

MEMORIALS AS SECONDARY EVIDENCE.

shew a better or preferable title relatively to any other, but to prove that the title is certainly and exclusively in the party asserting it. Again, conveyancers evidence is for the most part necessarily *ex parte*; a vendor may therefore be required to furnish evidence which would be elicited by adverse proceedings, to prove or disapprove facts, which, if he were a party litigant, it would be the business of his opponent to negative or establish. The heir in ejectment, either by or against him, or as a party to a suit in equity, need not adduce proof that his ancestor died intestate, it resting with his adversary to prove the affirmative fact of a will, if there is one."

The execution of a memorial which is receivable in evidence need not be proved when more than thirty years old (*Doe Maclem v. Turnbull*, 5 U. C. Q. B. 129), and it would seem that where a foundation is laid by proper search or otherwise for the admission of the contents of a memorial as evidence, and when requisite, sufficient corroborating circumstances or privity shewn, that such memorial, though not thirty years old, produced from the registry office, need not be proved; and that a copy certified by the registrar as such is also admissible without proof of the execution of the original, or of the instrument to which the original relates (*Marvin v. Hales*, 6 U. C. C. P. 211; *Lynch v. O'Hara*, 6 U. C. C. P. 267; Buller N. P. 255; 1 Taylor Ev. 362; see also *Doe d. Prince v. Girty*, 9 U. C. Q. B. 41. Con. Stat. Can. ch. 80; 29 Vic. ch. 24, s. 19.)

It is difficult to gather any very definite principle from the cases. So far as the ordinary principles of evidence apply, it appears difficult to escape from the conclusion of Alderson, B., in *Loscombe v. Clifford*, that "if there is no clause in the Act of Parliament making the memorial evidence, it is only evidence against the persons registering and those who claim under them;" and indeed this seems to be assumed as the rule in Taylor on Evidence, sec. 389, p. 377, 3rd ed., where the author observes "That in all cases where the evidence has been admitted against third persons, it has been under some special circumstances (drawing no distinction between such memorials as have been executed by the grantor and those which have been executed by the grantee). Perhaps, however, this may

not be the rule when the memorial is executed by the grantor, and is in reality against his interest, and not as in the case of *Jones v. Todd*, where the grantor was in fact getting rid of a *damnosa hereditas*, and the memorial was sought to be used against the grantee; though in strictness to render the evidence admissible on this ground, it would of course be essential that the grantor should be proved to be dead at the time the evidence is tendered. When the memorial is executed by the grantee it seems admitted on all hands, (and the same rule must apply, where though executed by the grantor, it is not in reality against his interest,) that it is not necessarily, or in all cases, secondary evidence. And here the distinction must be borne in mind between the admissibility, and the weight of the evidence. It seems in the cases, on which such evidence has been admitted, that the memorials have been rather treated as part of a chain of circumstances given in evidence towards proof of the alleged deed, than as secondary evidence in themselves; and the decisions in effect appear to be, that from the existence of such a memorial coupled with the other proof, the existence of such a deed may be presumed; in other words, that there may be circumstantial secondary evidence, and that such a memorial may form a link.

The remarks of Lord Eldon in *Scully v. Scully*, are in accordance with this view—"The question, he observes, in every case of this sort is, whether all the testimony taken together, offered as secondary evidence, is or is not sufficient to enable you to say, that as you have not the writing before you, you will act upon it as if you had it before you, and with an absolute certainty of what that writing contained." And the observations of Lord St. Leonards in *Sadlier v. Briggs*, point in the same direction. It may be observed that most, if not all of the English cases in which the memorials have been admitted, have been cases in equity, in which the Court were judges, both of law and fact, of the admissibility and weight of the evidence. Viewed in this light, the effect of a memorial, and the attendant circumstances become a question rather of fact than of law, and its probative effect in each case will depend, to use the words of Lord Eldon, upon whether upon all the facts taken together the Court, or the jury under the direction of the Court, can say