Where the declaration was for money had and received by the defendant, with a count in trover, and the plea after averring that the money received was due on a contract jointly with T. B., set forth a judgment in satisfaction recovered by the plaintiff in trover against T. B.; and the evidence supported this plea, with the variance that there was proved to have been a joint conversion and sale by the defendant and T. B., but a receipt of the proceeds of the sale by the defendant alone; it was held that the substantial question was, whether there had been such a recovery in the former action as barred the subsequent one; and, that having been proved, that the plea was rightly amended by striking out the allegation that the debt was a joint one, and by substituting an allegation that the money was received by the defendant as the proceeds of the sale (*o*). So,

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(*m*) *Roles* v. *Davis*, 4 H. & N. 484.
(*n*) *St. Losky* v. *Green*, 9 C. B., N. S. 370.
(*o*) *Buckland* v. *Johnson*, 15 C. B. 145.

a judge has amended a declaration by altering an injury to possession to an injury to the reversion (*p*).

So, where the declaration was on a breach of contract for a year's hiring, and the evidence disclosed a usage to dismiss on three months' notice, it was held that the judge was wrong at trial in holding that there was no variance, because the usage was to be treated as annexed to the contract, and ought to have been stated; but it was also held that an amendment should have been allowed at trial (*q*).

In a declaration for injuring the plaintiff's horse by riding him improperly, an unproved averment that the defendant would not let any other person ride the horse has been struck out (*r*).

In determining whether an amendment should be allowed, the character of the action or defence ought not to be taken into consideration. There is, however, some difference of opinion on this point (*s*). Whenever an amendment would raise a new point between the parties, it should not be allowed (*t*); but where the amount claimed by the plaintiff had been inadvertently misstated in the declaration it was held that the judge had power to insert a larger sum (*u*).

It was held that no appeal lay against the refusal

(*p*) *May* v. *Footner*, 5 E. & B. 505.
(*q*) *Metzner* v. *Bolton*, 9 Ex. 518.
(*r*) *Salter* v. *Burnaby*, 1 F. & F. 139.
(*s*) *Hughes* v. *Bury*, 1 F. & F. 374.
(*t*) *Adams* v. *Smith*, 1 F. & F. 311.
(*u*) *Knowlman* v. *Bluett*, L. R., 9 Ex. 1; 43 L. J., Ex. 29; 22 W. R. 77.

of an amendment by a judge at Nisi Prius; but the court would review such refusal, if they thought it necessary (*x*), though as a general rule they would do so only when they thought that the discretionary power had been improperly exercised (*y*).

When a cause is sent down for trial to a county court under the 19 & 20 Vict. c. 76, s. 37, the judge has power under the 37th section of the Common Law Procedure Act, 1852, to amend a misjoinder of defendants (*z*).

AMENDMENTS IN CRIMINAL CASES.

The day and year on which facts are stated in an indictment to have occurred, are not in general material: and the facts may be proved to have occurred upon any other day previous to the finding of the bill by the grand jury. So it is not generally necessary to prove the offence to have been committed at the place named in the indictment, but it is enough to show that it was committed within the county, or within the jurisdiction of the court. Such, at least, is the rule where the offence is of a transitory nature, *e. g.*, in murder, larceny, treason, and even, it is said, in highway robbery.

(*x*) *Brennan* v. *Howard*, 1 H. & N. 138.

(*y*) *Holden* v. *Ballantyne*, 29 L. J., Q. B. 148.

(*z*) *Rennison* v. *Walker*, L. R., 7 Ex. 143; 41 L. J., Ex. 43; 20 W. R. 471.

But where time or place are of the essence of the offence, they must be strictly proved. Thus, burglary may be proved to have been committed on any day prior to that which is charged in the indictment; but it must be proved to have been committed between the hours of 9 p.m. and 6 a.m. (*a*). So, where place is stated as matter of local description, and not merely as venue, a variance will be fatal at common law. Thus, on indictments for burglary, housebreaking, setting fire to a dwelling-house, stealing from a dwelling-house, place is of the essence of the offence, and must be proved. So, on an indictment against a parish for not repairing a road, the part of the road out of repair must be proved to be within the parish.

When there is a material variance between the offence charged and the offence proved, it is fatal unless amended. But if the variance be only a matter of value or aggravation, and does not vary the species of the charge, the variance is in many cases immaterial, either at common law or by statute. Thus, in murder, the homicide is the substance of the crime; and the malice, which distinguishes it from manslaughter and justifiable or excusable homicide, is merely matter of aggravation, which does not vary the essence of the charge, and cannot therefore mislead a prisoner in his defence. Accordingly, on an indictment for the higher offence, he may be convicted of either of the lower offences. So, in larceny, it is sufficient to prove the species of the goods stolen

(*a*) 7 Will. 4, c. 86, s. 4.

to correspond with the description in the indictment, without proving the amount or the value to be the same. Thus, on an indictment for stealing eight pairs of shoes of the value of 4*l.*, two waistcoats of the value of 30*s.*, and three coats of the value of 5*l.*, it is not necessary, in either case, to prove the value of any of the articles to be more than nominal, nor to prove the number of the goods assigned to each species, nor the accumulative number of the different species. A conviction will be warranted by evidence that any one article, of any value, of any one distinct species, has been stolen. But a prisoner charged with one kind of felony or misdemeanor cannot be convicted of another kind of felony or misdemeanor; still less, when he is indicted for a felony, can he be convicted of a misdemeanor; nor when indicted for a misdemeanor can he be convicted of a felony. Thus, a prisoner charged with housebreaking cannot be convicted of burglary; and when charged with stealing boots or a coat, he cannot be found guilty of stealing shoes or a waistcoat. So, when there is a variance in the name of the person against whom the offence is committed, it is fatal at common law, unless the name be *idem sonans*.

But, although the variances which are fatal at first sight, in criminal cases, are still numberless, yet practically their amount is reduced to a very narrow compass by the extensive powers of amendment which different statutes, as in civil cases, have vested in the judge at trial. The most recent one, and the only one which need be considered here, as it virtually

includes many which preceded it, is the 14 & 15 Vict. c. 100.

By this act, after reciting that "offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case; and that such technical strictness may safely be relaxed in many instances, so as to insure the punishment of the guilty, without depriving the accused of any just means of defence; and that a failure of justice often takes place on the trial of persons charged with felony and misdemeanor by reason of variances between the statement in the indictment on which the trial is had and the proof of names, dates, matters and circumstances therein mentioned not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his own defence,"—it is enacted as follows:—

"From and after the coming of this act into operation, whenever, on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in name of any county, riding, division, city, borough, town corporate, parish, township or place mentioned or described in any such indictment; or in the name or description of any person or persons, or body politic or corporate therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein; or in the name or description of any person or persons, body politic or corporate, therein stated or alleged

to be injured or damaged, or intended to be injured or damaged by the commission of such offence; or in the Christian name or surname, or both Christian name and surname, or other description whatsoever of any person or persons whomsoever; or in the name or description of any matter or thing whatsoever therein named or described; or in the ownership of any property named or described therein; it shall and may be lawful for the court, before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended according to the proof, by some officer of the court, or other person, both in that part of the indictment wherein such variance occurs, and in every other part of the indictment which it may become necessary to amend; on such terms as to postponing the trial, to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred: and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend, shall be amended accordingly by the proper officer; and in all other cases the order

DICAL DEPARTMENT OF THE ARMY.

for the amendment shall either be indorsed on the indictment, or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court: provided, that in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant and his surety or sureties, if any, accordingly; in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively; and the defendant shall be bound to attend to be tried at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: provided also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn."

Sect. 2.—"Every verdict and judgment which shall be given after the making of any amendment under the provisions of this act shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made."

By the interpretation clause of this act (s. 30), the word "indictment" is declared to include an "information," "inquisition," "presentment," and "also any plea, replication or other pleading, and any Nisi

Prius record." Consequently, in all these cases amendments will be allowed.

Under sect. 1 of this act, the ownership of property in larceny may be altered at trial. Where the indictment was for stealing the goods of C.; and the proof was that D. was a special bailee of similar property belonging to C. and B. severally, and had delivered by mistake the goods in question to the prisoner as belonging to C., although they really belonged to B.; the court supported an amendment which laid the property in D. (*b*). It is doubtful, however, whether, in every case, the power of amendment at trial extends so far as to allow a charge of stealing goods from A. B., to be converted into a charge of stealing them from C. D. In an Irish case (*c*), such an amendment has been allowed even after the prisoner's counsel had addressed the jury; and the ruling of Williams, J., in *R.* v. *Rymers* (*d*) was disapproved. Where such an amendment was not made, the court, without deciding whether it might have been made, held that an acquittal on a charge of stealing goods from A. B. would not sustain a plea of *autrefois acquit* on a charge against the prisoner of stealing the same goods from C. D. (*e*).

In perjury alleged to have been committed on the trial of B. "for setting fire to the barn of P.," the certificate of the trial and conviction of B. stated it to be "for setting fire to a stack of barley." It

(*b*) *R.* v. *Vincent*, 2 Den. C. C. 464.
(*c*) *R.* v. *Fullarton*, 6 Cox Crim. Cas. 194.
(*d*) 3 C. & K. 326.
(*e*) *R.* v. *Green*, 1 D. & B. 113.

appeared that the barn and stack of barley were burning at the same time; and Williams, J., directed the indictment to be amended according to the certificate, considering the case within the words of sect. 1, "in the name or description of any matter or thing whatsoever," and observing that this was one of the very cases for which the statute was passed (*f*).

But where the prisoner was charged with obtaining money on a false pretence that he had served an order of affiliation on A., which he had not served; and the evidence proved only a statement by him that he had left it with a third person for A., it was held that this was a material variance which could not be amended (*g*). So, where the indictment charged the concealment of a birth by placing the body in and among a heap of carrots, and the evidence was that it was placed on the back of the heap, Crompton J., held the variance material, and refused an amendment (*h*). A material omission in an indictment cannot be supplied. Thus, on a charge of perjury, an omission to state a material allegation in the indictment is a defect of substance, and not of form, which ought not to be amended (*i*).

If the evidence prove a variance as to the Christian name of a person named in an indictment as matter of description, the court may amend by striking out all the names; but not by striking out merely some

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(*f*) *R.* v. *Neville*, 6 Cox Crim. Cas. 69.
(*g*) *R.* v. *Bailey*, 6 Cox Crim. Cas. 29.
(*h*) 6 Cox Crim. Cas. 391.
(*i*) Per Byles, J., *R.* v. *Harvey*, 8 Cox Crim. Cas. 102.

of the names which have been inserted, and not proved. Where the indictment charged an assault on a gamekeeper of George William Frederic Charles, Duke of Cambridge; and the first two names alone were proved; it was held that the Court of Quarter Sessions might have amended by striking out all the names except that of "Duke of Cambridge," but that they were not bound so to amend; and that therefore the allegations, although unnecessary, ought to have been proved (*k*). Where, however, the prisoner was indicted for forgery as a statutable *felony*, but the offence proved was holden to be a *misdemeanor*, Hill, J., refused an amendment, on the ground that the statute does not permit an alteration of the nature or quality of the offence charged (*l*).

The 9th section of this act enacts that a prisoner charged with a felony may be convicted of an attempt to commit a felony, if it shall appear on the evidence that he did not complete the offence charged; and in like manner, if charged with a misdemeanor, he may be convicted of an attempt to commit a misdemeanor. The 11th section enacts, that on an indictment for robbery, the prisoner may be found guilty of an assault with intent to rob.

The 12th section enacts, that if on a trial for misdemeanor the evidence prove a felony, the prisoner may, notwithstanding, either be convicted of the misdemeanor and plead this conviction in bar of a

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(*k*) *R.* v. *Frost*, 1 Dears. 474.
(*l*) *R.* v. *Wright*, 2 F. & F. 320.

subsequent trial, for the same offence, on a charge of felony; or the court may discharge the jury from giving a verdict, and direct the prisoner to be indicted for the felony. Previously, by the 7 & 8 Geo. 4, c. 29, s. 53, on a charge for obtaining goods by false pretences, a prisoner might be convicted, notwithstanding the evidence proved a taking which amounted to larceny. But, on a charge of larceny, a conviction cannot be had for obtaining goods by false pretences.

The 13th section, after noticing the subtle distinction between the legal crimes of larceny and embezzlement by a servant or clerk, enacts, that if on an indictment for the one crime the evidence should bring it within the legal definition of the other, the jury may convict of whichever crime the evidence establishes.

The 14th section allows prisoners charged with a joint receipt of stolen property to be convicted severally of a separate receipt.

The object of this act, as stated by its author, Lord Campbell, C. J., is held "to apply to all cases where amendments may be made in furtherance of justice, and where the defendant cannot be prejudiced in his defence, on the merits, by such amendment" (*m*).

It has been ruled that an amendment will not be allowed after the counsel for the prisoner has addressed the jury. The proper course is that, where the counsel for the prosecution has given all the evi-

(*m*) *R.* v. *Sturge*, 3 E. & B. 734.

dence that he means to give, he should, if he wishes for an amendment, ask for it before he closes his case; and then, if the amendment be allowed, the counsel for the prisoner addresses the jury on the indictment as it is amended (*n*).

The effect of the 14 & 15 Vict. c. 100, has been virtually to abolish the multitude of technical subtleties, which were formerly the means of defeating justice, and procuring unreasonable verdicts of acquittal after the substance of the charge had been proved. The responsibility of letting loose on society a criminal, of whose guilt no reasonable auditor has entertained a doubt, no longer rests with the shortcomings of the Legislature, but with the discretion of the judge; and, as it is his duty to amend a defective indictment, when the prisoner cannot fairly complain that he is required suddenly to meet a charge for which he is not prepared, so it is equally the duty of a judge not to endanger the liberty of the subject, nor to encourage the carelessness of prosecutors, by permitting the form of an indictment to be altered substantially from what it was when the prisoner was called on to plead to it. On this head, it has been said by a learned writer, that no general rule can be laid down for the guidance of the court in all cases. It is very possible that an amendment, which in one case might not prejudice a prisoner, might in another case prejudice him materially. The inclination of the court will still be *in favorem vitæ*. The court will look at all the

(*n*) *R.* v. *Rymers*, 3 C. & K. 326.

circumstances of the case to ascertain whether the transaction would be changed by the amendment, and will not forget that the protection of the weak from oppression, and of the presumptively innocent from injustice, are higher objects, even in the estimation of positive law, than the detection and punishment of the guilty (*o*).

(*o*) The Indian procedure as to amendments in civil cases is governed by Act viii. of 1859, s. 144, and in criminal cases by the Code of Criminal Procedure, ss. 443—448.

CHAPTER V.

ON THE RELEVANCY OF EVIDENCE.

As it is the object of pleading to reduce the case of each litigating party to one or more substantial issues which involve the merits of the question; and as for this purpose none but material allegations which tend to the raising of such issues are admissible; so it is the object of evidence to provide that, when such allegations have been made, and such issues selected, they shall be supported by strictly relevant proof (*a*). The rule is that—

> The evidence must correspond with the allegations, and be confined to the points in issue.

Or as it is sometimes stated that—

> The evidence must be relevant to the issue.

On this subject the Judicial Committee of the Privy Council once said, "This case is one of considerable importance, and their lordships desire to take advantage of it for the purpose of pointing out the absolute necessity that the determination in a

(*a*) The Indian Evidence Act enacts (sect. 5), that "evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are herein declared to be relevant, and of no others," and then proceeds (in sects. 7—55) to enact what facts are relevant.

cause should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case made thereby" (*b*).

"Evidence," says Mr. Best, "may be rejected as irrelevant for one of two reasons:—1st, that the connection between the principal and evidentiary facts is too remote and conjectural; 2nd, that it is excluded by the state of the pleadings, or what is analogous to the pleadings; or is rendered superfluous by the admissions of the party against whom it is offered" (*c*)

It is for the first of the above-mentioned reasons, that no presumption as to the conduct, intention, or course of dealing between two parties arises from evidence of the conduct, intention, or course of dealing between one of them and a third party. Such evidence is said to be *res inter alios acta*, and will be rejected as irrelevant to the issue, unless, indeed, it is part of the *res gestæ*, and so tends to throw any light upon the question at issue (*d*). The fact that A. contracted, or dealt in a particular manner with B., is no evidence that he meant to contract, or deal in the same manner with C. Thus in an action for goods sold and delivered, in which the defence is that the plaintiff sold them to the defendant on certain terms, the defendant cannot show that the plaintiff has sold the same quality

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(*b*) *Eshenchunder Singh* v. *Shamachurn Bhutto*, 11 Moo. Ind. App. 20.

(*c*) Best on Evidence, 6th ed. p. 353.

(*d*) *Milne* v. *Leisler*, 7 H. & N. 786.

of goods to other persons on the same terms, for the fact that a man has once or more acted in a particular way does not make it probable that he so acted on a given occasion. The admission of such evidence would be fraught with the greatest inconvenience. Where, indeed, the question is one of guilty knowledge or intent, as in cases of uttering forged documents or base coin, such evidence is admissible as tending to establish a necessary ingredient of the crime (*e*). And where in an action for work done to some houses the defendant denied that he was personally interested in the property, the plaintiff was allowed to call other persons as witnesses who had done work or supplied materials on the personal order of the defendant (*f*).

In an action by a brewer against a publican, where the issue was as to the quality of beer supplied by the former to the latter, Lord Ellenborough refused to let the plaintiff call witnesses to show that he supplied them, at the time in question, with good beer. His lordship said:—"This is *res inter alios acta*. We cannot here inquire into the quality of different beer furnished to different persons. The plaintiff might deal well with one, and not with the others" (*g*). Hence, where the issue was whether the plaintiff, a tradesman, had given credit to A.'s father, evidence that other tradesmen had given credit to

(*e*) *Hollingham* v. *Head*, 4 C. B., N. S. 388; cf. *Howard* v. *Sheward*, 36 L. J., C. P. 42; L. R., 2 C. P. 148; 15 W. R. 45.

(*f*) *Woodward* v. *Buchanan*, L. R., 5 Q. B. 285; 39 L. J., Q. B. 71.

(*g*) *Holcombe* v. *Hewson*, 2 Camp. 391.

the father was rejected (*h*). So, evidence of the treatment of scholars at one school is no evidence of the quality of their treatment at another school (*i*); and where the action was for withdrawing scholars without a quarter's notice, according to a prospectus of terms, which the defendant was proved to have received, it was held, that a witness might state that she had never received any prospectus while her children had been at the school, because this evidence bore on the usual course of the plaintiff's dealing, but that she could not prove that she had taken her children away without notice, and without being called on to pay a quarter's salary; apparently because this might have been merely a matter of peculiar arrangement (*k*). So, the terms on which one tenant holds are no evidence of the terms on which another tenant holds under the same landlord (*l*); and an award in favour of a party to a former action is not evidence for a party to a subsequent action, claiming by paramount title, as against a party claiming through the person against whom the award was made (*m*); and in an action to recover money paid to a third party, the receipt given by the latter to the plaintiff is not *per se* evidence against the defendant (*n*). So, on the trial of an indictment

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(*h*) *Smith* v. *Wilkins*, 6 C. & P. 180.

(*i*) *Boldron* v. *Widdows*, 1 C. & P. 59.

(*k*) *Delamotte* v. *Lane*, 9 C. & P. 261.

(*l*) *Carter* v. *Pryke*, Peake, 95.

(*m*) *Lady Wenman* v. *Mackenzie*, 5 E. & B. 447.

(*n*) *Carmarthen and Cardigan Railway Co.* v. *Manchester and Milford Railway Co.*, L. R., 8 C. P. 685; 42 L. J., C. P. 262.

for carrying on a noxious trade, a previous summary conviction for a similar offence is inadmissible (*o*).

Where, however, the extraneous transaction contains the principle of a reasonable and credible inference as to the motive or conduct of the party, the judge, in his discretion, will admit evidence of it. Thus, where a letter from the defendant, in answer to a letter written on the plaintiff's behalf, was proved to have been seen by the plaintiff, it was admitted in evidence against the latter (*p*). So, in false imprisonment on a charge of felony, where the defence is a *bonâ fide* belief that the defendant had committed felony, the defendant may show that he had previously done acts which go to establish the presumption of *bona fides* (*q*). So, on a charge of uttering counterfeit coin, a guilty knowledge may be proved by evidence either of a previous or subsequent uttering of another description of counterfeit coin (*r*); and on an indictment for knowingly and unlawfully having possession of coining instruments, proof is admissible that the prisoner had previously uttered counterfeit coin (*s*); and the strictness of the rule is similarly relaxed in cases of false pretence, where the prisoner's guilty knowledge or intent is in question (*t*); and even on a charge of murder, evi-

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(*o*) *R.* v. *Fairrie*, 8 E. & B. 486.
(*p*) *Carne* v. *Steer*, 5 H. & N. 628.
(*q*) *Thomas* v. *Russell*, 9 Ex. 764.
(*r*) *R.* v. *Foster*, 1 Dears. 456.
(*s*) *R.* v. *Weeks*, L. & C. 18.
(*t*) *R.* v. *Francis*, L. R., 2 C. C. R. 128; 43 L. J., M. C. 97; 22 W. R. 663.

dence that the prisoner committed other murders has been admitted (*u*).

The customs of one manor are not evidence of the customs of another manor (*x*), unless a connection between them be first established, as by showing that they belong to the same lord, that the same description of tenants has existed in each, and that their leases have been granted in the same terms. In such a case, the usage which has prevailed in one part, and which is therefore evidence to explain the meaning of a grant there, is evidence to explain a grant expressed in similar terms as to any other part of the district (*y*). But the unity or original identity of the manors must be clearly shown; and the mere fact of their being in the same leet, or parish, is not sufficient (*z*).

A custom of trade may be proved by showing what is the custom of the same trade in a different place. Thus, evidence of the custom of fisheries off Newfoundland, is evidence of the custom of similar fisheries off the coast of Labrador (*a*): and evidence of an usage in the colonial market, under which a broker contracting on behalf of an undisclosed principal is personally liable unless he discloses such principal within three days from the date of the contract, has been admitted as relevant, to show a

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(*u*) *R.* v. *Geering*, 20 L. J., M. C. 215.
(*x*) *Marquis of Anglesea* v. *Lord Hatherton*, 10 M. & W. 233.
(*y*) Per Bayley, J., *Rowe* v. *Brenton*, 8 B. & C. 764.
(*z*) Per Lord Abinger, 10 M. & W. 236.
(*a*) *Noble* v. *Kennaway*, 2 Doug. 510.

similar custom in the fruit trade (*b*). So, parish books were held to be evidence against a member of the vestry of the practice of the parish, although they related to proceedings of the vestry before he became a member (*c*).

When the issue involves a question of manorial right as between a lord and an adverse claimant, evidence of the exercise of such right over part of a waste has been held to be evidence of title to other parts which, from their local situation, may be deemed to belong to it. Thus, in the Exchequer Chamber, on a question whether a piece of waste land, between a highway and the plaintiff's inclosure, belonged to the plaintiff, or to the lord of the manor, it was held that the latter might support his claim by evidence of grants of similar pieces between the same road and the inclosure of other persons. Lord Denman said:—"If the lord has a right to one piece of waste, it affords no inference, even the most remote, that he has a right to another in the same manor, although both may be similarly situated with respect to the highway. Assuming that all were originally the property of the same person, as lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises, from his retaining one part in his hands, that he retained another; nor, if in one part of the manor the lord has dedicated a portion of the waste to the

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(*b*) *Fleet* v. *Murton*, L. R., 7 Q. B. 126; 41 L. J., Q. B. 49; 20 W. R. 97.

(*c*) *Cooper* v. *Ward*, 6 C. B., N. S. 50.

use of the public, and granted out the adjoining land to individuals, does it by any means follow, nor does it raise any probability, that in another part he may not have granted the whole out to private individuals, and they afterwards have dedicated part as a public road. But the case is very different with regard to those parcels which, from their local situation, may be deemed part of one waste or common; acts of ownership, in one part of the same field, are evidence of title to the whole; and the like may be said of similar acts on part of one large waste or common" (*d*).

In all these cases it will be observed, that the act between third parties, which has, nevertheless, been received, has been either connected presumptively with the party who is to be affected by it, or has been invested with a *primâ facie* credibility by evidence of an original unity of nature or title. In short, it seems to be a safe general rule in these cases, that transactions with third parties are inadmissible, unless their privity or connection with the party against whom they are tendered be first proved extrinsically, so as to make such intermediate transactions operate in the nature of an admission or estoppel (*e*). Unless this be done, it will be the duty of the judge to reject the evidence, or to strike it from his notes.

Evidence of good or bad character is generally irrelevant and inadmissible in civil cases, unless cha-

(*d*) *Doe* v. *Kemp*, 2 Bing. N. C. 102; cf. *Dendy* v. *Simpson*, 18 C. B. 831.

(*e*) Per Maule and Bosanquet, JJ., *Taylor* v. *Parry*, 1 M. & G. 614; *Petrie* v. *Nuttal*, 11 Ex. 569.

racter be of the substance of the issue (*f*). In actions for seduction, evidence of the real plaintiff's bad character is admitted in reduction of damages; but the evidence must refer to a time prior to that when the seduction took place. The Divorce Court will receive evidence of adultery committed after the latest act charged in the petition, to show the character and tendency of the earlier acts of familiarity (*g*).

In actions for defamation, evidence of the plaintiff's general good character is held irrelevant, even on a plea of justification (*h*). In such cases, however, the plaintiff may give in evidence any words, as well as any act, of the defendant, to show the malice or *animus* of the words which are the subject of the action (*i*): but the mere abandonment of a plea of justification ought not to weigh with a jury, where the actual defence sets up only a privileged communication (*k*). Where the libel charged the plaintiff with incompetency as a surveyor, he was not allowed to travel out of the record by showing that he had, at other times, acted competently in that capacity (*l*).

In criminal cases the rule is observed with the utmost strictness, that no evidence shall be admitted

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(*f*) *Elsam* v. *Faucett*, 2 Esp. 563. As to the law in India, see Ind. Ev. Act, ss. 52 and 55.

(*g*) *Boddy* v. *Boddy*, 30 L. J., P. M. & A. 23.

(*h*) *Cornwall* v. *Richardson*, R. & M. 305.

(*i*) *Pearson* v. *Lemaitre*, 5 M. & G. 700.

(*k*) *Wilson* v. *Robinson*, 7 Q. B. 68.

(*l*) *Brine* v. *Bazalgette*, 3 Exch. 692.

which does not tend directly to the proof, or disproof, of the matter in issue (*m*). Therefore, as a general rule, evidence that a prisoner has committed a similar crime before, or that he has a disposition to commit such crimes, is inadmissible (*n*). On a charge of burglary and larceny on a particular day, evidence of a larceny in the same house on a previous day was rejected (*o*). So on a charge of obtaining money under false pretences, evidence that the prisoner had within a week previously obtained another sum of money under the same false pretence was rejected (*p*). But in the last case the question seems to have been as to the prisoner's authority to obtain the money. If the question had been as to his knowledge of the falseness of the pretence, the decision would doubtless have been different; for recently, when a man had been indicted for attempting to obtain an advance from a pawnbroker by falsely asserting that a certain ring contained diamonds, evidence of a similar attempt two days before was held to have been rightly admitted as proof of his knowledge that the pretence was false (*q*). However, when the *animus* or intent of an act has to be shown, previous and subsequent conduct will be evidence of it. Thus, the *animus* or intent in uttering counterfeit coin may be proved by evidence of pre-

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(*m*) Wels. Crim. Prac. 183.

(*n*) *R.* v. *Cole*, 1 Phil. Ev. 508.

(*o*) *R.* v. *Vandercomb*, 2 Lea. C. C. 816.

(*p*) *R.* v. *Holt*, Bell, 280.

(*q*) *R.* v. *Francis*, L. R., 2 C. C. R. 128; 43 L. J., M. C. 97; 22 W. R. 663; cf. *R.* v. *Roebuck*, D. & B. 24.

vious utterings; and the possession alone of several pieces of counterfeit coin is evidence of guilty knowledge (*r*). On the same principle, a woman being upon her trial for murdering her husband by means of arsenic, and there being a question whether she had administered it intentionally, evidence was admitted of the subsequent death of two of her children, and that their bodies displayed the same appearances as that of her husband (*s*). Again, when several felonies are so connected as to form one transaction, evidence of all may be given in order to convict of one. Thus, where the indictment charged stealing from the prosecutor's till; and the evidence showed different takings, by which the whole deficit was caused; it was held that the fact might be shown by proof of the results of different inspections of the till (*t*). So, in conspiracies, since the act of one is in law the act of all, when complicity has been proved, the act of one conspirator is evidence on an indictment against another.

The most important exceptions, however, to the last stated general rule arise under the 19th section of the Prevention of Crimes Act, 1871 (*u*), which provides, that "Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the

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(*r*) *R.* v. *Jarvis*, Dears. 552.

(*s*) *R.* v. *Geering*, 20 L. J., M. C. 215.

(*t*) *R.* v. *Ellis*, 6 B. & C. 145.

(*u*) 34 & 35 Vict. c. 112; cf. *R.* v. *Davis*, L. R., 1 C. C. R. 272; 39 L. J., M. C. 109; 18 W. R. 958.

proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him;" and "Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the accused knew the property which was proved to be in his possession to have been stolen; provided that not less than seven days' notice shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the party so accused."

In larceny, to prove the identity of the prisoner, it may be shown that other goods not included in the indictment, which were stolen at the same time, were found in his possession (*x*).

On the trial of Hunt (*y*) for riot and conspiracy,

(*x*) 2 Wels. Crim. Prac. 184.

(*y*) 3 B. & A. 566.

resolutions passed at a meeting, prior and avowedly preliminary to that named in the indictment, were held to be relevant evidence to show the objects of the second meeting. So, the general conduct of the members on their way to it, their military order and threatening language to people on the road, were held strictly relevant to show the character of the meeting. On the other hand, it was held that the defendant could not go into evidence of the conduct of the military who dispersed the meeting, because that could have no bearing upon the intention and object of the assembly, as these must have existed before the dispersion, and were in their nature perfectly distinct from the conduct of those who dispersed the assembly.

CHAPTER VI.

ON DEPOSITIONS.

DEPOSITIONS were at common law secondary evidence, and inadmissible where the original witness can be produced; but admissible in certain cases, and subject to certain restrictions, when he cannot be produced. The principle of this exclusion in the first instance rests on the hearsay nature of such evidence, and the prejudice to the adverse party who loses the benefit of his cross-examination.

They were absolutely and universally inadmissible at common law when the adverse party had no opportunity of controlling and explaining the evidence at the time of deposition, by cross-examining the deponent. But where he has had such opportunity, he was (and is) in certain instances, where public policy recommends such a course, affected by such testimony of an absent witness.

A deposition to be in any case admissible must refer to the same parties, or their privies, and there must be the same substantial issue (*a*). It is on this principle that the evidence of a witness in a former action may, after his decease, be read in a subsequent

(*a*) *Morgan* v. *Nicholl*, 36 L. J., C. P. 86; L. R., 2 C. P. 117; 15 W. R. 110.

action (*b*). Thus, also, in criminal cases, a deposition taken on one charge cannot be read on a different charge. It is, however, sufficient in such a case that the charges should be substantially identical, or so connected as to create a reasonable presumption that the prisoner's mind, at the time of the first charge, was sufficiently directed to the matters which form the substance of the subsequent charge. Thus, where the prisoner was charged before magistrates with wounding A. with intent to do her some grievous bodily harm, and was afterwards indicted for wounding A., A.'s deposition on the original charge was received on the subsequent charge, because the prisoner had had necessarily full opportunity of cross-examining A. (*c*).

Where the deposition is received, it operates as a complete substitution for the evidence of the witness. But if it be wanting in any statutory formalities, as, if it be not signed by the magistrate or coroner (*d*), or if it contain hearsay, such as a letter purporting to have been written by the deponent but not produced, the deposition will, in the former case, be wholly inadmissible, and in the latter, the part purporting to recite the letter must be omitted (*e*).

We proceed to consider first, as being of the chief practical importance,—

DEPOSITIONS IN CRIMINAL CASES.

At common law, depositions taken in the presence

(*b*) *Wright* v. *Tatham*, 1 A. & E. 3.
(*c*) *R.* v. *Beeston*, Dears. 405.
(*d*) *R.* v. *England*, 2 Lea. C. C. 770.
(*e*) *Tufton* v. *Whitmore*, 12 A. & E. 370.

of a prisoner before a magistrate, and signed by the latter, were generally evidence against the prisoner on his trial if it appeared that he had had an opportunity of cross-examining the witness, and that the witness at the time of trial was either dead, or permanently unable to travel, owing to illness, or that he had been kept out of the way by the prisoner, or by some one on the prisoner's behalf, in order to prevent him from giving evidence against him.

The admissibility of these depositions is now subject to the 11 & 12 Vict. c. 42, s. 17, by which it is enacted, that in all cases where any person shall be charged before any justice of the peace with any indictable offence, "such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing; and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness be examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid it shall be

proved, by the oath or affirmation of any credible witness, that any person, whose deposition shall have been taken as aforesaid, is dead, or so ill as not to be able to travel; and if, also, it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

Before a deposition can be received under this section it must therefore appear—

1. That it was taken in the presence of the magistrate and of the prisoner (*f*), and that the latter either cross-examined, or had an opportunity of cross-examining, the deponent.

2. That it has been signed by the witness and also by the magistrate. The christian name of the witness may be proved by any one who saw the witness sign (*g*).

3. That it was made on oath by the witness, or on affirmation, in such cases only in which an affirmation is allowed.

4. That the deponent is either dead, or so ill as not to be able to travel (*h*).

(*f*) *R.* v. *Watts*, L. & C. 339.

(*g*) *R.* v. *Foote*, 26 L. J., M. C. 79.

(*h*) Depositions may be used in India when the court is satisfied

Only the first and last of these conditions is required to be distinctly proved, and the last is usually proved first. The signatures, purporting to be authentic, are presumed to be so until proved to be otherwise; and the deposition is declared on the face of it to be taken on oath.

It is not enough to show that the deposition purports to be signed by the magistrate, but it must also be shown affirmatively by the prosecutor that the deposition was taken in the presence of the prisoner, and that he or his counsel or attorney had a full opportunity of cross-examining the witness; and, when the prisoner is not attended by counsel or attorney, it ought also to appear that the magistrate had asked him whether he would like to cross-examine, and that he had allowed the prisoner sufficient time to consider what questions he would put (*i*).

It is to be observed on the last condition, that it does not contain all the circumstances in which a deposition is generally admissible. Thus, before the statute, the deposition was received at common law, not merely on proof that the deponent was either dead or so ill as to be unable to travel, but if he were proved to have become permanently insane (*k*), or to be actually insane at the time of trial with a

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that for any sufficient cause it is impossible to procure the attendance of a witness, or that his attendance would cause unreasonable delay and expense. Ind. Ev. Act, s. 33.

(*i*) Per Platt, B., *R.* v. *Day*, 19 L. T. 35.

(*k*) *R.* v. *Eriswell*, 3 T. R. 707.

possibility of recovery (*l*). So, it neither was nor is necessary to show that the illness under which a deponent is suffering is of a permanent, or of more than a temporary nature. But where the illness of the witness is proved to be of a very transitory nature, the judge may and will, in his discretion, postpone the trial until he recover; and this is the proper course whenever such postponement does not clearly clash with public convenience.

The illness must be real and serious, and there must either be a physical incapability of locomotion, or a probability that it might dangerously affect the witness's health (*m*). It is desirable, when it is possible, to prove this fact by a medical attendant, but it may be proved by any one who has seen and examined the deponent recently. The court will inquire scrupulously and even suspiciously into all these circumstances before receiving the deposition; and will reject it when the alleged illness appears to be not dangerous or serious enough to excuse the absence of the deponent. Thus, at the Salisbury Spring Assizes, 1853, Crompton, J., held that the fact of a woman being within a month of her confinement was insufficient, in her absence, to render her deposition admissible. But immediately after, at Exeter, the same learned judge considered that it might be received when it appeared, in such a case, that the woman was expecting every hour to be confined. So, where a witness had had an attack of

(*l*) *R.* v. *Marshall*, C. & M. 147.
(*m*) *R.* v. *Day*, 19 L. T. 35.

paralysis, his deposition was read, although it would not have endangered his life to come into court. But in this case the deponent could neither hear nor speak (*n*). The fact, however, that a female witness was seventy-four years of age, and nervous, and (in the opinion of a medical witness) likely to faint under cross-examination, was held not to amount to such inability to travel as to make her deposition admissible (*o*).

It appears that it is for the judge to decide, whether the evidence of the witness's inability to travel is, in his opinion, sufficient (*p*).

It is also decided that, as before 11 & 12 Vict. c. 42, a deposition will be received if the deponent be proved to have been kept out of the way and prevented from appearing at the trial, by the act of the prisoner, or by collusion with him or his friends (*q*). This was expressly decided in *R.* v. *Scaife*, where the deponent was kept out of the way by the prisoner's agents; but it is necessary to create by evidence a reasonable presumption that the prisoner's agents have been authorized or sanctioned by him to procure the absence of the witness (*r*). But in such a case the deposition is evidence only against the prisoner who procured the absence of the deponent,

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(*n*) *R.* v. *Cockburn*, D. & B. 202.

(*o*) *R.* v. *Farrell*, L. R., 2 C. C. R. 116; 22 W. R. 578; 43 L. J., M. C. 94.

(*p*) *R.* v. *Stephenson*, L. & C. 165.

(*q*) *R.* v. *Gutteridge*, 9 C. & P. 471; *R.* v. *Scaife*, 2 Den. 281.

(*r*) Chitty's Statutes, vol. 2, p. 38, n.

and not against other prisoners in the same indictment who are not implicated in the collusion (*s*).

Unless the absence of the witness be accounted for in some one of these ways, his deposition cannot be received, because it will retain all its original and unsatisfactory incidents as hearsay evidence. When the deponent is in a foreign country, his deposition cannot be read (*t*).

Before the statute it was usual for the magistrate to sign each deposition; but in one case, where the deposition of a deceased witness was first on the same sheet of paper with the depositions of two other witnesses, and the magistrate's signature was at the end only of the last deposition, but was not in terms confined to it, Coleridge, J., after conferring with Lord Abinger, received the first deposition, but with the remark that it would have been bad in an affidavit (*u*). It seems, however, to have been the impression of the learned judge in this case, that each deposition ought, strictly, to be separately signed by the committing magistrate; and the language of the 17th section of 11 & 12 Vict. c. 42, appears to point out distinctly that such is the correct practice; for it declares the deposition to be admissible "if such deposition purport to be signed by the justice," and that it shall be inadmissible if "it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." As

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(*s*) *R.* v. *Scaife*, 2 Den. 281.
(*t*) *R.* v. *Austin*, Dears. 612.
(*u*) *R.* v. *Osborne*, 8 C. & P. 113.

"deposition" is here used in the singular, and applies only to the separate statement of the deceased or absent witness, and not to the aggregate mass of the distinct sheets of the whole depositions, it would seem that, according to the manifest words of the section, if the deposition of a deceased or absent witness is not signed by the magistrate at the foot of such statement, although it might be used for purposes of contradicting the evidence, or refreshing the memory of a present witness, it would not, in any case, be evidence in his absence against a prisoner. This is clearly also the justice of the case; for depositions, as being in the nature of hearsay, and as tending to affect the liberty of the subject, in opposition to the principle which entitles every man to be confronted by his accuser, ought clearly to be received, if received at all, only when every legal formality has been observed, and when, especially the signature of the magistrate, countersigning and following immediately on that of the witness, may be presumed to afford a reasonable guarantee that the written deposition corresponds exactly with the verbal statement. Such a guarantee of accuracy is clearly of a far higher nature than that which is contained in a single signature at the end of the whole depositions of numerous witnesses contained on separate sheets which have no necessary connection. After the passing of the statute it was the ordinary practice for the committing magistrates to sign the depositions of each witness, but this is now unnecessary, for it has recently been determined that it is sufficient if the signature

or signatures be placed at the end of the depositions, even though they be written on different sheets of paper which are only connected by a pin (*x*).

The depositions before a magistrate against a prisoner must be taken in the presence both of the magistrate and of the prisoner (*y*); and nothing should be returned as a deposition against the prisoner unless the prisoner had an opportunity of knowing what was said, and an opportunity of cross-examining the persons making the deposition.

The 6th section of the 30 & 31 Vict. c. 35, providing for cases of witnesses dangerously ill and unable to travel, enacts, that "whenever it shall appear to the satisfaction of any justice of the peace that any person dangerously ill, and, in the opinion of some registered medical practitioner, not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition (in accordance with the provisions of the act 11 & 12 Vict. c. 42, s. 17) of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto, by way of caption, a statement of his reason for taking the

(*x*) *R.* v. *Parker*, 39 L. J., M. C. 60; L. R., 1 C. C. R. 225; 18 W. R. 353.

(*y*) *R.* v. *Watts*, L. & C. 339.

same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof; and if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same, with the said addition, to the proper officer of the court for trial at which such accused person shall have been so committed or bailed; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it if needed; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or give evidence, it shall be lawful to read such statement in evidence, *either for or against the accused*, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (*whether prosecutor or accused*) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, had he chosen to be present, a full opportunity of cross-examining the deceased person who made the same." And the 7th section provides that when a prisoner in actual custody has served or re-

ceived notice of intention to take a statement in the manner mentioned, he or she may be brought up in custody to hear the statement taken.

If the depositions are lost without fraud or gross negligence before trial, and cannot be found after diligent search, they may be proved by a copy produced and certified by the magistrate's clerk (*z*); and now, probably, under 14 & 15 Vict. c. 99, s. 14, any duly-examined copy would be admissible.

Every deposition against a prisoner ought to be taken down in writing, whether any case is made out or not; and Jervis, C. J., has declared it to be "a practice quite illegal and highly improper" not to take down in writing every such deposition. Accordingly, the court will require distinct evidence that it has not been so taken down, before it will admit secondary parol evidence of anything that was said on an examination before a magistrate (*a*).

The prisoner's statement will be limited, as to its admissibility in the first instance, by the principles laid down in the chapter on Confessions, and the statutory provisions which are there mentioned (*b*).

A voluntary statement made by a prisoner before a magistrate ought to be reduced into writing, and read as evidence against or for him in the case for the prosecution at trial.

It is desirable, but not necessary, that the prisoner should sign the statement; and it is said not to be

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(*z*) *R.* v. *Shellard*, 9 C. & P. 277.
(*a*) *Parsons* v. *Brown*, 3 C. & K. 295.
(*b*) Supra, p. 274.

necessary that the magistrate should sign it, if the prisoner sign or admit the statement to be true when it is read over to him; but a statement not signed by the magistrate, and neither signed nor admitted by the prisoner, is clearly inadmissible (*c*). But if it be clearly proved that the prisoner made a statement before the magistrate which was not taken down in writing, it may be proved by any one who heard it (*d*).

A prisoner's statement is only evidence against himself, and not against others who are implicated in the same charge (*e*). It has been decided that a statement will not be inadmissible because a magistrate has not given the prisoner the statutory caution that he has nothing to hope from any promise of favour, or to fear from any threat of punishment (*f*).

The 3rd section of 30 & 31 Vict. c. 35, provides, that if an accused person calls, or desires to call, witnesses, the "justice or justices shall, in the presence of such accused person, take the statement on oath or affirmation, both examination and cross-examination, of those who shall be called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same into writing; and such depositions of such witnesses shall be read over to and signed by the witnesses who

(*c*) *Lambe's case*, 2 Lea. 625.
(*d*) *R.* v. *Jacobs*, 1 Lea. 309.
(*e*) *R.* v. *Appleby*, 3 Stark. 33.
(*f*) *R.* v. *Sansome*, 1 Den. 545.

have been so examined, and signed also by the justice or justices taking the same, and transmitted in due course of law with the depositions."

DEPOSITIONS BEFORE CORONERS.

These are not within the 11 & 12 Vict. c. 42, but are practically admissible under similar restrictions. But it is said not to be necessary that they should be taken in the presence of the prisoner (*g*). But they must be signed by the coroner, and the handwriting must be proved (*h*).

A coroner's inquisition is admissible between third parties to show that there has been such a judicial inquiry into the matters to which it refers (*i*). Such an inquisition will not be inadmissible in cases of murder or manslaughter, under the 6 & 7 Vict. c. 83, as being written on paper and not on parchment (*k*).

DEPOSITIONS IN CIVIL CASES (*l*).

The 1st rule of Order XXXVII. provides that the court or a judge may at any time, for sufficient reason, order that "any witness whose attendance in court ought for some sufficient cause to be dispensed

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(*g*) Bull. N. P. 248; Wels. Cr. Pr. 210.
(*h*) *R.* v. *England*, 2 Leach, 770.
(*i*) *R.* v. *Gregory*, 15 L. J., M. C. 38.
(*k*) Ibid.
(*l*) For the practice in India, see Act VIII. of 1859, ss. 175, 179, 180.

with, be examined by interrogatories or otherwise before a commissioner or examiner;" and the 4th rule of the same Order provides, that "the court or a judge may, in a cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct."

Application will have to be made under the foregoing rules when it is desired to have the testimony of a witness whose attendance in court cannot be secured by reason of age, illness, or absence from the jurisdiction. The phraseology of these rules vests in courts and judges a far wider discretion in such matters than was antecedently possessed by the courts of common law, but perhaps not substantially a wider discretion than was possessed by the Court of Chancery, although the exercise of that discretion was seldom called for, owing to almost all evidence in that court being by way of affidavit. How that discretion will be exercised it is impossible to predict with certainty, but in all probability there will be little departure from the practice in these matters, which has existed for many years.

DEPOSITIONS IN CHANCERY.

The practice, so far as the Court of Chancery was concerned, was that provided by the 15 & 16 Vict. c. 86, s. 28, and the 11th rule of the Order of the 5th of February, 1861 (which was made in pursuance of that act, and of 23 & 24 Vict. c. 128). The act provides, that "the mode of examining witnesses in the said court, and all the practice of the said court in relation thereto, so far as such practice shall be inconsistent with the mode hereinafter prescribed of examining such witnesses, and the practice in relation thereto, shall, from and after the time appointed for the commencement of this act, be abolished: provided always, that the court may, if it shall think fit, order any particular witness or witnesses out of the jurisdiction of the said court to be examined upon interrogatories in the mode now practised in the said court, and that with respect to such witness or witnesses the practice of the said court in relation to the examination of witnesses shall continue in full force, save only so far as the same may be varied by any general order of the Lord Chancellor in that behalf, or by any order of the court with reference to any particular case.

The Order provides, that "Notwithstanding any of these rules the court or the judge in chambers may direct that the oral examination and cross-examination of any witness (whether a party or not), or the cross-examination of any person who has been examined *ex parte* before an examiner, or made an affidavit, shall be taken before an examiner of the

court or a special examiner in the manner prescribed by the statute 15 & 16 Vict. c. 86, as if these rules had not been made, in case it shall appear to the judge that owing to the age, infirmity or absence out of the jurisdiction of such witness or person, or for any other cause which to the judge shall appear sufficient, it is expedient that such direction should be given. Such direction may be obtained on application to the court or the judge in chambers on notice."

In practice the act was seldom resorted to. All examinations of witnesses who were old, ill, or out of the jurisdiction were had before examiners.

The method of taking the depositions was this: The witness was examined before one of the examiners in London, although the examiners could be ordered to attend at any place in England or Wales to examine infirm persons. If there was any sufficient reason the court would appoint a special examiner, but there was a reluctance to do so on account of the expense (*m*). Witnesses out of the jurisdiction were examined before a special examiner (*n*); but the court would not appoint one for such purpose unless new facts were likely to be elicited (*o*). The 32nd section of 15 & 16 Vict. c. 86, is as follows:—"The depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner, not ordinarily by question and answer, but in

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(*m*) *Brocas* v. *Lloyd*, 21 Beav. 520.
(*n*) *Crofts* v. *Middleton*, 9 Hare, App. xviii.
(*o*) *Lord* v. *Colvin*, 2 W. R. 134.

the form of a narrative, and, when completed, shall be read over to the witness, and signed by him in the presence of the parties, or such of them as may think fit to attend: provided always, that in case the witness shall refuse to sign the said depositions, then the examiner shall sign the same; and such examiner may, upon all examinations, state any special matter to the court as he shall think fit: provided also, that it shall be in the discretion of the examiner to put down any particular question or answer if there shall appear any special reason for doing so; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide upon the materiality or relevancy of any question or questions: and the court shall have power to deal with the costs of immaterial or irrelevant depositions as may be just."

The following points have been decided under this section:—The examiner must write the depositions with his own hand (*p*), and sign them. If he dies before signing, the signature of his successor will be sufficient (*q*), or the depositions may be filed without signature (*r*). If a witness demurs or objects to any question put to him, "the question or questions so put, and the demurrer or objection of the witness

(*p*) *Stobart* v. *Todd*, 2 W. R. 617.

(*q*) *Bryson* v. *Warwick Canal Co.*, 1 W. R. 124.

(*r*) *Felthouse* v. *Bailey*, 14 W. R. 827; *Stephens* v. *Wanklin*, 19 Beav. 585.

thereto, shall be taken down by the examiner, and transmitted by him to the Record Office of the said court to be there filed; and the validity of such demurrer or objection shall be decided by the court; and the costs occasioned by such demurrer or objection shall be in the discretion of the court" (*s*). A witness may object on any ground of privilege or relevancy (*t*), and the examiner has no power to overrule the objection. If, in spite of the objection, the examiner proceeds with the examination, the depositions would, as under the old practice (*u*), be suppressed. The examiner cannot decide upon the relevancy of evidence (*x*), or exclude anything unless it "is clearly and palpably no evidence" (*y*). But since the act, as well as before, the exact limits of the examiner's power to exclude evidence are not well defined (*z*). When a witness is treated as adverse, it is the duty of the examiner to take down the particular questions asked, so as to show that the requirements of the 22nd section of the Common Law Procedure Act, 1854, which applies to Chancery proceedings, have been complied with, and then leave will be given upon special motion to produce counter-evidence.

The original depositions, authenticated by the sig-

(*s*) 15 & 16 Vict. c. 86, s. 33.
(*t*) Supra, Part I. Chap. VII. and Part III. Chap. V.
(*u*) *Goodall* v. *Gawthorn*, 4 De G. & S. 97.
(*x*) *Buckley* v. *Cooke*, 1 K. & J. 32.
(*y*) *Surr* v. *Walmsley*, L. R., 2 Eq. 440.
(*z*) *Buckley* v. *Cooke*, ubi supra.

nature of the examiner, are filed in the Record Office, but copies are supplied for the purposes of the suit.

The chief clerks of the Master of the Rolls and Vice-Chancellors have power to examine witnesses either upon interrogatories or *vivâ voce*, as the judge to whom they are subordinate may direct (*a*). The depositions taken before a chief clerk are filed, and copies thereof given to the parties to the proceedings, and the procedure thereupon is substantially the same as that in the case of depositions taken under 15 & 16 Vict. c. 86, and the order of the 5th of February 1861.

DEPOSITIONS AT COMMON LAW.

Whenever a witness was beyond the jurisdiction of the courts, or likely to be so at the time of trial; or when he was likely to be unable to attend the trial, owing to approaching dissolution, or permanent infirmity, the courts of common law had power to grant a commission to examine such witness, either in Great Britain or abroad, at any time after the commencement of the action (*b*); and to permit his written deposition, as certified by the commissioner, to be read in evidence at the trial, on proof that the deponent was at that time beyond the jurisdiction of the court, or dead, or unable from permanent sickness, or other permanent infirmity, to attend the trial.

(*a*) 15 & 16 Vict. c. 80, s. 30.

(*b*) *Fynney* v. *Beasley*, 17 Q. B. 86.

The foundation of this privilege is in the 13 Geo. 3, c. 63, s. 40, which permitted the prosecutor or defendant, in all indictments or informations for offences committed in India, to apply for and obtain a writ of *mandamus* to the superior judges in India, directing them to take, in due form of law, the statements of witnesses within their jurisdiction concerning the offence; and to return them in the form of signed and sealed depositions to the King's Bench. A similar privilege was given in actions and suits commenced in England (sect. 44).

The 1 Will. 4, c. 22, taking this act as its basis, extended its provisions substantially "to all colonies, islands, plantations, and places under the dominion of his Majesty in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of his Majesty's courts at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court, to the judges whereof the writ of commission may be directed, or elsewhere. By the second section the colonial judges are empowered to enforce the attendance of witnesses in such cases in the same way as if the action of suit had arisen within their jurisdiction. The fourth section empowers the courts at Westminster, "and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named

in such order, of any witnesses within the jurisdiction of the court where the action shall be depending; or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction or otherwise; and by the same, or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters connected with such examination as may appear reasonable and just."

By section 5, witnesses within the jurisdiction may, by order of the court or of a judge, be summoned to attend the commission, and be attached for non-attendance. By section 7, the commissioner is authorized to administer an oath to the witness, or an affirmation in cases where the law permits it in substitution; and the witness is subjected to the penalties of perjury for giving evidence falsely (see also 6 & 7 Vict. c. 83, s. 5). And by sect. 10 it is enacted as follows: "That no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant" (*query* examinee) "or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness, or other permanent infirmity, to attend the trial; in all or any of which cases the examinations and depositions, certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of

signature to such certificate, be received and read in evidence, saving all just exceptions."

The sickness need not necessarily be incurable, but only so far permanent as to be likely to last beyond the trial; and the decision of the judge as to the deponent's inability to attend the trial was subject to review by the court; but the court would not interfere unless they were satisfied that the judge had been misled by misrepresentations or that injustice was likely to be done (*c*).

Either plaintiff or defendant, after the commencement of the action, might apply for a commission (*d*); but the courts would not grant it as a matter of course, lest it should lead to parties going abroad to avoid cross-examination at trial; and they required the applicant to satisfy them, on affidavit, that it would conduce to the due administration of justice for the commission to issue. Accordingly, mere residence beyond the jurisdiction of the courts was held insufficient, if it appeared that the witness could attend at trial (*e*). The application was liable to be refused on the ground of delay (*f*).

A commission may issue to any one whom the court may appoint, even to a foreign court or the judges of a foreign court, if such judges are willing to act (*g*); and it will be no objection to the commission issuing, that it appears that they will examine

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(*c*) *Duke of Beaufort* v. *Crawshay*, H. & R. 638.
(*d*) *Brown* v. *Mollett*, 16 C. B. 514.
(*e*) *Castelli* v. *Groome*, 18 Q. B. 490.
(*f*) *Stone* v. *Stone*, 34 L. J., P. M. & A. 33.
(*g*) *Fischer* v. *Sztaray*, E. B. & E. 321.

the witnesses on principles which are not recognized by the English law of evidence; but if it should appear at trial, either on the face of the depositions, or from extrinsic evidence, that inadmissible statements, hearsay for instance, have been received by the commissioners, the whole depositions will be rejected; or, at all events, such portions as are inadmissible according to the English law (*h*). The court has always a discretion to receive parts of a deposition and to reject other parts which either appear to have been elicited by leading questions or to be otherwise objectionable (*i*).

The courts will not grant a commission to examine witnesses in a hostile country, although there be an open communication with it (*k*).

The order must state the place to which the commission is directed, and the names of the commissioners, where the examination is within the jurisdiction of the court; but the last requisite is dispensed with, where the commission is directed to a foreign country (*l*). It should also state the mode in which the examinations are to be taken and returned (*m*).

It has been held that the party to be prejudiced by the deposition must have had an opportunity of being present at the examination, and of cross-examining the witness (*n*), and that he must have formal

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(*h*) *Lumley* v. *Gye*, 2 E. & B. 216.
(*i*) *Small* v. *Nairne*, 13 C. B. 840.
(*k*) *Barrick* v. *Buba*, 16 C. B. 492.
(*l*) *Greville* v. *Stulz*, 11 Q. B. 997.
(*m*) *Atkins* v. *Palmer*, 4 B. & Ald. 377.
(*n*) *Att.-Gen.* v. *Davison*, M'Clel. & Y. 160.

notice that the commission was to be applied for or issued (*o*). But the opposite party has been allowed to put in the depositions, as the witnesses are examined as much for one side as the other (*p*). It was held that cross-interrogatories must also be read, as well as the interrogatories in chief, by the party who makes the latter his evidence (*q*). But it was held no objection to the admissibility of depositions under a commission that the written interrogatories and cross-interrogatories were not put to the witnesses, but that the examinations were taken *vivâ voce* (*r*).

The depositions could not heretofore be read if the deponent be in the country, and producible at the trial, and his inability to attend could not be proved by hearsay (*s*). When they were tendered on the ground of his being beyond the jurisdiction of the court, this fact had to be proved satisfactorily (*t*). Thus, where it only appeared that the deponent was a sailor, and had belonged some months previously to a vessel lying in the Thames, but it did not further appear what had become of the man or the vessel, Lord Ellenborough thought the proof that the former was beyond the jurisdiction of the court too vague,

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(*o*) *Steinkeller* v. *Newton*, 9 C. & P. 317.

(*p*) *Proctor* v. *Lainson*, 7 C. & P. 629.

(*q*) *Temperley* v. *Scott*, 5 C. & P. 341.

(*r*) *Grill* v. *General Iron Screw Collier Co.*, H. & R. 654; cf. *Hitchens* v. *Hitchens*, 35 L. J., P. & M. 63; L. R., 1 P. & D. 153.

(*s*) *Robinson* v. *Markis*, 2 M. & R. 375.

(*t*) Ibid.

although he was disposed to have admitted the deposition, if it had been shown that any efforts had been recently made to find the deponent (*u*). But where a witness proved that he had seen the deponent start by railway to Gravesend, where the vessel lay in which he was to sail to Australia, and that he had received letters from the deponent, dated from two places on the English coast, where the vessel was known to have touched, it was held sufficient proof that the deponent was out of the jurisdiction of the court (*v*). But where it appeared in a similar case that the deponent was on board the night before the trial, and expecting to sail immediately, this was held insufficient (*x*). If the commission was granted on the ground of the witness's permanent residence abroad very slight evidence was sufficient to raise the presumption of his being so at the time of the trial (*y*); but if it was granted on account of temporary absence abroad or of illness, the absence or illness must be clearly proved (*z*).

In like manner, when the deponent was dead or absent from sickness, the death or the nature of the malady had to be distinctly shown. It has been doubted whether pregnancy, and generally whether temporary illness, would excuse non-attendance (*a*).

The deposition of a party to an action will be ad-

(*u*) *Falconer* v. *Hanson*, 1 Camp. 171.
(*v*) *Varicas* v. *French*, 2 C. & K. 1008.
(*x*) *Carruthers* v. *Graham*, 1 C. & M. 5.
(*y*) *Pollack* v. *Pollack*, 2 S. & T. 310.
(*z*) *Mills* v. *Mills*, ibid.
(*a*) *Abraham* v. *Newton*, 8 Bing. 384.

missible or inadmissible, as in the cases of ordinary witnesses (*b*). But if a party wishes to have his own deposition taken on the ground that he is about to leave the country, he must satisfy the court by affidavit that his application is *bonâ fide*, and that his voyage is one of necessity (*c*).

As previously observed, a commission may be issued to the judges of any foreign court. So a commission may issue to the judges of the superior courts of common law in Westminster, and of the Court of Session in Scotland, and of any supreme court in any of her Majesty's colonies or possessions abroad, and to any judge in any such colony or possession appointed for the purpose by order in council; with respect to whom it is provided by 22 Vict. c. 20, s. 1, as follows:—"Where, upon an application for this purpose, it is made to appear to any court or judge having authority under this act, that any court or tribunal of competent jurisdiction in her Majesty's dominions has duly authorized, by commission, order, or other process, the obtaining the testimony in or in relation to any action, suit, or proceeding pending in or before such court or tribunal, of any witness or witnesses out of the jurisdiction of such court or tribunal and within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination, before the person or persons

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(*b*) *Solomon* v. *Howard*, 12 C. B. 463.
(*c*) *Fischer* v. *Hahn*, 13 C. B., N. S. 659.

appointed, and in manner and form directed by such commission, order, or other process as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said court or judge by the same order, or for such court or judge or any other judge having authority under this act, by any subsequent order, to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place and manner of such examination, and all other matters connected therewith, as may appear *reasonable* and just; and any such order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by such court or judge in a cause depending in such court or before such judge." The 2nd section provides, that every person examined as a witness under any such commission, order, or other process as aforesaid, who shall upon any such examination wilfully and corruptly give any false evidence shall be deemed and taken to be guilty of perjury. The 4th section provides, that every person examined under any such commission, order, or other process as aforesaid shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause pending in the court by which or by a judge whereof or before the judge by whom the order for examination was made would be entitled to; and that no person shall be compelled to produce under any such order as aforesaid any writing or other

document that he would not be compellable to produce at a trial of such a cause. The 5th section provides, that her Majesty's superior courts of common law at Westminster and in Dublin respectively, the Court of Session in Scotland, and any supreme court in any of her Majesty's colonies or possessions abroad, and any judge of any such court, and any judge in any such colony or possession who by any order of her Majesty in council may be appointed for this purpose, shall respectively be courts and judges having authority under the act.

Under this act the attendance of witnesses before a special examiner can be enforced by the court having jurisdiction where the examination is to take place; and in such case it is the duty of such court, and not of the court that appoints the special examination, to determine what witnesses are to be summoned, and what documents they are to produce, as well as to decide all questions of privilege on the evidence which may arise in the examination (*d*).

Depositions taken in foreign countries may be used in proceedings taken under the Extradition Act, 1870 (33 & 34 Vict. c. 52), for sect. 14 of that act provides, that "depositions or statements on oath taken in a foreign state, and copies of such depositions or statements, and foreign certificates of or judicial documents stating the facts of a conviction, may, if duly authenticated, be received in evidence in proceedings under this act." It has been

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(*d*) *Campbell* v. *Att.-Gen.*, L. R., 2 Ch. 571; 36 L. J., Ch. 600; 15 W. R. 915.

held to be unnecessary that the accused should have been present at the taking of the depositions (*e*); and the Extradition Act of 1873 (36 & 37 Vict. c. 60), s. 4, enables a magistrate in this country, when acting under an order bearing the seal of a secretary of state, to take evidence for the purpose of any criminal matter pending in a foreign court or tribunal, whether the accused be present or not, but his presence or absence must be stated in the deposition. Due authentication is defined by sect. 15 of the Act of 1870.

The Court of Chancery, following the practice of the civil law, would make an order to examine an important witness *de bene esse, i. e.*, before the regular time for the examination of witnesses, and this power the High Court will possess, and will exercise wherever the Court of Chancery would under similar circumstances have exercised it. The order might have been applied for directly the bill was filed; and the plaintiff or defendant might be ordered to be examined in this way. When a witness was seventy years of age or upwards, or was in a dangerous state of health, or was about to go abroad, or when there was only one witness to a particular fact, or, indeed, wherever the justice of the case required it, the order would be made. The application, which had to be supported by an affidavit of the facts, was made either to the Court or to a judge in chambers on notice.

(*e*) *Re Counhaye*, L. R., 8 Q. B. 410; 21 W. R. 883.

CHAPTER VII.

ON PRIVATE WRITINGS, INSPECTION, AND NOTICE TO PRODUCE.

When private writings contain a contract, or otherwise imbody, or are material to the substance of the issue, they are not only admissible, but also, when producible, indispensable evidence. In such cases a party who relies upon them must either produce them, or account satisfactorily for their non-production. Such writings are frequently in the hands of an adverse party, who will not voluntarily produce them either before or at the trial. The important practical questions then on this subject are, how can a party ascertain what documents are in his opponent's possession? how can he get these documents produced for his inspection previous to the trial? and, lastly, how can he get them produced at the trial, or put himself in a position, by reason of their non-production, to give secondary evidence of their contents?

The future practice as to discovery of documents, production previous to the trial and inspection is regulated by Order XXXI. of the new rules of court, the portions of which, material for the present purpose, are as follows:—

"11. It shall be lawful for the court or a judge at any time during the pendency therein of any action

or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the court or judge shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.

"12. Any party may, without filing any affidavit, apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action.

"13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned, he objects to produce, and it may be in the Form No. 9 in Appendix B. hereto, with such variations as circumstances may require.

"14. Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the court that such document relates only to his own title, he

being a defendant to the action, or that he had some other sufficient cause for not complying with such notice.

"15. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the Form No. 10 in Appendix B. hereto.

"16. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice may be in the Form No. 11 in Appendix B. hereto, with such variations as circumstances may require.

"17. If the party served with notice under Rule 15 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a judge for an order for inspection.

"18. Every application for an order for inspection of documents shall be to a judge. And except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit

showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

"19. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

"20. If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the court or a judge for an order to that effect, and an order may be made accordingly."

It should be observed that in the foregoing rules it is discretionary with the court to order production or not (*a*).

The principles embodied in these rules do not differ materially from those embodied in 15 & 16

(*a*) Cf. *Lane* v. *Gray*, L. R., 16 Eq. 552; 43 L. J., Ch. 187.

Vict. c. 86, s. 18, which regulated the practice in the Court of Chancery, and 14 & 15 Vict. c. 99, s. 6, and 17 & 18 Vict. c. 125 (Common Law Procedure Act, 1854), s. 50, which regulated the practice of the courts of common law. The decisions on these acts will, therefore, be material to show what will be the practice of the future. In the first place, then, all documents are *primâ facie* producible, but the production of privileged documents cannot be enforced (*b*); and although a party has a right to the production of all documents that relate to his own case alone, or to his case conjointly with that of his adversary, he has no right to the production of documents that are irrelevant to the issue, or that relate exclusively to the title of his adversary (*c*); but it will not be sufficient merely to allege that the documents relate exclusively to the title of the party resisting production, if that conclusion is opposed to the character of the documents. Knight Bruce, V.-C., in *Combe* v. *Corporation of London* (*d*), said: —"If it be, with distinctness and positiveness, stated in an answer that a document forms or supports the defendant's title and is intended to be or may be used by him in evidence accordingly, and does not contain anything impeaching his defence or forming or supporting the plaintiff's title or the plaintiff's case, that document is, I conceive, protected from production,

(*b*) *Clegg* v. *Edmondson*, 22 Beav. 125, 137. As to privilege, *vide supra*, Part I. Chap. VII.

(*c*) *Ingilby* v. *Shafto*, 33 Beav. 31; see *Minet* v. *Morgan*, L. R., 8 Ch. 361; 42 L. J., Ch. 627; 21 W. R. 467.

(*d*) 1 Y. & Coll. C. C. 631.

unless the court sees upon the answer itself that the defendant erroneously represents or misconceives its nature. But where it is consistent with the answer that the document may form the plaintiff's title or part of it, may contain matter supporting the plaintiff's title or the plaintiff's case, or may contain matter impeaching the defence, then I apprehend the document is not protected; nor I apprehend is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness." It has recently been held that a defendant can only avoid production of documents, the possession and relevancy of which he admits, by giving a reason for alleging that the production is unnecessary for the decision of the issue, and that the discovery would be injurious to himself (*e*). The court will accept the oath of a defendant whether documents are relevant or not, but the plaintiff is entitled to the production of all relevant documents except such as the court can clearly see to have no bearing on the issue (*f*).

The right to deal with documents will warrant an order for their production. Therefore a party will be ordered to produce documents in the possession of his agent or of his solicitor, whose ordinary lien is no defence to production (*g*). Where the documents are in the possession of an agent for the party against

(*e*) *Heugh* v. *Garrett*, 31 L. T., N. S. 669.
(*f*) *Mansell* v. *Feeney* (2), 2 J. & H. 320.
(*g*) *Hope* v. *Liddell*, 20 Beav. 438.

whom the application is made jointly with other persons, no order to produce will be made, but the party will be compelled to discover by answer any knowledge he may be able to obtain by inspecting such documents. *A fortiori* these principles apply to cases where the documents sought are in the possession of the party jointly with others. Lord Cottenham, in *Taylor* v. *Rundell* (*h*), said:—"It is true that the rule of court, adopted from necessity, with reference to the production of documents, is, that if a defendant has a joint possession of a document with somebody else who is not before the court the court will not order him to produce it, and that for two reasons: one is, that a party will not be ordered to do that which he cannot or may not be able to do; the other is, that another party not present has an interest in the document which the court cannot deal with. But that rule does not apply to discovery, in which the only question is, whether as between the plaintiff and the defendant the plaintiff is entitled to an answer to the question he asks; for if he is, the defendant is bound to answer it satisfactorily, or, at least, show the court that he has done so as far as his means of information will permit."

When privilege is claimed on this ground the party claiming it must show enough to satisfy the court what the nature of the joint ownership is (*i*). The mere fact that a person not before the court has

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(*h*) Cr. & Ph. 124; cf. *Clench* v. *Financial Corporation*, L. R., 2 Eq. 271.

(*i*) *Bovill* v. *Cowan*, 18 W. R. 533; L. R., 5 Ch. 495.

an interest in documents is no ground for resisting production (*j*).

Where a defendant in a suit relating to transactions in which he was engaged on his own account had made entries of such transactions in the books of a partnership, it was held by the Court of Appeal in Chancery that he could not be compelled to produce such books without the consent of his co-partner, and that the plaintiff should interrogate him so as to compel him to set forth the entries, and then enforce production of the originals at the hearing by serving a *subpœna duces tecum* on the co-partner (*k*).

A mortgagee cannot be compelled to produce his security (including title deeds deposited with him) except on payment of his principal, interest and costs (*l*); nor, if he purchases the equity of redemption, can he be compelled to produce the conveyance to him (*m*). But where a mortgagee purchased the equity of redemption from a trustee, with notice of the trust, he was held not entitled to refuse production of the conveyance to him in a suit by *cestui que trust* for redemption and reconveyance (*n*). Where a mortgage security is impeached, that security must be produced, although the mere fact of charging a

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(*j*) *Kettlewell* v. *Barstow*, L. R., 7 Ch. 693; 41 L. J., Ch. 718; 20 W. R. 917.

(*k*) *Hadley* v. *M'Dougall*, 38 W. R. 393; L. R., 7 Ch. 312; 41 L. J., Ch. 504.

(*l*) *Chichester* v. *Marquis of Donegal*, L. R., 5 Ch. 502; 39 L. J., Ch. 694; 18 W. R. 531.

(*m*) *Greenwood* v. *Rothwell*, 7 Beav. 291.

(*n*) *Smith* v. *Barnes*, L. R., 1 Eq. 65.

mortgagee with fraud will not entitle a mortgagor to production (*o*); and this applies to all deeds which are impeached, and not only to mortgages (*p*).

Letters written to and in the possession of a party to the suit will, if material, be ordered to be produced, although marked "private and confidential," and although the writer objects to their production; but the party claiming their production must enter into an undertaking not to use such letters for any collateral object (*q*). The mere heading "confidential" cannot protect a document from production (*r*). Where documents are confidential, whether so headed or not, it would seem to be the true principle that a *primâ facie* case for production must be made out to justify the court in ordering production, but wherever fraud is pleaded, all documents which would throw any light on the alleged fraud ought to be produced (*s*).

When documents contain partly privileged or irrelevant matter and partly unprivileged or relevant, the privileged or irrelevant parts may be sealed up on production. Thus a part of a pedigree was allowed to be sealed up by defendants on an affidavit

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(*o*) See judgment of Malins, V.-C., in the *Republic of Costa Rica* v. *Erlanger*, L. R., 19 Eq. 44; 23 W. R. 108.

(*p*) *Bassford* v. *Blakesley*, 6 Beav. 131.

(*q*) *Hopkinson* v. *Lord Burghley*, L. R., 2 Ch. 447; 36 L. J., Ch. 605; 15 W. R. 543.

(*r*) Per Bovill, C. J., in *Mahoney* v. *National Widows' Life Insurance Fund*, L. R., 6 C. P. 256.

(*s*) *Mahoney* v. *National Widows' Life Insurance Fund*, L. R., 6 C. P. 252; 40 L. J., C. P. 203; 19 W. R. 722.

that it related to their title and not to the plaintiffs' (*t*). But when the parts which might be thus concealed are so interspersed with those parts which are producible that sealing up is impossible, it seems that, except in extraordinary cases, no order to produce will be made (*u*).

Inspection will be granted as a matter of course of any document referred to in the pleadings or affidavits of the party against whom the motion is made or disclosed in his affidavit of documents; but in all other cases application for inspection must be founded on an affidavit showing (1) of what documents inspection is sought; (2) that the party applying is entitled to inspect them, and (3) that they are in the possession or power of the other party. Such an affidavit must state more than a mere general belief that the adverse party holds documents which are material to the applicant's case, and must describe them sufficiently to enable the court to judge of their materiality (*x*), and the court will be guided by the circumstances of each particular case (*y*). The application ought to be refused if it appear to be of a *fishing* nature (*z*), or if it appear to be a pretext for

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(*t*) *Kettlewell* v. *Barstow*, L. R., 7 Ch. 693; 41 L. J., Ch. 718; 20 W. R. 917.

(*u*) *Churton* v. *Frewen*, 2 Dr. & Sm. 394.

(*x*) *Thompson* v. *Robson*, 2 H. & N. 412; *Wolley* v. *Pole*, 14 C. B., N. S. 538; and see as to materiality, *Sneider* v. *Mangino*, 7 Exch. 229; and *Riccard* v. *Inclosure Commissioners*, 4 E. & B. 329.

(*y*) Per Blackburn, J., *Chartered Bank of India, &c.* v. *Rich* 4 B. & S. 73.

(*z*) *Shadwell* v. *Shadwell*, 6 C. B., N. S. 679.

delay, or merely to discover the case of the adverse party (*a*), or if made on the chance that the document sought to be inspected might possibly afford materials for cross-examination (*b*). In one case (*c*), to detinue for a deed, the plaintiff pleaded lien as an attorney; and the plaintiff, on an affidavit that he had not retained the defendant, and that the costs were due from a third party, was allowed to inspect the entries in defendant's books as to costs claimed. So, in an action for work done, the defendant, on an affidavit that the work was not done, and that, if done, the charge was exorbitant, was allowed to inspect the entries in the plaintiff's books relating to the work (*d*). So, where the defendant pleads fraud, he is entitled to inspect any document which he alleges will prove that the alleged misrepresentation was untrue to the plaintiff's knowledge (*e*). In an action for breach of promise of marriage inspection has been granted to the defendant of letters written by him to the plaintiff, and in the possession of the latter (*f*).

In libel, imputing dishonesty to the plaintiff while in the defendant's service, where the defendant justified, the plaintiff has been allowed to inspect the books of the defendant, so far as they were necessary to enable the plaintiff to disprove the charge in the

(*a*) Per Lord Campbell, *Scott* v. *Walker*, 2 E. & B. 560.
(*b*) *Richards* v. *Gellatley*, L. R., 7 C. P. 127; 20 W. R. 630.
(*c*) *Scott* v. *Walker*, *ubi supra*.
(*d*) *Hunt* v. *Hewitt*, 7 Ex. 236.
(*e*) *Colman* v. *Truman*, 3 H. & N. 871.
(*f*) *Pape* v. *Lister*, L. R., 6 Q. B. 242; 40 L. J., Q. B. 87; 19 W. R. 445.

plea (*g*). But in another case where a company sued for a libel by imputing insolvency, and the defendant pleaded a justification, the defendant was refused an inspection of the company's books, on the ground that a person publishing a libel ought to be prepared to prove it himself (*h*). And where a domestic servant who had been in the employ of the defendants and was refused a situation on account of a letter written by one of them, sued for libel; it was held by Lord Coleridge, C. J., and Grove, J., that an application for inspection under 14 & 15 Vict. c. 97, s. 6, must be refused, but Lord Coleridge expressed his opinion that if the application had been made under the thirtieth section of the Common Law Procedure Act, 1854, it ought to have been granted (*i*).

Communications with an unprofessional agent in anticipation of litigation, and with a view to the prosecution of a defence to a claim, will not be ordered to be produced (*j*). This principle has been applied by the Courts of Common Pleas in 1870, and Exchequer in 1874, to the reports of medical officers sent by a railway company to examine a passenger alleged to have been injured in an accident on their line, when a claim has been made by such passenger for compensation (*k*). But

(*g*) *Collins* v. *Yates*, 27 L. J., Ex. 150.

(*h*) *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 146.

(*i*) *Hill* v. *Campbell*, L. R., 10 C. P. 222; 44 L. J., C. P. 97; 23 W. R. 336.

(*j*) *Ross* v. *Gibb*, L. R., 8 Eq. 522.

(*k*) *Cossey* v. *London, Brighton and South Coast Railway Co.*, L. R., 5 C. P. 146; 39 L. J., C. P. 175; 18 W. R. 473; *Skinner* v.

the Court of Queen's Bench, in a still more recent case (*l*), following its own decision in 1867 (*m*), held that such reports were not privileged. In this conflict of authority the question is, which decision is most consonant with the principles of natural justice. We incline to the opinion that the rule of the Court of Queen's Bench is the proper one. When the officials of a company, in the course of their ordinary duty, make a report as to an accident, whether before or after litigation is commenced, such report is subject to inspection (*n*). But inspection will not be permitted of reports of scientific men consulted by or on behalf of the company as to the cause of the accident (*o*).

A defendant has been held entitled to production of documents although in contempt (*p*). The order usually made was for the party, his solicitors and agents, to inspect documents, and this will probably be the form of the order in future, notwithstanding that only the party giving notice and his solicitors are referred to in Order XXXI. Rule 14. This

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Great Northern Railway Co., L. R., 9 Ex. 298; 43 L. J., Ex. 150; 23 W. R. 6.

(*l*) *Farquhar* v. *Great Northern Railway Co.*, Weekly Notes, 1875, p. 13; 10 L. J., W. N. 11.

(*m*) *Baker* v. *London and South Western Railway Co.*, L. R., 3 Q. B. 91; 37 L. J., Q. B. 53; 16 W. R. 126.

(*n*) Per Bramwell, B., in *Skinner* v. *Great Northern Railway*, *ubi supra*.

(*o*) *Woolley* v. *North London Railway Co.*, L. R., 4 C. P. 602; 38 L. J., C. P. 317; 17 W. R. 650.

(*p*) *Haldane* v. *Echford*, 17 W. R. 570; L. R., 7 Eq. 425; 38 L. J., Ch. 372.

form has been held to include a confidential agent whose assistance is necessary to carry on the suit, although he is a witness in the cause (*q*), and the usual rule of the Court of Chancery was that witnesses were not allowed to inspect documents before the hearing (*r*). When Y. was named in a bill as the agent of the plaintiffs (a foreign republic) in this country, the defendants were required to produce their documents to S., who was stated in the affidavit of the plaintiff's solicitor to be their agent for the purposes of the suit (*s*).

A party authorized to take copies of documents will be permitted to employ an accountant, and not necessarily a professional accountant, if there are complicated accounts (*t*), and a surveyor when there are plans and sections (*u*).

Again, it must be observed that where the plaintiff's interest and title are denied by the defendant, the defendant ought not to be compelled to produce all documents, but only those which are necessary or material to the question to be decided at the hearing or trial (*x*); and where the alleged next of kin of an intestate instituted a suit against the solicitor of the Treasury, to whom administration had been granted,

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(*q*) *Att.-Gen.* v. *Whitwood Local Board*, 40 L. J., Ch. 592; 19 W. R. 1107.

(*r*) *Boyd* v. *Petrie*, L. R., 3 Ch. 818; 17 W. R. 903.

(*s*) *Republic of Costa Rica* v. *Erlanger*, 44 L. J., Ch. 402; 23 W. R. 462.

(*t*) *Lindsay* v. *Gladstone*, L. R., 9 Eq. 132.

(*u*) *Swansea Railway Co.* v. *Budd*, L. R., 2 Eq. 274.

(*x*) *Turney* v. *Bayley*, 34 Beav. 105.

Malins, V.-C., refused to order the defendant to make an affidavit of documents until a *primâ facie* case had been made out by the plaintiff, saying, "it seems just and reasonable that the court should not order persons in possession of an estate to produce their documents of title to any one who may claim, and who may, perhaps, have no foundation for the claim" (*y*). Lastly, the right to production depends upon the state of the pleadings. A defendant, who has demurred to the plaintiff's entire statement of claim, cannot obtain production of documents by the plaintiff, nor can the plaintiff obtain it if the defendant has pleaded a purely affirmative plea, *i. e.*, admitted the case made by the plaintiff, but stated some new fact not denied by the plaintiff as a defence to his claim; but if the defendant pleads a negative plea the plaintiff is entitled to obtain production of documents (*z*).

The county courts have now all the powers of the superior courts of common law as to granting and enforcing inspection. This they derive from an order in council, dated the 18th day of November, 1867, made in accordance with the provisions of the Common Law Procedure Act, 1854. This order directs that the provisions of sect. 50 of that act shall extend to all Courts of Record established under the County Courts Act, 1846, and to the City of London Court; and that the powers and duties incident to the provisions of that section with respect

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(*y*) *Lane* v. *Gray*, L. R., 16 Eq. 552; 43 L. J., Ch. 187.

(*z*) See Daniell's Ch. Pract. 5th ed. p. 1689.

to matters in such courts shall be exercised by the judges thereof or their deputies, and that the statutes, rules, orders, and forms used in such courts shall be adopted with reference to all proceedings under the above-mentioned section, so far as the same shall be applicable, *mutatis mutandis*. The procedure, therefore, where an inspection of documents is required in county court proceedings, will be substantially the same as that adopted in actions commenced in the superior courts previous to the Judicature Acts coming into operation.

The court will not compel a person, not a party to the suit, to produce a document for inspection (*a*), unless he has obtained it from a party to the suit, and holds it in the nature of a trust for such party (*b*). And where such person holds independently, and paramount to the title of the party, he will not be subject to an inspection (*c*). In one case, Stuart, V.-C., refused to order an executor to produce certain cheques of his testator which were at the date of the application in the possession of the banker on whom they were drawn (*d*).

An inspection ought not to be granted when it appears to be sought, not *bonâ fide* for the pending action, but to assist the applicant in an action against a third person (*e*). Nor will a party be permitted

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(*a*) *Cocks* v. *Nash*, 9 Bing. 721.
(*b*) *Doe* v. *Roe*, 1 M. & W. 207.
(*c*) Ibid.
(*d*) *Bayley* v. *Cass*, 10 W. R. 370.
(*e*) *Temperley* v. *Willett*, 6 E. & B. 380.

to make public information which he has obtained from the inspection of his opponent's documents (*f*).

ON PRODUCTION AT THE TRIAL AND NOTICE TO PRODUCE.

The court can, under Order XXXI., Rule 11, compel the production of any document at the trial. A party cannot compel his opponent to produce any document at the trial; but if he wishes to be in a position to give secondary evidence of the contents of any document in the possession of his opponent, he must, as a general rule, give his opponent notice to produce such document at the time. If after proof that such notice has been given, and that the original is in the hands of the adverse party, the latter will not produce it, the party requiring it may resort to secondary evidence of it.

Before this can be used, the party tendering it must prove, or raise at least a reasonable presumption, that the original is in the hands of the adverse party, or of a third person in privity with him (*g*). Slight evidence of this fact will be sufficient, when the document either naturally, necessarily or probably, might be expected to be in the custody, or under the control, of such adverse party. Thus, it has been presumed that a bankruptcy certificate came

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(*f*) *Williams* v. *Prince of Wales' Life Assurance Co.*, 23 Beav. 338; and cf. *Hopkinson* v. *Lord Burghley*, L. R., 2 Ch. 447; 36 L. J., Ch. 605; 15 W. R. 543.

(*g*) *Sharp* v. *Lamb*, 11 A. & E. 805.

into the hands of a bankrupt who was proved to have solicited it, and to have been charged for it by his solicitor (*h*). And generally, where documents have been traced into a party's possession, it lies upon him to show what has become of them, in order to be able to object, after notice to produce, to the substitution of secondary evidence (*i*).

Similarly, when there is a privity of title between the adverse party and a third person who holds the original, the former is equally compellable to produce. The question in this case is, whether the custody was virtually, although not actually, the custody of the adverse party; or whether he had such a control over the holding by the third party as made it virtually a personal holding. Thus, generally, where the holding is by an agent, he may either be served with a *subpœna duces tecum*, or the principal may be served with notice to produce. Where a notice was given to an owner of a vessel to produce a document which appeared to be in the possession of the captain (*k*); where it was given to the drawer to produce a cheque which was proved to have been delivered to the drawer's banker (*l*); to a sheriff to produce a warrant which had been returned to the under-sheriff (*m*); secondary evidence has been received. But where the possession was independent

(*h*) *Henry* v. *Leigh*, 3 Camp. 502.
(*i*) *R.* v. *Thistlewood*, 33 How. St. Tr. 757.
(*k*) *Baldney* v. *Ritchie*, 1 Stark. 338.
(*l*) *Partridge* v. *Coates*, Ry. & M. 156.
(*m*) *Taplin* v. *Atty*, 3 Bing. 164.

of the adverse party, as where he had assigned a lease (*n*); or where the writing was held as a security by a third party (*o*); or where it has been traced by a party satisfactorily into the possession of a stranger with whom he is unconnected, and over whom he has no control; he will not be affected by notice unless he have wilfully parted with the document after receiving the notice (*p*).

A party may produce an original document at any time when secondary evidence is tendered; and then the latter becomes inadmissible. If there be any question as to the originality of the document, such question is for the judge (*q*); but where the existence of a duly stamped document is denied upon the pleadings, and the plaintiff, after giving notice to produce, tenders a copy of it, the judge cannot hear evidence to decide the question of the existence of the stamped original as a preliminary to that of the admissibility of the copy, because he would be thereby determining an issue which is in the province of the jury (*r*).

A notice to produce may be given to the adverse party or his agent, either verbally or in writing (*s*). It must be proved to have been given in one of these

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(*n*) *Knight* v. *Martin*, Gow. 103.

(*o*) *Parry* v. *May*, 1 M. &. R. 279.

(*p*) *Knight* v. *Martin*, Gow. 103.

(*q*) *Boyle* v. *Wiseman*, 11 Ex. 360.

(*r*) *Stowe* v. *Querner*, 39 L. J., Ex. 60; L. R., 5 Ex. 155; 18 W. R. 466.

(*s*) *Smith* v. *Young*, 1 Camp. 440; *Suter* v. *Burrell*, 2 H. & N. 867.

ways, as soon as it appears that he is holder of a required document, before secondary evidence of it can be received (*t*). It may be served either on the party or his solicitor (*u*), and it will be sufficient to leave it with a servant at the residence of the former, or with a clerk at the office of the latter (*x*).

The notice is not required to be in any precise or minutely descriptive form, and the courts will not entertain frivolous or technical objections to its validity, if it point out, with general distinctness, to the adverse party the documents which he is required to produce (*y*). Notices to produce "all letters written by the plaintiff to the defendant, relating to the matters in dispute in the action" (*z*); or "all letters written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person on their behalf; and also all books, papers, &c., relating to the subject-matter of this cause" (*a*); or "all accounts relating to the matters in question in this cause" (*b*); have been held sufficient notice to produce any document reasonably included in the description.

The notice ought to be within a reasonable time before the trial comes on; and it will be for the judge

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(*t*) *R.* v. *Stoke Golding*, 1 B. & A. 173.
(*u*) *Hughes* v. *Budd*, 8 Dowl. 315.
(*x*) *Evans* v. *Sweet*, Ry. & M. 84.
(*y*) *Lawrence* v. *Clark*, 14 M. & W. 251.
(*z*) *Jacob* v. *Lee*, 2 M. & Rob. 33.
(*a*) *Morris* v. *Hanser*, 2 M. & Rob. 392.
(*b*) *Rogers* v. *Custance*, 2 M. & Rob. 179.

to determine, on the circumstances of the case, whether the notice has been served within a reasonable time previously to the trial (*c*).

In town causes, and also in country causes, where the solicitor lives in the assize town, if the documents be such as from the nature of the case may reasonably be presumed to be in his hands, notice may be served not later than early in the evening of the day preceding the trial (*d*); but if they are not such as are immediately connected with the cause, or are such as would presumably be in the hands of a client or other person, the notice must be proportionably earlier, according to an estimate of the time necessary to obtain them (*e*). In such a case, and especially in country causes, where the adverse solicitor does not live in the assize town, the notice ought to be served on him before the commission day, and within a reasonable time before he is required to leave home for the assize town (*f*). But if he has the document with him at the assize town, service there will be sufficient (*g*).

Where the adverse holder is abroad, or beyond the jurisdiction of the court, and leaves his solicitor to conduct his cause, it will be presumed that he has also left with him all papers naturally connected with his case; and the courts, under such circumstances, have been inclined to maintain the validity of a notice

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(*c*) Per Parke, B., *Lloyd* v. *Mostyn*, 10 M. & W. 483.
(*d*) *Atkyns* v. *Meredith*, 4 Dowl. 658.
(*e*) *Byrne* v. *Harvey*, 2 M. & Rob. 89.
(*f*) *George* v. *Thompson*, 4 Dowl. 656.
(*g*) *R.* v. *Hawkins*, 2 C. & K. 823.

to the solicitor (*h*). But the circumstances must be such as to support a supposition that the papers were producible, and the notice sufficient. Thus, a three days' notice to produce letters written by a defendant to his partners in New South Wales, was held sufficient, on its appearing that there had been litigation between the same parties some years previously, for the purposes of which it was reasonable to suppose that the letters must have been remitted to England (*i*).

If a party, on being served with notice to produce, state that the document does not exist, secondary evidence will be admissible, and the adverse party cannot object to the lateness of the notice (*k*).

The Common Law Procedure Act, 1852 (14 & 15 Vict. c. 99), s. 119, enacts, that—"An affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce, in respect of which notice to admit shall have been given, and of the time when it was served, with a copy of such notice to produce annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice, and of the time when it was served."

Notice to produce is unnecessary—(*l*)

1st. Where a party holds a duplicate original, or counterpart of his adversary's document (*m*).

(*h*) *Bryan* v. *Wagstaff*, Ry. & M. 47.

(*i*) *Sturge* v. *Buchanan*, 10 A. & E. 598.

(*k*) *Foster* v. *Pointer*, 9 C. & P. 720.

(*l*) Notice to produce is unnecessary in India when the court dispenses with it, and in the cases mentioned in sect. 66 of the Ind. Ev. Act.

(*m*) *Colling* v. *Treweek*, 6 B. & C. 398.

But such duplicate or counterpart must not be a mere copy, but in all respects of equal and coextensive character and validity with the adversary's document. In such a case it is receivable as being itself primary evidence.

2nd. When the nature of the case and proceedings inform the adverse party sufficiently, that he will be required to produce the document.

Thus in an action to recover for a bond or other instrument (*n*), or on an indictment for stealing a writing (*o*), the plaintiff or prosecutor may give secondary evidence without proving notice to produce. "Where the nature of the action or indictment is such that the defendant must know that he is charged with the possession of the document, and is called upon to produce it, notice is not necessary, and such is the case in an action of trover or on an indictment for stealing; but if the matter is collateral, it is unnessary to give notice (*p*). Hence, where on an indictment for perjury, the prisoner having sworn that a certain draft did not exist, and the materiality of its existence depended on its contents and certain alleged alterations in it, it was held that no parol evidence was admissible, either of its existence or of its contents, without notice to produce" (*q*). The general rule stated above is subject to several special limitations. Thus, in forgery, the prosecutor must

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(*n*) *Scott* v. *Jones*, 4 Taunt. 865.

(*o*) *R.* v. *Aickles*, 1 Lea, C. C. 294.

(*p*) Per Kelly, C. B., *R.* v. *Elworthy*, 37 L. J., M. C. 3; L. R., 1 C. C. P. 103; 16 W. R. 207.

(*q*) Ibid.

give notice to the prisoner to produce the original (*r*); in arson, for setting fire to a dwelling-house, with intent to defraud an insurance company, notice must be given to produce the policy (*s*). So, in civil cases, in an action on a cheque or a bill, if the defendant does not traverse the making or acceptance, but only avoids, the plaintiff need not produce without notice (*t*).

3rd. A notice to produce a notice is not required (*u*), *e. g.*, a notice to quit, a notice of action, notice of dishonour of a bill, notice to produce a signed solicitor's bill in an action on it (*v*).

The principle of this rule is that the service of the original notice is in itself a sufficient notice to produce it at the trial if required. It does not apply where the notice has been given to one who is not a party to the action, nor where it contains the terms of a contract; as where a carrier, relying upon a notice served on the plaintiff to limit his liability, was held bound to give notice to produce it (*x*).

4th. If a party or his solicitor be shown to have an original with him in court, and refuses to produce it, secondary evidence will be received, notwithstanding the want of a notice to produce (*y*).

(*r*) *R.* v. *Halworth*, 4 C. & P. 254.
(*s*) *R.* v. *Ellicombe*, 5 C. & P. 522.
(*t*) *Goodered* v. *Armorer*, 3 Q. B. 956.
(*u*) *Philipson* v. *Chase*, 2 Camp. 111.
(*v*) *Colling* v. *Treweek*, 6 B. & C. 394.
(*x*) *Jones* v. *Tarleton*, 9 M. & W. 675.
(*y*) *Dwyer* v. *Collins*, 7 Ex. 739.

5th. Notice will not be required when the adverse party has admitted the loss of the original; or where it is in the nature of an irremovable fixture, such as a mural inscription (*z*).

But this rule does not apply to a removable and portable notice or writing (*a*).

6th. Merchant seamen (*b*) are permitted to prove orally an agreement with the master of a ship, without producing the original, or giving notice to produce it (*c*).

(*z*) *Bartholomew* v. *Stephens*, 8 C. & P. 728.

(*a*) *Jones* v. *Tarleton*, 9 M. & W. 675.

(*b*) 17 & 18 Vict. c. 104, s. 165; *Bowman* v. *Manzelman*, 2 Camp. 315.

(*c*) In India the plaintiff is required to produce in court any document upon which he sues or relies as evidence when the plaint is presented, and to deliver copies thereof to be filed with the plaint. At the same time the plaintiff, if he requires the production of any written document in the possession or power of the defendant, may deliver to the court a description thereof, and the defendant will be required to produce the same. If the defendant requires the production of any document in the possession or power of the plaintiff, he must deliver to the court two notices in writing to the plaintiff calling upon him to produce the same, one of which notices the court serves by its officer upon the defendant. This method of proceeding is also open to the plaintiff in respect of any document the production of which he did not ask for when the plaint was filed (Act viii. of 1859, ss. 39, 40, 43, 107).

CHAPTER VIII.

ON INTERROGATORIES.

It is proposed in this chapter to treat of evidence elicited by means of interrogatories which were imported into the superior courts of common law from the equity courts, and have been adopted in the new practice. By means thereof a party is able to acquire evidence, which may be necessary to enable him to prove his case in court, and which he can obtain only by extracting it from his adversary.

The new practice relative to interrogatories is thus laid down in Order XXXI. of the Rules of Court.

"1. The plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the court or a judge, deliver interrogatories in writing for the examination of the opposite party or parties, or any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose.

"2. The court in adjusting the costs of the action shall at the instance of any party inquire or cause inquiry to be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing master or of the court or judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault.

"3. Interrogatories may be in the Form No. 7 in Appendix B. hereto, with such variations as circumstances may require.

"4. If any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

"5. Any party called upon to answer interrogatories, whether by himself or by any member or officer, may, within four days after service of the interrogatories, apply at chambers to strike out any interrogatory, on the ground that it is scandalous or irrelevant, or is not put *bonâ fide* for the purposes of the action, or that the matter inquired after is not sufficiently material at that stage of the action, or on any other ground. And the judge, if satisfied that any interrogatory is objectionable, may order it to be struck out.

6. " Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as a judge may allow.

7. " An affidavit in answer to interrogatories shall, unless otherwise ordered by a judge, if exceeding three folios, be printed and may be in the Form No. 8 in Appendix B. hereto, with such variations as circumstances may require.

8. " Any objections to answering any interrogatory may be taken, and the ground thereof stated in the affidavit.

9. " No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the court or a judge on motion or summons.

10. " If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further either by affidavit or by *vivâ voce* examination, as the judge may direct."

The practice of the Court of Chancery as to interrogatories was regulated by the 15 & 16 Vict. c. 86, the 12th section of which authorized the plaintiff to file interrogatories for the examination of any defendant or defendants, and to deliver a copy thereof to such defendant or defendants, or to his or their solicitor.

These interrogatories were required to be founded

on the bill; but a variety of questions might be founded upon a single allegation therein, and it was not necessary that an interrogatory should in all cases be founded upon a distinct allegation in the bill. Formerly, if the defendant required from the plaintiff any information, it was necessary for him to file a cross bill: with a view to remedy this, it was enacted by the 19th section of the above-mentioned act, that it should be lawful for any defendant in any suit, whether commenced by bill or by claim, but in suits commenced by bill which the defendant is required to answer, not until after he shall have put in a sufficient answer to the bill, and without filing any cross bill of discovery (which, however, he might file if he thought fit), to file interrogatories for the examination of the plaintiff, to which shall be prefixed a concise statement of the subjects on which a discovery is sought, and to deliver a copy of such interrogatories to the plaintiff or his solicitor; and such plaintiff shall be bound to answer such interrogatories in like manner as if the same had been contained in a bill of discovery filed by the defendant against him, and the practice of the court with reference to excepting to answers for insufficiency, or for scandal, should extend and be applicable to answers put in to such interrogatories: provided that in determining the materiality or relevancy of any such answer, or of any exception thereto, the court is to have regard, in suits commenced by bill, to the statements contained in the original bill, and in the answer which may have been put in thereto by the defendant exhibiting such interrogatories for the examination of the plaintiff.

The common law practice as to interrogatories was founded upon and regulated by the 51st section of the Common Law Procedure Act, 1854 (*a*), which enacts, that "in all causes in any of the superior courts, by order of the court or a judge, the plaintiff may (with the declaration), and the defendant may (with the plea), or either of them, by leave of the court or a judge, may at any other time, deliver to the opposite party, or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter), interrogatories in writing upon any matter as to which discovery may be sought, and require such party (or, in the case of a body corporate, any of the officers of such body corporate) within ten days to answer the question in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting without just cause sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the court or judge shall allow, shall be deemed to have committed a contempt of court, and shall be liable to be proceeded against accordingly."

There was some doubt among the judges whether the Legislature, in the above section, intended to limit the new privilege to those cases only in which a court of equity would entertain a bill of discovery; and eminent authorities held that the statutory right of discovery in the common law courts is more ex-

(*a*) 17 & 18 Vict. c. 125.

tensive than that which exists in the equity courts (*b*). But it was subsequently settled that the right of discovery at common law was measured by, and exactly coextensive with, the right of discovery in a court of equity (*c*), the principles (*d*) but not the practice of the courts of equity being binding upon the courts of common law.

The new practice as to interrogatories differs apparently from the previous practice at common law only in one material particular, viz., that under the latter no leave to file interrogatories is necessary (in which respect the rule of the Court of Chancery has been adopted). If the party interrogated is unwilling to answer all or any of the interrogatories, he may either omit to answer the interrogatories objected to, in which case the party interrogating will proceed under Rules 9 or 10, or the party interrogated may apply, under Rule 5, to have the interrogatory or interrogatories objected to struck out (*e*). If the ground of objection to an interrogatory is that the answer thereto would criminate the party interrogated, and that upon this or any other ground of privilege such party cannot be compelled to answer, he must take the first course; as the fact that the party interrogated is privileged from answering is no

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(*b*) Per Parke, B., and Alderson, B., *Osborne* v. *London Dock Company*, 10 Ex. 698.

(*c*) *Carew* v. *Davies*, 5 E. & B. 709; *Horton* v. *Bolt*, 2 H. & N. 249; *Adams* v. *Lloyd*, 3 H. & N. 351.

(*d*) *Pye* v. *Butterfield*, 5 B. & S. 829.

(*e*) It may be presumed that an application to take the interrogatories as a whole off the file would lie under this rule.

ground for striking out an interrogatory. Inasmuch as the application to strike out an interrogatory may be made not only on the three grounds specified in the 5th rule, but "on any other ground," and inasmuch as the judge may, upon such an application, strike out any interrogatory that he is satisfied is "objectionable," it is most probable that in granting or refusing applications to strike out interrogatories, judges of the High Court will frequently follow the principles adopted by the common law judges in granting or refusing leave to file interrogatories. The first of such principles was that only such interrogatories would be allowed as tended strictly to advance the case, which, according to the rules concerning the burden of proof, the interrogating party was bound to establish in court (*f*). It was held that the above-quoted provisions of the Common Law Procedure Act, 1854, were applicable when either party had a specific case to establish, and some of the materials were in the possession or under the control of his adversary (*g*). For this purpose, he was allowed to ask all questions which were strictly relevant and material to the proof of his interrogant's case; but he could not require an answer to merely speculative questions; nor to questions of which the only object was to discover or weaken the case of his opponent. The latter branch of this rule was stated by several learned judges, in the homely but expressive doctrine that the court

(*f*) *Bartlett* v. *Lewis*, 12 C. B., N. S. 249.
(*g*) *Moor* v. *Roberts*, 2 C. B., N. S. 671.

would not allow either party to deliver *fishing* interrogatories (*h*)—*i. e.*, interrogatories which, although the answers to them might be serviceable and important to the interrogator, were not necessary to enable him to present a reasonable *primâ facie* case to the court, and were manifestly destructive to the case of the party interrogated (*i*). An exception to this rule seems to have been established in the case of *Flitcroft* v. *Fletcher* (*k*), where in an action of ejectment the defendant was allowed to interrogate the plaintiff as to his title; but this case was questioned in *Stoate* v. *Rew* (*l*) and *Pearson* v. *Turner* (*m*), where it was held that special circumstances must be shown to justify such interrogatories. It was also held that a defendant in trover could not interrogate the plaintiff as to his claim unless he in some way admitted the plaintiff's title or connected him with the person from whom he received the goods, or alleged fraud (*n*), and the Court of Exchequer declined to extend to trover the exception to the general rule which *Flitcroft* v. *Fletcher* had made in a case of ejectment (*o*). But an interrogatory

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(*h*) *Zarifi* v. *Thornton*, 26 L. J., Ex. 215.

(*i*) *Peppiatt* v. *Smith*, 3 H. & C. 129; *Beckervaise* v. *Great Western Railway Co.*, 40 L. J., Ex. 8; L. R., 6 C. P. 36; 19 W. R. 229.

(*k*) 11 Ex. 543.

(*l*) 14 C. B., N. S. 209.

(*m*) 16 C. B., N. S. 157; cf. *Wallen* v. *Forrest*, 41 L. J., Q. B. 96; L. R, 7 Q. B. 239.

(*n*) *Derby Commercial Bank* v. *Lumsden*, 39 L. J., C. P. 72; L. R., 5 C. P. 107; 18 W. R. 526.

(*o*) *Finney* v. *Forward*, 4 H. & C. 33.

was not disallowed merely because the answer to it would destroy the case of the interrogated party, provided that the subject-matter of the interrogatory could be construed as reasonably common to both parties (*p*). In *Osborne* v. *London Dock Company* (*q*), it seems to have been thought by the Court of Exchequer that interrogatories might be administered to the same extent as if the party interrogated were a witness under examination at the trial; but it would appear that this view was founded on that more extensive construction of the statute which the Court of Queen's Bench dissented from in *Carew* v. *Davies* (*r*), in which case Lord Campbell, C. J., after citing the last-mentioned view of the Court of Exchequer, spoke of it as laying down the rule "rather widely;" and his lordship added, "I think the true rule is, that such questions may be put as may reasonably be expected to produce answers tending to advance the case of the party who puts them. The rule on this subject has been very clearly laid down by that great jurist, Sir James Wigram; and I concur in that rule in the very terms he has laid it down. Whatever advances the plaintiff's case may be inquired into, though it may at the same time bring out matters which the defendant relies on for his defence; but you shall not inquire into that which is exclusively matter of defence. That which is common to both the plaintiff and the

(*p*) *Whateley* v. *Crawford*, 5 E. & B. 712.
(*q*) 10 Ex. 698.
(*r*) 5 E. & B. 709.

defendant may be inquired into by either." The general principle apparently was (as laid down by Lord Campbell), that although community of interest in one subject-matter, equally applicable and necessary to the establishment of the cases of both parties, would enable both to interrogate, and be ground for compelling both to answer, yet such community and reciprocity must be manifest; and, where they were not so, and still more where it appeared that the case of the interrogant was reasonably complete without the discovery sought, and that the purpose of the interrogatory apparently was merely to defeat by anticipation the case of the party interrogated—then and in all such cases the interrogatory would be disallowed. *Carew* v. *Davies*, and the contemporaneous case of *Whateley* v. *Crawford* (*s*), afford a good illustration of this principle. In both cases the actions were for negligence; and the plaintiffs proposed to deliver interrogatories, seeking thereby to elicit admissions from the defendants, which tended directly to prove the negligence of which the plaintiffs complained. It was argued for the defendants that the latter should not be compelled to answer, because the interrogatories sought directly to elicit facts on which the defence in each case rested. The court recognized this tendency of the interrogatories, but, notwithstanding, gave leave to the plaintiffs to deliver them, on the above-stated ground that the information sought was the common right of both parties, and

(*s*) 5 E. & B. 712.

that, as the plaintiffs were directly bound to prove the negligence of which they complained, the defendants were bound to disclose all facts which would help the plaintiffs to prove that negligence. There was nothing in the information sought by the interrogatories which could be said to be exclusively matter of defence, and therefore nothing which was beyond the grasp of the plaintiffs under the statute. So, in the case of *Thol* v. *Leaske* (*t*), the action was for money had and received, and non-delivery of goods, to which the defendant pleaded never indebted and delivery. The plaintiff applied subsequently for leave to deliver interrogatories to the defendant, and the former in his affidavit stated substantially that the latter had acted as broker in the transaction, and had been paid by the plaintiff for the goods in question, which, notwithstanding, had never been delivered to the plaintiff. The interrogatories were to ascertain in effect whether the defendant had acted in the pretended sale as an agent, or as a principal; and Parke, B., had refused leave to the plaintiff at chambers, because the learned judge thought that the object of the interrogatories was to discover some third person against whom the plaintiff might bring an action. The court, however, granted leave, because the plaintiff was bound, in proving his case, to show that the defendant was not authorized to act as a broker. The court assigned no reason for this judgment; but it proceeded manifestly on this ground, and the case is therefore an illustration of

(*t*) 10 Ex. 704.

the general principle, that interrogatories must ask only for answers which are reasonably necessary to establish the interrogant's case. The dictum of Parke, B., in this case should be noted, that if the plaintiff had really sought to discover evidence to fix a third person, the interrogatories could not have been allowed, not because they were "fishing," but because the answers to them, although valuable to the plaintiff and harmless to the defendant, would have been wholly irrelevant to the issue between them, and merely an underhand way of attempting to prejudice persons who were not before the court. On the other hand, interrogatories were not deemed objectionable merely on the ground that the answers to them would incidentally expose a third person to an action, provided that the interrogatories were material to the applicant's case (*u*). It is also to be noticed that *Thol* v. *Leaske* clearly agrees with *Whateley* v. *Crawford*, in the doctrine that a party may be compelled to answer interrogatories, however damaging to his own case, provided such answers are material to support the interrogator's case. So the Court of Queen's Bench have allowed the plaintiff to interrogate the defendant as to the allegations in his plea, Cockburn, C. J., saying that "an inquiry as to any point tending to displace the plaintiff's case is pertinent to his case" (*x*). In *Tetley* v. *Easton*, in an action for infringing a

(*u*) *Tetley* v. *Easton*, 18 C. B. 643; cf. *Stewart* v. *Smith*, L. R., 3 C. P. 293.

(*x*) *Hawkins* v. *Carr*, 35 L. J., Q. B. 81; L. R., 1 Q. B. 89.

patent, and in which the defendant admitted the infringement, the plaintiff was allowed to deliver interrogatories as to the occasions on which the defendant had infringed the patent, and the persons to whom or for whose benefit the defendants had sold the goods which they had illegally manufactured. Such information was clearly necessary to the plaintiff's case, as it enabled him to compute damages. So, in another patent case, the defendant was held entitled to learn by interrogatories what were the portions of the machine, to which the plaintiff contended that his invention had been unlawfully applied; and it was held also in this case that the insufficiency of the defendant's answer to the plaintiff's interrogatories was no ground for the plaintiff refusing to answer the defendant's interrogatories (*y*). So, also, in another case for infringing a patent, the plaintiffs were allowed to deliver interrogatories as to whether the defendants had in their possession books containing entries, and also plans of the manufacture, by the defendant, of the subject-matter of the alleged infringement (*z*).

It seems to have been previously doubtful whether a defendant was entitled to interrogate a plaintiff as to actual damage sustained in order to guide him as to paying money into court (*a*): but it was recently held by the Court of Common Pleas that such interrogatories ought to be allowed if the court be

(*y*) *Jones* v. *Lee*, 25 L. J., Ex. 241.

(*z*) *Smith* v. *Great Western Railway Co.*, 6 E. & B. 405.

(*a*) *Jourdain* v. *Palmer*, 4 H. & C. 171; *Dobson* v. *Richardson*, 37 L. J., Q. B. 261; 16 W. R. 1010; L. R., 3 Q. B. 778.

satisfied of a *bonâ fide* intention to stay further proceedings by a sufficient payment (*b*).

It was held that interrogatories which tended to contradict a writing could not be allowed (*c*); unless there was a *primâ facie* case that the writing was lost, when a party might be interrogated as to its contents; but the answers could not be made evidence at the trial, unless the non-production of the original could be accounted for satisfactorily, so as to let in secondary evidence (*d*).

It will be noticed that among the grounds for objecting to an interrogatory under the 5th rule is that it is scandalous. Scandal consists in the allegation of anything which it is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the action. Any unnecessary allegation bearing cruelly on the moral character of an individual is scandalous. But nothing that is material is scandalous, consequently the language of the record is often, although literally scandalous, not legally so (*e*).

Another ground for objecting to an interrogatory is that the matter inquired after is not sufficiently material at that stage of the action. Thus, in an action for an infringement of a patent, where the defendant denied the infringement, he was held not

(*b*) *Horne* v. *Hough*, 43 L. J., C. P. 70; L. R., 9 C. P. 135; 22 W. R. 412.

(*c*) *Moor* v. *Roberts*, 2 C. B., N. S. 671.

(*d*) *Wolverhampton Railway Company* v. *Hawksford*, 5 C. B., N. S. 703.

(*e*) See Dan. Ch. Pr. 5th ed. p. 290.

bound to answer any interrogatory inquiring after matters irrelevant to that question (*f*). But in a recent case where the plaintiff filed her bill to establish that a business carried on by three of the defendants in partnership belonged to the estate of her late husband, and the interrogatories required these defendants to set forth whether they, or any of them, had drawn out of the business any money for their or his own account in respect of capital advanced, profits or otherwise, and to set forth the particulars of the moneys so drawn out, and the third defendant declined to answer this interrogatory, submitting that the plaintiff was not entitled to this discovery till she had established her right to a decree, the Court of Appeal in Chancery held, affirming the decision of the Master of the Rolls, that the interrogatory must be answered (*g*). An executor must, if required, set out his accounts in his answer (*h*), and a mortgagee in possession admitting himself to be redeemable cannot decline answering interrogatories as to the state and particulars of the account which it is one of the objects of the suit to take (*i*). In a recent case (*k*) the Court of Appeal in Chancery said that the true rule was, that in an ordinary suit for accounts, a defendant submitting to answer (even when he altogether denies the plaintiff's title), must

(*f*) *Delarue* v. *Dickinson*, 3 K. & J. 388.

(*g*) *Saull* v. *Browne*, L. R., 9 Ch. 364; 43 L. J., Ch. 568; 22 W. R. 427.

(*h*) *Thompson* v. *Dunn*, 18 W. R. 854.

(*i*) *Elmer* v. *Creasey*, L. R., 9 Ch. 69; 43 L. J., Ch. 166; 22 W. R. 141.

(*k*) Ibid.

answer fully not only as to other matters but also as to consequential matters of account. But, the judgment proceeded, "the court may be trusted to exercise a proper control over any attempt on the plaintiff's part to press for any such minuteness of discovery as would be either vexatious or unreasonable, as indeed it can do in every case in which it is satisfied that any kind of discovery is required vexatiously or oppressively." The same court, in a subsequent case (*l*), on the ground that it was vexatious or unreasonable within the meaning of the above quoted words, refused where the plaintiff had filed a bill, founded on the alleged agency of the defendant, which was the question in the suit, to compel the defendant to answer interrogatories as to what appeared to be his private transactions, saying that "It would be monstrous that a man, by merely alleging that he had a share in a concern, which allegation was denied and had not been established, and whilst it was doubtful whether it would be established, could get the accounts of the defendant's private business and of his dealings with other people."

(*l*) *Great Western Colliery Co.* v. *Tucker*, L. R., 9 Ch. 376; 43 L. J., Ch. 518.

CHAPTER IX.

ON STAMPS.

In this chapter only the leading principles of the Stamp Acts will be stated, so far as they affect the admissibility in evidence of written documents.

The general rule is, that no instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

The 15th section of the Stamp Act, 1870 (*a*), provides that "except where express provision to the contrary is made by this or any other act," any unstamped or insufficiently-stamped instrument may be stamped after execution on payment of the unpaid duty, and a penalty of 10*l*., and, in certain cases, of interest on the duty. The 16th section of the same act provides as follows:—

"(1.) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United King-

(*a*) 33 & 34 Vict. c. 97.

dom, the officer whose duty it is to read the instrument shall call the attention of the judge to any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the amount of the unpaid duty, and the penalty payable by law on stamping the same as aforesaid, and *of a further sum* of one pound, be received in evidence, saving all just exceptions on other grounds.

"(2.) The officer receiving the said duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the commissioners the name or title of the cause or proceeding in which, and of the party from whom, he received the said duty and penalty, and the date and description of the instrument, and shall pay over to the Receiver-General of Inland Revenue, or to such other person as the commissioners may appoint, the money received by him for the said duty and penalty.

"(3.) Upon production to the commissioners of any instrument in respect of which any duty or penalty has been paid as aforesaid, together with the receipt of the said officer, the payment of such duty and penalty shall be denoted on such instrument accordingly."

The party who objects to the want or sufficiency of a stamp must prove it (*b*); and the judge will deter-

(*b*) *Doe* v. *Coombs*, 3 Q. B. 687.

mine the question before the instrument can be shown to the jury (*c*). But by sect. 18 of the Stamp Act, 1870, provision is made for taking the opinion of the Commissioners of Inland Revenue on the liability of any instrument to duty, and for stamping such instrument in accordance with such opinion; and it is enacted that "every instrument stamped with the particular stamp denoting either that it is not chargeable with any duty, or is duly stamped, shall be admissible in evidence, and available for all purposes notwithstanding any objection relating to duty."

If an agreement be no more than a proposal, it does not require a stamp; but when it is either an agreement strictly, or evidence of one, it must be stamped, if the subject-matter be above 5*l.* (*d*).

Where an agreement, which appears to be in writing, is in dispute between parties, it must, according to the rule which requires the best evidence, be produced; and when produced, if it appear to require a stamp, it will be inadmissible unless it be properly stamped. Thus, where it appears in the course of a party's case that there is a written agreement, bearing directly on the points at issue, he must produce it duly stamped (*e*). Such an agreement cannot be treated as a nullity, if it be produced and appear to be unstamped; and therefore it was held in *Delay* v. *Alcock* (*f*), that a county court judge

(*c*) Per Lord Tenterden, *Jardine* v. *Payne*, 1 B. & Ad. 670.
(*d*) *Hegarty* v. *Milne*, 14 C. B. 627.
(*e*) *Buxton* v. *Cornish*, 12 M. & W. 426.
(*f*) 4 E. & B. 660.

was wrong in allowing parol evidence to be given of an agreement contained in an unstamped writing. But where a party succeeds in establishing his case by oral evidence, the opposite party cannot defeat it by merely producing an unstamped written agreement. Therefore in *Magnay* v. *Knight* (*g*), where the plaintiff closed his case without anything appearing to show that there was a written agreement between her and the defendant as to the subject-matter of the action, the defendant was held not entitled to call for a nonsuit by producing a paper purporting to be an agreement, but unstamped. This case, although apparently contradicted by *Delay* v. *Alcock*, will be reconciled with it by presuming that, in the latter case, the defendant was called as a witness by the plaintiff, and that the existence of the unstamped agreement was disclosed in the course of the plaintiff's case. If that had closed without evidence of an agreement in writing, it appears, on the authority of *Magnay* v. *Knight*, that the defendant could not have nonsuited the plaintiff by producing an unstamped written agreement.

When it is necessary to produce the writing, or account for its absence, secondary evidence will not be received if it appear that the original required a stamp, and that it was unstamped (*h*). But a writing requiring a stamp will be presumed to have been properly stamped (*i*); and as against a party refusing

(*g*) 1 M. &. G. 944.

(*h*) *Vide supra*, p. 352.

(*i*) *Hart* v. *Hart*, 1 Hare, 1; cf. *Pooley* v. *Goodwin*, 4 A. & E. 94.

to produce a document after notice there is a similar presumption (*j*); but such a presumption may be rebutted by evidence that the writing was not stamped (*k*). If it be shown that a lost document was at one time unstamped, this fact alone will raise a presumption that it continued without a stamp (*l*). The court will not sanction an agreement to waive the objection for want of a stamp (*m*).

When an instrument purports to have been stamped, but no stamp appears, or one partially effaced, the judge may receive the writing, if the want of the stamp or its erasure be satisfactorily explained to him (*n*).

An unstamped instrument, inadmissible as an agreement, may yet be admissible to prove a collateral or independent fact. Thus, a cheque, drawn beyond the legal limits, has been received to prove the receipt of money by a holder, but not to discharge the banker (*o*); an unstamped receipt to show that goods were sold to a third person, and not to the defendant (*p*); an unstamped agreement to show an illegal consideration for a debt (*q*); but it cannot be presented to a jury as evidence of any part of the

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(*j*) *Crisp* v. *Anderson*, 1 Stark. 85.
(*k*) *Crowther* v. *Solomons*, 6 C. B. 758.
(*l*) *Marine Investment Co.* v. *Haviside*, L R., 5 E. & I. 624; 42 L. J., Ch. 173.
(*m*) *Owen* v. *Thomas*, 3 M. & K. 353.
(*n*) *Doe* v. *Coombs*, 3 Q. B. 687.
(*o*) *Blair* v. *Bromley*, 11 Jur. 617.
(*p*) *Miller* v. *Dent*, 10 Q. B. 846.
(*q*) *Coppock* v. *Bower*, 4 M. & W. 361.

substantial claim of a party (*r*). It may be handed to a witness to refresh his memory; and when it is a document, which for some purposes requires a stamp but not for others, it will be strictly admissible for such latter purposes. Where a document is void as a receipt for want of a stamp, it may be made evidence of an account stated, or other outstanding accounts (*s*). An unstamped and unregistered assignment of a debtor's whole property may be given in evidence as an act of bankruptcy, although until stamped it cannot be received for the purpose of giving it effect or supporting any claim under it (*t*).

Where an instrument is inadmissible by reason of the stamp laws it will be allowable to resort to other admissible evidence. Thus, when a promissory note is defectively stamped, a holder may give evidence of the original consideration; as by showing on a count for money lent that the defendant has acknowledged the debt for which the note was given (*u*). So, when a receipt is unstamped, he may prove payment by oral evidence (*x*).

(*r*) *Jardine* v. *Payne*, 1 B. & Ad. 670.
(*s*) *Matheson* v. *Ross*, 2 H. L. Cas. 301.
(*t*) *Ex parte Squire*, L. R., 4 Ch. 47.
(*u*) *Farr* v. *Price*, 1 East, 56.
(*x*) *Rambert* v. *Cohen*, 4 Esp. 213.

APPROPRIATED STAMPS.

The 9th section of the Stamp Act, 1870, provides:—

"(1.) A stamp which by any word or words on the face of it is appropriated to any particular description of instrument is not to be used, or, if used, is not to be available, for an instrument of any other description.

"(2.) An instrument falling under the particular description to which any stamp is so appropriated as aforesaid is not to be deemed duly stamped, unless it is stamped with the stamp so appropriated."

ALTERATION OF A STAMPED DOCUMENT.

A material alteration in a writing requiring a stamp, after it has been made or executed, avoids the stamp, and renders a fresh stamp necessary; but not so if the alteration be immaterial, or according to the original intent of the parties (*y*).

Thus, when the defect is unintentional, and the alteration makes the writing merely what it was intended originally to have been, it will not require to be restamped (*z*). Where a promissory note was made originally payable to the plaintiff, who com-

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(*y*) *Master* v. *Miller*, 1 Smith, L. C. 796, and notes.

(*z*) *Cole* v. *Parkin*, 12 East, 471.

plained that it ought to have been payable to order, it was held that, as between the parties to the note, the interlineation of the words, "or to order," did not render a new stamp necessary (*a*). So, when a bill is altered by the consent of parties before the note has issued, it will not require to be restamped. But when the bill has issued, and where the alteration is material and varies the essential character of the writing, so as to amount to a new contract, a new stamp will be required, notwithstanding the consent of the parties to the alteration (*b*).

TIME OF OBJECTING TO THE WANT OF STAMP.

Where an objection is raised to an instrument for want of a stamp, the objection should be taken as soon as the instrument is tendered, and before it is received in evidence. If the instrument be received, and read without objection, it cannot afterwards be objected to for want of a stamp (*c*). Such a deficiency is not ground for a new trial (*d*). It is doubtful whether a judge has not at least a discretionary power to reject a document which, after

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(*a*) *Byron* v. *Thompson*, 1 A. & E. 31.

(*b*) *Bowman* v. *Nicholl*, 5 T. R. 537.

(*c*) *Robinson* v. *Lord Vernon*, 7 C. B., N. S. 235.

(*d*) By the 31st section of the Common Law Procedure Act, 1854, it is provided that "no new trial shall be granted by reason of the ruling of any judge that the stamp on any document is sufficient, or that it does not require a stamp."

being put in, subsequently appears to be unstamped, or insufficiently stamped (*e*). Where a judge rules that a document is inadmissible on account of the insufficiency of the stamp, his decision is open to review (*f*).

(*e*) *Field* v. *Wood*, 7 A. & E. 114.
(*f*) *Sharples* v. *Rickard*, 2 H. & N. 57.

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CHAPTER X.

AFFIDAVITS—NEW TRIALS—APPEALS—PERPETUATING TESTIMONY.

THE LXIInd Order of the new Rules of Court provides, that "nothing in these rules shall affect the practice or procedure in any of the following causes or matters:—criminal proceedings; proceedings on the crown side of the Queen's Bench division; proceedings on the revenue side of the Exchequer division; proceedings for divorce or other matrimonial causes:" and the 20th section of the Judicature Act, 1875 (*a*), provides, that "nothing in this act or in the first schedule hereto, or in any rules of court to be made under this act, save as far as relates to the power of the court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries." But although the principles of evidence are not altered by the act, nevertheless that considerable alteration has been introduced in procedure, so far as it affects the mode of giving evidence in various cases, will be apparent from the allusions to and quotations from the new rules made in other por-

(*a*) 38 & 39 Vict. c. 77.

tions of this work, and particularly also from the XXXVIIth and XXXVIIIth Orders, which will be found *in extenso* in the Appendix hereto.

It will be found that, by the 1st rule of Order XXXVII, discretionary powers are vested in the court, (1) to order any particular fact or facts to be proved by affidavits; (2) to allow the affidavit of any witness to be read at a hearing or trial on such conditions as it may think reasonable, with this proviso, that when the opposite party *bonâ fide* desires to cross-examine a witness and the witness can be produced, such witness's evidence shall not be allowed to be given by affidavit. The first of these powers, which can be exercised by the court even against the wishes of both parties, will be advantageously employed to the manifest saving of expense in proof of formal matters, even in trials by jury. The second, which, subject to the proviso, can be exercised by the court at the instance of one party but against the wish of the other, will, in proper cases, enable the evidence of an absent witness to be brought before the court without the expensive interposition of a commissioner or examiner.

Subject to these powers, and to the rule that upon any motion, petition or summons, evidence may be given by affidavit, every witness, at the trial of any action or at any assessment of damages, must be examined *vivâ voce* and in open court. But if the parties to an action consent, the evidence therein may be taken by affidavit. That such consent ought to and will be given in the majority of actions for the administration of the estates of deceased persons, for

partition and the like, as well as in all actions where the object of all the parties is to obtain a judicial decision upon facts as to which there is little if any dispute, is tolerably certain. But in all actions where the parties are at arms' length, it obviously is theoretically right that the witnesses should be examined *vivâ voce* and in open court. Whether this will practically always be done, especially in the Chancery division of the High Court, remains to be seen. That affidavit evidence has its merits as well as demerits may be conceded, but the latter certainly outweigh the former. The two chief defects in affidavit evidence are, that the court has no opportunity of observing the demeanour of the witness while under examination, and that the version given of the story is too often that of the lawyer who prepares the affidavit rather than that of the deponent.

NEW TRIALS AND APPEALS.

Bills of exceptions and proceedings in error are now abolished (*b*). But it is open to a defeated party (1) to appeal in all cases; (2) when an adverse verdict has been found by a jury, or by a judge without a jury, to move for a new trial (*c*).

It is, however, provided by the new Rules (*d*), that "a new trial shall not be granted on the ground of

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(*b*) Rule 1 of Order VIII.
(*c*) Rule 1 of Order XXXIX.
(*d*) Rule 3 of Order XXXIX.

misdirection or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy, the court may give final judgment as to part thereof, and direct a new trial as to the other part only" (*e*).

Where an appeal is preferred, it is provided by the new Rules (*f*), that "the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to

(*e*) In India it is provided by the Ind. Ev. Act, s. 167, that "the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it shall appear to the court before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

(*f*) Rule 5 of Order LVIII.

matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the court" (*g*).

The new Rules also provide, that "when any question of fact is involved in an appeal, the evidence taken in the court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows:—(1) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed; (2) as to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the court may deem expedient."

It is also provided, that "where evidence has not been printed in the court below, the court below or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order."

Finally, it is provided, that "if, upon the hearing of an appeal, a question arise as to the ruling or direction of the judge to a jury or assessors, the court shall have regard to verified notes or other evidence, and to such other materials as the court may deem expedient."

(*g*) As to the Indian rules regulating the reception of further evidence on appeals, see Act VIII. of 1859, ss. 355—357.

PERPETUATING TESTIMONY.

Where there was a danger that testimony might be lost before the question to which it related could be made the subject of judicial investigation, the Court of Chancery, following the practice of the civil law, lent its aid to preserve and perpetuate such testimony.

A bill was filed, stating the matter respecting which the plaintiff desired to take evidence, showing that he had an interest in the matter which could not be barred by the defendant; that the defendant claimed an interest adverse to the plaintiff in the matter, and that the matter could not be made the subject of present judicial investigation (*h*). An affidavit of the circumstances by which the evidence desired to be preserved was in danger of being lost, was filed with the bill.

The plaintiff could only require an answer from the defendant as to the facts and circumstances alleged by the bill as entitling him to examine the witnesses (*i*): nor could the bill be set down for hearing (*k*).

The witnesses were examined before an examiner, according to the provisions of sections 31, 32 and 33 of 15 & 16 Vict. c. 86, by the defendant as well as by the plaintiff. An order might be obtained to use the depositions so taken, either after the death

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(*h*) *Earl Spencer* v. *Peek*, L. R., 3 Eq. 415; 15 W. R. 478.
(*i*) *Ellice* v. *Roupell*, 32 Beav. 308.
(*k*) Con. Ord. IX. 7.

of the witness (*l*), or in case he were too infirm (*m*), or could not be compelled, to attend (*n*).

A case for the perpetuation of testimony was not confined to aged and infirm witnesses, or to a single witness who can alone speak to the matter; but Lord Romilly said (*o*), "you may examine everybody, and all the evidence is sealed up and only brought out when occasion requires it, and if the witnesses are alive it cannot be used, and the evidence must be taken all over again."

(*l*) *Barnsdale* v. *Low*, 2 R. & M. 142.
(*m*) *Biddulph* v. *Lord Camoys*, 20 Beav. 402.
(*n*) Ibid.
(*o*) *Earl Spencer* v. *Peek*, L. R., 3 Eq. 415; 15 W. R. 478.

APPENDIX A.

LORD DENMAN'S ACT.

6 & 7 Vict. c. 85.

An Act for improving the Law of Evidence.

[22nd August, 1843.]

I. *Witnesses not to be excluded from giving evidence by incapacity from crime or interest—Proviso—Not to repeal any provision in* 7 *Will.* 4 *&* 1 *Vict. c.* 26*—In courts of equity defendant may be examined on behalf of the plaintiff or any co-defendant, &c.*]—Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony: Now, therefore, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil, or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or

solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively: provided also that this act shall not repeal any provision in a certain act passed in the session of parliament holden in the seventh year of the reign of his late Majesty, and in the first year of the reign of her present Majesty, intituled *An Act for the Amendment of the Laws with respect to Wills:* provided that in courts of equity any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matters or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness.

DOCUMENTARY EVIDENCE ACT.

8 & 9 Vict. c. 113.

An Act to facilitate the Admission in Evidence of certain Official and other Documents.

[8th August, 1845.]

I. *Certain documents to be received in evidence without proof of seal or signature, &c. of person signing*

the same.]—Whereas it is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations and of joint stock and other companies, and certified copies of documents, bye-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes: and whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine; and it is expedient to facilitate the admission in evidence of such and the like documents: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, that whenever by any act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence.

II. *Courts, &c., to take judicial notice of signature of equity or common law judges, &c.*]—And be it enacted, that all courts, judges, justices, masters in Chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial

notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.

III. *Copies of private acts printed by the Queen's printer, journals of Parliament, and proclamations, admissible as evidence.*]—And be it enacted, that all copies of private and local and personal acts of parliament not public acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either house of parliament, and of royal proclamations, purporting to be printed by the printers to the Crown or by the printers to either house of parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others without any proof being given that such copies were so printed.

IV. *Persons forging seal, stamp, or signature of certain documents, or printing any private act with false purport, guilty of felony.*]—Provided always, and be it enacted, that if any person shall forge the seal, stamp, or signature of any such certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or of any certified copy of any document, bye-law, entry in any register or other book, or other proceeding as aforesaid, or shall tender in evidence any such certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, whether such seal, stamp, or signature be those of or relating to any corporation or company already established, or to any corporation or company to be hereafter established, or if any person shall forge the signature of any such judge as aforesaid to any order, decree, certificate, or other judicial or official document, or shall tender in evidence any order, decree, certificate, or other judicial or official document with a false or

counterfeit signature of any such judge as aforesaid thereto, knowing the same to be false or counterfeit, or if any person shall print any copy of any private act or of the journals of either house of parliament, which copy shall falsely purport to have been printed by the printers to the Crown, or by the printers to either house of parliament, or by any or either of them, or if any person shall tender in evidence any such copy, knowing that the same was not printed by the person or persons by whom it so purports to have been printed, every such person shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not more than three nor less than one year, with hard labour: provided also, that whenever any such document as before mentioned shall have been received in evidence by virtue of this act, the court, judge, commissioner, or other person officiating judicially, who shall have admitted the same, shall, on the request of any party against whom the same is so received, be authorized, at its or at his own discretion, to direct that the same shall be impounded, and be kept in the custody of some officer of the court or other proper person, until further order touching the same shall be given, either by such court, or the court to which such master or other officer belonged, or by the persons or person who constituted such court, or by some one of the equity or common law judges of the superior courts at Westminster on application being made for that purpose.

THE DOCUMENTARY EVIDENCE ACT, 1868.

31 & 32 Vict. c. 37, ss. 2, 3 & 6.

2. *Primâ facie* evidence of any proclamation, order or regulation issued before or after the passing of this act by her Majesty or by the Privy Council, also of any proclamation, order or regulation issued before or after the passing of this act by or under the authority of any such department of the Government or officer as is mentioned in the first column of the schedule hereto, may be

given in all courts of justice and in all legal proceedings whatsoever in all or any of the modes hereinafter mentioned, that is to say:

(1.) By the production of a copy of the Gazette purporting to contain such proclamation, order or regulation.

(2.) By the production of a copy of such proclamation, order or regulation purporting to be printed by the Government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession.

(3.) By the production, in the case of any proclamation, order or regulation issued by her Majesty or the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the lords or others of the Privy Council; and, in the case of any proclamation, order or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such department or officer.

Any copy or extract made in pursuance of this act may be in print or in writing, or partly in print and partly in writing. No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this act, to the truth of any copy of or extract from any proclamation, order or regulation.

3. Subject to any law that may be from time to time made by the legislature of any British colony or possession this act shall be in force in every such colony and possession.

6. The provisions of this act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute or existing at common law.

SCHEDULE.

Column 1. *Name of Department or Officer.*	Column 2. *Names of Certifying Officers.*
The Commissioners of the Treasury.	Any Commissioner, Secretary or Assistant Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral, or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under Secretary of State.
Committee of Privy Council for Trade.	Any Member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee.
The Poor Law Board.	Any Commissioner of the Poor Law Board, or any Secretary or Assistant Secretary of the said Board.

IMPROVEMENT OF THE JURISDICTION OF EQUITY ACT, AND ORDER OF THE 5TH FEBRUARY, 1861.

15 & 16 Vict. c. 86, ss. 31—35.

An Act to amend the Practice and Course of Proceeding in the High Court of Chancery.

[1st July, 1852.]

XXXI. *Witnesses to be examined by one of the examiners of the court in the presence of the parties.*]—All witnesses to be examined orally under the provisions of this act shall be so examined by or before one of the examiners of the court, or by or before an examiner to be specially appointed by the court, the examiner being furnished by the plaintiff with a copy of the bill, and of the answer, if any, in the cause: and such examination

shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses so examined orally shall be subject to cross-examination, and re-examination; and such examination, cross-examination and re-examination shall be conducted as nearly as may be in the mode now in use in courts of common law with respect to a witness about to go abroad, and not expected to be present at the trial of a cause.

XXXII. *Depositions to be taken down in writing and read over to the witness, who shall sign the same in presence of the parties, but if he refuse to sign, examiner may do so, and state any special matter he may think fit.*]—The depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative, and when completed shall be read over to the witness, and signed by him in the presence of the parties, or such of them as may think fit to attend: provided always, that in case the witness shall refuse to sign the said depositions, then the examiner shall sign the same, and such examiner may, upon all examinations, state any special matter to the court as he shall think fit; provided also, that it shall be in the discretion of the examiner to put down any particular question or answer, if there should appear any special reason for doing so; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide upon the materiality or relevancy of any question or questions; and the court shall have power to deal with the costs of immaterial or irrelevant depositions as may be just.

XXXIII. *If parties refuse to be sworn or to answer any lawful questions, the same course to be pursued as is now adopted—Proviso as to witness demurring to questions.*]—If any person produced before any such examiner as a witness shall refuse to be sworn, or to answer any lawful question put to him by the examiner,

or by either of the parties, or by his or their counsel, solicitor, or agent, the same course shall be adopted with respect to such witness as is now pursued in the case of a witness produced for examination before an examiner of the said court, upon written interrogatories, and refusing to be sworn, or to answer some lawful question: provided always, that if any witness shall demur or object to any question or questions which may be put to him, the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the record office of the said court, to be there filed; and the validity of such demurrer or objection shall be decided by the court; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the court.

XXXIV. *Original depositions to be transmitted to the Record Office, and filed.*]—When the examination of witnesses before any examiner shall have been concluded, the original depositions, authenticated by the signature of such examiner, shall be transmitted by him to the record office of the said court, to be there filed, and any party to the suit may have a copy thereof, or of any part or portion thereof, upon payment for the same in such manner as shall be provided by any general order of the Lord Chancellor in that behalf.

XXXV. *Commission for examination of witnesses dispensed with, and examiner empowered to administer oaths.*]—It shall not be necessary to sue out any commission for the examination of any witnesses within the jurisdiction of the said court; and any examiner appointed by any order of the court shall have the like power of administering oaths as commissioners now have under commissions issued by the court for the examination of witnesses.

Order, 5th February, 1861, Rule 11.

Examination of witnesses who are old, infirm, &c.]—Notwithstanding any of these rules the court or the

judge in chambers may direct that the oral examination and cross-examination of any witness (whether a party or not), or the cross-examination of any person who has been examined *ex parte* before an examiner, or made an affidavit, shall be taken before an examiner of the court or a special examiner in the manner prescribed by the statute 15 & 16 Vict. c. 86, as if these rules had not been made, in case it shall appear to the judge that owing to the age, infirmity or absence out of the jurisdiction of such witness or person, or for any other cause which to the judge shall appear sufficient, it is expedient that such direction should be given. Such direction may be obtained on application to the court or the judge in chambers on notice.

COMMON LAW PROCEDURE ACT, 1854.

17 & 18 Vict. c. 125, ss. 22—27.

An Act for the further Amendment of the Process, Practice and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster, and of the Superior Courts of Common Law of the Counties Palatine of Lancaster and Durham. [12th August, 1854.]

XXII. *How far a party may discredit his own witness.*]—A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

XXIII. *Proof of contradictory statements of adverse witness.*]—If a witness upon cross-examination as to a

former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

XXIV. *Cross-examination as to previous statements in writing.*]—A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit.

XXV. *Proof of previous conviction of a witness may be given.*]—A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

XXVI. *Attesting witness need not be called, except in certain cases.*]—It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto.

XXVII. *Comparison of disputed writing.*]—Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.

AN ACT FOR THE FURTHER AMENDMENT OF THE LAW OF EVIDENCE.

32 & 33 Vict. c. 68.

Whereas the discovery of truth in courts of justice has been signally promoted by the removal of restrictions on the admissibility of witnesses, and it is expedient to amend the law of evidence with the object of still further promoting such discovery: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. The fourth section of chapter ninety-nine of the statutes passed in the fourteenth and fifteenth years of her present Majesty, and so much of the second section of "The Evidence Amendment Act, 1853," as is contained in the words "or in any proceeding instituted in consequence of adultery," are hereby repealed.

2. The parties to any action for breach of promise of marriage shall be competent to give evidence in such action: provided always, that no plaintiff in any action for

breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise.

3. The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

4. If any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to, as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration:

> "I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth."

And any person who having made such promise and declaration shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried and convicted for perjury as if he had taken an oath.

5. This act may be cited for all purposes as "The Evidence Further Amendment Act, 1869.

6. This act shall not extend to Scotland.

THE COMPANIES ACT, 1862.

25 & 26 Vict. c. 89.

By section 31, "a certificate under the common seal of the company, specifying any share or shares or stock held by any member of a company shall be *primâ facie* evidence of the title of the member to the share or shares or stock therein specified."

By section 37, "the register of members shall be *primâ facie* evidence of any matters by this act directed or authorized to be inserted therein."

By section 61, "a copy of the report of any inspectors appointed under this act, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in such report."

By section 67, "every company under this act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company, in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose; and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings, and, until the contrary is proved, every general meeting of the company, or meeting of directors or managers, in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened, and all resolutions passed thereat or proceedings had to have been duly passed and had, and all appointments of directors, managers or liquidators shall be deemed to be valid, and all acts done by such directors, managers or liquidators shall be valid notwithstanding any defect that may afterwards be discovered in their appointments or qualifications" (*a*).

(*a*) All acts done, &c., means done before the invalidity is shown, and does not cover subsequent acts. *Re Bridport Old Brewery Co.*, L. R., 2 Ch. 194.

By section 106, "any order made by the court in pursuance of this act upon any contributory shall, subject to the provisions herein contained for appealing against such order, be conclusive evidence that the moneys, if any, thereby appearing to be due, or ordered to be paid, are due; and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons, and in all proceedings whatsoever, with the exception of proceedings taken against the real estate of any deceased contributory, in which case such order shall only be *primâ facie* evidence for the purpose of charging his real estate unless his heirs or devisees were on the list of contributories at the time of the order being made."

By section 154, "where any company is being wound up, all books, accounts and documents of the company and of the liquidator shall, as between the contributories of the company, be *primâ facie* evidence of the truth of all matters purporting to be therein recorded."

By section 192, "a certificate of incorporation given at any time to any company, registered in pursuance of this part of this act, shall be conclusive evidence that all the requisitions herein contained in respect of registration under this act have been complied with, and that the company is authorized to be registered under this act as a limited or unlimited company, as the case may be, and the date of incorporation mentioned in such certificate shall be deemed to be the date at which the company is incorporated under this act."

THE BANKRUPTCY ACT, 1869.

32 & 33 Vict. c. 71, ss. 10, 18, 47, 49, 81, 106—109, 127.

10. A copy of an order of the court adjudging the debtor to be bankrupt shall be published in the London Gazette, and be advertised locally in such manner (if any) as may be prescribed, and the date of such order shall be the date of the adjudication for the purposes of this act, and the production of a copy of the Gazette containing such order as aforesaid shall be conclusive evidence in all

legal proceedings of the debtor having been duly adjudged a bankrupt and of the date of the adjudication.

18. The appointment of a trustee shall be reported to the court, and the court, upon being satisfied that the requisite security has been entered into by him, shall give a certificate declaring him to be trustee of the bankruptcy named in the certificate, and such certificate shall be conclusive evidence of the appointment of the trustee, and such appointment shall date from the date of the certificate. When the registrar holds the office of trustee, or when the trustee is changed, a like certificate of the court may be made declaring the person therein named to be trustee, and such certificate shall be conclusive evidence of the person therein named being trustee.

47. When the whole property of the bankrupt has been realized for the benefit of his creditors, or so much thereof as can, in the joint opinion of the trustee and committee of inspection, be realized without needlessly protracting the bankruptcy, or a composition or arrangement has been completed, the trustee shall make a report accordingly to the court, and the court, if satisfied that the whole of the property of the bankrupt has been realized for the benefit of his creditors, or so much thereof as can be realized without needlessly protracting the bankruptcy, or that a composition or arrangement has been completed, shall make an order that the bankruptcy has closed, and the bankruptcy shall be deemed to have closed at and after the date of such order. A copy of the order closing the bankruptcy may be published in the London Gazette, and the production of a copy of such Gazette containing a copy of the order shall be conclusive evidence of the order having been made, and of the date and contents thereof.

49. . . . An order of discharge shall be sufficient evidence of the bankruptcy, and of the validity of the proceedings thereon, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by such order, the bankrupt may plead that the

cause of action occurred before his discharge, and may give this act and the special matter in evidence.

81. Whenever any adjudication in bankruptcy is annulled all sales and dispositions of property and payments duly made, and all acts theretofore done, by the trustee or any person acting under his authority, or by the court, shall be valid ; but the property of the debtor who was adjudged a bankrupt shall in such case vest in such person as the court may appoint, or in default of any such appointment revert to the bankrupt for all his estate or interest therein upon such terms and subject to such conditions, if any, as the court may declare by order. A copy of the order of the court annulling the adjudication of a debtor as a bankrupt shall be forthwith published in the London Gazette and advertised locally in the prescribed manner, and the production of a copy of the Gazette containing such order shall be conclusive evidence of the fact of the adjudication having been annulled, and of the terms of the order annulling the same.

106. The registrar, or any other person presiding at a meeting of creditors under this act shall cause minutes to be kept and duly entered in a book of all resolutions and proceedings of such meeting, and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, shall be received as evidence in all legal proceedings, and until the contrary is proved, every general meeting of the creditors in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened, and all resolutions passed thereat or proceedings had to have been duly passed and had.

107. Any petition or copy of a petition in bankruptcy, any order or copy of an order made by any court having jurisdiction in bankruptcy, any certificate or copy of a certificate made by any court having jurisdiction in bankruptcy, any deed or copy of a deed of arrangement in bankruptcy, and any other instrument or copy of an instrument, affidavit or document made or used in the course of any bankruptcy proceedings or other proceedings had

under this act, may, if any such instrument as aforesaid or copy of an instrument appears to be sealed with the seal of any court having jurisdiction, or purports to be signed by any judge having jurisdiction in bankruptcy under this act, be receivable in evidence in all legal proceedings whatever.

108. In case of the death of the bankrupt or his wife, or of a witness whose evidence has been received by any court in any proceeding under this act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.

109. Every court having jurisdiction in bankruptcy under this act shall have a seal describing such court in such manner as may be directed by order of the Lord Chancellor, and judicial notice shall be taken of such seal and of the signature of the judge or registrar of any such court, in all legal proceedings.

127. The registration by the registrar of a special resolution of the creditors on the occasion of a liquidation by arrangement under part six of this act, or of an extraordinary resolution of the creditors on the occasion of a composition under the seventh part of this act, shall, in the absence of fraud, be conclusive evidence that such resolutions respectively were duly passed and all the requisitions of this act in respect of such resolutions complied with.

Bankruptcy Act, 1869—General Rules.

Rule 301. The passing of a special resolution (in the case of liquidation by arrangement) shall be deemed and taken as conclusive evidence that the debtor has complied with the provisions of the statute with regard to the statement of his affairs required to be submitted to the general meetings of his creditors.

THE PREVENTION OF CRIMES ACT, 1871.

34 & 35 Vict. c. 112, parts of ss. 7 and 15, and ss. 18 and 19.

7. Where any person is convicted of a crime (*a*), and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes, be guilty of an offence against this act, and be liable to imprisonment, with or without hard labour, for a term not exceeding one year, under the following circumstances, or any of them :—

First. If on his being charged by a constable with getting his livelihood by dishonest means, and being brought before a court of summary jurisdiction, it appears to such court that there are reasonable grounds for believing that the person so charged is getting his livelihood by dishonest means ; or,

Secondly. If being charged with any offence punishable on indictment or summary conviction, and on being required by a court of summary jurisdiction to give his name and address, he refuses to do so, or gives a false name or a false address ; or,

Thirdly. If he is found in any place, whether public or private, under such circumstances as to satisfy the court before whom he is brought that he was about to commit or to aid in the commission of any crime punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any crime punishable on indictment or summary conviction ; or,

Fourthly. If he is found in or upon any dwelling-house, or any building, yard or premises being

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(*a*) *I. e.*, any felony, or the offence of uttering or possessing false or counterfeit coin, or of obtaining goods or money by false pretences, or of conspiracy to defraud, or any misdemeanor under 24 & 25 Vict. c. 96, s. 8.

parcel of or attached to such dwelling-house, or in or upon any shop, warehouse, counting-house or other place of business, or in any garden, orchard, pleasure-ground or nursery-ground, or in any building or erection in any garden, orchard, pleasure-ground or nursery-ground, without being able to account to the satisfaction of the court before whom he is brought for his being found on such premises.

15. Whereas by the fourth section of the act, passed in the fifth year of the reign of King George the Fourth, chapter eighty-three, intituled "An Act for the Punishment of Idle and Disorderly Persons, and Rogues and Vagabonds in that part of Great Britain called England," it is, amongst other things, provided that every suspected person or reputed thief, frequenting any river, canal or navigable stream, dock, or basin, or any quay, wharf or warehouse near or adjoining thereto, or any street, highway or avenue leading thereto, or any place of public resort or any avenue leading thereto, or any street, highway or place adjacent, with intent to commit felony, shall be deemed a rogue and vagabond, and may be apprehended and committed to prison with hard labour for any time not exceeding three calendar months: And whereas doubts are entertained as to the construction of the said provision, and as to the nature of the evidence required to prove the attempt to commit a felony: Be it enacted, firstly, the said section shall be construed as if instead of the words "highway or place adjacent," there were inserted the words "or any highway, or any place adjacent to a street or highway;" and, secondly, that in proving the intent to commit a felony, it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justices of the peace or court before whom or which he is brought it appears to such justices or court that his intent was to commit a felony.

18. A previous conviction may be proved in any legal

proceeding whatever against any person by producing a record or extract of such conviction and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted.

A record or extract of a conviction shall, in the case of an indictable offence, consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned.

A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same.

A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom, and a conviction before the passing of this act shall be admissible in the same manner as if it had taken place after the passing thereof.

A fee, not exceeding five shillings, may be charged for a record of a conviction given in pursuance of this section.

The mode of proving a previous conviction authorized by this section shall be in addition to and not in exclusion of any other authorized mode of proving such conviction.

19. Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person

knew the goods to be stolen which form the subject of the proceedings taken against him.

Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen: provided that not less than seven days' notice in writing shall have been given to the person accused, that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused.

THE NATURALIZATION ACT, 1870.

33 & 34 Vict. c. 14, s. 12.

12. The following regulations shall be made with respect to evidence under this act:—

(1.) Any declaration authorized to be made under this act may be proved in any legal proceeding by the production of the original declaration, or of any copy thereof certified to be a true copy by one of her Majesty's principal secretaries of state, or by any person authorized by regulations of one of her Majesty's principal secretaries of state to give certified copies of such declaration, and the production of such declaration or copy shall be evidence of the person therein named as declarant having made the same at the date in the said declaration mentioned:

(2.) A certificate of naturalization may be proved in

any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of her Majesty's principal secretaries of state, or by any person authorized by regulations of one of her Majesty's principal secretaries of state to give certified copies of such certificate:

(3.) A certificate of re-admission to British nationality may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of her Majesty's principal secretaries of state, or by any person authorized by regulations of one of her Majesty's principal secretaries of state to give certified copies of such certificate:

(4.) Entries in any register authorized to be made in pursuance of this act shall be proved by such copies and certified in such manner as may be directed by one of her Majesty's principal secretaries of state, and the copies of such entries shall be evidence of any matters by this act or by any regulation of the said secretary of state authorized to be inserted in the register:

(5.) The Documentary Evidence Act, 1868, shall apply to any regulation made by a secretary of state, in pursuance of or for the purpose of carrying into effect any of the provisions of this act.

FRIENDLY SOCIETIES ACT, 1875.

38 & 39 Vict. c. 60, ss. 10, 39.

10. The acknowledgment of registry shall be conclusive evidence that the society therein mentioned is duly registered, unless it be proved that the registry has been suspended or cancelled.

39. Every instrument or document (or copy or extract thereof) bearing the seal or stamp of the central office

shall be received in evidence without further proof, and every document purporting to be signed by the chief or an assistant registrar, or any inspector or public auditor or valuer under the act, shall, in the absence of evidence to the contrary, be received in evidence without proof of the signature.

SUPREME COURT OF JUDICATURE ACT (1873) AMENDMENT ACT.

38 & 39 Vict. c. 77.

Order XXXVII.

Evidence Generally.

1. In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial of any action or at any assessment of damages, shall be examined *vivâ voce* and in open court, but the court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such condition as the court or judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

2. Upon any motion, petition, or summons, evidence may be given by affidavit; but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

3. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The

costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.

4. The court or a judge may, in cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct.

Order XXXVIII.

Evidence by Affidavit.

1. Within fourteen days after a consent for taking evidence by affidavit as between the plaintiff and the defendant has been given, or within such time as the parties may agree upon, or a judge in chambers may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof.

2. The defendant within fourteen days after delivery of such list, or within such time as the parties may agree upon, or a judge in chambers may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof.

3. Within seven days after the expiration of the said fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.

4. When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed, a notice in writing, requiring the production of the deponent for cross-examination before the court at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for

filing affidavits in reply, or within such time as in any case the court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.

5. The party to whom such notice as is mentioned in the last preceding Rule is given, shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined.

6. When the evidence in any action is under this order taken by affidavit, such evidence shall be printed, and the notice of trial shall be given at the same time or times after the close of the evidence as in other cases is by these Rules provided after the close of the pleadings.

ADDENDA TO APPENDIX A.

The following Act should be noted against page 216, *as its effect is to render an entry made in the books of a bank, in the usual and ordinary course of business, admissible in evidence; notwithstanding that the person who made it is alive and might be called. It should further be observed, that such an entry may be proved by an examined copy.*

THE BANKERS' BOOKS EVIDENCE ACT, 1876.

39 & 40 Vict. c. 48.

An Act to amend the Law with reference to Bankers' Books Evidence. [11th August, 1876.]

Whereas serious inconvenience has been occasioned to bankers and also to the public by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings:

And whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. *Short title.*]—This act may be cited for all purposes as the Bankers' Books Evidence Act, 1876.

2. *Interpretation clause.*]—The word "bank" in this act shall mean any person or persons, partnership or company, carrying on the business of bankers, and who at the

commencement of each year shall have made their return to the Commissioners of Inland Revenue, and any savings bank certified under the Act of 1863.

The words "legal proceedings" in this act shall include all proceedings, whether preliminary or final, in courts of justice, both criminal and civil, legal and equitable, and shall include all proceedings, whether preliminary or final, by way of arbitration, examination of witnesses, assessment of damages, compensation or otherwise, in which there is power to administer an oath.

The words "the court" in this act shall mean the court, judge, magistrate, sheriff, arbitrator or other person authorized to preside over the said legal proceedings for the time being, and shall include all persons, judges or officers, having jurisdiction and authorized to preside over or to exercise judicial control over the said legal proceedings or the procedure or any steps therein.

The words "a judge of one of the superior courts" shall mean respectively a judge of her Majesty's High Court of Justice in so far as this act applies to England and Wales, a lord ordinary of the outer house of the Court of Session in Scotland in so far as it applies to Scotland, and a judge of one of the superior courts at Dublin in so far as it applies to Ireland.

3. *Entries in books by affidavit admissible in evidence.*]—From and after the commencement of this act the entries in ledgers, day books, cash books and other account books of any bank shall be admissible in all legal proceedings as primâ facie evidence of the matters, transactions and accounts recorded therein on proof being given by the affidavit in writing of one of the partners, managers or officers of such bank, or by other evidence that such ledgers, day books, cash books or other account books are or have been the ordinary books of such bank, and that the said entries have been made in usual and ordinary course of business, and that such books are in or come immediately from the custody or control of such bank. Nothing in this clause contained shall apply to any legal proceeding to which any bank whose ledgers, day books, cash books and other account books may be required to be produced in evidence shall be a party.

4. *Originals need not be produced.*]—Copies of all entries in any ledgers, day books, cash books or other account books used by any such bank may be proved in all legal proceedings as evidence of such entries without production of the originals, by means of the affidavit of a person who has examined the same, stating the fact of said examination, and that the copies sought to be put in evidence are correct.

5. *Proviso as to notice to parties in a suit.*]—Provided always, that no ledger, day book, cash book or other account book of any such bank, and no copies of entries therein contained, shall be adduced or received in evidence under this act, unless five days' notice in writing, or such other notice as may be ordered by the court, containing a copy of the entries proposed to be adduced and of the intention to adduce the same in evidence, shall have been given by the party proposing to adduce the same in evidence to the other party or parties to the said legal proceeding, and that such other party or parties is or are at liberty to inspect the original entries and the accounts of which such entries form a part.

6. *Power under order of court to inspect books and take copies.*]—On the application of any party to any legal proceedings who has received such notice, a judge of one of the superior courts may order that such party be at liberty to inspect and to take copies of any entry or entries in the ledger, day books, cash books, or other account books of any such bank relating to the matters in question in such legal proceedings, and such orders may be made by such judge at his discretion either with or without summoning before him such bank or the other party or parties to such legal proceedings, and shall be intimated to such bank at least three days before such copies are required.

7. *Judge may order that copies are not admissible.*]—On the application of any party to any legal proceedings who has received notice, a judge of one of the superior courts may order that such entries and copies mentioned in the said notice shall not be admissible as evidence of

the matters, transactions and accounts recorded in such ledgers, day books, cash books and other account books.

8. *Bank not compellable to produce books except in certain cases.*]—No bank shall be compellable to produce the ledgers, day books, cash books or other account books of such bank in any legal proceedings, unless a judge of one of the superior courts specially orders that such ledgers, day books, cash books or other account books should be produced at such legal proceedings.

9. *Proof as to status of bank.*]—The fact of any such bank having duly made their return to the Commissioners of Inland Revenue may be proved in any legal proceedings by production of a copy of such return, verified as having been duly made by the affidavit in writing of one of the partners, or of the manager, or of one of the officers of such bank, or by the production of a copy of a newspaper purporting to contain a copy of such return, published in such newspaper by the said Commissioners of Inland Revenue.

This Act should be noted at page 43 *as another exception to the General Rule stated at page* 40.

40 & 41 Vict. c. 14.

An Act for the Amendment of the Law of Evidence in certain cases of Misdemeanor. [28th June, 1877.]

Whereas it is expedient further to amend the law of evidence:

Be it therefore enacted by the queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses and compellable to give evidence.

APPENDIX B.

THE INDIAN EVIDENCE ACT,

No. I. OF 1872.

Received the assent of His Excellency the Governor-General on the 15th March, 1872.

WHEREAS it is expedient to consolidate, define, and amend the Law of Evidence; it is hereby enacted as follows:—

PART I.

RELEVANCY OF FACTS.

CHAPTER I.

PRELIMINARY.

1. This act may be called "The Indian Evidence Act, 1872:"

It extends to the whole of British India, and applies to all judicial proceedings in or before any court, including courts-martial, but not to affidavits presented to any court or officer, nor to proceedings before an arbitrator, and it shall come into force on the first day of September, 1872.

2. On and from that day the following laws shall be repealed:—

(1.) All rules of evidence not contained in any statute, act or regulation in force in any part of British India.

(2.) All such rules, laws and regulations as have acquired the force of law under the twenty-fifth section of "The Indian Councils' Act, 1861," in so far as they relate to any matter herein provided for; and

(3.) The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any statute, act or regulation in force in any part of British India, and not hereby expressly repealed.

3. In this act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

"Court" includes all judges and magistrates, and all persons, except arbitrators, legally authorized to take evidence.

"Fact" means and includes—

(1) Anything, state of things, or relation of things, capable of being perceived by the senses;

(2.) Any mental condition of which any person is conscious.

Illustrations.

(*a.*) That there are certain objects arranged in a certain order in a certain place, is a fact.

(*b.*) That a man heard or saw something is a fact.

(*c.*) That a man said certain words is a fact.

(*d.*) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(*e.*) That a man has a certain reputation is a fact.

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this act relating to the relevancy of facts.

The expression "Facts in issue" means and includes—

Any fact from which, either by itself or in connection with other facts, the existence, non-exist-

ence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to civil procedure, any court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue.

Illustrations.

A is accused of the murder of B.

At his trial the following facts may be in issue :—

That A caused B's death ;

That A intended to cause B's death ;

That A had received grave and sudden provocation from B;

That A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

"Document" means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations.

A writing is a document.

Words printed, lithographed or photographed are documents.

A map or plan is a document.

An inscription on a metal plate or stone is a document.

A caricature is a document.

"Evidence" means and includes—

(1) All statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

Such statements are called oral evidence.

(2) All documents produced for the inspection of the court;

Such documents are called documentary evidence.

A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man

ought, under the circumstances of the particular case, to act upon the supposition that it exists.

A fact is said to be disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

A fact is said not to be proved when it is neither proved nor disproved.

4. Whenever it is provided by this act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

Whenever it is directed by this act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

When one fact is declared by this act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

CHAPTER II.

OF THE RELEVANCY OF FACTS.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to civil procedure.

Illustrations.

(*a.*) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue :—

A's beating B with the club ;

A's causing B's death by such beating ;

A's intention to cause B's death.

(*b.*) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the code of civil procedure.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations.

(*a.*) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(*b.*) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(*c.*) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(*d.*) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

7. Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(*a.*) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(*b.*) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(*c.*) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of A, known to B, which afforded an opportunity for the administration of poison, are relevant facts.

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto (*a*).

Explanation 1.—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this act.

Explanation 2.—When the conduct of any person is relevant, any statement made to him, or in his presence and hearing, which affects such conduct, is relevant.

Illustrations.

(*a.*) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(*b.*) A sues B upon a bond for the payment of money. B denies the making of the bond.

(*a*) *R.* v. *Macdonald*, 10 B. L. R. (Cr. Ap.) 2.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(*c.*) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(*d.*) The question is, whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(*e.*) A is accused of a crime.

The facts that, either before, or at the time of, or after, the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(*f.*) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence, "the police are coming to look for the man who robbed B," and that immediately afterwards A ran away, are relevant.

(*g.*) The question is, whether A owes B 10,000 rupees.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing, "I advise you not to trust A, for he owes B 10,000 rupees," and that A went away without making any answer, are relevant facts.

(*h.*) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(*i.*) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(*j.*) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had

been ravished, is not relevant as conduct under this section, though it may be relevant—

As a dying declaration under *section* thirty-two *clause* (one); or,

As corroborative evidence under *section* one hundred and fifty-seven.

(*k.*) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant—

As a dying declaration under *section* thirty-two, *clause* (one); or,

As corroborative evidence under *section* one hundred and fifty-seven.

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, or relevant in so far as they are necessary for that purpose.

Illustrations.

(*a.*) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(*b.*) A sues B for a libel imputing disgraceful conduct to A. B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts, as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(*c.*) A is accused of a crime.

The fact that, soon after the commission of the crime, A ab-

sconded from his house, is relevant, under *section* eight, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(*d.*) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A, "I am leaving you because B has made me a better offer." This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(*e.*) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it, "A says you are to hide this." B's statement is relevant as explanatory of a fact which is part of the transaction.

(*f.*) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration.

(*a.*) Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the

existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

11. Facts not otherwise relevant are relevant—

(1) If they are inconsistent with any fact in issue or relevant fact;

(2) If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

(*a.*) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that on that day A was at Lahore, is relevant.

The fact that near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(*b.*) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either B, C or D, is relevant.

12. In suits in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant.

13. Where the question is as to the existence of any right or custom, the following facts are relevant (*b*):—

(*a.*) Any transaction by which the right or custom

(*b*) *Kurronath Mullick* v. *Nittanund*, 10 B. L. R. 263; *R.* v. *Ramsodoy Chuckerbutty*, 20 Cal. W. R. (Cr.) 19; *Koondo Nath Gossamee* v. *Dheer Chunder Surma*, 20 Cal. W. R. 345; *Neamut Ali* v. *Gooroo Doss*, 22 Cal. W. R. 365; *Roop Chand Bhukat* v. *Hur Kisher Doss*, 23 Cal. W. R. 162; *Daitari Mohunti* v. *Jago Bundhoo*, 23 Cal. W. R. 293; *Toorjo Narain Panda* v. *Bissumbhur Singh*, 23 Cal. W. R. 311; *Huree Sunkur Mookerjee* v. *Kristo Patho*, 24 Cal. W. R. 154.

in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence.

(*b.*) Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted, or departed from.

Illustration.

The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcileable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

14. Facts showing the existence of any state of mind —such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling,—are relevant, when the existence of any such state of mind or body or bodily feeling, is in issue or relevant.

Explanation.—A fact relevant as showing the existence of a relevant state of mind must show that it exists, not generally, but in reference to the particular matter in question.

Illustrations.

(*a.*) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that at the same time he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(*b.*) A is accused of fraudulently delivering to another person a piece of counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin, is relevant.

(*c.*) A sues B for damage done by a dog of B's which B knew to be ferocious.

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

(*d.*) The question is whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(*e.*) A is acccused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(*f.*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(*g.*) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(*h.*) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did

not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(*i.*) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

(*j.*) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

(*k.*) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts.

(*l.*) The question is, whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms, are relevant facts.

(*m.*) The question is, what was the state of A's health at the time when an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question, are relevant facts.

(*n.*) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant.

The fact that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(*o.*) A is tried for the murder of B by intentionally shooting him dead.

The fact that A, on other occasions, shot at B is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them, is irrelevant.

(*p.*) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime, is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.

15. When there is a question whether an act was accidental or intentional the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations.

(*a.*) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(*b.*) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(*c.*) A is accused of fraudulently delivering to B a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to A was not accidental.

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations.

(*a.*) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(*b.*) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

Admissions.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions (*c*).

Statements made by parties to suits suing or sued in a representative character are not admissions, unless they were made while the party making them held that character.

Statements made by—

(1) Persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested; or

(2) Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions if they are made during the continuance of the interest of the persons making the statements.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position, or is subject to such liability.

Illustration.

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

(*c*) *Hurish Chunder Mullick* v. *Prosunno Coomar Banerjee*, 22 Cal. W. R. 303.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration.

The question is, whether a horse sold by A to B is sound.

A says to B, "Go and ask C; C knows all about it." C's statement is an admission.

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases (*d*) :—

(1.) An admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under *section* thirty-two.

(2.) An admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3.) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations.

(*a.*) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(*b.*) A, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

(*d*) *Kurronath Mullick* v. *Nittanund*, 10 B. L. R. 263; *Unnopoorna Dassee* v. *Nufur Podder*, 21 Cal. W. R. 148.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under *section* thirty-two, *clause* (two).

(*c.*) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under *section* thirty-two, *clause* (two).

(*d.*) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(*e.*) A is accused of fraudulently having in his possession counterfeit coin, which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakíl from giving evidence of any matter of which he may be compelled to give evidence under *section* one hundred and twenty-six.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him (*e*).

25. No confession made to a police officer shall be proved as against a person accused of any offence.

26. No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a magistrate, shall be proved as against such person.

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved (*f*).

28. If such a confession as is referred to in *section* twenty-four is made after the impression caused by any such inducement, threat, or promise has, in the opinion of the court, been fully removed, it is relevant (*g*).

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of ob-

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(*e*) *R.* v. *Hicks*, 10 B. L. R. (App.) 1; *R.* v. *Navroji Dadabhai*, 9 Bom. H. C. 358.

(*f*) *R.* v. *Pagaree Shaha*, 19 Cal. W. R. (Cr.) 57.

(*g*) *R.* v. *Mussamat Luchoo*, 5 N. W. R. 86.

taining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him (*h*).

30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person, as well as against the person who makes such confession (*i*).

Illustrations.

(*a.*) A and B are jointly tried for the murder of C. It is proved that A said, "B and I murdered C." The court may consider the effect of this confession as against B.

(*b.*) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said, "A and I murdered C."

This statement may not be taken into consideration by the court against A, as B is not being jointly tried.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

Statements by Persons who cannot be called as Witnesses.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or

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(*h*) *R.* v. *Ram Churn Ghose*, 20 Cal. W. R. (Cr.) 33.

(*i*) *R.* v. *Amrita Govinda*, 10 Bom. H. C. 497; *R.* v. *Belat Ali*, 10 B. L. R. (Cr. Ap.) 453; *R.* v. *Mohesh Biswas*, 10 B. L. R. (Cr. Ap.) 455; *R.* v. *Jaffir Ali*, 19 Cal. W. R. (Cr.) 57; *R.* v. *Bakur Khan*, 5 N. W. R. 213; *R.* v. *Bunwaree Lall*, 21 Cal. W. R. (Cr.) 53; *R.* v. *Sheikh Buxoo*, 21 Cal. W. R. (Cr.) 65; *R.* v. *Sadhu Mundul*, 21 Cal. W. R. (Cr.) 69; *R.* v. *Naga*, 23 Cal. W. R. (Cr.) 24.

whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases :—

(1.) When the statement is made by a person, as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question (*k*).

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2.) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty ; or of an acknowledgment written or signed by him of the receipt of money, goods, securities, or property of any kind ; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

(3.) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

(4.) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

(*k*) *R.* v. *Degumber Thakoor*, 19 Cal. W. R. (Cr.) 44 ; *R.* v. *Tariniclarau Dey*, 9 B. L. R. (Ap.) 2.

(5.) When the statement relates to the existence of any relationship [by blood, marriage or adoption (*l*)] between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6.) When the statement relates to the existence of any relationship [by blood, marriage or adoption (*l*)] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7.) When the statement is contained in any deed, will, or other document which relates to any such transaction as is mentioned in *section* thirteen, *clause* (*a*) (*m*).

(8.) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question (*n*).

Illustrations.

(*a.*) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(*b.*) The question is as to the date of A's birth.

(*l*) Added by Act XVIII. of 1872.
(*m*) *Kurronath Mullick* v. *Nittanund*, 10 B. L. R. 263.
(*n*) *R.* v. *Ram Dutt*, 23 Cal. W. R. (Cr.) 35.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(*c.*) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(*d.*) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(*e.*) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(*f.*) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(*g.*) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(*h.*) The question is, what was the cause of the wreck of a ship.

A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(*i.*) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(*j.*) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased bánya in the ordinary course of his business, is a relevant fact.

(*k.*) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(*l.*) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(*m.*) The question is, whether, and when, A and B were married.

An entry in a memorandum book by C, the deceased father of B,

of his daughter's marriage with A at a given date, is a relevant fact.

(*n*.) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable (*o*):

Provided—

That the proceeding was between the same parties or their representatives in interest;

That the adverse party in the first proceeding had the right and opportunity to cross-examine;

That the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

Statements made under Special Circumstances.

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability (*p*).

(*o*) *R.* v. *Monjair*, 20 Cal. W. R. (Cr.) 69; *R.* v. *Etwaree Dharee*, 21 Cal. W. R. (Cr.) 12; *R.* v. *Lukhen Santhal*, 21 Cal. W. R. (Cr.) 56; *Soojan Bibee* v. *Achmut Ali*, 21 Cal. W. R. 414; *R.* v. *Prosonno Chunder Gossami*, 22 Cal. W. R. (Cr.) 36; *Mrinmoyee Dahea* v. *Bhoshunmoyee*, 15 B. L. R. 1.

(*p*) *Belaet Khan* v. *Rash Beharee Mookerjee*, 22 Cal. W. R. 549; *R.* v. *Hurdeep Sahoy*, 23 Cal. W. R. (Cr.) 27.

Illustration.

A sues B for rupees 1,000 and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

35. An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact.

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts(*p*).

37. When the court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any act of parliament, or in any act of the Governor-General of India in Council, or of the Governors in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the government appearing in the Gazette of India, or in the gazette of any local government, or in any printed paper purporting to be the London Gazette, or the government gazette of any colony or possession of the Queen, is a relevant fact.

38. When the court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the government of such country and to contain any such law, and any report of a ruling of the courts of such country contained in a book purporting to be a report of such rulings, is relevant.

How much of a Statement is to be proved.

39. When any statement of which evidence is given

(*p*) *Khetter Mohun Neozy* v. *Sreenath Dutt*, 24 Cal. W. R. 188.

forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers, as the court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

Judgments of Courts of Justice when Relevant.

40. The existence of any judgment, order or decree, which by law prevents any court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such court ought to take cognizance of such suit, or to hold such trial.

41. A final judgment, order, or decree of a competent court, in the exercise of probate, matrimonial, Admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order, or decree is conclusive proof—

That any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

That any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment [order or decree (*q*)] declares it to have accrued to that person;

That any legal character which it takes away from any such person ceased at the time from which such judgment [order or decree (*q*)] declared that it had ceased or should cease;

(*q*) These words are added by Act XVIII. of 1872.

And that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment [order or decree (*q*)] declares that it had been or should be his property.

42. Judgments, orders or decrees, other than those mentioned in *section* forty-one, are relevant, if they relate to matters of a public nature relevant to the inquiry; but such judgments, orders, or decrees are not conclusive proof of that which they state.

Illustration.

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

43. Judgments, orders or decrees, other than those mentioned in *sections* forty, forty-one and forty-two, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this act (*r*).

Illustrations.

(*a.*) A and B separately sue C for a libel which reflects upon each of them. C in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification.

The fact is irrelevant as between B and C.

(*b.*) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's life-time. C says that she never was B's wife.

The judgment against B is irrelevant as against C.

(*q*) These words are added by Act XVIII. of 1872.

(*r*) *Neamut Ali* v. *Gooroo Doss*, 22 Cal. W. R. 365.

(*c*.) A prosecutes B for stealing a cow from him. B is convicted. A afterwards sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(*d*.) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

44. Any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under *section* forty, forty-one or forty-two, and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion.

Opinions of Third Persons when Relevant.

45. When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting, the opinions upon that point of persons specially skilled in such foreign law, science or art [or in questions as to identity of handwriting (*s*)], are relevant facts.

Such persons are called experts.

Illustrations.

(*a*.) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(*b*.) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of

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(*s*) Added by Act XVIII. of 1872.

knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(*c.*) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person, or by different persons, are relevant.

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations.

(*a.*) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(*b.*) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

47. When the court has to form an opinion as to the persons by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration.

The question is, whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.

48. When the court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression "general custom or right" includes customs or rights common to any considerable class of persons.

Illustration.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

49. When the court has to form an opinion as to the usages and tenets of any body of men or family, the constitution and government of any religious or charitable foundation, or the meaning of words or terms used in particular districts or by particular classes of people, the opinions of persons having special means of knowledge thereon, are relevant facts.

50. When the court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact: provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under *section* 494, 495, 497 or 498 of the Indian Penal Code.

Illustrations.

(*a.*) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(*b*) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

Character when Relevant.

52. In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

53. In criminal proceedings, the fact that the person accused is of a good character is relevant.

54. In criminal proceedings, the fact that the accused person has been previously convicted of any offence is relevant ; but the fact that he has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

55. In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation.—In *sections* 52, 53, 54 and 55, the word "character" includes both reputation and disposition ; but evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

PART II.

ON PROOF.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED.

56. No fact of which the court will take judicial notice need be proved.

57. The court shall take judicial notice of the following facts:—

(1.) All laws or rules having the force of law now or heretofore in force or hereafter to be in force in any part of British India:

(2.) All public acts passed or hereafter to be passed by parliament, and all local and personal acts directed by parliament to be judicially noticed:

(3.) Articles of war for her Majesty's army or navy:

(4.) The course of proceeding of parliament and of the councils for the purposes of making laws and regulations established under the Indian Councils' Act, or any other law for the time being relating thereto.

Explanation.—The word "parliament," in clauses (2) and (4), includes—

1. The parliament of the United Kingdom of Great Britain and Ireland;
2. The parliament of Great Britain;
3. The parliament of England;
4. The parliament of Scotland; and
5. The parliament of Ireland.

(5.) The accession and the sign manual of the sovereign for the time being of the United Kingdom of Great Britain and Ireland:

(6.) All seals of which English courts take judicial notice: the seals of all the courts of British India, and of all courts out of British India, established by the authority of the Governor-

General or any local government in council: the seals of Courts of Admiralty and Maritime Jurisdiction and of notaries public, and all seals which any person is authorized to use by any act of parliament or other act or regulation having the force of law in British India:

(7.) The accession to office, names, titles, functions, and signatures, of the persons filling, for the time being, any public office in any part of British India, if the fact of their appointment to such office is notified in the Gazette of India, or in the official gazette of any local government:

(8.) The existence, title, and national flag of every state or sovereign recognized by the British crown:

(9.) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the official gazette:

(10.) The territories under the dominion of the British crown:

(11.) The commencement, continuance, and termination of hostilities between the British crown and any other state or body of persons:

(12.) The names of the members and officers of the court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attornies, proctors, vakils, pleaders, and other persons authorized by law to appear or act before it:

(13.) The rule of the road [on land or at sea].

In all these cases, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.

If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit

by any writing under their hands, or which, by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

CHAPTER IV.

OF ORAL EVIDENCE.

59. All facts, except the contents of documents, may be proved by oral evidence.

60. Oral evidence must, in all cases whatever, be direct; that is to say (*t*)—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness, without an amount of delay or expense which the court regards as unreasonable;

(*t*) *Neel Kanto Pandit* v. *Juggobundhoo Ghose*, 12 B. L. R. (Ap.) 18.

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.

CHAPTER V.

OF DOCUMENTARY EVIDENCE.

61. The contents of documents may be proved either by primary or by secondary evidence.

62. Primary evidence means the document itself produced for the inspection of the court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document :

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

63. Secondary evidence means and includes—

(1.) Certified copies given under the provisions hereinafter contained ;

(2.) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies ;

(3.) Copies made from or compared with the original;

(4.) Counterparts of documents as against the parties who did not execute them ;

(5.) Oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations.

(*a.*) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(*b.*) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(*c.*) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence ; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(*d.*) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

64. Documents must be proved by primary evidence, except in the cases hereinafter mentioned.

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases (*u*) :—

(*a.*) When the original is shown, or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in *section* sixty-six, such person does not produce it ;

(*u*) *Hurish Chunder Mullick* v. *Prosunno Coomar Banerjee*, 22 Cal. W. R. 303.

(*b.*) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(*c.*) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(*d.*) When the original is of such a nature as not to be easily moveable;

(*e.*) When the original is a public document within the meaning of *section* seventy-four;

(*f.*) When the original is a document of which a certified copy is permitted by this act, or by any other law in force in British India, to be given in evidence;

(*g.*) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

In cases (*a*), (*c*) and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

66. Secondary evidence of the contents of the documents referred to in *section* sixty-five, *clause* (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is [or to his attorney or pleader (*x*)], such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the court considers reasonable under the circumstances of the case:

(*x*) Added by Act XVIII. of 1872.

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the court thinks fit to dispense with it :—

(1.) When the document to be proved is itself a notice;

(2.) When, from the nature of the case, the adverse party must know that he will be required to produce it;

(3.) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4.) When the adverse party or his agent has the original in court;

(5.) When the adverse party or his agent has admitted the loss of the document;

(6.) When the person in possession of the document is out of reach of, or not subject to, the process of the court.

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting, must be proved to be in his handwriting (*y*).

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

(*y*) *Neel Kanto Pandit* v. *Juggobundhoo Ghose*, 12 B. L. R. (Ap.) 18; *Abdool Ali* v. *Buhman*, 21 Cal. W. R. 429.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

72. An attested document not required by law to be attested, may be proved as if it was unattested.

73. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted, or proved to the satisfaction of the court, to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose (*z*).

The court may direct any person present in court to write any words or figures, for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person.

Public Documents.

74. The following documents are public documents :—

1. Documents forming the acts, or records of the acts (*a*)—
   - (i) Of the sovereign authority,
   - (ii) Of official bodies and tribunals, and
   - (iii) Of public officers, legislative, judicial and executive, whether of British India or of any other part of her Majesty's dominions, or of a foreign country.
2. Public records kept in British India of private documents.

(*z*) *Tara Pershad Tangee* v. *Lukhee Naram Panrai*, 21 Cal. W. R. 6.

(*a*) *Shazada Shahaboodeen* v. *Wedgeberry*, 10 B. L. R. (App.) 11.

75. All other documents are private.

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies (*b*).

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

77. Such certified copies may be produced in proof of the contents of the public documents, or parts of the public documents, of which they purport to be copies.

78. The following public documents may be proved as follows :—

(1.) Acts, orders, or notifications of the executive government of British India in any of its departments, or of any local government, or any department of any local government,

By the records of the departments certified by the heads of those departments respectively,

Or by any document purporting to be printed by order of any such government :

(2.) The proceedings of the legislatures,

By the journals of those bodies respectively, or by published acts or abstracts, or by copies purporting to be printed by order of government :

(*b*) *Kureehur Mojoondur* v. *Churn Majbee*, 22 Cal. W. R. 355.

(3.) Proclamations, orders, or regulations issued by her Majesty or by the privy council, or by any department of her Majesty's government,

By copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's printer:

(4.) The acts of the executive or the proceedings of the legislature of a foreign country,

By journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the Governor-General of India in Council:

(5.) The proceedings of a municipal body in British India,

By a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body:

(6.) Public documents of any other class in a foreign country,

By the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public or of a British consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

Presumptions as to Documents.

79. The court shall presume every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified, by any officer in British India, or by any officer in any native state in alliance with her Majesty, who is duly authorized thereto by the Governor-General in Council, to be genuine: provided that such document is substantially in the form and purports to be executed in

the manner directed by law in that behalf. The court shall also presume that any officer, by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

80. Whenever any document is produced before any court purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding, or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any judge or magistrate, or by any such officer as aforesaid, the court shall presume that the document is genuine, that any statements, as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken (*c*).

81. The court shall presume the genuineness of every document purporting to be the London Gazette, or the Gazette of India, or the government gazette of any local government, or of any colony, dependency, or possession of the British crown, or to be a newspaper or journal, or to be a copy of a private act of parliament printed by the Queen's printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law, and is produced from proper custody.

82. When any document is produced to any court purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any court of justice in England or Ireland without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to

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(*c*) *R.* v. *Nussuruddin*, 21 Cal. W. R. (Cr.) 5; *R.* v. *Gonowri*, 22 Cal. W. R. (Cr.) 2.

be signed, the court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

83. The court shall presume that maps or plans purporting to be made by the authority of government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

84. The court shall presume the genuineness of every book purporting to be printed or published under the authority of the government of any country, and to contain any of the laws of that country, and of every book purporting to contain reports of decisions of the courts of such country.

85. The court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a notary public, or any court, judge, magistrate, British consul or vice-consul, or representative of her Majesty or of the government of India, was so executed and authenticated.

86. The court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of her Majesty, or of the government of India resident in such country, to be the manner commonly in use in that country for the certification of copies of judicial records.

87. The court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by

the person, and at the time and place, by whom or at which it purports to have been written or published.

88. The court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the court shall not make any presumption as to the person by whom such message was delivered for transmission.

89. The court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature, and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested (*d*).

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section eighty-one.

Illustrations.

(*a.*) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(*d*) *Eheowree Singh Roy* v. *Kylash Chunder Mookerjee*, 21 Cal. W. R. 45.

(*b.*) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(*c.*) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper.

CHAPTER VI.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents, in cases in which secondary evidence is admissible under the provisions hereinbefore contained (*e*).

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills [admitted to probate in British India (*f*)] may be proved by the probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or disposition of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

(*e*) *Kedarnath Dutt* v. *Shamloll Khettry*, 11 B. L. R. 405; *R.* v. *Mangul Doss*, 23 Cal. W. R. (Cr.) 28.

(*f*) Substituted by Act XVIII. of 1872.

Explanation 3.—The statement in any document whatever of a fact other than the facts referred to in this section shall not preclude the admission of oral evidence as to the same fact.

Illustrations.

(*a.*) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(*b.*) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(*c.*) If a bill of exchange is drawn in a set of three, one only need be proved.

(*d.*) A contracts in writing with B for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(*e.*) A gives B a receipt for money paid by B.

Oral evidence is offered of the payment.

The evidence is admissible.

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms (*g*):

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso

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(*g*) *Ram Doolal Sen* v. *Radha Nath*, 23 Cal. W. R. 167.

applies, the court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant, or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents, not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved: provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations.

(*a.*) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

(*b.*) A agrees absolutely in writing to pay B Rs. 1,000 on the 1st March, 1873. The fact that, at the same time, an oral agreement was made that the money should not be paid till the 31st March, cannot be proved.

(*c.*) An estate, called "the Rampore tea estate," is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate, and was meant to pass by the deed, cannot be proved.

(*d.*) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

(*e.*) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to

one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(*f.*) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(*g.*) A sells B a horse and verbally warrants him sound. A gives B a paper in these words : "Bought of A a horse for Rs. 500." B may prove the verbal warranty.

(*h.*) A hires lodgings of B, and gives B a card on which is written, "Rooms, Rs. 200 a month." A may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement drawn up by an attorney is made between them. It is silent on the subject of board. A may not prove that board was included in the terms verbally.

(*i.*) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount, A may prove this.

(*j.*) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations.

(*a.*) A agrees in writing to sell a horse to B for Rs. 1,000 or Rs. 1,500.

Evidence cannot be given to show which price was to be given.

(*b.*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration.

A sells to B by deed "my estate at Rampore containing 100 bígás." A has an estate at Rampore containing 100 bígás. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration.

A sells to B by deed "my house in Calcutta."

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations.

(*a.*) A agrees to sell to B for Rs. 1,000 "my white horse." A has two white horses. Evidence may be given of facts which show which of them was meant.

(*b.*) A agrees to accompany B to Hyderabad. Evidence may be given of facts showing whether Hyderabad in the Deccan or Hyderabad in Scind was meant.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration.

A agrees to sell to B "my land at X in the occupation of Y." A has land at X, but not in the occupation of Y, and he has land in

the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations, and of words used in a peculiar sense.

Illustration.

A, a sculptor, agrees to sell to B "all my mods." A has both models and modelling tools. Evidence may be given to show which he meant to sell.

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration.

A and B make a contract in writing that B shall sell A certain cotton to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C if it affected his interests.

100. Nothing in this chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X. of 1865) as to the construction of wills (*h*).

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.

OF THE BURDEN OF PROOF.

101. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence

(*h*) *Sheoruttun Goi* v. *Doorga*, 6 N. W. R. 36.

of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations.

(*a.*) A desires a court to give judgment that B shall be punished for A's crime which A says B has committed.

A must prove that B has committed the crime.

(*b.*) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true.

A must prove the existence of those facts.

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations.

(*a.*) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(*b.*) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration.

(*a.*) A prosecutes B for theft, and wishes the court to believe that B admitted the theft to C. A must prove the admission.

B wishes the court to believe that, at the time in question, he was elsewhere. He must prove it.

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(*a.*) A wishes to prove a dying declaration by B. A must prove B's death.

(*b.*) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances.

Illustrations.

(*a.*) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(*b.*) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(*c.*) *Section* three hundred and twenty-five of the Indian Penal Code provides that whoever, except in the case provided for by *section* three hundred and thirty-five, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under *section* three hundred and twenty-five.

The burden of proving the circumstances bringing the case under *section* three hundred and thirty-five lies on A.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations.

(*a.*) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(*b.*) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. [Provided that (*i*)] when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it.

109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner (*j*).

111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Illustrations.

(*a.*) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(*b.*) The good faith of a sale by a son just come of age to a father

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(*i*) Added by Act XVIII. of 1872.

(*j*) *Hur Dyal Naz* v. *Roy Kristo Bhoomech*, 24 Cal. W. R. 107.

is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

113. A notification in the Gazette of India that any portion of British territory has been ceded to any native state, prince or ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification (*k*).

114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case (*l*).

Illustrations.

The court may presume—

(*a.*) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(*b.*) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(*c.*) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

(*d.*) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

(*k*) *Damodar Gordhar* v. *Ganesh Devram*, 10 Bom. H. C. 37.

(*l*) *R.* v. *Luckmee Pershad*, 19 Cal. W. R. (Cr.) 43; *R.* v. *Sudhu Mundul*, 22 Cal. W. R. (Cr.) 69.

(*e.*) That judicial and official acts have been regularly performed;

(*f.*) That the common course of business has been followed in particular cases;

(*g.*) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

(*h.*) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(*i.*) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them :—

As to illustration (*a*)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business :

As to illustration (*b*)—A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable :

As to illustration (*c*)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence :

As to illustration (*d*)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course :

As to illustration (*e*)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances :

As to illustration (*f*)—The question is whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances :

As to illustration (*g*)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family :

As to illustration (*h*)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might

cause loss to him in matters unconnected with the matter in relation to which it is asked:

As to illustration (*i*)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

CHAPTER VIII.

ESTOPPEL.

115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

Illustration.

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

116. No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at

the time when the bailment or licence commenced, authority to make such bailment or grant such licence.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

CHAPTER IX.

OF WITNESSES.

118. All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind (*m*).

Explanation.—A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open court. Evidence so given shall be deemed to be oral evidence.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person respectively shall be a competent witness.

121. No judge or magistrate shall, except upon the special order of some court to which he is subordinate,

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(*m*) *R.* v. *Anunto Chuckerbutty*, 22 Cal. W. R. (Cr.) 1.

be compelled to answer any questions as to his own conduct in court as such judge or magistrate, or as to anything which came to his knowledge in court as such judge or magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations.

(*a.*) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior court.

(*b.*) A is accused before the Court of Session of having given false evidence before B, a magistrate. B cannot be asked what A said, except upon the special order of the superior court.

(*c.*) A is accused before the Court of Session of attempting to murder a police officer whilst on his trial before B, a sessions judge. B may be examined as to what occurred.

122. No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of state, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

125. No magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence.

126. No barrister, attorney, pleader, or vakíl, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakíl, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any [illegal (*n*)] purpose;

(2) Any fact observed by any barrister, pleader, attorney, or vakíl, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [pleader (*n*),] attorney or vakíl was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations.

(*a.*) A, a client, says to B, an attorney, "I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(*b.*) A, a client, says to B, an attorney, "I wish to obtain possession of property by the use of a forged deed, on which I request you to sue."

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(*c.*) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book charging A with the

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(*n*) See Act XVIII. of 1872, Section 10.

sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

127. The provisions of *section* one hundred and twenty-six shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakíls.

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in *section* one hundred and twenty-six; and if any party to a suit or proceeding calls any such barrister, [pleader (*o*),] attorney or vakíl as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, [pleader (*o*),] attorney or vakíl on matters which, but for such question, he would not be at liberty to disclose.

129. No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled

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(*o*) Added by Act XVIII. of 1872.

to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate such witness, or that it will expose, or tend, directly or indirectly, to expose such witness to a penalty or forfeiture of any kind:

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice (*p*).

134. No particular number of witnesses shall in any case be required for the proof of any fact.

CHAPTER X.

OF THE EXAMINATION OF WITNESSES.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the court.

(*p*) *R.* v. *Mohesh Biswas*, 10 B. L. R. (Cr. Ap.) 455; *R.* v. *Luchmee Pershad*, 19 Cal. W. R. (Cr.) 43; *R.* v. *Koa*, 19 Cal. W. R. (Cr.) 48; *R.* v. *Udhan Bind*, 19 Cal. W. R. (Cr.) 18.

136. When either party proposes to give evidence of any fact, the judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations.

(*a.*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under *section* thirty-two.

The fact that the person is dead must be proved by the person proposing to prove the statement before evidence is given of the statement.

(*b.*) It is proposed to prove by a copy the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced.

(*c.*) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(*d.*) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate

facts (B, C and D) which must be shown to exist before the fact A can be regarded as the cause or effect of the fact in issue. The court may either permit A to be proved before B, C or D is proved, or may require proof of B, C and D before permitting proof of A.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

The examination of a witness by the adverse party shall be called his cross-examination.

The examination of a witness, subsequent to the cross-examination, by the party who called him, shall be called his re-examination.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination ; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

140. Witnesses to character may be cross-examined and re-examined.

141. Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the court.

The court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

143. Leading questions may be asked in cross-examination.

144. Any witness may be asked, whilst under examination, whether any contract, grant, or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents, if such statements are in themselves relevant facts.

Illustration.

The question is, whether A assaulted B.

C deposes that he heard A say to D, "B wrote a letter accusing me of theft, and I will be revenged on him." This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend

(1) To test his veracity;

(2) To discover who he is and what is his position in life, or

(3) To shake his credit, by injuring his character, although the answer to such questions might tend, directly or indirectly, to criminate him, or might expose or tend, directly or indirectly, to expose him to a penalty or forfeiture.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of *section* one hundred and thirty-two shall apply thereto.

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the court shall have regard to the following considerations :—

(1.) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies.

(2.) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he testifies.

(3.) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

(4.) The court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer, if given, would be unfavourable.

149. No such question as is referred to in *section* one hundred and forty-eight ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.

Illustrations.

(*a.*) A barrister is instructed by an attorney or vakíl that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.

(*b.*) A pleader is informed by a person in court that an important witness is a dacoit. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dacoit.

(*c.*) A witness, of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.

(*d.*) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

150. If the court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakíl or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakíl or attorney is subject in the exercise of his profession.

151. The court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

152. The court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the court needlessly offensive in form.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.

Illustrations.

(*a.*) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(*b.*) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(*c.*) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(*d.*) A is asked whether his family has not had a blood feud with the family of B against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

154. The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him :—

(1.) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2.) By proof that the witness has been bribed or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3.) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(4.) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations.

(*a.*) A sues B for the price of goods sold and delivered to B.

C says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(*b.*) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration.

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery

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which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

158. Whenever any statement, relevant under *section* thirty-two or thirty-three, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness, and had denied upon cross-examination the truth of the matter suggested.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the court, refer to a copy of such document: provided the court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

160. A witness may also testify to facts mentioned in any such document as is mentioned in *section* one hundred and fifty-nine, although he has no specific recollection of

the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court.

The court, if it sees fit, may inspect the document, unless it refers to matters of state, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and if the interpreter disobeys such direction, he shall be held to have committed an offence under *section* one hundred and sixty-six of the Indian Penal Code.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the court.

Illustration.

A sues B on an agreement and gives B notice to produce it. At the trial, A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

165. The judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:

Provided, that the judgment must be based upon facts declared by this act to be relevant, and duly proved.

Provided also, that this section shall not authorize any judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under *sections* one hundred and twenty-one to one hundred and thirty-one, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the judge ask any question which it would be improper for any other person to ask under *sections* one hundred and forty-eight or one hundred and forty-nine; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the judge, which the judge himself might put and which he considers proper.

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the court, before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision (*q*).

(*q*) *R.* v. *Navroji Dadabhai*, 9 Bom. H. C. 358.

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THE INDIAN EVIDENCE ACT AMENDMENT ACT.

ACT No. XVIII. OF 1872.

An Act to amend the Indian Evidence Act, 1872.

WHEREAS it is expedient to amend the Indian Evidence Act, 1872, it is hereby enacted as follows :—

1. This act may be called "The Indian Evidence Act Amendment Act," and it shall come into force on the passing thereof.

2. In section 32 of the Indian Evidence Act, 1872, clauses 5 and 6, after the word "relationship," the words "by blood, marriage, or adoption" shall be inserted.

3. In section 41 of the same act, lines 17, 20 and 23, after the word "judgment," the words "order or decree" shall be inserted.

4. In section 45 of the same act, line 5, after the word "art," the words "or in questions as to identity or handwriting" shall be inserted.

5. In section 57 of the same act, paragraph (13), after the word "road," the words "on land or at sea" shall be inserted.

6. In section 66 of the same act, line 5, after the word "is," the words "or to his attorney or pleader" shall be inserted.

7. In section 91 of the same act, exception (2), after the words "under the Indian Succession Act," the words "admitted to probate in British India" shall be substituted.

8. In section 92 of the same act, proviso (1), for the words "want of failure," the words "want or failure" shall be substituted.

9. In section 108 of the same act, line 1, for the word "when," the words "provided that when" shall be substituted; and in the last line, for the word "on," the words "shifted to" shall be substituted.

10. In section 126 of the same act, line 22, and in section 128 of the same act, line 6, after the word "barrister," the word "pleader" shall be inserted. In section 126 of the same act, line 15, for the word "criminal," the word "illegal" shall be substituted.

11. In section 155 of the same act, paragraph 2, for the word "had," the word "accepted" shall be substituted.

12. Nothing in the Indian Evidence Act, 1872, shall be deemed to affect Act No. XV. of 1852 (*to amend the Law of Evidence*), section 12.

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