

HINTS TO WITNESSES, IN COURTS OF JUSTICE.—By a Barrister.

(Continued from our last.)

VII. It is always important, in relating the assertions or admissions of the parties in the cause (particularly the confessions of prisoners in criminal cases,) to adopt the exact language which the party used. Substance is an unsatisfactory thing in civil cases, and in criminal ought never to convict a prisoner. The best method is for the witness to put himself in the situation of the party, and relate his very language (as nearly as he can recollect it) in the first person. A witness soon enters into this dramatic form, and is in this manner less liable to put words into the party's mouth, which he did not actually make use of, than if he were reporting his speech in the third person.

VIII. Unpractised witnesses make more difficulty of proving a person's hand-writing than they would, if they were duly impressed with the knowledge that, unless they actually saw the manuscript or signature in question written, they cannot swear positively that it is the hand-writing of the person, and that in a court of justice they are only called upon to swear as to their belief that it is his hand-writing. If they have ever seen him write his name or any thing else, or have corresponded with him, and found him treat a similar hand-writing as his own, they must have a belief as to the autograph they are asked to prove; and all they are required to do is, to state to the court that belief.

IX. Upon the subject of dates, it becomes witnesses to take the greatest pains to inform themselves before they come into the court; and for the purpose of ascertaining and fixing these, they may have recourse to any contemporaneous or other memoranda of their own, or another person's, not only as to the date of the fact in question, but as to that of any other which will fix it; but then these must exist in the mind of the witnesses an original and independent conviction that such was the date of the fact in question; and must operate in the nature of a refresher to his memory; for, memory of his own (no matter how acquired) he must have.* The abovementioned memoranda he may even take into court with him, for the purpose of again refreshing his memory while in the witness box. Trade-books are the most frequent instances of these assistants to the memory; but they can only be used as such; and are not evidence of themselves of the facts they record.†

X. If a witness be served with a subpoena duces tecum, requiring him to bring with him books, papers, and writings,

* 3 Term Rep. 749.

† 2 Veley's Rep. 49.

this is a compulsory obligation upon him to produce all such as he has in his possession, and which he has no lawful or reasonable excuse for withholding; and of the validity of this excuse, the court, and not the witness, are to judge.* But the witness cannot be compelled, under this writ, to produce any paper which constitutes a part of his title, or the production of which would expose him to an action.†

XI. Where a witness resides out of the town in which the trial takes place, so that he is obliged to travel, in order to be present thereat, he is entitled to be paid his expences before he is compellable to open his mouth; or he may afterwards maintain an action for them against the party who subpoenas him; and this, though he may not be examined on account of his refusal to give evidence, unless his expences are paid.‡ And the court of Common Pleas will not grant an attachment against a witness for not obeying a subpoena to attend a trial, unless the whole necessary expences of the journey, to and from the place of trial, and of the witnesses necessary stay there, be tendered with the subpoena; and where less is offered, the witness is not obliged to trust to the courts allowing him more when he comes to the book; for perhaps the party may not call him, and then it may be difficult for him to get home again.¶ What shall be the measure of necessary expences may be collected from the following case of Chapman v. Paynton: "Ryder and Fletcher, two witnesses, were subpoenaed eight miles from Chester, to attend in town at the trial of a cause, and two guineas each were tendered to them, but they refused the money, objecting that it was too little; the summoner declined to give them any more, on which the witnesses neglected to attend. It was proved that a horse could not be hired for the journey under 17. 8s. (this was in 1741): and upon a motion for an attachment against them, it was insisted that they might have come on foot or in a cart, that there was no necessity for a horse; but that if they had hired horses, such expences must have been paid before the witnesses would have been obliged to be sworn, and therefore they ought to have come up. But the court said, that a man is not bound to trust for payment upon the trial. The party, who would have the benefit of a witness's testimony, must tender him sufficient to bear his charges backwards

* 9 East's Rep. 473.

† 1 Esp. Cas. 405.

‡ 13 East, 15.

¶ 1 H. B. 49.

§ 2 Strange, 1150. 13 East, 16. (a) S. C. more fully stated, 1 Black. 36. But under the Stat. 1 Jac. c. 15, §§ 10 and 11, it is not necessary, upon summoning a witness before commissioners of bankrupt to be examined touching the bankrupt's effects, to tender him the expences of his journey beforehand; though, if he be in fact without the means of taking the journey, it may be an excuse for not obeying the summons, 8 East, 319.

and forwards, or otherwise he is not obliged to attend. The design of the witnesses to travel on horseback was reasonable; and it was said that the directions of the statute, 5 Eliz. c. 9, which requires a tender of such reasonable sums for the witness's costs and charges, according to his countenance and calling as having regard to the distance of the places, are necessary to be allowed in that behalf; was the guide of the court in cases of this kind; that the sum tendered here was much too small; and so the rule was discharged.¶ And Mr. Justice Wright said, that in the court of Common Pleas an attachment against witnesses, for not attending in pursuance of a subpoena, was never granted, but had often been refused; and though this court would censure a witness, yet, if it was doubtful whether the sum tendered was sufficient, the court ought to leave the party injured to his remedy at law; that they ought not, in process of contempt, to be balancing too nicely the expences of travellers; that if a witness insisted upon riding post, he did not know that the court ought to grant an attachment for his non-attendance, if the person requiring his attendance refused to accommodate him with such a passage; and that the only true foundation to grant an attachment, was some obstinacy or contempt in the party. By the statute before referred to, a penalty of 10*l.* is given for the non-attendance of the witness subpoenaed, and also a further recompence directed to be yielded to the party grieved, "by the discretion of the Judge of the court out of which the process shall be awarded." This further recompence, it is decided*, must be assessed by the court, out of which the process issued, and not by the judge or jury at nisi prius. The current of actions, noticed in the books for this species of default, is upon the statute; but Lord Mansfield says, "An action will lie for damages against a material witness, who absents himself without any excuse; but that must be an action upon the case."† In a very late case, the Court of Common Pleas refused an attachment against a witness who, being subpoenaed, without particular notice when the cause would come on, in the course of his third day's attendance left the court, to attend to urgent business in his trade; and this, although the cause was tried in his absence, and the plaintiff was non-suited for want of his evidence. And so, though the witness was induced to leave the court by the representation of the adverse attorney.‡ The subpoena should be served on the witness a reasonable time before the day of trial; for witnesses ought to have a convenient time to put their own affairs in such order, as

* Dougl. 556. † 13 East, 17. (a) ‡ 5 Taunton, 200.

their attendance may be of as little prejudice. And notice to attend the sitting that evening, has been short. Where the weekly bills of moor to leave only a small ticket.¶ XII. The question how compellable to bear one's own disgrace, is, in the consideration of a bill of exceptions, is known, the witnesses that they ever any questions with tendency. There is which it was held, that asked whether he should pillory for perjury; considered case of the K. tants of Castle Careld not receive evidence of grand jury sent for which he was himself; and Mr. J. d the books as uniform production of a record less convicted of an astly—Lest I should of a popular pamphlet a treatise-writer, I only one more to far he is obliged, in lose a confidential here I am afraid to can protect only to ce itself; that is to attorney, and their very other confidential or even confession, whole truth over-rid a confession to a st, for the purpose of s conscience; the to his private friend is physician, are no tion of the law. W k that the priest, a sician, who voluntidence reposed in l rably; but he can if called upon in a Strange 510. † Tidd's Pr Term Rep. 440. § 8 Peake's Evidence, 180, cite 17; Duchess of Kingston v. Sparke was that of a Mr. Justice Buller, was co crime, upon evidence of his man pro salute anime. L a Barre v. Lavette, Peake have paused before he ad

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