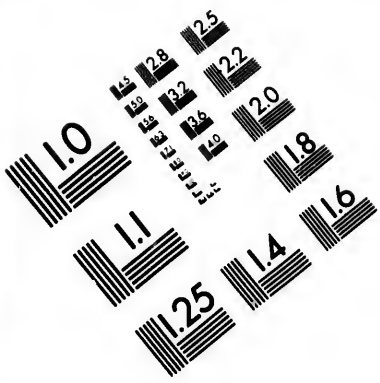


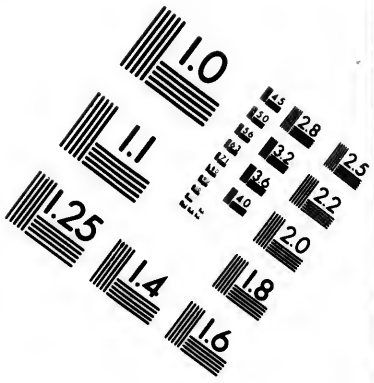
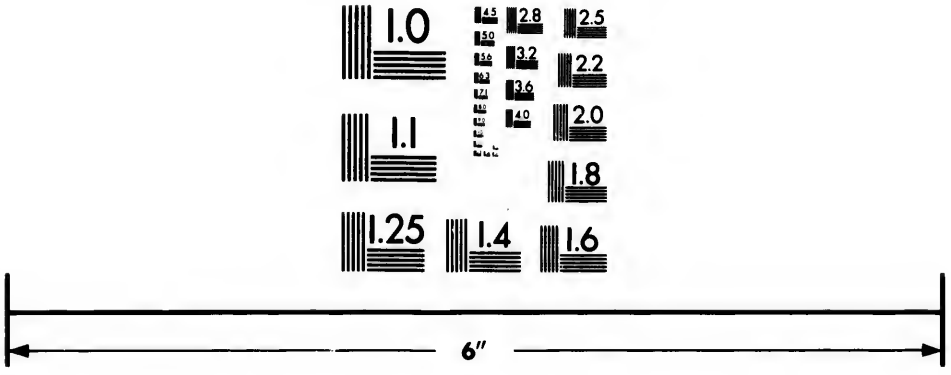
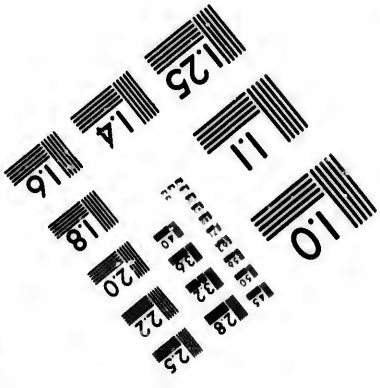


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Technical and Bibliographic Notes/Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured covers/ Couverture de couleur
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☐ Bound with other material/ Relié avec d'autres documents
- ☐ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distortion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- ☐ Additional comments:/ Commentaires supplémentaires:

- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☑ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☐ Quality of print varies/ Qualité inégale de l'impression
- ☐ Includes supplementary material/ Comprend du matériel supplémentaire
- ☐ Only edition available/ Seule édition disponible
- ☐ Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image/ Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
							✓				

The copy filmed here has been reproduced thanks to the generosity of:

National Library of Canada

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol → (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

L'exemplaire filmé fut reproduit grâce à la générosité de:

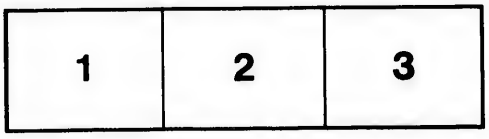
Bibliothèque nationale du Canada

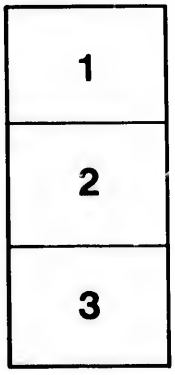
Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

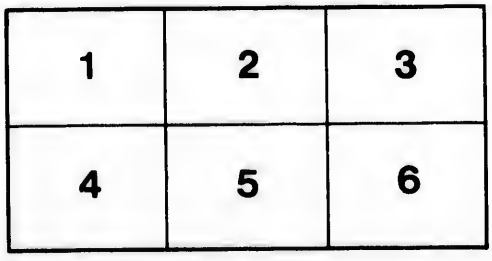
Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole → signifie "A SUIVRE", le symbole ▽ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.







32X

A TREATISE

ON THE

LAW OF EVIDENCE

AS ADMINISTERED IN ENGLAND AND IRELAND;

WITH ILLUSTRATIONS FROM SCOTCH, INDIAN, AMERICAN, AND OTHER LEGAL SYSTEMS.

BY HIS HONOUR

THE LATE JUDGE PITT TAYLOR.

Ninth Edition.

(IN PART RE-WRITTEN)

By G. PITT-LEWIS, Q.C.

With Notes as to American Law

By CHARLES F. CHAMBERLAYNE.

IN TWO VOLUMES.

VOL. II.

LONDON:
SWEET AND MAXWELL, LTD., 3, CHANCERY LANE.
BOSTON, MASS.:
THE BOSTON BOOK COMPANY.
TORONTO:
THE CARSWELL CO. LTD., LAW PUBLISHERS, ETC.
1897.

Entered according to Act of the Parliament of Canada in the year one thousand eight hundred and ninety-seven, by Sweet & Maxwell, Ltd., in the Office of the Minister of Agriulture

Presswork (Canadian Edition) by the Carswell Co. Ltd., 30 Adelaide St. E.

PART IV.

EVIDENCE SUBJECT TO SPECIAL RULES OF LAW.

CHAPTER I.

EVIDENCE EXCLUDED ON GROUNDS OF PUBLIC POLICY.

§ 908.[1] The law *excludes* or dispenses with some kinds of evidence *on grounds of public policy:* because it is thought that greater mischiefs would probably result from requiring or permitting their admission, than from wholly rejecting them. Our attention must now be directed to it so far as it applies to the matter concerning which the witness is interrogated.

§ 909. The rule has reference to either (*a*) persons,[2] or (*b*) matters. The *matters* which the law says shall not be the subject of evidence in a Court of Justice are: (1) Communications which have passed between husband and wife during marriage; (2) disclosures by such adviser of communications which have been made by a man to his legal adviser; (3) evidence by judges or jurymen as to matters which have taken place while they were engaged *judicially;* (4) State secrets; and (5) matters of which decency forbids the disclosure.

§ 909A. The *first class* of subjects protected from disclosure consists of *communications* between *husband and wife.* "No husband," says the Legislature, "shall be *compellable*[3] to disclose any communi-

[1] Gr. Ev. § 236, in part.

[2] So far as the rule relates to *the persons* testifying, it will be hereafter discussed in the chapter relating to the competency of witnesses, post, Part v. Ch. ii.

[3] In America it has been decided that, so far as such statute is concerned, a *voluntary* statement is admissible. See Southwick *v.* Southwick, 1870 (Am.). But see infra, as to whether at common law one of the

cation made to him by his wife during the marriage, and no wife shall be *compellable*[1] to disclose any communication made to her by her husband during the marriage."[2] This enactment rests on the obvious ground, that the admission of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence, which is the most endearing solace of married life. The protection is not confined to cases where the communication sought to be given in evidence is of a *strictly confidential* character, but the seal of the law is placed upon *all* communications of whatever nature which pass between husband and wife.[3] It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record. It is, however, limited to such matters as have been communicated "during the marriage." Consequently, if a man were to make the most confidential statement to a woman *before* he married her, and she were subsequently called as a witness in a civil suit, and interrogated with respect to the communication, she would, it seems, be bound to disclose what she knew of the matter.

§ 910. It has not been settled in England to what communications made during marriage the privilege extends. In America it has been held only to extend to matters or knowledge of what was only obtained by reason of the conjugal relation;[4] to extend to all that passes between husband and wife when alone, or when only children of tender years are present; to also extend to conversations between husband and wife which have been *overheard* by a third person,[5] but not to extend to information which has come to either of the parties quite independently of the marriage relationship.[6] A married person is always, both in England and in America, a competent witness to prove acts alleged by him or her to have been done by the other party to the marriage in violation of the complainant's person or liberty.[4]

parties can, without his or her consent, testify against the other as to communications which passed between them during the marriage.

[1] See last note.

[2] 16 & 17 V. c. 83, § 3.

[3] See O'Connor *v.* Marjoribanks, 1842.

[4] See Commonwealth *v.* Sapp, 1890 (Am.), where the whole subject is considered.

[5] Com. *v.* Griffin, 1872; State *v.* Center (Am.), 1862, cited Greenleaf on Ev. 15th edit. (1892), note to § 254.

§ 910A. A question may arise as to whether or not the relation of husband and wife must be *still subsisting* at the time when the evidence is required. On the one hand, the statute speaks only of husbands and wives, and makes no reference either to widowers or widows, or to parties who have been divorced; but on the other hand, the old common law rule, which precluded husbands and wives from giving evidence for or against each other, has been construed by the judges to mean, that whatever had come to the knowledge of either party by means of the hallowed confidence which marriage inspires, could not be afterwards divulged in testimony, even though the other party were no longer living.[1] Accordingly, when a woman, divorced by Act of Parliament, and married to another person, was offered as a witness against her former husband, she was held clearly incompetent, the judge adding, "It never can be endured that the confidence, which the law has created while the parties remained in the most intimate of all relations, shall be broken, whenever, by the misconduct of one party, the relation has been dissolved."[2]

§ 911.[3] Secondly, as regards *professional communications*, the rule is now well settled, that, where a *barrister* or *solicitor* is professionally employed by a client, all communications between them, in the course and for the purpose of that employment, are so far privileged, that the legal adviser, when called as a witness, cannot be permitted to disclose them, whether they be in the form of title deeds, wills,[4] documents, or other papers delivered, or statements made, to him, or of letters, entries, or statements, written or made by him in that capacity,[5] and this even though third persons were

[1] O'Connor *v.* Marjoribanks, 1842; overruling Beveridge *v.* Minter, 1824, and confirming Monro *v.* Twistleton, 1802. See, also, Doker *v.* Hasler, 1824 (Best, C.J.).

[2] Monroe *v.* Twistleton, 1802 (Ld. Alvanley); explained and confirmed (Ld. Ellenborough) in Aveson *v.* Ld. Kinnaird, 1805; Commonwealth *v.* Sapp, 1890 (Am.), ubi supra.

[3] Cr. Ev. § 237, slightly.

[4] Doe *v.* James, 1857. There, a party claiming as devisee under a will, his solicitor was upheld in refusing to produce a will which had come into his hands in a professional capacity, though it was suggested that it related also to personalty, and ought, therefore, to be deposited in the Eccles. Court, and to be open for public inspection.

[5] Herring *v.* Clobery, 1842; Cromack *v.* Heathcote, 1820; Greenough *v.* Gaskell, 1833, where Brougham, C., was assisted by Ld. Lyndhurst, Tindal, C.J., and Parke, J. See Moore *v.* Terrell, 1833. Ld. Abinger also mentions the case as reviewing all the authorities. See Turquand *v.*

present at them.[1] Of course, cases laid before counsel on behalf of a client, and their opinions thereon, stand upon precisely the same footing as other professional communications from client to either counsel or solicitor, or from either counsel and solicitor to client.[2]

§ 912. This rule equally applies, though the solicitor be employed in the character, either of a scrivener to raise money,[3] or of a *conveyancer* to draw deeds of conveyance;[4] or though the conversation relate only to the sale of an estate, and to the amount of the bidding to be reserved.[5] In fact it extends to all communications between a solicitor and his client, relating to matters within the ordinary scope of a solicitor's duty.[6] And the legal adviser can be asked whether the conference between him and his client was for a lawful or an unlawful purpose.[7] If either from his admission or from independent evidence it clearly appears that the communication was made by the client for a criminal purpose,—as, for instance, if the solicitor was questioned as to the most skilful mode of effecting a fraud, or committing any other indictable offence,—he is bound to disclose such guilty project.[8] The existence of an illegal purpose, it is now clearly settled, prevents the privilege from attaching; for it is as little the duty of a solicitor to advise his client how to evade the law, as it is to contrive a positive fraud.[9] The mere name of the client, moreover, is not the subject of privilege.[10]

§ 913. Where the *professional adviser is the party interrogated*, it is quite immaterial whether the communication relate to any

Knight, 1836. See, also, Chant *v.* Brown, 1851-2.

[1] Blount *v.* Kimpton, 1892 (Am.). But the third party may give evidence as to them: Hurlbert *v.* Hurlbert, 1891 (Am.).

[2] Pearse *v.* Pearse, 1846 (K.-Bruce, V.-C.); Jenkins *v.* Bushby, 1866. See Bargaddie Coal Co. *v.* Wark, 1859, H. L.

[3] Turquand *v.* Knight, 1836 (Ld. Abinger); Harvey *v.* Clayton, 1675; Anon., 1693 (Ld. Holt). But here it is necessary that the solicitor should have been consulted as the party's own legal adviser: R. *v.* Farley, 1846. See post, § 923, ad fin.

[4] Cromack *v.* Heathcote, 1820.

[5] Carpmael *v.* Powis, 1845-6.

[6] Id. (Ld. Lyndhurst).

[7] Reg. *v.* Cox and Railton, 1884, C. C. R.; overruling Doe *v.* Harris, 1833; R. *v.* Farley, 1850.

[8] R. *v.* Cox and Railton, supra; R. *v.* Avery, 1838; Follett *v.* Jefferyes, 1850, cited post, note to § 930; Mornington *v.* Mornington, 1861; Charlton *v.* Coombes, 1863 (Stuart, V.-C.); Annesley *v.* Ld. Anglesea, 1743 (Ir.); and post, § 936. See, also, Gartside *v.* Outram, 1856 (Wood, V.-C.); and post, § 929.

[9] Reg. *v.* Cox and Railton, supra; Russell *v.* Jackson, 1851 (Turner, V.-C.). See, also, Kelly *v.* Jackson, 1849 (Ir.).

[10] Bursill *v.* Tanner, 1885; Ex parte Campbell, In re Cathcart, 1870.

litigation commenced or anticipated.[1] As Brougham, L. C., observed, "If[2] the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous. * * * If, touching matters that come within the ordinary scope of professional employment, legal advisers receive a communication in their professional capacity, either from a client, or on his account and for his benefit in the transaction of his business,—or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client,—they are not only justified in withholding such matters, but *bound to withhold* them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness."[3]

§ 914.[4] "The *foundation* of this rule," his lordship also explains, "is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings."[5] The same learned judge remarked in another case, that if such communications were not protected, no man would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights; and no man could safely come into a court, either to obtain redress, or to defend himself.[6]

[1] Ld. Walsingham *v.* Goodricke, 1843; Desborough *v.* Rawlins, 1838; Pearse *v.* Pearse, 1846 (Knight-Bruce, V.-C.); Sawyer *v.* Birchmore, 1835; Herring *v.* Cloberry, 1842; Jones *v.* Pugh, 1842; Greenhough *v.* Gaskell, 1833; Carpmael *v.* Powis, 1845-6 (Ld. Langdale). These cases overrule Williams *v.* Mudie, 1824; Clark *v.* Clark, 1830; Broad *v.* Pitt, 1828; and Wadsworth *v.* Hamshaw, 1819.

[2] Gr. Ev. §§ 240 and 237.

[3] Greenough *v.* Gaskell, 1833.

[4] Gr. Ev. § 238, verbatim.

[5] Greenough *v.* Gaskell, 1833; quoted with approbation in Russell *v.* Jackson, 1851 (Turner, V.-C.).

[6] Bolton *v.* Corp. of Liverpool, 1833. "This rule seems to be corre-

§ 915. The rigid enforcement of the rule no doubt occasionally operates to the exclusion of truth; but if any law-reformer feels inclined to condemn it on this ground, he may be reminded of the language of the late Knight Bruce, L. J., who observed:—"Truth, like all other good things, may be loved unwisely,—may be pursued too keenly,—may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."[1]

§ 916. Such being the reasons for which communications to legal advisers are privileged, the privilege—though perhaps the policy of such restriction is questionable[2]—does not extend to matters communicated to *other* persons, though made under terms of the closest secrecy.[3] Thus,[4] medical men[5] and clergymen[6] are bound

lative with that which governs the summary jurisdiction of the courts over attorneys. In Ex parte Aitken, 1820, that rule is laid down thus: 'Where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, then the court will exercise this jurisdiction.' See, also, Ex parte Yeatman, 1835. So where the communication made relates to a circumstance so connected with the employment as an attorney, that the character formed the ground of the communication, it is privileged from disclosure." Turquand *v.* Knight, 1836 (Alderson, B.). The Roman law was similar to ours, though the reasons were different. 1 Mas. de Prob., Concl. 66; vol. 3, Concl. 1239; Farin. Op. Tom. 2, Tit. 6, Quest. 63, Illat. 5, 6.

[1] Pearse *v.* Pearse, 1846.

[2] In Wilson *v.* Rastall, 1792, Buller, J., much regretted that privilege was not extended to cases in which medical persons acquired information by attending in their professional characters. In Greenough *v.* Gaskell, 1833, Ld. Brougham, while stating that the rule was limited to legal advisers, observed, that "certainly it may not be very easy to discover why a like privilege has been refused to others, especially to medical advisers." In many of the American States statutes have been passed by which communications to medical men and to ministers of religion are made privileged, or may not be disclosed. As to these, and for the principal decisions upon them, see Greenleaf on Evidence, 15th edit. (1892), note to § 248.

[3] See Jessel, M. R., in Wheeler *v.* Le Marchant, 1881.

[4] Gr. Ev. § 248, in part.

[5] Duch. of Kingston's case, 1776, H.L.; R. *v.* Gibbons, 1823; Broad *v.* Pitt, 1828 (Best, C. J.).

[6] R. *v.* Gilham, 1828. In considering this case and other common law decisions upon the subject of evidence it must be recollected that the common law knew of no distinction between *competent* and *com-*

to disclose any information which, by acting in their professional character, they have confidentially acquired; and clerks,[1] bankers,[2] stewards,[3] confidential friends,[4] pursuivants of the Heralds' College,[5] and, perhaps, even licensed conveyancers,[6] are equally obliged to reveal what has been imparted to them in confidence, except as to matters which the principal himself would not be compelled to disclose, such as his title-deeds and private papers, in a case in which he is not a party.

pellable such a distinction being entirely the creation of modern statute law. When, therefore, the judges decided (as in 1828, after argument, they all unanimously did in R. *v.* Gilham, absentee Hullock, B.) that a clergyman was *competent* to give evidence of a confession made to him, they in effect also decided that he was *compellable* to do so. It has been argued with much ability in Best on Evidence, 8th edit. 1893, §§ 854, 855; Phillimore's Ecclesiastical Law, edit. 1873, pp. 701 et seq.; and in The Privilege of Religious Confessions in English Courts of Justice, by Edward Badeley, M.A. —a convert from Protestantism to the Roman Catholic Church— which was published in London, by Butterworth's, in 1865, that confessions to clergymen of the Established Church are privileged, on the ground that the articuli cleri (9 Ed. 2, c. 10), although for centuries treated as obsolete, and at last actually repealed by "The Statute Law Revision Act, 1863" (26 & 27 V. c. 125), were long the law of the land, and that the opinion (given after the Reformation) expressed in Sir Edward Coke's comment on this statute (2 Inst. 629) may be so read as to imply that such privilege extended to everything but high treason. This view, however, cannot be accepted as being at present the law in the teeth of the decision in R. *v.* Gilham; of the dicta of the eminent judges mentioned in note [8] to § 917, in which they tacitly or expressly accept the position that strict law does not admit the privilege, although they protest that they individually will never enforce the strict letter of the law; and of the weight of opinion amongst the writers of text books on the law of evidence. The present Editor has, under these circumstances, advised magistrates that, as they are bound by their oaths to dispense justice to all who seek it of them, without fear, favour, or affection, and as they are also bound to accept without question the law as laid down by the superior courts, they have no alternative but to enforce an answer from a clergyman on a matter relevant to the case before them, and ought not to excuse him on the ground that it is privileged by having been made in confession, and this although they can only punish a witness who refuses to answer by committing him for contempt, and not by merely imposing a fine: The Queen *v.* Flavell, 1884. The same considerations ought to govern the actions of other inferior courts. It will be noticed that all that the late Sir R. Phillimore ventured to commit himself to was an expression of opinion (Phill. Ecc. Law, 704) that it is "at least not improbable" that the privilege of clergymen of the Church of England as to matters told them in confession will be recognized when the question next comes before a superior court.

[1] Lee *v.* Birrell, 1813; Webb *v.* Smith, 1824.

[2] Loyd *v.* Freshfield, 1826 (Abbott, C.J.).

[3] Vaillant *v.* Dodemead, 1792 (Buller, J.); Ld. Falmouth *v.* Moss, 1822.

[4] Wilson *v.* Rastall, 1792, as reported 4 T. R. 758 (Ld. Kenyon); Hoffman *v.* Smith, 1803 (Am.).

[5] Slade *v.* Tucker, 1880 (Jessel, M.R.).

[6] See (Parke, B.) in Turquand *v.* Knight, 1836.

§ 917.[1] The propriety of extending privilege to communications to clergymen admitting *criminal* conduct, has been strongly urged, on the ground that evil-doers should be enabled with safety to disburthen their guilty consciences, and by spiritual instruction and discipline to seek pardon and relief.[2] The Roman Church adopts this principle in its fullest extent, not only,—as already intimated,[3] —by excepting such confessions from the general rules of evidence, but by punishing the priest who reveals them, and even allows a priest, who has heard a confession as such, when appearing as a witness in his private character, to swear that he knows nothing of the subject.[4] In Scotland, the confession of a prisoner in custody while preparing for his trial, in order to obtain spiritual advice and comfort, is privileged; but communications made confidentially to clergymen in the ordinary course of their duty, are not.[5] By the common law of England,[6] no distinction is recognised between clergymen and laymen, and all confessions and other matters, not confided to legal counsel, must be disclosed when required for the purposes of justice.[7] By it neither penitential confessions made to the minister or to members of the party's own Church, nor even secrets confided to a Roman Catholic priest in the course of confession, are privileged.[8] In many of the American States, however,

[1] Gr. Ev. § 247, in great part.

[2] See note [6], to § 916.

[3] Ante, § 879, and notes.

[4] Muscardus, after observing that, in general, persons coming to the knowledge of facts under an oath of secrecy are compellable as witnesses to disclose them—states that confessions to a priest are not within the operation of the rule, since they are made not so much to the priest as to the Deity whom he represents. 1 Mus. de Prob., Quæst. v. n. 51; id. Concl. 377. Vide Farin. Op., Tit. 8, Quæst. 78, n. 73.

[5] Tait, Ev. (Sc.) 386, 387; Alison, Pract. of Cr. L. (Sc.) 586; 2 Dickson, Ev. (Sc.) 937—939.

[6] While the law of the Established Church of England encourages a penitent to confess his sins "for the unburthening of his conscience, and to receive spiritual consolation and ease of mind," yet even by its law the minister, to whom the confession is made, is merely excused from presenting the offender to the civil magistrate, and enjoined not to reveal the matter confessed, "under pain of irregularity." Const. & Can. 1 J. 1, Can. cxiii.; 2 Gibson, Cod. p. 963.

[7] R. *v.* Gilham, 1828. As to this case, see supra, n. [6] to § 916.

[8] Butler *v.* Moore, 1802, McNally, Ev. 253—255; Anon., 1693 (Holt, C.J.); Du Barré *v.* Livotte, 1791; Com. *v.* Drake, 1818 (Am.). In Broad *v.* Pitt, 1828, Best, C.J., however, said, that he, for one, would never compel a clergyman to disclose communications made to him by a prisoner; but that if he chose to disclose them, he would receive them in evidence. In R. *v.* Griffin, 1853, Alderson, B., is reported to have gone further, and to have expressed an opinion that communications made by a prisoner to a clergyman ought not to be disclosed. See, also, R. *v.* Hay, 1860; Joy on Conf. (Ir.), 49—58; Jer. Taylor's Sermon on the Anniversary of Gunpowder

confessions made to a priest or other minister of religion in that capacity are rendered privileged by express statutory enactment.[1]

§ 918. Accordingly privilege, in its full extent, applies only between a client and his legal adviser.[2] But it also to some extent exists between employer and employed with regard to communications passing between them. An employer must, for instance, produce reports, &c., made by his servants in the *ordinary* course of their employment; but he will not be compelled to produce those made with a view to and in contemplation of anticipated litigation.[3] And reports, &c., obtained after the controversy has arisen (or post litem motam) are privileged, and will not be ordered to be produced,[4]—and this even though an offer has been made which is in fact based upon them.[5] Moreover, with respect to the *production of title-deeds*, the protection has been held applicable to the case of *trustees* and *mortgagees*, and they cannot be compelled either to produce the deeds of the cestuis que trust, or mortgagors, or to give parol evidence of their contents.[6]

§ 918A. Further, whenever a party is justified in refusing to produce an instrument, he in general cannot be forced to disclose its contents; although some few dicta, or even decisions,[7] to the contrary may be found. Alderson, B., remarks,[8] "It would be perfectly illusory for the law to say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happens to know the contents of the deed, and would be only a roundabout way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate."[9]

§ 919. The protection afforded to professional confidence applies

Treason, 6th vol. of his Works, pp. 614–622, ed. 1828; and a very learned pamphlet by the late Mr. Badeley on the Privilege of Religious Confessions in English Courts of Justice, publ. in 1865.

[1] See Greenleaf on Evidence, 15th ed., 1892, note to § 248.

[2] Thomas *v.* Rawlings, 1859.

[3] See MacCorquodale *v.* Bell, 1876.

[4] Friend *v.* L. C. & D. Rail. Co., 1877; Southwark, &c. Co. *v.* Quick, 1878, C. A.

[5] Cooper *v.* Metrop. Bd. of Works, 1883, C. A.

[6] Davies *v.* Waters, 1842; R. *v.* Upper Boddington, 1826; Chichester *v.* M. of Donegal, 1870 (Giffard, L.J.). See Few *v.* Guppy, 1830. Also, ante, § 458.

[7] See Cocks *v.* Nash, 1833 (Gurney, B.); Marston *v.* Downes, 1834; observed upon (Rolfe, B.) in Davies *v.* Waters, 1842.

[8] Davies *v.* Waters, 1842.

[9] See further post, § 921.

though the client be in no way before the court.[1] The rule which excludes hearsay prevents, indeed, this question from often arising with respect to mere oral communications, but it has nevertheless sometimes arisen on occasions when a solicitor has been called upon, either by subpœna duces tecum or otherwise, to produce a document with which he has been confidentially intrusted by some *stranger* to the suit. In such a case, if the solicitor claims the privilege of the client, he will be protected not only from producing the deed or other paper, but from answering any question with respect to its nature.[2] Moreover, although on several occasions the court has inspected the document, and pronounced upon its admissibility, according as its production has appeared to be prejudicial or not to the client,[3] yet in strict law, the judge ought not to look at the writing to see whether it is a document which may properly be withheld.[4] The protection exists where documents called for are in the hands of solicitors for the trustees of bankrupts[5]—solicitors, agents, steward or others—for instance. Where the client or principal would have been entitled, if called as a witness, to withhold a document, the solicitor, agent, or steward cannot be compelled, though he will be permitted, to produce it.[6] In such a case, however, if both the client and solicitor, or principal and agent, concur in refusing to produce a document, the party calling for it may give secondary evidence of its contents.[7]

§ 920.[8] This protection, though confined to communications between a client and his legal adviser,[9] extends to all the necessary organs by which such communications are effected; and therefore an *interpreter*,[10] or an *intermediate agent*,[11] is under the

[1] R. *v.* Withers, 1811 (Ld. Ellenborough).

[2] Volant *v.* Soyer, 1853. See, also, Bursill *v.* Tanner, 1885.

[3] 1 Ph. Ev. 175; Doe *v.* Langdon, 1848; Copeland *v.* Watts, 1815; Ditcher *v.* Kenrick, 1824; Doe *v.* Thomas, 1822.

[4] Volant *v.* Soyer, 1853.

[5] Lamg *v.* Barclay, 1821; Bateson *v.* Hartsink, 1801; Cohen *v.* Templar, 1817; Hawkins *v.* Howard, 1824; Corsen *v.* Dubois, 1816; Bull *v.* Loveland, 1830. It was at one time thought that the production in such cases was a matter of public duty. Pearson *v.* Fletcher, 1803 (Ld. Ellenborough).

[6] Hibbard *v.* Knight, 1848. See ante, § 458.

[7] Ditcher *v.* Kenrick, 1824 (Am.); R. *v.* Hunter, 1829. As to the cases where a witness may refuse to produce his deeds, or to disclose their contents, see ante, §§ 457—460.

[8] Gr. Ev. § 239, in part.

[9] Thomas *v.* Rawlings, 1858.

[10] Du Barré *v.* Livette, 1791, explained in Wilson *v.* Rastall, 1792, as reported 4 T. R. 756; Jackson *v.* French, 1829 (Am.); Andrews *v.* Solomon, 1816 (Am.); Parker *v.* Carter.

[11] Bustros *v.* White, 1876 (Jessel,

same obligation as the legal adviser himself; and if the legal adviser has communicated with such person, he will be as much bound to silence as if he had communicated directly with his client.[1] The rule also extends to a *solicitor's town or local agent*[2] (who is considered as standing in precisely the same situation as the solicitor) to a Scotch solicitor, and to a Scotch law agent practising in England;[3] and it also is applicable to a case submitted, after the institution of the suit, to a *foreign* counsel, and to his opinion thereon.[4] A barrister's or a solicitor's *clerk*, moreover, cannot be permitted to disclose facts coming to his knowledge in the course of employment, unless the barrister or solicitor himself might have been interrogated respecting them.[5] Where a person is sent abroad *by solicitors* to collect evidence respecting a pending suit, letters written by him either to the party himself or to his solicitors on the subject of the evidence are privileged communications.[6]

§ 921. It was said by Lord Cranworth,[7] that "there is no protection as to letters between parties themselves, or from a stranger to a party, merely because such letters may have been written in order to enable the person to whom they were addressed to communicate them in professional confidence to his solicitor,"[8] but it is submitted his lordship referred only to communications ante litem motam.

§ 922. As the privilege is established, not for the benefit of the

M.R.); Bunbury *v.* Bunbury, 1833; Walker *v.* Wildman, 1821; Hooper *v.* Gumm, 1862; Charlton *v.* Frowen, 1865; Jenkins *v.* Bushby, 1866; Reid *v.* Langlois, 1849 (Ld. Cottenham). See Doe *v.* Jauncey, 1837.

[1] Carpmael *v.* Powis, 1846 (Ld. Lyndhurst), recognising Walker *v.* Wildman, 1821.

[2] Parkins *v.* Hawkshaw, 1817 (Holroyd, J.); Goodall *v.* Little, 1851.

[3] Lawrence *v.* Campbell, 1859.

[4] Bunbury *v.* Bunbury, 1833.

[5] Taylor *v.* Forster, 1825 (Best, C.J.), cited with approbation in Foster *v.* Hall, 1831 (Am.), as reported in 12 Pick. 93; Foote *v.* Hayne, 1824; Chant *v.* Brown, 1851-2; Bowman *v.* Norton, 1831 (Tindal, C.J.); R. *v.* Upper Boddington, 1826 (Bayley, J.); Mills *v.* Oddy, 1834; Jackson *v.* French, 1829 (Am.).

[6] Steele *v.* Stewart, 1843-4; Cossey *v.* Lond. Bright. &c. Ry. Co., 1870; Lafone *v.* Falkland Islands Co., 1857; Hooper *v.* Gumm, 1862; Walsham *v.* Stainton, 1863; Ross *v.* Gibbs, 1869; Bullock *v.* Corry, 1878.

[7] See ante, § 918, and post, § 1705.

[8] Goodall *v.* Little, 1850-1; recognised (Ld. Truro) in Glyn *v.* Caulfield, 1851; and in Betts *v.* Menzies, 1857 (Wood, V.-C.). See, also, Smith *v.* Daniell, 1875, where an opinion, given confidentially and as a friend by Ld. Westbury on a case submitted to him, was ordered to be produced. But see Jenkins *v.* Bushby, 1866; and Hamilton *v.* Nott, 1873 (Malins, V.-C.).

solicitor, but for the protection of the client,[1] it extends to an executor in regard to papers coming to his hands as the personal representative of the solicitor.[2] If, however, a solicitor, in violation of his duty, voluntarily communicate to a stranger the contents of an instrument with which he was confidentially intrusted, or permit him to take a copy, the secondary evidence so obtained would, it seems, be admissible in case of notice to produce the original being duly given, and the production resisted on the ground of privilege.[3] Indeed,[4] it has more than once been laid down, that the mere fact that papers and other subjects of evidence have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, constitutes no valid objection to their admissibility, provided they be pertinent to the issue. For the court will not notice whether they were obtained lawfully or unlawfully, nor will it raise an issue to determine that question.[5]

§ 923. To protect communications, they must have been made to the legal adviser while he was either acting, or at least considered by the client as acting,[6] in that capacity. It is not, however,[7] required that there should have been any regular *retainer*, or any particular form of application or engagement, or the payment of any fees; it is enough if the legal adviser be, in any way, consulted in his professional character.[8] It would also seem that if a person be consulted confidentially, under the erroneous supposition that he is a lawyer, he cannot be compelled to disclose the matters communicated.[9] But where a prisoner in custody on a charge of forgery, wrote to a friend, requesting him "to ask Mr. G. or any

[1] Herring *v.* Clobery, 1842 (Ld. Lyndhurst).

[2] Fenwick *v.* Reed, 1816.

[3] Cleave *v.* Jones, 1852 (Parke, B.); Lloyd *v.* Mostyn, 1842 (id.), questioning contrary decision of Bayley, J., in Fisher *v.* Heming, 1809, cited 1 Ph. Ev. 170. In Lloyd *v.* Mostyn, Parke, B., likened the case to that of an instrument being stolen, and a correct copy taken, and asked whether it would not be reasonable to admit such copy? If the client sustains any injury from such improper disclosure being made, an action will lie against the solicitor. Taylor *v.* Blacklow, 1836.

[4] Gr. Ev. § 254A, in great part.

[5] Legatt *v.* Tollervey, 1811; Jordan *v.* Lewis, 1739-40; Doe *v.* Date, 1842; Com. *v.* Dana, 1841 (Am.).

[6] Smith *v.* Fell, 1841. There a communication was held to be privileged, which was made by a party to a solicitor, under the impression that the latter acceded to a request to act as his legal adviser.

[7] Gr. Ev. § 241, in part.

[8] Foster *v.* Hall, 1831 (Am.). See, also, Bean *v.* Quimby, 1829 (Am.).

[9] Calley *v.* Richards, 1854 (Romilly, M.R.), questioning Fountain *v.* Young, 1807 (Sir J. Mansfield).

other attorney" a question respecting the punishment of forgery, the letter was admitted in evidence, on the ground that it did not appear that the relation of attorney and client ever subsisted between Mr. G. and the prisoner.[1] If, too, a party were to go to a person not a solicitor to discount a forged note, or to raise money on a forged will, what passed at the interview would of course not be privileged.[2]

§ 924—5. It has long been established that, where the *client* himself is the *party interrogated*,[3] all communications between him and his solicitor, whether pending and with reference to litigation, or made before litigation and with reference thereto, or made after the dispute between the parties followed by litigation, though not in contemplation of, or with reference to, that litigation, are protected; as also are communications made respecting the subject-matter in question, pending, or in contemplation of, litigation on the same subject with other persons, with a view of asserting the same right.[4] Even communications which have passed between a client and solicitor *before any dispute* had arisen between the client and his opponent, are, it is now settled, privileged from production.[5]

[1] R. *v.* Brewer, 1834 (Park, J.).

[2] R. *v.* Farley, 1846. As to solicitors, see ante, § 912; post, § 929.

[3] See Macenam *v.* Macenam, 1862 (Crosswell, J.O.).

[4] Holmes *v.* Baddeley, 1844; Wigram, V.-C., in Ld. Walsingham *v.* Goodricke, 1843, citing Bolton *v.* Corp. of Liverpool, 1833; Hughes *v.* Biddulph, 1827; Goodall *v.* Little, 1850-1; Thompson *v.* Falk, 1852; Vent *v.* Pacey, 1830; Chigell *v.* Phillips, 1842; Combe *v.* Corp. of London, 1842. See, also, Woods *v.* Woods, 1844; Reece *v.* Trye, 1846; Adams *v.* Barry, 1843; Knight *v.* M. of Waterford, 1836; Curling *v.* Perring, 1835; Lyell *v.* Kennedy, 1883, H. L.; and Nias *v.* North. & East. Ry. Co., 1838. These cases overrule Preston *v.* Carr, 1826; and Newton *v.* Beresford, 1831. See Ld. Walsingham *v.* Goodricke, 1843, as reported, 3 Hare, 129.

[5] Minet *v.* Morgan, 1873; overruling Ld. Walsingham *v.* Goodricke, 1843, in which Wigram, V.-C., reluctantly submitted to Radcliffe *v.* Fursman, 1730. See, also, Pourtsdock *v.* Hammond, 1847; Hawkins *v.* Gathercole, 1850-51; Beadon *v.* King, 1849; and Greenlaw *v.* King, 1848, in which last case Ld. Langdale compelled a son and heir to discover a case, which had been submitted to counsel by his father, and had come with the estate to his hands. The contrary doctrine to that stated in the text was propounded in Radcliffe *v.* Fursman, 1730, by the House of Lords, at a time when the subject of professional confidence was not developed to the same extent as it is at the present day (per Wigram, V.-C., in Ld. Walsingham *v.* Goodricke, 1843, as reported, supra); but although Radcliffe *v.* Fursman was disapproved of by almost every judge under whose notice it was subsequently brought, and its principle was more than once successfully exposed and refuted (see Bolton *v.* Corp. of Liverpool, 1833 (Ld. Brougham); Pearse *v.* Pearse, 1846 (K.-Bruce, V.-C.); Walker *v.* Wildman, 1821; Preston *v.* Carr, 1826; Ld. Walsingham *v.*

§ 926. If a solicitor be *employed for two parties*, as for mortgagor and mortgagee, and peruse on behalf of the former his abstracts of the title, he cannot, as against him, disclose their contents;[1] and where a professional man was engaged by vendor and purchaser to prepare the deeds, and the draft conveyance was confidentially deposited with him by both parties, he was not allowed to produce it at the trial against the interest of the purchaser's devisees, though with the consent of the vendor.[2] If, however, a solicitor, acting as such for opposite parties, has an offer made to him by the one for the purpose of being communicated to the other, he may be called upon to disclose the nature and terms of this offer at the instance of either party.[3] Where two persons, having a dispute about a claim made by one of them upon the other, went together to a solicitor, when one of them made a statement, and instructed the solicitor to write a letter to a third party on the subject of the claim,—in a subsequent action between these two persons, both the statement and the letter were held admissible;[4] and if a wife be induced by her husband to deal with her separate interest under the advice of her husband's solicitor, the latter would naturally be regarded by the client as acting for both husband and wife, and, consequently, in the event of any dispute arising between the married couple, each party is entitled to call for the production, and to have full inspection, of all documents that may have come into the possession of the solicitor in the course of the transaction.[5] In all these cases the question would seem to be, was the communication made by the party to the witness in the character of his own

Goodricke, 1843; Bp. of Meath *v.* M. of Winchester, 1836, H. L.; Pearse *v.* Pearse, 1846. See, also, two articles in Law Mag. vol. xvii. pp. 51—74, and vol. xxx. pp. 107—123), it was still reluctantly followed till Selborne, L.C., had the hardihood to set it at nought in 1873, in the important case of Minet *v.* Morgan, 1876, *supra*; followed by Hall, V.-C., in Turton *v.* Barber, 1874; and in Bacon *v.* Bacon, 1876; and by C. P. D. in Mostyn *v.* West Mostyn Coal & Iron Co., 1876. See, also, Bullock *v.* Corry, 1878. The view of Selborne, L.C., also derives support from Wilson *v.* Northampton & Banbury Junction Rail. Co., 1872 (Malins, V.-C.); Manser *v.* Dix, 1855 (Wood, V.-C.); Macfarlan *v.* Rolt, 1872 (Wickens, V.-C.); and Culley *v.* Richards, 1854 (Romilly, M.R.).

[1] Doe *v.* Watkins, 1837. But see R. *v.* Avery, 1838, cited post, § 929.

[2] Doe *v.* Senton, 1834.

[3] Baugh *v.* Cradocke, 1832; Cleve *v.* Powel, 1832; Perry *v.* Smith, 1842; Reynell *v.* Spryo, 1846.

[4] Shore *v.* Bedford, 1843. See, also, Griffith *v.* Davies, 1833; and Weeks *v.* Argent, 1847.

[5] Wardo *v.* Wardo, 1851.

exclusive solicitor? If it was, the bond of secrecy is imposed upon the witness; if it was not, the communication will not be privileged.[1]

§ 927.[2] The protection does not cease with the termination of the suit, or other litigation or business, in which the communications were made; nor is it affected by the party's ceasing to employ the solicitor, and retaining another, nor by any other change of relation between them, nor by the solicitor's being struck off the rolls,[3] nor by his becoming personally interested in the property, to the title of which the communications related,[4] nor even by the death of the client. The seal of the law, once fixed upon the communications, *remains for ever*,[5] *unless it be removed either by the party himself*,[6] in whose favour it was placed, or perhaps, in the event of his death, by his personal representative;[7] and, therefore, if the client becomes a bankrupt, his trustee cannot waive the privilege without his particular permission.[8] Neither does the client waive his privilege by calling the solicitor as a witness, unless he also examines him in chief to the matter privileged;[9] and even in that case, it has been held, in Ireland, that the cross-examination must be confined to the point upon which the witness has been examined in chief.[10]

§ 928. When it is said that the privilege does not terminate with the death of the client, cases where disputes arise between the client's representatives and strangers, and those in which both the litigating parties claim under the client, must be distinguished. Where the litigation is between a client's representatives and strangers, the protection, doubtless, survives for the benefit of those who represent the client; but when it is between litigating parties

[1] Perry *v.* Smith, 1842 (Parke, B.); Reynell *v.* Sprye, 1846.

[2] Cr. Ev. § 243, in part.

[3] Ld. Cholmondeley *v.* Ld. Clinton, 1815.

[4] Chant *v.* Brown, 1849.

[5] Wilson *v.* Rastall, 1792 (Buller, J.); Parker *v.* Yates, 1827. But see Charlton *v.* Coomes, 1863 (Stuart, V.-C.).

[6] Merle *v.* More, 1826 (Best, C.J.); Baillie's case, 1778. If the client be willing, the court will compel the counsel to discover what he knows" (North, C.J., in Lea *v.* Wheatley, 1678). See, also, Blenkinsop *v.* Blenkinsop, 1848, and Chant *v.* Brown, 1849.

[7] Doe *v.* M. of Hertford, 1850.

[8] Bowman *v.* Norton, 1831 (Tindal, C.J.).

[9] Vaillant *v.* Dodemead, 1742; Waldron *v.* Ward, 1654; Bate *v.* Kinsey, 1834.

[10] M'Donnell *v.* Conry, 1843 (Ir.) (Richards, B.).

who both claim under the client, there is no reason why the privilege should belong to one side rather than to the other. Consequently, where the question was, whether certain executors were or were not trustees for the testator's next of kin, the evidence of the solicitor who prepared the will as to what had passed between him and the testator on the subject of the will, has been received on behalf of the next of kin.[1]

§ 929. Whether the protection can be removed without the client's consent, in cases where the interests of *criminal justice* require the production of the evidence, is a point upon which there are conflicting decisions.[2] The prevalent opinion (and it is expressed in the last edition of Greenleaf on Evidence as being the law in America[3]) appears to be that even the interests of criminal justice do not justify the production of evidence which is privileged.[4] But where a party having possessed himself of the title-deeds of a deceased person, placed a forged will of the deceased amongst them, and then sent the whole to his solicitor, ostensibly for the purpose of asking his advice upon them, but really, as it seemed, that the solicitor might find the will and act upon it,—the judges unanimously held, that the solicitor was bound to produce the will on such party's trial for forgery, it not having been intrusted to him in professional confidence, *even if that would have made any difference*.[5] Where, too, on a trial for forgery of a will,

[1] Russell *v.* Jackson, 1851 (Turner, V.-C.).

[2] R. *v.* Tylney, 1849. Where a party had intrusted a solicitor with a promissory note, and had instructed him to bring an action upon it, Holroyd, J., held that the solicitor ought not to produce the note, on the trial of a subsequent indictment against his client for forgery (R. *v.* Smith, 1822, cited in 1 Ph. Ev. 171; see, also, R. *v.* Hankins, 1849); and a similar decision appears to have been pronounced by the Court of King's Bench in the time of Ld. Mansfield (R. *v.* Dixon, 1765; see, also, Anon., 1811). On the other hand, Patteson, J., has compelled a solicitor, who had been employed by a mortgagor and mortgagee to negotiate a loan between them, and had received from the former a forged will as part of his title-deeds, to produce the will on a trial of the mortgagor for forging that instrument (R. *v.* Avery, 1838. In R. *v.* Tuffs, 1848, the learned judge admitted that the language which he, in the case cited, is reported to have used, to the effect that R. *v.* Smith, 1822, was not law, was too strong. See, also, ante, §§ 912, 923). But matrimonial proceedings are *civil* proceedings, though the question at issue may involve the sin of adultery. Branford *v.* Branford, 1879.

[3] Greenleaf on Evidence, 14th ed. (1892), § 243.

[4] But it must be remembered that no privilege can exist to protect it where crime is shown to exist. See R. *v.* Cox and Railton, 1884, ante, § 912.

[5] R. *v.* Hayward, 1846. See R. *v.* Jones, 1846; R. *v.* Brown, 1862; and R. *v.* Downer, 1880. Clearly the

it appeared that prisoner's wife had taken the will to a solicitor, and asked him to advance money upon it for her husband, but he refused to do this, and took a copy of the will, it was held that such copy was admissible as secondary evidence, and that the conversation between the wife and the solicitor was not privileged.[1]

§ 936.[2] The privilege of a solicitor does *not* exist in eight classes of cases, which are as follows:[3] (1) where the knowledge was not acquired by the solicitor *solely* by his being employed professionally, but was in some measure obtained by his acting as a *party* to the transaction, and the more especially so, if this transaction was fraudulent;[4] (2) or where the communication was made *before* the solicitor *was employed* as such, or *after* his employment had *ceased*; (3) or where, though consulted by a friend because he was a solicitor, he had refused to act as such, and was therefore only applied to *as a friend*; (4) or where the information was obtained, not exclusively from the client, but also from some other independent source;[5] (5) or where it could not be fairly stated that any communication had been made, as, for instance, where something that then took place became known to a professional adviser from his having been brought to a certain place by the circumstance of his being the professional adviser of a party, but *any other man*, if there, would have been *equally cognisant* of such fact;[6] (6) or where the matter communicated was *not in its nature private*, and

principle of the decision in R. *v.* Cox and Railton (ante, § 912), now would cover such a case as this.

[1] R. *v.* Farley, 1846. This case, however, is scarcely an authority on either side of the question; for the judges took the distinction that the solicitor consulted was not the prisoner's own legal advisor.

[2] Cir. Ev. § 244, in great part.

[3] Besides those here stated, there is the following exception. In taking a partnership account between solicitors, semble that the plaintiff is entitled to the discovery and production of papers material to the account, though they relate to professional business, and the effect of their production must be that some stranger will become acquainted with matters intrusted to the partners in confidence. Brown *v.* Perkins, 1843. This obviously rests on necessity, for otherwise no account could ever be taken between solicitors in partnership.

[4] In Follett *v.* Jefferyes, 1850, Rolfe, V.-C., said, "It is not accurate to speak of cases of fraud, contrived by the client and solicitor in concert together, as cases of exception to the general rule. They are cases not coming within the rule itself, for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence; and no court can permit it to be said that the contriving of a fraud can form part of the professional occupation of a solicitor." See, also, Charlton *v.* Coombes, 1863; and Kelly *v.* Jackson, 1849 (Ir.).

[5] Lewis *v.* Pennington, 1860 (Romilly, M.R.); Marsh *v.* Keith, 1860.

[6] Brown *v.* Foster, 1857, cited post,

could in no sense be termed the subject of a confidential disclosure;[1] (7) or where it had *no reference to professional employment*, though disclosed while the relation of solicitor and client subsisted;[2] (8) or where the solicitor, having made himself a *subscribing witness* and thereby assumed another character for the occasion, adopted the duties which it imposes, and became [illegible] to give evidence of all that a subscribing witness can be required to prove. In all such cases, it is plain that the solicitor is not called upon to disclose matters which he can be said to have learned by communication with his client, or on his client's behalf; matters which were so committed to him in his capacity of solicitor; and matters which in that capacity alone he had come to know.[3] The eight classes of cases may now be discussed in detail.

§ 931. The first of the cases just mentioned is where the solicitor has obtained his knowledge as a party. Thus, if a solicitor, having been engaged in a conspiracy, turn informer, he cannot be prevented from disclosing what he knows of the transaction, though he may have been employed by some of the guilty parties in his professional character, and have acquired much of his knowledge in consequence of that connection.[4] On the ground, too, that his knowledge was not obtained *merely* as a solicitor, disclosure has been compelled both of a confession made to a solicitor by his client before his retainer respecting an erasure in a will,[5] and also of a gratuitous conversation after the compromise of a suit in which the client stated that he was glad the action was settled, as the promissory note on which it was founded had been indorsed to him without consideration, and with notice that it was void as being

§ 934. Even such a matter as stated in the text has been held privileged in some of the cases.

[1] See Doe *v.* M. of Hertford, 1850.

[2] Goodall *v.* Little, 1851.

[3] Per Ld. Brougham, in Greenough *v.* Gaskell, 1833. See, also, Desborough *v.* Rawlins, 1838; Bolton *v.* Corp. of Liverpool, 1833; Annesley *v.* Ld. Anglesea, 1743 (Ir.).

[4] Greenough *v.* Gaskell, 1833, as reported 1 Myl. & K. 103, 104, 109 (Ld. Brougham). In Dublin *v.* Smith, 1792, usury in a mortgage was proved by the plaintiff's solicitor, who prepared the deed, and who was called by the defendant to prove the consideration usurious. The judge (Ld. Kenyon) who admitted this evidence assumed that the solicitor had, by his conduct, become a party to the transaction; but as the facts do not warrant this assumption, the case cannot be supported at the present day (see Ld. Brougham's remarks in Greenough *v.* Gaskell, 1833, as reported, 1 Myl. & K. 109, and also ante, § 929), so that it is only valuable as recognising the general principle, that if a solicitor acts as a party, no knowledge he obtains will be privileged.

[5] Cutts *v.* Pickering, 1672.

mixed up with a lottery transaction.[1] On the other hand, where a person, having possession of a deed in the character of trustee to the defendant, had first obtained a knowledge of its contents while acting as his solicitor, the knowledge thus obtained was held to be privileged;[2] and where a solicitor became a trustee under a deed for the benefit of his client's creditors, subsequent communications made to him by the client were held privileged.[3]

§ 932. The second class of cases in which a solicitor's knowledge is not privileged is where it was acquired *before* or *after* his professional employment. Accordingly, where a trustee for two parties had acted as solicitor for one, in certain disputes which had arisen between the two on the subject of the trusts, it was held that, inasmuch as he had been voluntarily placed in a situation inconsistent with his duty as trustee for both parties, the communications between him and his client were not privileged as against the other cestui que trust;[4] and a solicitor who had been confidentially consulted, but had not been professionally employed, because he was then acting as undersheriff, was held bound to disclose what had been communicated to him.[5] On the like ground[6] that the knowledge gained by him was not by reason of its being intrusted to him in his professional character, but merely by his being present at the conversation,[7] a witness called by the plaintiff has also been permitted to state a conversation, in which the defendant proposed a compromise to the plaintiff, although, when the conversation took place, the witness was attending as solicitor for the defendant. If, too, a solicitor, by the direction of his client, makes a proposal to the opposite party, he may be compelled to disclose what he stated to that party, though he cannot divulge what his client had communicated to him;[8] while if communications from an adverse party be made, either directly to the solicitor for the purpose of being communicated to the client,[9] or

[1] Cobden *v.* Kendrick, 1791.

[2] Davies *v.* Waters, 1842. There, the witness, as *trustee*, might equally have refused to state the contents of the deed, but it was objected in Banc that this point was not raised at Nisi Prius. See ante, § 918.

[3] Pritchard *v.* Foulkes, 1837.

[4] Tugwell *v.* Hooper, 1847.

[5] Wilson *v.* Rastall, 1792. See Calley *v.* Richards, 1854.

[6] Griffith *v.* Davies, 1833. See, also, Shore *v.* Bedford, 1843; Weeks *v.* Argent, 1847.

[7] Per Alderson, B., in Davies *v.* Waters, 1842.

[8] Per Parke and Patteson, JJ., 1833; commenting on and questioning Gainsford *v.* Grammar, 1809. See, also, Ripon *v.* Davies, 1833, and Reynell *v.* Spryo, 1840.

[9] Speneeley *v.* Schulenburgh, 1800.

to the client himself in the presence of the solicitor,[1] the solicitor is not at liberty to withhold them. A solicitor is indeed bound, it seems, to produce all letters, and to disclose all information, communicated to him from *collateral* quarters.[2]

§ 933. The third class of cases in which there is no privilege is where the solicitor has been consulted *as a friend* on matters of fact, and not as a *legal* adviser. In this case, he must disclose all questions put to him by his client as to *matters of fact*, as distinguished from those put with the view of obtaining *legal advice*, together with his answers thereto.[3] On a question[4] whether the client had committed an act of bankruptcy on a particular day on which he had inquired of his solicitor whether he could safely attend a particular meeting of his creditors without being arrested for debt, and by the solicitor's advice had remained in the latter's office for two hours to avoid being arrested, and till the solicitor returned from the meeting, even what had passed between the solicitor and his client was allowed to be given in evidence. Lord Tenterden observing,[5] that "a man could hardly ask, *as matter of law*, whether he would be free from arrest while attending a voluntary meeting of creditors, though he might well ask, *as matter of fact*, from the person at whose suggestion the creditors had been convened, whether any arrangement had been made with the creditors to prevent his arrest," and his lordship added, "The solicitor gives no *legal* advice, his answer implying that no arrangement had been made, but that he would see at the meeting whether

There the solicitor was held bound to discover the contents of a notice to produce documents, which he had received from the opposite solicitor. See, also, Ford *v.* Tennant, 1863 (Romilly, M.R.); Clore *v.* Bowser, 1851 (Parker, V.-C.); Paddon *v.* Winch, 1870 (James, V.-C.).

[1] Desborough *v.* Rawlins, 1838 (Ld. Cottenham).

[2] Thus, a communication between a solicitor and one of his client's witnesses as to the evidence to be given by the witness, is not privileged: Mackenzie *v.* Yeo, 1841. But, semble, a solicitor is not bound to produce the "proof" of a witness's evidence, which he had prepared for insertion in his counsel's brief (Bovill, C.J., in the Tichborne case, 28th Feb. 1872, MS.).

[3] Sawyer *v.* Birchmore, 1835 (Ld. Cottenham); Spenceley *v.* Schulenburgh, 1806; Desborough *v.* Rawlins, 1838.

[4] Bramwell *v.* Lucas, 1824; observed upon (Ld. Brougham) in Greenough *v.* Gaskell, 1833, as reported 1 Myl. & K. 113—115; and also (Ld. Cottenham) in Desborough *v.* Rawlins, 1838, as reported 3 Myl. & Cr. 520—522.

[5] Bramwell *v.* Lucas, 1824, as reported 2 B. & C. 749, 750. The case, however, seems very open to doubt *on the facts*.

any could be effected; and he recommends his client, not as a *legal adviser*, but as any agent or any friend might have recommended, to stay where he was till that matter of fact could be ascertained." The fourth class of cases in which no privilege exists, namely, where the solicitor's knowledge has come from an independent source, and not from the client, is so obvious that it does not require illustration.

§ 934. The fifth of the above class of cases in which there is no professional privilege, is where the legal advisor's knowledge of a fact was not communicated directly to him by his client, but he came to know of it during the progress of a trial, and it would have been equally known to any other man who had been present. For instance, where[1] counsel had attended before a magistrate on behalf of a man charged with embezzlement, when the prosecutor had produced a book, in which the accused, contrary to his duty, had omitted to enter a sum of money received by him, and which was on a subsequent examination found to contain the entry: it was held at a trial for malicious prosecution, that the counsel might give evidence that the entry was not in the book at the time of the first examination. Similarly, a solicitor may be called, either to prove his client's handwriting, though he be acquainted with it only from having seen him sign documents in the cause;[2] or to disclose the name of the person by whom he was retained, in order to let in the declarations and admissions of the real party in interest;[3] or to discover when and to whom he parted with his client's title-deeds, and in whose possession they are,[4] so as to let in secondary evidence of the contents. In the latter case the solicitor will be bound to answer whether the documents are in his possession or elsewhere in court, even though they may have been obtained from his client in the course of communication with reference to the cause.[5]

[1] Brown *v.* Foster, 1857. See, also, Wheatley *v.* Williams, infra, § 937A.

[2] Hurd *v.* Moring, 1824 (Abbott, C.J.); Johnson *v.* Daverno, 1821 (Am.).

[3] Bursill *v.* Tanner, 1885, C. A.; Levy *v.* Pope, 1829 (Parke, J.); Brown *v.* Payson, 1833 (Am.).

[4] Banner *v.* Jackson, 1847 (K. Bruce, V.-C.), reluctantly following Stanhope *v.* Knott, undated, and Kingston *v.* Gale, 1676.

[5] Dwyer *v.* Collins, 1852; Contes *v.* Birch, 1841; Bevan *v.* Waters, 1828 (Best, C.J.); Eicke *v.* Nokes, 1829; Roupell *v.* Haws, 1863 (Channell, B.).

§ 935. The sixth class of cases in which privilege was stated not to exist, is where the information is not in its nature private, or such that it can be considered as having been given in confidence. On this ground a legal advisor is (as we have just seen) bound to furnish his client's *name*,[1] and any information in his power as to his address, especially if the client be a ward in Chancery, who is attempting to conceal his residence from the court;[2] he may be called to identify his client as the person who has put in any pleading, or sworn any affidavit, because these acts, so far from being secrets, are in their very nature matters of publicity;[3] from one case it would even seem that he may be compelled to divulge the character in which his client employed him, as, for instance, whether as executor, or trustee, or on his own private account;[4] and a solicitor, who has prepared a will at the instance of a party benefited by it, is not privileged to withhold from the Probate Division of the High Court any facts which are connected with contemporaneous business transacted between the testator and himself on account of his client the legatee, when his opinion of the testator's capacity to make a will is in any degree founded on such facts.[5]

§ 936. The seventh class of cases as to which privilege cannot be claimed, was stated to be where the communications were not in their nature private, or made with reference to professional employment, and were, therefore, so far as professional relations were concerned, quite unnecessary. Accordingly a prosecutor's solicitor has been allowed to state that, pending the proceedings on the indictment, his client had observed to him that he would give a large sum to have the prisoner hanged;[6] and, in an action by a solicitor for his bill, where the question was whether he had been employed by the defendant or by a third party, a statement made by the plaintiff to his solicitor, on introducing such third party to

[1] Bursill *v.* Tanner, 1885, C. A.; ante, n. to § 934.

[2] Ramsbotham *v.* Senior, 1869 (Malins, V.-C.); Burton *v.* Ld. Darnley, 1869; Ex parte Campbell, 1870. But see Heath *v.* Crealock, 1873 (Bacon, V.-C.).

[3] B. N. P. 284, b; Studdy *v.* Sanders, 1823; Doe *v.* Andrews, 1778 (Ld. Mansfield); cited by Ld. Brougham in Greenough *v.* Gaskell, 1833, as reported 1 Myl. & K. 108, overruling R. *v.* Watkinson, 1739-40.

[4] Beckwith *v.* Benner, 1834 (Gurney, B.). It has, however, been held in America that counsel could not state whether they were employed to conduct an ejectment for their client, as *landlord of the premises*: Chirac *v.* Reinicker, 1826 (Am.).

[5] Jones *v.* Goodrich, 1844, P.C.

[6] Annesley *v.* Ld. Anglesea, 1743; Cobden *v.* Kendrick, 1791, cited ante, § 931.

him, was held not to be privileged.[1] The eighth, and last, class of cases in which communications are not privileged, arises where a solicitor *attests an instrument* which his client executes. In this event he may be compelled, either to prove the execution, or to disclose all that passed at that time, even though such evidence may establish the invalidity of the deed; for by voluntarily becoming a subscribing witness he makes himself a public man, and pledges himself to give evidence on the subject, whether he be called by the party by or to whom the deed is executed, or by any other person who claims an interest in the property.[2]

§ 937. Accordingly, where the assignees of a bankrupt, to establish that a conveyance made by a bankrupt to his son was fraudulent, called the bankrupt's solicitor, he was, as attesting witness to the deed, held bound to disclose what took place at the time of its execution.

§ 937A. In the case just cited, however, the very legal adviser who as an attesting witness was held not to be privileged, was also held to be privileged from stating what occurred during its concoction and preparation, and not liable to be asked whether it had not been subsequently destroyed, if the only knowledge he had, as to its concoction, preparation or destruction, was acquired from his confidential situation as solicitor.[3] Moreover, a legal adviser cannot disclose in what condition an instrument was when it was intrusted to him by his client, as whether or not it then were stamped, or indorsed, or had an erasure upon it;[4] nor even for what purpose his client brought it to him.[5]

§ 938.[6] We have now seen that the first class of persons who, on grounds of public policy, are privileged from disclosing communications made to them as such, are *husband and wife;* and that the second class of such persons consists of *legal advisers.* The third class of persons who are privileged on the grounds mentioned above, are *judges*, *arbitrators*, and *counsel*, persons who are not

[1] Gillard *v.* Bates, 1840. See, also, Caldbeck *v.* Boon, 1872 (Ir.).

[2] Doe *v.* Andrews, 1778; Robson *v.* Kemp, 1803; Crawcour *v.* Salter, 1881 (Malins, V.-C.); Sandford *v.* Remington, 1793.

[3] Robson *v.* Kemp, 1803 (Ld. Ellenborough).

[4] Wheatley *v.* Williams, 1836. Cf. Brown *v.* Foster, 1857, supra, § 934. See, also, R. N. P. 284. a; and Brown *v.* Payson, 1833 (Am.).

[5] Turquand *v.* Knight, 1836.

[6] Gr. Ev. § 249, in part.

compellable to testify as to matters in which they have been judicially or professionally engaged. They may, indeed, like ordinary persons, be called upon to speak to any foreign and collateral matters, which happened in their presence, while the trial was pending, or after it was ended.[1] It is considered dangerous, or at least highly inconvenient, to compel judges of courts of record to state what occurred before them in court; and on this ground the grand jury have been advised not to examine a chairman of quarter sessions, as to what a person testified in a trial in his court.[2] The general policy as to arbitrators is the same; and the courts will not disturb the deliberate decision of an arbitrator, by requiring him to disclose the grounds of his award, or what passed in his own mind when exercising his discretionary powers as to the matters submitted to him,[3] unless indeed under very cogent circumstances, such as upon an allegation of fraud; for *Interest reipublicæ ut sit finis litium*.[4] A judge or an arbitrator is, however, a *competent* witness, and may, by his own consent, be examined respecting the facts proved, or the matters claimed, at the trial or the reference.[5] Moreover, he may be asked questions as to what passed before him, and as to what matters were presented to him for consideration, or for the purpose of showing that, as a fact, he has exceeded his powers, as, for instance, by awarding compensation for injuries not included in the matters submitted to him.[6] Again, barristers cannot be forced to prove what was stated by them on a motion before the court.[7] The like privilege has been strenuously claimed, though not expressly recognised, where a counsel was called upon as a witness to disclose a confidential negotiation, into which, on behalf of his client, he had entered with a third party, though the client himself waived all objection to the course of examination proposed.[8]

§ 939.[9] The *fourth kind* of cases, in which evidence is excluded

[1] R. *v.* E. of Thanet, 1799; Pousford *v.* Swaine, 1861.
[2] R. *v.* Gazard, 1838 (Patteson, J.).
[3] Duke of Buccleuch *v.* Metropolitan Board of Works, infra.
[4] Johnson *v.* Durant, 1831; Ellis *v.* Saltau, 1808; Pousford *v.* Swaine, 1861; Story, Eq. Pl. §§ 599, 824, 825, n.; 2 Story, Eq. Jur. §§ 1457, 1498; Anon., 1748.
[5] Martin *v.* Thornton, 1796 (Ld. Alvanley).
[6] D. of Buccleuch *v.* Met. Board of Works, 1872, H. L.
[7] Curry *v.* Walter, 1796 (Eyre, C.J.).
[8] Baillie's case, 1778.
[9] Gr. Ev. § 250, in great part.

from motives of public policy, comprises *secrets of State*, or matters which concern the administration, either of penal justice, or of government, and the disclosure of which would be prejudicial to the public interest. The principle of the rule of exclusion is in both cases concern for public interest and the rule will accordingly be applied no further than the attainment of that object requires. The protection to State Papers afforded by this principle extends, it is almost needless to say, to applications for discovery, and there are many instances of such applications.[1] In accordance with these principles, the public prosecutor is, in a prosecution carried on by him, not obliged (unless so ordered by the judge) to state who set him in motion.[2] In Crown prosecutions, and in informations for frauds committed against the revenue laws, witnesses for the Crown *will not*, on cross-examination, *be permitted to disclose* either the names of their employers, or the nature of the connection between them, or the names of the persons from whom they received information, or the names of those to whom they gave information, whether such last-mentioned persons were magistrates, or actually concerned in the executive administration, or were only the channel through which the communication was made to Government.[3] Neither can a witness be asked whether he himself was the informer.[4] Eyre, L. C. J., said[5]: "It is perfectly right that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of which the detection is made, should not be unnecessarily disclosed."

§ 940. The protection of this rule will be upheld, though the witness, in his examination in chief, has admitted that suggestions have been made to him on the part of the Government.[6] The doctrine has been even carried so far, that a witness, who had consulted a private friend by whom he had been advised to communi-

[1] Hennesy *v.* Wright, 1888.
[2] Marks *v.* Beyfus, 1890, C. A.
[3] R. *v.* Watson, 1817; R. *v.* Hardy, 1794; 1 Ph. Ev. 178–180.
[4] Att.-Gen. *v.* Briant, 1846.
[5] Hardy's case, 1794.
[6] R. *v.* O'Connell, 1843 (Ir.). See, also, pp. 233, 240, of Arm. & T., where the general doctrine was recognized and acted upon.

cate his information to Government, was held by a majority of the judges unable to disclose the name of his friend,[1] the judges thinking[2] that all questions tending to the discovery of the channels by which the information was given to the officers of justice were, upon the general principle of public convenience, to be suppressed; that all persons in that situation were protected from the discovery; and that, if an objection were raised to the question, it was no more competent for the defendant to ask who had advised the witness to give information, than to ask to whom he had given it in consequence of that advice, or to put any other question respecting the channel of communication.[3] A witness may, however, be asked, whether the person to whom the information was communicated was a magistrate or not.[4]

§ 941. It may be doubted whether this rule of protection extends to ordinary prosecutions.[5] Even when it applies,—as it unquestionably does whenever the Government is directly concerned,—it may sometimes, if rigidly enforced, be productive of great individual hardship; since, where a witness is giving an account of what occurred at a distant period, it is obviously material to ascertain whether he gave substantially the same account recently after the transaction; and if the object be to shake the credit of the witness, it is equally important to know whether a communication, which he asserts that he made to a certain person, was, in fact, ever so made. On the other hand, it is absolutely essential to the welfare of the State, that the names of parties who interpose in situations of this kind should not be divulged; for otherwise,—be it from fear, or shame, or the dislike of being publicly mixed up in inquiries of this nature,—few men would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequence would be that many great crimes would pass unpunished.[6]

§ 942.[7] For the same reasons of public policy and in the further-

[1] R. *v.* Hardy, 1794 (Eyre, C.J., Hotham, B., and Grose, J., pro; Macdonald, C.B., and Buller, J., con.).

[2] Gr. Ev. § 250, in part.

[3] R. *v.* Hardy, 1794, as reported 24 How. St. Tr. 816 (Eyre, C.J.).

[4] Id. 808.

[5] Att.-Gen. *v.* Briant, 1846 (Pollock, C.B.); R. *v.* Richardson, 1863 (Cockburn, C.J.).

[6] Home *v.* Bentinck, 1820 (Dallas, C.J.); U. S. *v.* Moses, 1827 (Am.).

[7] Gr. Ev. § 252, in part.

ance of justice, the *proceedings of grand jurors* are regarded as privileged. Some imagine that a preliminary inquiry as to the guilt or innocence of a party accused ought to be secretly conducted.[1] At all events every grand jury is sworn to secrecy. One reason of this was to prevent the escape of the party, if he got to know that proceedings were in train against him; another is said to be, to secure freedom of deliberation and opinion among grand jurors. The first reason assigned is now met by the fact, that most crimes are primarily investigated by an open inquiry before the committing magistrate. The second supposed reason rests on an assumption of pusillanimity and meanness, which those who constitute the grand jury but little deserve. A third reason may possibly be to prevent an opportunity of the evidence given before the grand jury being contradicted before the petty jury by subornation of perjury.[2]

§ 943. The privilege extends not only to the grand jury themselves, but to their clerk,[3] if they have one, and to the prosecuting officer,[4] if present at their deliberations; all these being equally concerned in the administration of the same portion of penal law. On the prosecution of a witness for perjury committed before the grand jury, not only may a mere witness who was there and heard what was said give evidence,[5] but apparently so may the persons just enumerated. With this exception, however, they are not permitted to disclose what number of jurors were present when a case was brought before them, or the number or names of the jurors who agreed or refused to find the bill of indictment;[6] neither can they be called on the trial of the original indictment to explain their finding,[7] or to detail the evidence on which the accusation was

[1] In R. *v.* Ballard, 1872, Byles, J., observed, that "the grand jury were a secret tribunal, and not bound by any rules of evidence."

[2] See observations on grand juries, in Law Mag. vol. xxxi. pp. 242—251.

[3] 12 Vin. Abr. Ev. B. a. 5.

[4] So decided in America, Com. *v.* Tilden (undated) (Am.); M'Lellan *v.* Richardson, 1836 (Am.).

[5] Reg. *v.* Hughes, 1844.

[6] R. *v.* Marsh, 1837. See 4 Hawk. P. C. b. 2, c. 25, § 15. In America, grand jurors have been asked whether twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of that fact: M'Lellan *v.* Richardson, 1836 (Am.); Low's case, 1827 (Am.); Com. *v.* Smith, 1812 (Am.).

[7] R. *v.* Cooke, 1838 (Patteson, J.).

founded,[1] or to show that a witness has given testimony in court contrary to what he had sworn before them.[2]

§ 944.[3] The privilege extends to and excludes the testimony of *traverse* or *petty jurors*, when offered to prove *mistake* or *misbehaviour* by the jury in regard to the verdict.[4] Accordingly, on a motion to amend the postea by increasing the damages, the court refused to admit an affidavit sworn by all the jurymen, in which they stated their intention to have been to give the plaintiff such increased sum.[5] On several occasions, affidavits that verdicts have been decided by lot have been rejected on motions for new trials, whether such affidavits were sworn by individual jurymen,[6] or by strangers, stating the subsequent admissions of jurors to the

[1] See R. *v.* Watson, 1817 (Ld. Ellenborough); and R. *v.* Marsh, 1837, arg.; Hindekoper *v.* Cotton, 1831 (Am.); M'Lellan *v.* Richardson, 1836 (Am.); Low's case, 1827 (Am.); Burr's trial, about 1807 [Anon.], Ev. for deft. p. 2 (Am.).

[2] In England, the competency of a grand juror to testify in other than criminal cases as to what a witness said before the grand jury is doubtful. See Stephen's Evidence, art. 114. In some of the United States it has, however, been decided to be receivable. See Greenleaf on Ev., 15th edit. (1892), § 252; Carr *v.* Mead, 1858 (Am.); Jones *v.* Turpin, 1871 (Am.); State *v.* Wood, 1873 (Am.); Stattuck *v.* State, 1858 (Am.); Burdick *v.* Hunt, 1873 (Am.). In an action, however, for a malicious indictment, the plaintiff has twice been allowed to call one of the grand jury, in order to prove that the defendant was the prosecutor (Sykes *v.* Dunbar, 1800 (Ld. Kenyon); Freeman *v.* Arkell, 1823 (Park, J.)). As to criminal cases, Chitty (1st vol. of Crim. Law, p. 322), states that perjury before a grand jury is indictable, and refers to his vol. on Prec., which contains nothing on the subject. Christian, also, in a note to 4 Bl. Com. 126, narrates that, at York, a grand juror hearing a witness swear in court contrary to the evidence which he had given before the grand jury, told the judge, "and the witness was committed for perjury, to be tried upon the testimony of the gentlemen of the grand jury." What became of this case does not appear. By the N. York Cr. Code, § 267, "Every member of the grand jury must keep secret, whatever he himself, or any other grand juror may have said, or in what manner he, or any other grand juror, may have voted on a matter before them." § 268. "A member of the grand jury may, however, be required by any court to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining whether it is consistent with that given by the witness before the court; or to disclose the testimony given before them by any person, upon a charge against him for perjury in giving his testimony, or upon his trial therefor." This appears to be the common-sense view of the matter.

[3] Gr. Ev. § 252, in part.

[4] So, also, in America. See Greenleaf on Ev., 15th edit. (1892), § 252 *a*, and notes; Woodward *v.* Leavitt, 1871 (Am.); Rowe *v.* Carney, 1885 (Am.).

[5] Jackson *v.* Williamson, 1788.

[6] Vasie *v.* Delaval, 1785; Owen *v.* Warburton, 1805; Heyes *v.* Hindle, 1863; Little *v.* Larrabee, 1822 (Am.).

deponents,[1] or even stating that a declaration to this effect had been made by one juror in the hearing of his fellows in open court after the verdict had been pronounced[2]; and, so also in America, has a juryman's affidavit as to alleged conversations passing between him and another juror on their way to or from the court.[3] In all cases of this kind, the court must obtain their knowledge of the misconduct complained of, either from the officer who had charge of the jury,[4] or from some other person who actually witnessed the transaction.[5] But, although a juryman's affidavit of what occurred in the jury-box during the trial cannot be received, it is admissible to explain the circumstances under which he came into the box.[6]

§ 945. But a similar privilege is not extended to a clerk to the Property Tax Commissioners, who is bound to produce in a court of justice his official books, and to answer all questions respecting the collection of the tax, though sworn, on entering the office, not to disclose anything learnt in that capacity, without the consent of the Commissioners, or unless by force of some Act of Parliament.[7]

§ 946. On principles of public policy again, no witness,—whether a Peer, an M.P., an officer of either House, or a shorthand writer,—can be forced, without the permission of the House having been first obtained, to disclose in a court of justice what took place *within the walls of Parliament*, or to relate any expressions or arguments that may have been used by one of the members in the course of debate.[8] Although he may probably be asked as to the fact, he may decline to answer any question as to whether or not a member spoke upon a particular subject of discussion,[9] or as to what he said, or as to the manner in which votes were given on a division.[10]

§ 947.[11] On grounds of public policy, too, official transactions between the *heads of the departments of Government and their subor-*

[1] Straker *v.* Graham, 1839; The State *v.* Freeman, 1824 (Am.); Meade *v.* Smith, 1844 (Am.).
[2] Burgess *v.* Langley, 1843; Raphael *v.* Bk. of England, 1855.
[3] Comm. *v.* White, 1878 (Am.).
[4] Burgess *v.* Langley, 1843, as reported 5 M. & Gr. 725 (Cresswell, J.).
[5] Vasie *v.* Delaval, 1785 (Ld. Mansfield).
[6] Bailey *v.* Macaulay, 1849.
[7] Lee *v.* Birrell, 1820 (Ld. Ellenborough).
[8] Plunkett *v.* Cobbett, 1804 (Ld. Ellenborough); Chubb *v.* Salomons, 1852 (Pollock, C.B.).
[9] Plunkett *v.* Cobbett, 1804.
[10] Chubb *v.* Salomons, 1852.
[11] Gr. Ev. § 251, in great part.

dinate officers, are, in general, treated as *secrets of State*.[1] Thus, communications between a colonial governor and his attorney-general, on the condition of the colony or the conduct of its officers,[2] or between such governor and a military officer under his authority;[3] the report of a military commission of inquiry, made to the commander-in-chief;[4] the report of a collision at sea, made by the captain of one of the ships to the Lords Commissioners of the Admiralty;[5] the report submitted to the Lord Lieutenant of Ireland by an Inspector General of the prisons;[6] and the correspondence between an agent of the Government and a Secretary of State;[7] or between the Directors of the East India Company and the Board of Control, under the old law;[8] or between an officer of the Customs and the Board of Commissioners;[9] or dispatches between a Secretary of State for the Colonies and a Colonial Governor;[10] or a report by an officer of Inland Revenue,[11] are confidential and privileged matters, the disclosure of which the interests of the State will not permit to be enforced. Until recently, there existed, however, no[12] instance of a document being held protected from production unless it contained a communication made *by* one officer of State to another officer of State in the course of official communication between them on a matter of public business. But the Court of Appeal have recently held[13] that a communication which it can see is to be one *to* a Government Department is also protected from production as being a State secret if a Minister, or the Head of the Department, sees fit to claim such protection for

[1] Hennesy *v.* Wright, 1888. By the N. York Civ. Code, § 1710, r. 5, "a public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure."

[2] Wyatt *v.* Gore, 1816.

[3] Cooke *v.* Maxwell, 1817.

[4] Home *v.* Bentinck, 1820; Beatson *v.* Skene, 1860; Dawkins *v.* Ld. Rokeby, 1873.

[5] H.M.S. Bellerophon, 1874.

[6] M'Elveney *v.* Connollan, 1864 (Ir.).

[7] Anderson *v.* Hamilton, 1816; Cooke *v.* Maxwell, 1817 (Ld. Ellenborough, cited by the Att.-Gen.); Stace *v.* Griffith, 1869; Marbury *v.* Madison, 1803 (Am.).

[8] Smith *v.* E. India Co., 1841; Rajah of Coorg *v.* East India Co., 1856; Wadeer *v.* E. India Co., 1856.

[9] Black *v.* Holmes, 1822 (Ir.).

[10] Hennessey *v.* Wright, 1888.

[11] Hughes *v.* Vargas, 1893, C. A.

[12] Blake *v.* Pilford, 1832 (Taunton, J.), is not an authority that such a document is *not* privileged, but is properly explicable according to the C. A. on the ground mentioned below.

[13] Latter *v.* Goolden, 10th Nov. 1894, C. A.; unreported, but in which the editor was counsel.

it, and this even though he gives reasons for the claim which are founded on grounds of convenience rather than of State policy. According to the Court of Appeal,[1] the minister to whose department a document belongs, or the head of a department in whose custody it is, is the exclusive judge as to whether such document is or is not protected from production on grounds of State policy, and if he claims such protection the court will not go behind the claim, or inquire whether the document be or be not one which can properly be the subject of such a claim. Notwithstanding these decisions it may, however, be[2] that if a minister or head of a department, instead of attending at the trial personally, sent the required papers by the hands of a *subordinate* officer, the judge would examine them himself and compel their production, unless he were satisfied that they ought, on public grounds, to be withheld.

§ 947A. In America the President of the United States, and the Governors of the several States, are not bound to produce papers or disclose information communicated to them, when, in their own judgment, the disclosure would, on public considerations, be inexpedient.[3] And the same doctrine, as it would seem, prevails in England, whenever ministers of State are called as witnesses for the purpose of producing public documents.[4]

§ 948. When the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary evidence of their contents.[5] In an action of trespass against the governor of a colony, a military officer under his con-

[1] Namely, Hughes *v.* Vargas, 1893, C. A., ubi supra, and Latter *v.* Goolden, 10th Nov. 1894, C. A., ubi supra. In Latter *v.* Goolden the protection was successfully claimed by the head of the department for a letter containing a character written to the authorities at the Mint, though he only said that it was a confidential document, and that as the Civil Service Commissioners received some 20,000 characters a year, Government would be much inconvenienced if the production of any of them could be enforced in a Court of Law, and did not suggest that public policy (as such) would be in any way affected by the production of the particular document.

[2] As suggested in Beatson *v.* Skene, 1860. See, also, Dickson *v.* Earl of Wilton, 1859 (Ld. Campbell), discussed in Dawkins *v.* Ld. Rokeby, 1873.

[3] 1 Burr's trial, about 1807 (Am.) (Marshall, C.J.); Gray *v.* Pentland, 1815 (Am.).

[4] Beatson *v.* Skene, 1860.

[5] Gray *v.* Pentland, 1815 (Am.) (Tilghman, C.J.), cited with approbation in Yoter *v.* Sanno, 1837 (Am.) (Gibson, C.J.). See, also, Stace *v.* Griffith, 1869; and ante, § 918.

trol may, however, be asked in general terms, whether he did not act by the direction of the defendant, though the written instructions cannot be given in evidence.[1]

§ 948A. The objection that a document is protected from production as being a "State document" cannot, however, be given effect to unless it be taken by the proper officer of the Government himself (*i.e.*, a minister or head of a department), who may not have counsel to argue in support of his objection. The claim that a document is protected as a State document is not available to either of the parties to the action.[2]

§ 949.[3] There is a *fifth* kind of evidence which the law excludes, on public grounds, namely, that which involves the *unnecessary* disclosure of matter that is *indecent*, or offensive to public morals, or *injurious to the feelings of third persons*. A disclosure is for this purpose "unnecessary" whenever the parties themselves have no interest in the matter, except what they have impertinently created. The mere indecency of disclosures will not exclude them, where the evidence is *necessary* for the purpose of civil or criminal justice; as, on an indictment for a rape; or on a question upon the sex of one claiming an estate tail, as heir male or female; or upon the legitimacy of one claiming as lawful heir; or on a petition for dissolution of marriage, for judicial separation, or for damages on the ground of adultery.[4] But where the parties have impertinently interested themselves in a question, tending to violate the peace of society by exhibiting an innocent third person in a ridiculous light, or to disturb his peace and comfort, or to offend public decency by the disclosures which its decision may require, the evidence will not be received. Of this sort are wagers[5] or contracts respecting the sex of a third person,[6] or upon the question whether an unmarried woman has had a child.[7]

[1] Cooke *v.* Maxwell, 1817 (Bayley, J.).

[2] Blake *v.* Pilfold, 1832 (Taunton, J.), as explained by C. A. in Latter *v.* Goolden, 1894, supra.

[3] Cr. Ev. § 253, almost verbatim.

[4] See 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), §§ 16, 27, 33.

[5] No wager is now recoverable, 8 & 9 V. c. 109 ("The Gaming Act, 1845"), § 18; 55 V. c. 4 ("The Betting and Loans (Infants) Act, 1892). See Higginson *v.* Simpson, 1877; Diggle *v.* Higgs, 1877; Hampden *v.* Walsh, 1876; Read *v.* Anderson, 1884, C. A.; Trimble *v.* Hill, 1879, P. C.

[6] Da Costa *v.* Jones, 1778.

[7] Ditchburn *v.* Goldsmith, 1845. If the subject of the action is frivolous, or the question impertinent, and this is apparent on the record, the court will not proceed at all in

§ 950. In like manner, when the legitimacy of a child born in wedlock is the question in dispute, the testimony of the parents, that they have or have not *had connexion*, has,—on the same grounds of decency, morality, and policy,—until recent times, been uniformly rejected by the judges.[1] This rule has not[2] been superseded,[3] and it excludes not only all direct questions respecting access, but all questions which have a tendency to prove or disprove that fact, unless they are put with a view to some different point in the cause;[4] and it applies to the depositions of the parents equally with their vivâ voce testimony.[5] Neither is it affected by the circumstance, that, at the time of the examination of one of the parents, the other is dead; because the rule has been established on the broad basis of general public policy.[6] But it does not exclude statements by its deceased mother that a child is a bastard.[7] Nor does it preclude the parents from proving that their supposed marriage was either invalid,[8] or valid,[9] or that their children were born before or after its celebration, though the effect of such evidence is, in the first and third cases, to bastardize the issue, and, in the others, to establish its legitimacy.[10] For this purpose, too, their declarations or their old answers in Chancery are admissible evidence.[11] On the other hand, a father cannot be heard to contradict his own admissions of access.[12]

the trial. Brown *v.* Leeson, 1792; Henkin *v.* Gerss, 1810. But see Hussey *v.* Crickett, 1811.

[1] Goodright *v.* Moss, 1777; Legge *v.* Edmonds, 1855; Cope *v.* Cope, 1833 (Alderson, B.); Wright *v.* Holdgate, 1850 (Cresswell, J.); R. *v.* Luffe, 1807; R. *v.* Rook, 1752; R. *v.* Reading, 1734; R. *v.* Mansfield, 1841; Anon. *v.* Anon., 1856; Com. *v.* Shepherd, 1814 (Am.). See ante, § 649.

[2] In re Walker, In re Jackson, 1885, following Guardians of Nottingham *v.* Tomkinson, 1879; followed Burnaby *v.* Baillie, 1889. See, also, Aylesford Peerage case, 1885, H. L.

[3] By either 32 & 33 V. c. 68 (cited post, § 1355), or by two modern decisions, which were at one time supposed to have this effect, namely, In re Rideout's Trusts, 1870; Re Yearwood's Trusts, 1877 (Hall, V.-C.).

[4] Wright *v.* Holdgate, 1850; R. *v.* Sourton, 1836, where, to prove non-access, the father was asked whether, at a particular time, he did not live with her sister 100 miles away from his wife; it was held that this question could not be put.

[5] Goodright *v.* Moss, 1777 (Ld. Mansfield); Cope *v.* Cope, 1853 (Alderson, B.); Atchley *v.* Sprigg, 1864; Re R——'s Trusts, 1870 (Kindersley, V.-C.), explaining Plowes *v.* Bossey, 1862; Inglis *v.* Inglis and Allen, 1867.

[6] R. *v.* Kea, 1809.

[7] Ulverstone Union *v.* Park, 1889. See, also, Bunsby *v.* Baillie, 1889.

[8] In re Dareys, 1860 (Ir.).

[9] R. *v.* Bramley, 1795; Standen *v.* Standen, 1791.

[10] Goodright *v.* Moss, 1777, and the cases referred to in Ld. Mansfield's judgment.

[11] Id.

[12] The Aylesford Peerage case, 1885, H. L.

§ 951. In a bastardy case, too, a married woman may, when the fact of her husband's non-access has already been proved by independent evidence, confess her adulterous connexion with another person, and thus enable the justices, in the event of her testimony being corroborated in some material particular,[1] to make the order of maintenance.[2] But this exception to the general rule of exclusion is founded on necessity; since the fact, to which she is permitted to testify, is probably within her own knowledge and that of the adulterer alone.[3] Moreover, in an action against a husband for necessaries supplied to his wife while living alone, the wife is an admissible witness for the defendant to prove that she has committed adultery, and that, consequently, he is not responsible for her maintenance.[4] Such evidence is strictly legal, however open to comment, not only as coming from a polluted source, but as the possible result of collusion between the husband and the wife for the purpose of defeating the plaintiff's claim.[5]

[1] 35 & 36 V. c. 65 ("The Bastardy Laws Amendment Act, 1872"), § 4; 36 V. c. 9 ("The Bastardy Laws Amendment Act, 1873"), § 5; 8 & 9 V. c. 10 ("The Bastardy Act, 1845"), § 6.

[2] R. *v.* Reading, 1734; Cope *v.* Cope, 1853; Legge *v.* Edmonds, 1855.

[3] R. *v.* Luffe, 1807 (Ld. Ellenborough).

[4] Cooper *v.* Lloyd, 1859.

[5] Id. (Willes, J.).

AMERICAN NOTES.

Privileged Matters. — As stated in the text (§ 908), the policy of the law refuses to compel, and frequently even to permit evidence of certain facts to be given, by persons standing in certain relationships to the source of information of the facts in question.

Marital Confidence. — Among the facts excluded are confidential communications between husband and wife made during coverture. Chicago, &c., R. R. *v.* Ellis, 52 Kans. 41 (1893); Phenix, &c., Ins. Co. *v.* Shoemaker (Tenn.), 31 S. W. 270 (1895).

Neither party can be compelled to testify to such communications. If a husband, however, makes a voluntary disclosure, he can be compelled to make it full and complete. State *v.* Turner, 39 S. C. 414 (1892).

A prosecutor cannot be asked, on cross-examination, whether he did not tell his wife that the prisoner acted in self-defence, as being "what the law considers a confidential communication, and which he was not bound to disclose." Murphy *v.* Com., 23 Gratt. 960 (1873); and frequently the courts have refused to permit such evidence to be given. Jenne *v.* Marble, 37 Mich. 319, 322 (1877); Moore *v.* Wingate, 53 Mo. 398, 408 (1873).

In an action for assault and battery private communications between the defendant and his wife are not competent, unless shown to be so for special reasons. Mechelke *v.* Bramer, 59 Wis. 57 (1883).

A husband in an action for divorce cannot "testify as to any facts derived by him from the confidential relation of husband and wife." Castello *v.* Castello, 41 Ga. 613 (1871).

"Privileged communications" are not limited to verbal statements of a husband or wife. The exclusion extends to acts done in presence of the other at private and confidential interviews. Perry *v.* Randall, 83 Ind. 143 (1882). Husband and wife can testify to offences against each other. Bramlette *v.* State, 21 Tex. App. 611 (1886). Husband and wife cannot testify that a certain transfer of money from one to the other was a loan, for that implies a promise to pay, which cannot be proved by a private conversation between the parties. Brown *v.* Wood, 121 Mass. 137 (1876). The testimony of one to whom the married couple admitted the fact of a loan "was even more objectionable." *Ibid.*

The rule extends even to the fact that in the confidential intercourse of husband and wife a certain statement was *not* made. "What transpired between her and her husband, (whether positively by way of communication, or negatively by way of silence,) in the privacy and confidence of the marriage relation, is sacred." Goodrum *v.* State, 60 Ga. 509 (1878).

Letters between husband and wife, including the envelopes and the evidence furnishable by postmarks, addresses, &c., are privileged. Selden *v.* State, 74 Wis. 271 (1889).

The prohibition extends to facts learned from the other party in the intimacy of married life. "It is . . . admitted in all the cases, that the wife is not competent . . . to disclose that which she has learned from him in their confidential intercourse." Stein *v.* Bowman, 13 Pet. 209, 222 (1839).

Not all private communications between husband and wife are excluded. The rule applies merely to those which are made under the seal of marital confidence. For example, a communication between husband and wife relating to the affairs of an estate of which they are joint trustees is not privileged. Wood *v.* Chetwood, 27 N. J. Eq. 311 (1876).

So of other business communications between husband and wife. Southwick *v.* Southwick, 9 Abb. (N. Y.), Prac. N. S. 109 (1870).

The prohibition applies after the married couple have been divorced. Perry *v.* Randall, 83 Ind. 143 (1882); Crose *v.* Rutledge, 81 Ill. 266 (1876); Cook *v.* Grange, 18 Ohio, 526 (1849); Buckingham *v.* Roar, 45 Neb. 244 (1895).

And even after one of them has died. "A widow, though competent as a witness, cannot be allowed to testify as to confidential conversations from her husband. This sort of testimony is excluded on the ground of public policy." Spradling *v.* Conway, 51 Mo. 51 (1872).

"Communications between husband and wife are protected forever. This is necessary to the preservation of that perfect confidence and trust which should characterize and bless the relation of man and wife. Each must feel that the other is a safe and sacred depository of all secrets. And the protection which the law holds over the dead, is the very source of greatest security to all the living." Lingo *v.* State, 29 Ga. 470, 483 (1859); Walker *v.* Sanborn, 46 Me. 470 (1859); Pillow *v.* Thomas, 1 Baxter (Tenn.), 120, 129 (1873).

A qualification, not perhaps sufficiently observed in Lingo *v.* State (*ubi supra*), is that the excluded fact must have been learned in a confidential way from the other party. Where a widow had learned a fact, simply because she chanced to be present, she may testify to it. Walker *v.* Sanborn, 46 Me. 470 (1859); Litchfield *v.* Merritt, 102 Mass. 520 (1869); Griffin *v.* Smith, 45 Ind. 366 (1873).

The statutes allowing husband and wife to testify for or against each other have not modified the rule as to confidential communications. Robinson *v.* Chadwick, 22 Oh. St. 527 (1872); Keator *v.* Dimmick, 46 Barb. 158 (1865).

Limitations of the Rule. — The rule does not proceed upon

any idea that the private communications between married people are peculiarly sacred *per se*. It is based upon an apprehension of the consequences liable to follow if either of the parties could testify to such communications. No privilege inheres in the subject-matter.

A confidential communication to a woman who erroneously supposed she was married to the speaker is not privileged. Cole *v.* Cole, 153 Ill. 585 (1894).

If an eavesdropper overhears such a communication he can testify to it, if relevant. "There is no rule of law," say the supreme judicial court of Massachusetts, "requiring that third persons who hear a private conversation between husband and wife shall be restrained from introducing it in their testimony." Com. *v.* Griffin, 110 Mass. 181 (1872); State *v.* Center, 35 Vt. 378 (1862).

Where a third person is present at a conversation between husband and wife, such person can state the conversation. Allison *v.* Barrow, 3 Cold. 414 (1866); Gannon *v.* People, 127 Ill. 507 (1889); State *v.* Gray, 55 Kans. 135 (1895).

The presence of young children of a family, taking no part in and paying no attention to a conversation in their presence between husband and wife, does not prevent the conversation from being private. Jacobs *v.* Hesler, 113 Mass. 157 (1873).

For the same reasons, the presence of a daughter fourteen years old at a conversation between her parents, in which she naturally would take an interest, makes the conversation competent. Lyon *v.* Prouty, 154 Mass. 488 (1891).

It is within the reasoning on which the rule is founded, that where a private letter from a husband to his wife fell into the possession of a third person, not agent or representative of husband or wife, the latter may produce it in evidence. State *v.* Hoyt, 47 Conn. 518, 540 (1880); State *v.* Buffington, 20 Kans. 599, 613 (1878).

Where a wife turns over to a paramour a confidential letter from her husband, the paper is still privileged. "We are aware that there are respectable authorities holding that a privileged oral communication may be given in evidence by one who overheard it, though an eavesdropper; or that a privileged written communication, purloined from the proper custodian of it, may be received in evidence. In such instances, however, the parties to the privileged communication do not themselves successfully make and keep it private; but where this result is accomplished, the law will not permit either of the parties, directly or indirectly, to violate the confidence of the other. In respect to documents, there is a difference between those which are confidential in their own nature, such as letters between husband and wife, and those which become confidential by custody, such as papers deposited by

a client with his attorney. The law, for reasons of its own, desires that all communications between husband and wife shall be absolutely free and untrammelled, and that each may say or write whatsoever he or she pleases to the other, with the absolute assurance that the one receiving the communication will neither be compelled nor permitted to disclose it. We therefore think it the wiser and better course to adhere strictly to the declared policy of our law, and to hold that this letter was properly rejected, however important it may be in the determination of this case." Wilkerson *v.* State, 91 Ga. 729, 738 (1893).

To the contrary effect is People *v.* Hayes, 70 Hun, 111 (1893). "A letter, also, written confidentially by husband to wife is admissible against the husband when brought into court by a third party." *Ibid.*

The same rule is prescribed by statute in certain states. Pub. Stats. Mass. Chap. 169, § 18, cl. 1. Com. *v.* Cleary, 152 Mass. 491 (1890).

Communications between Attorney and Client. — Upon necessary grounds of public policy for furthering the adequate administration of justice, the intercourse between attorney and client is privileged from disclosure on the witness stand. An attorney is forbidden to testify as to such facts as he may learn from his client by virtue of his professional relation. Chirac *v.* Reinicker, 11 Wheat. 280 (1826); Sargent *v.* Hampden, 38 Me. 581 (1854); Huster *v.* Davis, 3 Yeates, 4 (1800); Maxham *v.* Place, 46 Vt. 434 (1874); Jenkinson *v.* State, 5 Blackf., 465 (1840); Forsyth *v.* Charlebois, 12 L. C. Jur. 264 (1868); Parker *v.* Carter, 4 Munf. 273, 236 (1814); State *v.* Sterrett, 68 Ia. 76 (1885); Bondy *v.* Valois, 15 Rev. Lég. 63 (1887); Chew *v.* Farmers' Bank, 2 Md. Chan. 231 (1848); Erickson *v.* R. R. Co., 93 Mich. 414 (1892); State *v.* Calhoun, 50 Kans. 523 (1893); Austin *v.* Heiser, (S. Dak.) 61 N. W. 445 (1894).

The element of confidence is one essential to the existence of the privilege. Howard *v.* Copley, 10 La. Ann. 504, 505 (1855). Therefore communications by an attorney by one having only a nominal interest in a case are not privileged. Adams *v.* Harrison, 30 Vt. 219 (1858).

The rule applies to all cases where legal advice is sought. It is not necessary that the advice should relate to a suit in court. Borum *v.* Fouts, 15 Ind. 50 (1860).

"On the whole we are of opinion, that although this rule of privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly, yet still, whether we consider the principle of public policy upon which the rule is founded, or the weight of authority by which its extent and limits are fixed, the rule is not strictly confined to communications made for the

purpose of enabling an attorney to conduct a cause in court, but does extend so as to include communications made by one to his legal adviser, whilst engaged and employed in that character, and when the object is to get his legal advice and opinion as to legal rights and obligations, although the purpose be to correct a defect of title, by obtaining a release, to avoid litigation by compromise, to ascertain what acts are necessary to constitute a legal compliance with an obligation, and thus avoid a forfeiture or claim for damages, or for other legal and proper purposes, not connected with a suit in court." Foster *v.* Hall, 12 Pick. 89 (1831).

But it is necessary that the attorney should be acting in his paid professional capacity. Where he is acting to oblige a neighbor with no retainer or expectation of payment, the communications are not privileged. Coon *v.* Swan, 30 Vt. 6 (1856). "The communications must have been of a confidential and professional character, to bring them within the reason of the rule." *Ibid.* Rudd *v.* Frank, 17 Ont. 758 (1889); Patten *v.* Glover, 1 App. D. C. 466 (1893).

The actual payment of a retainer is, however, not essential. Orton *v.* McCord, 33 Wis. 205 (1873); Cross *v.* Riggins, 50 Mo. 335 (1872); Mowell *v.* Van Buren, 77 Hun, 569 (1894).

To the contrary effect, see De Wolf *v.* Strader, 26 Ill. 225 (1861).

Where an attorney is acting for both parties, no privilege exists. Sparks *v.* Sparks, 51 Kan. 195 (1893); Goodwin, &c., Co.'s Appeal, 117 Pa. St. 514, 537 (1888); Hebbard *v.* Haughian, 70 N. Y. 54 (1877). As where acting for two parties against a third, he is asked to testify in a suit between his two original clients. Rice *v.* Rice, 14 B. Monr. 417 (1854).

Or where an attorney acts as referee for both parties. Cady *v.* Walker, 62 Mich. 157 (1886). "Neither made, or was expected to make, any communication which was to be concealed from the other." *Ibid.*

The rule is the same, though the original consultation was by one of the parties as to a deed from himself for the benefit of the other. Gulick *v.* Gulick, 38 N. J. Eq. 402 (1884).

"Where several persons employ the same attorney in the same business, communications made by them in relation to such business, while privileged as to their common adversary, are not privileged *inter sese*." Seip's Estate. Probst's Appeal. 163 Pa. St. 423 (1894).

"Where both parties are present the general rule cannot apply, for the element which gives vitality to the rule does not exist. The authorities are abundant and harmonious upon this question, for it is agreed on every hand that communications made to one who is acting for both parties are competent and cannot be considered as privileged." Hanlon *v.* Doherty, 109 Ind. 37 (1886); Britton *v.* Lorenz, 45 N. Y. 51 (1871).

The rule extends to documents intrusted by a client to his attorney. "The prisoner has the privilege to prevent the disclosure of communications which he may have made to his counsel in the course of professional employment; and if papers have, under such circumstances, been placed by the former in the possession of the latter, they are considered as privileged. It is true, that the counsel may be permitted to give evidence of such matters, connected with the transaction, when his knowledge is derived *aliunde;* but the line of distinction must not be lost sight of, in admitting the evidence before the jury." State *v.* Hazleton, 15 La. Ann. 72 (1860); Crosby *v.* Berger, 11 Paige, 377 (1844); Freeman *v.* Brewster, 93 Ga. 648 (1894).

And to an answer in a Chancery suit which has not been filed. Neal *v.* Patten, 47 Ga. 73 (1872).

An attorney cannot be asked in what condition one of his client's papers was at a certain time. Dietrich *v.* Mitchell, 43 Ill. 40 (1867); Brown *v.* Payson, 6 N. H. 443 (1833); Coveney *v.* Tannahill, 1 Hill, 33 (1841); Matthews *v.* Hoagland, 48 N. J. Eq. 455 (1891); Arbuckle *v.* Templeton, 65 Vt. 205 (1892).

But see to a contrary effect, Turner *v.* Warren, 160 Pa. St. 336 (1894).

Confidential letters between attorney and client relating to legal business are privileged. Higbee *v.* Dresser, 103 Mass. 523 (1870); Ebersole *v.* Rankin, 102 Mo. 488 (1890); Nelson *v.* Becker, 32 Neb. 99 (1891).

Where A. writes to the attorney of his opponent B., on a professional subject, supposing him to be open to a retainer, B. cannot use the letters against A. Nelson *v.* Becker, 32 Neb. 99 (1891). But where a legatee asks the lawyer of the testator to use his influence with the testator for the legatee the communication is not privileged, even if the legatee has previously employed the attorney in some small matters. Turner's Estate, 167 Pa. St. 609 (1895).

In other words, the communications to be privileged must be *confidential.* Where a non-resident debtor sent a proposition of compromise to his creditors through a resident solicitor, it was held that the letter was not privileged. "Communications of such a character, made for such a purpose, and so dealt with, cannot, without manifest confusion, be termed confidential." Fraser *v.* Sutherland, 2 Grant's Chan. 442 (1851).

For similar reasons, no privilege attaches to a communication made by a client to the attorney of his adversary. There is no confidence. If there is, it is misplaced. Hall *v.* Rixey, 84 Va. 790 (1888); Tucker *v.* Finch, 66 Wis. 17 (1886).

And so where the communication is made to an attorney with directions to repeat it, as a messenger. "The statement, if made,

was not intended to be confidential." Ferguson *v.* McBean, 91 Cal. 63 (1891); State *v.* Hedgepath, 125 Mo. 14 (1894); Collins *v.* Robinson, 72 Hun, 495 (1893).

Or with directions to repeat it to the adverse party. "It was not a communication made to the attorney for the purpose of securing from him professional aid or advice." Henderson *v.* Terry, 62 Tex. 281 (1884).

A conversation between a client, his attorney, and his creditors is not privileged. Houx *v.* Blum (Tex.), 29 S. W. 1135 (1895).

And an attorney may testify to conversations made before the relation of attorney and client arose. Jennings *v.* Sturdevant (Ind.), 40 N. E. 61 (1895).

The privilege, moreover, applies only to legitimate professional business. It does not extend to communications made by the client to the attorney before the commission of a crime, and for the purpose of being guided or helped in its commission. Orman *v.* State, 22 Tex. App. 604, 616 (1886); Matthews *v.* Hoagland, 48 N. J. Eq. 455 (1891); Hickman *v.* Green, 22 S. W. 455 (Mo. Rep.) (1893).

The application to an attorney for advice to enable one to forge a contract is not privileged. People *v.* Blakeley, 4 Parker Cr. Rep. 176 (1859); State *v.* Kidd, 89 Ia. 54 (1893). So as to a scheme of fraud. State *v.* Cadwell, 16 Mont. 119 (1895).

But professional advice on the same day as a murder is privileged, if not calculated to aid in the perpetration of the crime. Graham *v.* People, 63 Barb. 468 (1872).

Communications made to an attorney for the purpose of making a conveyance said to be in fraud of the client's creditors are still privileged. Hollenbaek *v.* Todd, 119 Ill. 543 (1886). "So far from presenting a case entitling him to use the testimony of the attorney, it certainly presents a strong one to induce the court to exclude it; for the more plainly the witness makes the fraud appear, the greater, we must suppose, was the confidence reposed by the client, and his reliance upon the law to protect him against an abuse of the confidence, or the bad faith of the attorney." Parkhurst *v.* McGraw, 24 Miss. 134 (1852); Hamil *v.* England, 50 Mo. App. 338 (1892).

But communications by a client to his attorney of an intent to violate the insolvency law by permitting certain creditors to obtain preferences are not privileged. Taylor *v.* Evans (Tex.), 29 S. W. 172 (1894).

The privilege applies "to any words spoken, or any acts done, by the client . . . in the presence of his attorney and in the course of his employment." Kaut *v.* Kessler, 114 Pa. St. 603 (1886).

If a privileged question has been answered by an attorney, in ignorance of his relation to the fact, his answer may be stricken

out, on motion, when the fact of his professional character is developed later. "It would be too strict to hold that a party is bound to interrupt the examination of a witness in respect to a material matter on a mere suspicion that the witness may be debarred by his position from testifying. He may, we think, await his opportunity on cross-examination to bring out the facts, and, if on such examination it appears that the witness is incompetent, make his motion to have the testimony expunged from the record." Loveridge *v.* Hill, 96 N. Y. 222 (1884).

The rule has been so far extended as to embrace cases where a statement is made to an attorney in his professional capacity by one who has not employed him.

Thus, where the interests of A. were involved in a suit brought against his partner, B. (though he is not nominally a party to the record), A's declarations to B's lawyer, relating to the case, may be excluded as privileged. Orton *v.* McCord, 33 Wis. 205 (1873).

Where several persons, jointly indicted, were engaged in conference, attended by their respective counsel, none of the counsel present will be permitted to testify as to what was said. "Nothing can be more certain than that, according to all the authorities on the subject, whatever either of the counsel present heard, or saw, on the said occasion, concerning the matter of the said charge, was a privileged communication, within the meaning of the rule." Chahoon *v.* Com., 21 Gratt. 822 (1871).

Who are Legal Advisers. — A conveyancer is not necessarily a legal adviser, and in cases where he acts merely as an abstractor of title, no privilege attaches to statements made to him. Stallings *v.* Hullum, 79 Tex. 421 (1891); Sparks *v.* Sparks, 51 Kans. 195 (1893).

The rule is the same where an attorney is *pro hac vice* acting as a scrivener. "The fact that . . . had been the legal adviser of the appellant, generally, and that he was paid by him for his services in the writing of these papers, will not be allowed to affect the nature of the act done, it being otherwise clear from the proof that he was acting as a scrivener only." Thomas *v.* Griffin, 1 Ind. App. 457 (1890); Hanlon *v.* Doherty, 109 Ind. 37 (1886); Toms *v.* Beebe, 90 Ia. 612 (1894); Childs *v.* Merrill, 66 Vt. 302 (1894); Caldwell *v.* Davis, 10 Colo. 481, 492 (1887); Randal *v.* Yates, 48 Miss. 685 (1873); Hebbard *v.* Haughian, 70 N. Y. 54 (1877); Childs *v.* Merrill, 66 Vt. 302 (1894); Van Alstyne *v.* Smith, 82 Hun, 382 (1894).

The rule is the same where an attorney simply takes an acknowledgment as a notary public, Houx *v.* Blum (Tex.), 29 S. W. 1135 (1895); Aultman *v.* Daggs, 50 Mo. App. 280 (1892).

But where the attorney is consulted as such the fact that the consultations result in the execution of a deed does not alter the rule. Rogers *v.* Lyon, 64 Barb. 373 (1872).

And the privilege extends to an attorney in drawing a will. Gurley *v* Park, 135 Ind. 440 (1893).

"Conversation between the parties to a mortgage in the hearing of an attorney employed to draft the mortgage, not embracing any communications made to him as an attorney or for the purpose of obtaining his advice or legal opinion, is not privileged." Hanson *v.* Bean, 51 Minn. 546 (1892).

Communications made to one who is studying law in a lawyer's office, and obtained in that capacity, are not privileged. "An attorney is not permitted to disclose as a witness, the secrets of his client, because in doing so, he would betray a confidence, which from necessity the client must repose in him. All the reasons which apply to the attorney, apply to an interpreter between the client and the attorney, of whom he is merely the organ. Not one of these reasons apply to the student; no confidence is reposed in him by the client, nor is there any necessity that it should. The Court feels no inclination to extend the rule further than it has already gone." Andrews *v.* Solomon, Pet. C. C. 356 (1816); Barnes *v.* Harris, 7 Cush. 576 (1851). "We believe the rule is correctly stated in Foster *v.* Hall, 12 Pick. 93; *viz.*, that it 'is confined strictly to communications to members of the legal profession, as barristers and counsellors, attorneys and solicitors, and those whose intervention is necessary to secure and facilitate the communication between attorney and client; as interpreters, agents, and attorneys' clerks.'" Barnes *v.* Harris, 7 Cush. 576 (1851).

It is necessary that the attorney should have been admitted to the bar. If a law student is employed to do the work of an attorney, communications to him by a client are not privileged. As the supreme court of Pennsylvania rather unfeelingly say, "A law student is, in this respect, on no higher plane than a blacksmith retained in a like service." Schubkagel *v.* Dierstein, 131 Pa. St. 46 (1889). "Communications relating to the subject matter of a suit, made by one of the parties thereto, to a person supposed to be an attorney at law, and with a view to engage him professionally in said suit, when such person was not an attorney of any court, but was receiving business as one, and was expecting to be, and was, admitted to practice, at the next term of the District Court, are not privileged." Sample *v.* Frost, 10 Ia. 266 (1859).

On the contrary, in Ohio, communications to one who for years had pursued the calling of a legal practitioner in the lower courts, but without being admitted to the bar, have been held privileged. "There was present every element which would invoke the application of the general rule upon this subject except the mere form of the admission of the adviser to practice in courts of record. Every consideration of reason, justice, logic, and fair-play would seem to demand that the mere artificial distinction

which the state calls upon us to enforce should be made to yield to the modern tendency to apply the reason and spirit of the rule instead of adhering rigidly and sullenly to its letter." Benedict *v.* State, 44 Oh. St. 679, 689 (1887).

Collateral Facts. — The acts of attorney and client may be fully proved in any case where they are material. Perry *v.* State (Idaho), 38 Pac. 655 (1894).

The mere fact of the existence of the relation of attorney and client can be stated. Chirac *v.* Reinicker, 11 Wheat. 280 (1826). And an attorney can testify as to who employed him. Beamer *v.* Darling, 4 Q. B. U. C. 249 (1848).

So the attorney may state the result of his observation, *e. g.*, that his client seemed satisfied with a substituted security. Heister *v.* Davis, 3 Yeates, 4 (1800).

Or altered a document in his presence, even if his only reason for being present, and, consequently, able to observe, was his professional retainer. Patten *v.* Moor, 29 N. H. 163 (1854).

An attorney may be compelled to testify that he wrote a certain letter for the defendant, alleged to be libellous. Ethier *v.* Homier, 28 Lower Can. Jur. 83 (1873).

Or what took place in open court, *e.g.*, what claim of title was made by his client in a certain case in which he acted as her counsel. Levers *v.* Van Buskirk, 4 Pa. St. 309 (1846).

In general, facts which an attorney knows from a source other than confidential communications from his client are not privileged. "The rule is well settled that an attorney will not be compelled, or even allowed, against the objection of the client, to disclose anything communicated by his client to him in his professional capacity, and the reason on which the rule rests is that it is in the interest of justice that the most full, free and complete communication should take place between attorney and client. It is not, however, in the interest of justice to extend this privilege so that by its operation the truth in relation to facts otherwise in the knowledge of an attorney be suppressed." Swan *v.* Humphreys, 42 Ill. App. 370 (1891).

An attorney can state whether he took a certain deed in settlement of a claim or a mortgage. Caldwell *v.* Melvedt (Ia.), 61 N. W. 1091 (1895).

Limitations of the Rule. — The prohibition, like that relating to confidential communications between husband and wife is a perpetual one. Parker *v.* Carter, 4 Munf. 273, 286 (1814). A communication made after the relation of attorney and client has ended may be stated, though similar to statements made during the continuance of the relationship. Brady *v.* State, 39 Neb. 529 (1894).

An attorney who has learned facts from his client, in a profes-

sional capacity, cannot state them, though the difficulties have not, as yet, developed into litigation Riley *v.* Johnston, 13 Ga. 260, 268 (1853).

Merely as such, an attorney is entitled to no particular privilege. When he is a party he can be compelled to testify as any other witness. Ethier *v.* Homier, 28 Lower Can. Jur. 83 (1873).

An attorney who learns from others facts relating to a case, even during his active connection with the case, may be compelled to state them. Crosby *v.* Berger, 11 Paige, 377 (1844). "The privilege only extends to information derived from his client, as such; either by oral communications, or from books or papers shown to him by his client, or placed in his hands in his character of attorney or counsel. Information derived from other persons, or other sources, although such information is derived or obtained while acting as attorney or counsel, is not privileged." Crosby *v.* Berger, 10 N. Y. 377 (1844). Buckmaster *v.* Kelley, 15 Fla. 180 (1875); Chew *v.* Farmers' Bank, 2 Md. Chan. 231 (1848).

Where an attorney made memoranda of a settlement of litigation, in which his client was concerned at an interview where all parties were present, such memoranda are not privileged. Denser *v.* Hamilton, 52 Mo. App. 391 (1892).

For similar reasons, communications to an attorney not relating to the subject-matter of the consultation are not privileged. For example, where a defendant, during a consultation with his counsel, uttered threats against the deceased. Such a communication must be stated by an attorney. "It cannot be claimed, even, that the intention expressed by the threats was a matter submitted to the attorneys professionally. Their advice and aid were not sought in regard to it. The defendant's enmity, spirit of revenge, or other motive, whatever it may have been, which prompted the threats had no connection with the matter involving the rights of defendant submitted to the attorneys. Neither the threats nor the motives of defendant were the subject of professional communication. They cannot therefore be regarded as privileged." State *v.* Mewherter, 46 Ia. 88 (1877).

The privilege applies equally, in favor, both of the attorney and the client. Neither can be compelled to answer. The attorney will not be permitted. Hemenway *v.* Smith, 28 Vt. 701 (1856); State *v.* White, 19 Kans. 445 (1877); Carnes *v.* Platt, 15 Abb. (N. Y.) Prac. 337 (1873); Perry *v.* State (Idaho), 38 Pac. 655 (1894).

It is not material that the attorney declines to go on with the case which has been unfolded to him, or about which he has been consulted. Thorp *v.* Goewey, 85 Ill. 611 (1877); Peck *v.* Boone, 90 Ga. 767 (1892); Sargent *v.* Hampden, 38 Me. 581 (1854).

"As they were committed to him in his professional character, the spirit of the rule would require that they should not be divulged,

without the assent of the party by whom they were made. The protection justly extends to all communications made to legal advisers with a view to obtain professional aid, and in reference to their employment in legal proceedings pending or contemplated, or in any other legitimate professional services." *Ibid.* Parker *v.* Carter, 4 Munf. 273, 286 (1814). "The present record presents the question whether one who seeks counsel, but who in fact pays no fee, and employs others in the prosecution of the business — the counsel consulted being afterwards employed against him — can be so considered as a client that his communications are privileged. I know not where to draw a distinction. The rule should be universal, and apply to all who communicate facts, excepting professional advice, or it will fail to answer its ends. Its limitations may be unknown to laymen, and without feeling perfect freedom in all cases, instead of the perfect confidence that should exist, the intercourse might be restrained by fear and marred by dissimulation on the part of the client, and the object of the rule be defeated; and besides, a door would be open to fraud. One might seek advice, expecting not only to pay but to retain in an anticipated litigation, and, after his story had been heard, the retainer might be declined and the information be used against him; also an obstacle would be thrown in the way of the settlement of disputes. The noblest office of the lawyer is to heal difficulties, and far more is done in that direction in the higher walks of the profession than is known to the public.

In seeking this end counsel may receive communications from the opposite party, and not made under circumstances that would exclude them as propositions to compromise. The conventionalities that hedge in the English counsellor are unknown in this country, and public policy requires that persons should feel that they may securely say anything to members of the profession in seeking aid in their difficulties, although the person whose advice they seek may have been employed, or may be afterwards employed against him. The term 'client,' then, in the statute, should be used in its most enlarged sense, and the prohibition should close the mouths of all who have listened to disclosures looking to professional aid." Cross *v.* Riggins, 50 Mo. 335 (1872).

Therefore it is immaterial that the relation of attorney and client never became established. State *v.* Tally (Ala.), 15 So. 722 (1894).

What Communications are Confidential. — It is not an absolute rule that no one can be present except the attorney and his client. Both parties may require the assistance of agents without impairing the operation of the rule shielding the professional communication.

That a mother was present at a consultation between her daugh-

ter and a legal adviser as to the matter of the daughter's seduction does not remove the privilege from statements made to the attorney, by the daughter. "It is well established that the privilege extends as well to communications to or through an agent, as to those made directly to the attorney by the client in person, and we think it is only a dictate of decency and propriety to regard the mother in such a case as being present and acting in the character of confidential agent of her daughter." Bowers *v.* State, 29 Oh. St. 542 (1876).

A communication to a lawyer in presence of his clerk is none the less privileged. Brand *v.* Brand, 39 How. (N. Y.), Prac. 193, 260 (1870).

An interpreter cannot be compelled to divulge the statements, of which he is the channel, between attorney and client. Jackson *v.* French, 3 Wend. 337 (1829).

It has even been held that a communication made directly to the lawyer's clerk in the absence of the attorney, concerning a suit begun by the attorney, are privileged. "It is customary for attorneys to intrust their clerks, more or less, with the conduct of suits prior to the trial thereof, and communication with the clients is frequently necessary." Sibley *v.* Waffle, 16 N. Y. 180 (1857); State *v.* Sterrett, 68 Ia. 76 (1885).

But as a general rule, one who is present at the making of a professional communication, can be compelled to divulge it. "The counsel himself cannot disclose a communication made to him by his client relative to a case in which the relation of client and counsel exists; but that privilege is confined to counsel, to an interpreter, and perhaps to the clerks of an attorney or counsel, though as to the latter the cases differ. But if a party makes communications to counsel in presence of persons in no way connected with the counsel, such persons are bound to disclose what they may have heard." Jackson *v.* French, 3 Wend. 337 (1829). "A communication intended to be confidential should not be made in the hearing of a third person; unless that person stood in a peculiar relation of confidence; which was not the case with Macomber. He did not know of the crime and he simply took the defendant to see a lawyer, because his friend was alarmed by the newspaper comments and charges. The protection extended by the statute to communications between attorney and client is intended to cover those which the relation calls for and are supposed to be confided to the lawyer, to guide him in giving his professional aid and advice. I am not aware of any extension of the rule, which would protect the revelation of confidences made to a friend, or to a lawyer in the presence of a friend." People *v.* Buchanan, 145 N. Y. 1, 26 (1895).

So of a lawyer's son who "had no charge of, or connection with,

his professional business." Goddard *v.* Gardner, 28 Conn. 172 (1859). "The rule also, like the reason of it, extends to interpreters, and to clerks and agents employed by the attorney, etc., in the business committed to his charge, but extends no further. Its operation is to exclude material evidence from the consideration of the triers, and it ought not to be extended beyond the reason on which it rests.

"But, as the protection it affords is the privilege of the client, he may renounce or waive it at his pleasure. No reason of necessity requires that any witness (save an interpreter,) should ever be present at a consultation between the client and his attorney, and if the client procures or submits to the presence of such a witness, he voluntarily confides his secrets, not to his attorney only, but also to the witness, in whose custody the law cannot protect them when the interests of justice require that they should be disclosed." Goddard *v.* Gardner, 28 Conn. 172 (1859).

A statement by a client to his attorney made in the presence of a third party may be stated by the latter. Basye *v.* State, 45 Neb. 261 (1895). But the mere fact that a professional communication is made at a time when a large number of persons are present does not necessarily prevent the communication from being confidential, and so affect the matter of privilege.

So a communication made in a crowded court-room may still be privileged. Parker *v.* Carter, 4 Munf. 273, 286 (1814). "We must not, in relation to a fact of a highly confidential nature, and strictly applying to the question submitted, embark in a field of uncertainty and conjecture, and, without any certain scale to go by, undertake to decide, from the place and manner of the conversation, that this fact was not disclosed in confidence. It is safer, and more conducive to that free intercourse which should exist between a client and his attorney, to consider all communications confidential, which fall within the description just mentioned: unless, indeed, the client should seem to vaunt his disclosures to the public, and, as it were, challenge the by-standers to hear them." Parker *v.* Carter, 4 Munf. 273, 287 (1814).

As in case of a confidential communication between husband and wife the prohibition applies not to the communication itself but to the person giving it. Any one present at or who overhears a professional communication may be compelled to state it.

So of a stranger present. State *v.* Sterrett, 68 Ia. 76 (1885); Bulman *v.* Andrews, 12 Rev. Leg. 332 (1883); Hartford Ins. Co. *v.* Reynolds, 36 Mich. 502 (1877); Basye *v.* State, 45 Neb. 261 (1895).

That knowledge of a professional communication was obtained by eavesdropping, or by a casual bystander whom the parties did not know to be within hearing, does not affect the question of

admissibility. "In consequence of a want of proper precaution, the communications between him and his client were overheard by a mere stranger. As the latter stood in no relation of confidence to either of the parties, he was clearly not within the rule of exemption from giving testimony; and he might therefore, when summoned as a witness, be compelled to testify to what he overheard, so far as it was pertinent to the subject matter of inquiry upon the trial; this is all that was allowed by the court." Hoy *v.* Morris, 13 Gray, 519 (1859).

But where a confidential fee contract between an attorney and client came into the hands of a stranger, the latter was not allowed to use it. "To fairly carry out the real purpose of the rule, it must be held that privileged communications are, in and of themselves, incompetent, regardless of the mere manner in which it is sought to put them in evidence." Liggett *v.* Glenn, 51 Fed. Rep. 381, 396 (1892).

But the fact that a third person can testify to a communication does not enable the attorney himself to do so. "As between the client and attorney they are still confidential, though made in the presence or hearing of a third party. The only effect of that is that they are less confidential in fact, and that such third party may testify to them. It does not qualify the attorney as a witness." Blount *v.* Kimpton, 155 Mass. 378 (1892).

Privilege is the Client's. — It is for the client, if so disposed, to remove the seal of secrecy from the lips of the attorney. Sargent *v.* Hampden, 38 Me. 581 (1854); Denver Tramway Co. *v.* Owens, 20 Colo. 107 (1894); Mayo *v.* Foley, 40 Cal. 281 (1870); Tays *v.* Carr, 37 Kans. 141 (1887); Parker *v.* Carter, 4 Munf. 273 (1814); Goddard *v.* Gardner, 28 Conn. 172 (1859). When the question is doubtful the court should give the client the benefit of the doubt. People *v.* Atkinson, 40 Cal. 284 (1870).

The client cannot be forced on cross-examination, to disclose the privileged communications. Bigler *v.* Reyher, 43 Ind. 112 (1873); Tate *v.* Tate, 75 Va. 522, 533 (1881).

Where two persons with conflicting interests consult the same attorney, one cannot remove the bar of secrecy as to communications made by the other. Under these circumstances the consent of both is needed. Hull *v.* Lyon, 27 Mo. 570 (1858).

The privilege being that of the client, his opponents cannot object to the evidence. Smith *v.* Savings Bank, 1 Tex. Civ. App. 115 (1892).

"The general rule is not disputed, that confidential communications between client and attorney, are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client

to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent." Chirac *v.* Reinicker, 11 Wheat. 280 (1826).

"It is not material, whether the evidence relate to what was said by the attorney, or what was said by the client, in their private conversation on the business in which the attorney was professionally employed. The statements of each to the other, in such cases, must be considered as privileged communications; and the attorney should neither be required nor permitted, by any judicial tribunal, to divulge them against his client, if the latter object to the evidence." Jenkinson *v.* State, 5 Blackf. 465 (1840).

Waiver. — This privilege, like most others, the client can waive.

Sending a person to an attorney for information concerning the client's position is a sufficient waiver. Galle *v.* Tode, 74 Hun, 542 (1893).

He is not considered to waive it by voluntarily taking the stand as a witness. Bigler *v.* Reyher 43 Ind. 112 (1873); Hemenway *v.* Smith, 28 Vt. 701 (1856); Barker *v.* Kuhn, 38 Ia. 392 (1874).

To contrary, see Tate *v.* Tate, 75 Va. 522, 533 (1881), where the matter is part of the witness's case.

In inhabitants of Woburn *v.* Henshaw, 101 Mass. 193 (1869), the court say, "The policy of the law will not allow the counsel himself to make disclosures of confidential communications from his client; but if the client sees fit to be a witness, he makes himself liable to full cross-examination like any other witness. This is true even as to defendants in criminal cases." Woburn *v.* Henshaw, 101 Mass. 193 (1869).

Where the client testifies concerning conversations with his attorney it was suggested in Hartford Fire Ins. Co. *v.* Reynolds, 36 Mich. 502 (1877), that the privilege might be considered waived, at least to that extent.

A testator, by making an attorney an attesting witness in his will, waives the privilege of confidence relating to communications relating to the execution of the will. McMaster *v.* Scriven, 85 Wis. 162 (1893); Pence *v.* Waugh, 135 Ind. 143 (1893).

Merely putting a party's attorney on the stand as a witness does not of itself amount to a waiver of the privilege attaching to professional communications. Montgomery *v.* Pickering, 116 Mass. 227, 231 (1874).

See also to the effect that an attorney put on the stand becomes "a witness in the cause generally," Gilbert *v.* Campbell, 2 New Bruns. 55 (1870).

But where one of two joint defendants turns "state's evidence," and takes the stand to accuse himself and his associates, this amounts to a waiver. "Both client and counsel may in such

case be compelled to disclose such communications." Jones *v.* State, 65 Miss. 179 (1887); Alderman *v.* People, 4 Mich. 414 (1857); Hamilton *v.* People, 29 Mich. 173, 184 (1874).

Even this does not make the attorney of the testifying defendant competent as a witness. State *v.* James, 34 S. C. 49 (1890).

A Question for the Court. — Whether a communication is privileged is a preliminary question for the court. Hull *v.* Lyon, 27 Mo. 570 (1858). Goddard *v.* Gardner, 28 Conn. 172 (1859); Childs *v.* Merrill, 66 Vt 302 (1894).

Even though the attorney disclaims acting as a professional adviser. Bacon *v.* Frisbie, 80 N. Y. 394 (1880).

"A solicitor generally, and we will add properly, puts himself under the ruling of the court when such occasions arise, declining to answer or to produce, if his own client's interests are affected, unless the court direct or at least sanction or permit it. A contrary course may well be deemed a surprise on the client, and not the less if only a selected portion of the papers is produced." Livingstone *v.* Gartshore, 23 Q. B. U. C. 166 (1863).

Where an attorney was inquired of as to matters which "he did not know but what he got" as an attorney, the court say that the trial court "should have excluded the testimony on its own motion." People *v.* Atkinson, 40 Cal. 284 (1870).

But where the evidence is in conflict, as the existence of a professional relationship, the preliminary action of the court in admitting the evidence may be revised and controlled by the jury, who may be directed to disregard a communication, if under the law as given them, they find the necessary facts exist. "We understand this to be the correct practice, and in many cases to be the only safe rule for determining such questions." Hartford Fire Ins. Co. *v.* Reynolds, 36 Mich. 502 (1877).

The onus is on the party objecting to the evidence of an attorney as privileged, to show that the admission of the client to the attorney sought to be proved was confidential. Mowell *v.* Van Buren, 77 Hun, 569 (1894).

Secrets of State. — Courtesy to a co-ordinate branch of government and an obvious requirement of public policy that the executive dealings of the sovereign should not be embarrassed by the action of the courts, have established the rule that it is for the executive departments to decide for themselves what facts under their control the public interest permits them to reveal in court. Gray *v.* Pentland, 2 S. & R. 23, 32 (1815); Hartranft's Appeal, 85 Pa. St. 433 (1877).

Even the supreme court of the United States disclaims the right to compel executive secrets. "An extravagance, so absurd and excessive, could not have been entertained for a moment." Marbury *v.* Madison, 1 Cranch, 137, 170 (1803).

On proper steps being taken, a secretary of state may be compelled to do a ministerial act; e. g., deliver a commission for an appointment already made. Marbury *v.* Madison, 1 Cranch, 137, 144 (1803).

In response to a subpœna *duces tecum* addressed to the President of the United States, President Jefferson, in a letter substantially written to the court (Marshall, C. J.) took the following position: "With respect to papers, there is certainly a public and private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, and other papers patent in their nature. To the other belong mere executive proceedings. All nations have found it necessary that, for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interest will permit publication." Trial of Aaron Burr (Coombs, ed.) page 74. On this, according to the report in the edition by Hopkins & Earle (vol. 2, p. 536), Chief Justice Marshall is reported to have said: "In no case of this kind would the court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. . . . In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it he himself is the judge." The rule is the same in Pennsylvania. Appeal of Hartranft, 85 Pa. St. 433, 449 (1877), and in New Jersey. "Whether the highest officer in the government or state will be compelled to produce in court any paper or document in his possession, is a different question. And the rule adopted in such cases is, that he will be allowed to withhold any paper or document in his possession, or any part of it, if, in his opinion, his official duty requires him to do so." Thompson *v.* German Valley R. Co. 22 N. J. Eq. 111 (1871). In a case where the court refused a subpœna *duces tecum* against the governor and secretary of state for the production of a written communication to the governor, alleged to have been libellous, concerning the plaintiff, the court say: "It is matter of very delicate concern to compel the chief magistrate of the state to produce a paper which may have been addressed to him, in confidence that it should be kept secret. Many will be deterred from giving to the Governor that information which is necessary, if they are to do it at the hazard of an action, and of all the consequences flowing from the enmity of the accused. It would seem reasonable, therefore, that the Governor, who best knows the circumstances under which the charge has

been exhibited to him, and can best judge of the motives of the accuser, should exercise his own judgment with respect to the propriety of producing the writing." Gray *v.* Pentland, 2 S. & R. 23, 32 (1815). In a later case in the same state, the governor and his subordinates and agents were sustained in a refusal to obey a subpœna requiring them to disclose facts learned in an official capacity. "Influenced by this and the other precedents we have cited, as well as by reason and necessity, we are in like manner disposed to conclude that the propriety of withholding the information required by the grand jury, must be determined by the Governor himself: and the weight of the reasons influencing him in the conclusion at which he has arrived, is for himself and not for the court to consider." Appeal of Hartranft, 85 Pa. St. 433, 449 (1877).

So in an action of tort in giving false information to the treasury department of an intended violation by the plaintiffs of the revenue laws of the United States, the defendants cannot be compelled to answer interrogatories relating to communications to the government. "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications." Worthington *v.* Scribner, 109 Mass. 487 (1872).

It would seem that not only are such disclosures of state secrets not compelled, but that they are not permitted. Thus in a case where a plaintiff brought an action against the United States in the Court of Claims on an alleged contract made by the President for secret services as a spy during the war, the Supreme Court, in rejecting the claim, do so upon the ground that the very nature of the contract prevents a suit on it. "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be

violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed." Totten *v.* U. S., 92 U. S. 105 (1875).

The rule is the same in Canada. On an action of slander by a communication to the government at Ontario relating to the licensing of the plaintiff's hotel, the court compelled a disclosure by the head of the department against his objection. Held, error. "Whether the communication is a proper one in spirit, purpose, or language, cannot be known without the production of the document, and if the officer at the head of one of the High Government departments declines to produce it because it will not, in his opinion, be conducive to the public interest to do so, his judgment is conclusive." Bradley *v.* M'Intosh, 5 Ont. Rep. 227 (1884).

So held in a similar case in Lower Canada. "The Judges of this Court are all, I believe, agreed in the opinion, that the Head of a Department of state cannot be compelled, at the instance of a private suitor, to produce an official document in his custody, when the production of the document would, on grounds of public policy, be inexpedient. The question then arises, with whom does it rest to determine whether the production of a particular document is, on such general grounds, inexpedient? — The majority of the Court hold that the Head of the Department having official custody of the paper is necessarily the proper person to determine the question." Gugy *v.* Maguire, 13 Dec. des Tribunaux. 33, 51 (1863).

Public Justice. — Considerations of public policy, substantially similar to those which prevent the divulging of state secrets, forbid inquiry into matters which would conflict with the orderly administration of justice.

Grand jurors cannot be admitted to testify as to the secrets of their jury room. State *v.* Fasset, 16 Conn. 457, 466 (1844).

For example, how they or their fellows voted. Shelton *v.* State, 30 Tex. 431 (1867); "The affidavit of one of the grand jury by whom an indictment was found, is not admissible to prove that there was no legal evidence before the grand jury upon which it was found, nor that there was illegal evidence used by the grand jury, nor that the names of certain witnesses were indorsed on the indictment, who were not sworn or examined by or before the grand jury during the examination or consideration of the charge set forth in the indictment." State *v.* Beebe, 17 Minn. 241 (1871).

Or, as to what witnesses testified before them. Beam *v.* Link, 27 Mo. 261 (1858).

Or how a witness testified. Imlay *v.* Rogers, 7 N. J. L. 347 (1800); State *v.* Fasset, 16 Conn. 457, 466 (1844).

The attorney-general, being part of the grand jury, will not be permitted to testify as to its proceedings. "It is the policy of the law, that the preliminary inquiry, as to the guilt or innocence of a party, against whom a complaint has been preferred, should be secretly conducted. In furtherance of the same object, every grand juror is sworn to secrecy. One reason may have been, to prevent the escape of the party charged, to which he might be tempted, if apprised of the proceedings in train against him. Another may have been, to promote freedom of deliberation and opinion among the grand jury, which might be impaired, if it were known that the part taken by each, might be disclosed to the accused or his friends. A timid juror might in that case be overawed by the power and connections of an individual charged." McLellan *v.* Richardson, 13 Me. 82 (1836).

Neither are grand jurors permitted to testify as to facts of their jury room, impugning their official finding. State *v.* Oxford, 30 Tex. 428 (1867).

For example, by evidence that a certain member of the inquest did or did not vote. State *v.* Baker, 20 Mo. 338 (1855). "Incalculable mischief must result to the public at large from such a course of proceeding." *Ibid.*

Or that an indictment was found upon insufficient testimony. People *v.* Hulbut, 4 Denio, 133 (1847); State *v.* Beebe, 17 Minn. 241 (1871).

Grand juries may, however, testify to a confession of the prisoner. U. S. *v.* Charles, 2 Cranch C. Ct. 76 (1813).

The requirement of secrecy on the part of the grand jury has, however, been relaxed where the public interest requires it. Clark *v.* Field, 12 Vt. 485 (1839).

For example, on an indictment for perjury in giving evidence before the grand jury the witness cannot shelter himself behind a claim that grand jurors must not testify as to what his evidence was before them. "It is not necessary to determine whether it was strictly competent for the members of the grand jury before which the perjury was alleged to have been committed, to testify as to what the defendant swore to on that occasion, without having been required so to do by judicial order, under the two hundred and eighteenth section of the Criminal Practice Act. If the witnesses violated the obligation of secrecy imposed upon them by the two hundred and seventeenth section, the defendant could not take advantage of it. The obligation is due and owing to the public, and not to the witness, and therefore its violation cannot be an occasion of offense to him. The point was fully considered in State *v.* Broughton, 7 Iredell, 101, and the Court say: 'It seems to

us that the witness has no privilege to have his testimony treated as a confidential communication, but that he ought to be considered as deposing, under all the obligations of an oath, in a judicial proceeding, and therefore that the oath of the grand jurors is no moral or legal impediment to his solemn examination, under the direction of a Court, as to the evidence before him, whenever it becomes material for the administration of justice. The Judges have not considered the rule as designed for the protection of witnesses, but for that of the grand jurors, and in furtherance of public justice.' Under our system, it cannot be considered that the rule of secrecy has any reference to the protection of witnesses testifying before grand juries, in view of the fact that the names of all such witnesses are required to be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the Court." People *v.* Young, 31 Cal. 563 (1867).

And where a witness has, it is said, testified differently before the grand jury from what he testifies on the trial, evidence of the grand jurors is competent as to what his statement was before them. "It is an axiom in the law of evidence that no testimony should be rejected unless greater evil is seen as likely to arise from its admission than from its rejection. What possible evils can arise from this evidence? Wherein does the testimonial trustworthiness of a grand juror differ from that of any other citizen? What matters it whether the contradictory and impeaching story of the witness in the street, or under oath and in the deliberations of the grand jury room, save that in the latter case it would be altered under the highest sanctions for testimonial veracity? Let this evidence be excluded, and to the precise extent of the exclusion, the means for arriving at correct conclusions are withheld from the consideration of the jury. Injustice is done. The guilty escape. The innocent are punished. Such are, or may be, the results from the exclusion of relevant and material testimony.

It would be a strange and anomalous principle of public policy, which should specially clothe with impunity crime committed in the presence of a body impanelled to inquire into its existence, and when found to exist, to present it for punishment. It would be a discreditable denial of justice, which sho 'd exclude material and relevant testimony, whether needed for the conviction of the criminal or required for the exculpation of the innocent. Where would be the policy of licensing mendacity without the fear of contradiction or of punishment? State *v.* Benner, 64 Me. 267 (1874).

The rule is the same in New Hampshire. State *v.* Wood, 53 N. H. 484 (1873). In Massachusetts it has been held that the evidence of a grand juror is competent to show what a witness at

the trial testified before the grand jury. "The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be threefold. One is that the utmost freedom of disclosure of alleged crimes and offences by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known, it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it, before the presentment is made. . . . But when these purposes are accomplished, the necessity and expediency of retaining the seal of secrecy are at an end. *Cessante ratione, cessat regula.* After the indictment is found and presented, and the accused is held to answer, and the trial before the traverse jury is begun, all the facts relative to the crime charged and its prosecution are necessarily opened, and no harm can arise to the cause of public justice by no longer withholding facts material and relevant to the issue, merely because their disclosure may lead to the development of some part of the proceedings before the grand jury. On the contrary, great hardship and injustice might often be occasioned by depriving a party of important evidence, essential to his defence by enforcing a rule of exclusion, having its origin and foundation in public policy, after the reasons on which this rule is based have ceased to exist." Conn. *v.* Mead, 12 Gray, 167 (1858).

The rule making the proceedings of the grand jury privileged has been repealed by statute in certain jurisdictions. Rocco *v.* State, 37 Miss. 357 (1859).

A witness who testified before the grand jury is not precluded in any proper case from testifying as to what his evidence was. Way *v.* Butterworth, 106 Mass. 75 (1870).

Nor is any individual to whose case such fact is relevant prevented from inquiring as to what that evidence was. Burdick *v.* Hunt, 43 Ind. 381 (1873).

Jurors cannot impeach their Verdict. — The testimony of jurors of irregularity or misconduct in a petty or traverse jury in their jury-room cannot be used to impeach their verdict. Meade *v.* Smith, 16 Conn. 346 (1844); Folsom *v.* Manchester, 11 Cush. 334 (1853); People *v.* Hughes, 29 Cal. 257 (1865); Coker *v.* Hayes, 16 Fla. 368 (1878).

The rule is the same in criminal cases. State *v.* Coupenhaver, 39 Mo. 430 (1867); Read *v.* Com. 22 Gratt. 924 (1872); State *v.* Godwin, 5 Ired. L. 401 (1845); Johnson *v.* State, 27 Tex. 758 (1865); Bennett *v.* State, 3 Ind. 167 (1851); State *v.* Mellican, 15 La. Ann. 557 (1860).

Accordingly, the affidavit of a juryman that he would not have agreed to the verdict except that, on account of ill health, he was unable to bear further confinement, will not be received. State *v.* Stokely, 16 Minn. 282 (1871). "The affidavit comes within no known exception to the rule excluding the affidavits of jurors to impeach their own verdict." *Ibid.*

So the affidavit of a juryman that if he had known that the court would double the verdict, he would not have agreed to it. Hannum *v.* Belchertown, 19 Pick. 311 (1837).

The evidence of jurymen, being incompetent to impeach their verdict, is equally incompetent to sustain it. "The proper evidence of the decision of the jury is the verdict returned by them upon oath and affirmed in open court; it is essential to the freedom and independence of their deliberations that their discussions in the juryroom should be kept secret and inviolable; and to admit the testimony of jurors to what took place there would create distrust, embarrassment and uncertainty. Questions of the competency of such evidence have usually arisen upon its being offered with a view to overturn the verdict; for the party in whose favor the verdict has been rendered has ordinarily no need of further proof; but the decisive reasons for excluding the testimony of the jurors to the motives and influences which affected their deliberations are equally strong, whether the evidence is offered to impeach or to support the verdict." Woodward *v.* Leavitt, 107 Mass. 453, 460 (1871).

That the affidavit of a juror "is admissible in exculpation of himself, and to sustain the verdict," see State *v.* Ayer, 23 N. H. 301, 321 (1851).

The rule does not apply to the misconduct of a juryman in getting from the defendant, out of court, additional evidence to that given his fellow jurymen. Heffron *v.* Gallupe, 55 Me. 563 (1867).

Evidence is admitted of affidavits of the other jurors as to their fellows obtaining a view of the *locus* for themselves. Deacon *v.* Schreve, 22 N. J. Law, 176 (1849).

Of a Tennessee decision, Booby *v.* State, 4 Yerg. 111 (1833), to the same effect as Deacon *v.* Shreve (*ubi supra*), the court in a later case, Hudson *v.* State, 9 Yerg. 408 (1836) say: "It is a dangerous principle, and we are not disposed to extend it one step beyond what it has already been carried."

"Jurors cannot be permitted to disclose their deliberations and proceedings while consulting together in their private room; but the rule does not extend to their conduct at other times and in other places." Studley *v.* Hall, 22 Me. 198 (1842).

As, for example, listening to evidence not offered in court. Ritchie *v.* Holbrooke, 7 S. & R. 458 (1821).

The courts of Iowa, with "considerable hesitation," lay down the following rule: "That affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the juryroom, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast." Wright *v.* Ill. &c. Tel. Co., 20 Ia. 195, 210 (1866).

Traverse jurors are, moreover, permitted to testify as to certain things connected with their work in the administration of justice.

For example, they are at liberty, on a plea of *res adjudicata*, to testify as to what matters the jury passed upon in a former action between the parties. "It is entirely different from where they are called to impeach a verdict on the ground of their own misbehavior or that of their fellows." Follansbee *v.* Walker, 74 Pa. St. 306 (1873).

A witness is none the less competent because he has served as a juryman on a former trial of the cause. Cramer *v.* City of Burlington, 42 Ia. 315 (1875).

Sources of Information, etc. — An official charged with the enforcement of criminal law is not obliged to disclose the source of information as to the commission of offences. U. S. *v.* Moses, 4 Wash. C. Ct. 726 (1827); Worthington *v.* Scribner, 109 Mass. 487 (1872).

In Worthington *v.* Scribner (*ubi supra*) it is said that the "courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government."

But it has been held that this privilege, being intended for the benefit of the informant, may be waived by him, e. g., by testifying as a witness concerning the matter, and that the law officers may then testify as to the same matter, though the effect is to contradict and discredit the informant. Oliver *v.* Pate, 43 Ind. 132 (1873).

For similar reasons, one from whom property has been stolen,

is not bound to disclose the names of persons in his employment who gave the information which induced him to take measures for the detection of the persons indicted. State *v.* Soper, 16 Me. 293 (1839).

Matters against Decency. — Relevant evidence cannot be excluded merely because it concerns facts offensive to the morals or sense of decency of the court.

But there is a necessary discretion permitting the court to refuse to hear evidence offensive to the moral or social sense where the rights of the parties or the due administration of criminal law do not seem absolutely to require it.

In at least one important particular, perfectly relevant evidence is excluded on grounds of public policy. Husband and wife will not be permitted to testify, for the purpose of bastardying their offspring, that while residing together as a married couple they did not have sexual intercourse. Goss *v.* Froman, 89 Key. 318 (1889); Cross *v.* Cross, 3 Paige, 139 (1832); Simon *v.* State, 31 Tex. App. 186 (1892).

"The wife is not a competent witness to prove the non-access of her husband upon principles of public policy." State *v.* Pettaway, 3 Hawkes, 623 (1825).

But a wife has been permitted to testify to the fact of sexual intercourse with her husband to legitimize her child. Goss *v.* Froman, 89 Key. 318 (1889).

Or as to criminal intercourse with others during coverture. State *v.* Pettaway, 3 Hawkes, 623 (1825); Com. *v.* Shepherd, 6 Binney, 283 (1814); Cross *v.* Cross, 3 Paige, 139 (1832); Com. *v.* Wentz, 1 Ashmead, 269 (1826); Dean *v.* State, 29 Ind. 483 (1868).

It is not objectionable to prove non-access on the part of the husband. For example, that he was in the active service of the confederate army at the time when the child must have been begotten, that he did not come home, and his wife did not visit him. Scott *v.* Hillenburg, 85 Va. 245 (1888).

That the husband had abandoned his wife and removed to a distant state and not returned. Pittsford *v.* Chittenden, 58 Vt. 49 (1886); Tate *v.* Penne, 7 Martin, N. S. 548 (1829).

Or had abandoned his wife. Cross *v.* Cross, 3 Paige, 139 (1832).

But in a bastardy complaint, in favor of a married woman separated from her husband, the supreme court of Wisconsin has refused to permit the prosecutrix to testify that her husband has not had intercourse with her. "Testimony of the wife even tending to show such fact or of any fact from which such non-access could be inferred, or of any collateral fact connected with this main fact, is to be most scrupulously kept out of the case; and such non-access and illegitimacy must be clearly proved by other testimony." Mink *v.* State, 60 Wis. 583 (1884).

CHAPTER II.

MATTERS NOT PROVABLE BY A SINGLE WITNESS.

§ 952.[1] UNDER this head it is proposed to mention briefly the Statutes as to Treason and certain other statutes and rules of law which regulate particular cases, and take them out of the operation of the general principles by which they would otherwise be governed.

§ 952A. By the common law *treason* and the modern misprision of treason were sufficiently proved by one credible witness.[2] But by statute it is enacted that no person shall be indicted, tried, or attainted of treason 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 without violence, in open court, confess the same;[3] and further, that 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.[4]

§ 953. This protective rule as to treason—which in England has existed since the days of William III., and in Ireland was adopted in the year 1821,—has been incorporated, with some slight variation, into the constitution of America,[5] and may be met with in the statutes of most, if not all, of the States in the Union.

§ 953A. From the earliest notice of this rule, which is in a re-

[1] Gr. Ev. § 255, in part.

[2] Fost. C. L. 233; M'Nally, Ev. (Ir.) 31; R. *v.* Clare, 1803; Woodbeek *v.* Keller, 1826 (Am.).

[3] As to the confession, see ante, § 866.

[4] 7 W. 3, c. 3 ("The Treason Act. 1695"), §§ 2, 4, extended to Ireland by 1 & 2 G. 4, c. 24.

[5] "No person shall be convicted of treason, unless on the testimony of *two witnesses to the same overt* act, or on confession in open court:" Const. U. S. Art. 3, § 3; Laws U. S. vol. 2, ch. 36, § 1.

pealed statute temp. Henry VIII.,[1] it appears probable, that the original reason for its adoption was that, "Anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law, now and then in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and, anciently, heresy was treason; and from thence the Parliament thought fit to appoint, that two witnesses ought to be for proof of high treason."[2]

§ 954. Its modern continuance may be ascribed, in part, to the tenacity with which men hold to established forms; in part to the duty of allegiance, which may be supposed to counterpoise the information of a single witness;[3] and, in part, to the heinousness of the crime of treason, which raises a presumption of innocence in favour of the accused, while the counter-presumption, that on so serious a trial no witness would be guilty of criminative perjury is forgotten.[4] But the best reasons, for the regulation are, that, on State trials, the prisoner has to contend against the whole power of the Crown; which is especially liable to abuse in times of excitement and danger; that the law of treason is ill-defined, and worse understood; and that the consequences of a conviction, both to the accused and to his family, were, until very recently,[5] savage and revolting.

§ 955. Notwithstanding the above rule, it is sufficient to warrant a conviction if there be one witness to one overt act of treason, and another witness to another overt act of the same species of treason.[6] Moreover, any *collateral* matter not conducing to the proof of the overt acts, may be proved by the testimony of a single witness, by the extrajudicial confession of the prisoner, or by other evidence admissible at common law.[7] For instance, on an indictment for treason in adhering to the Queen's enemies, the fact that the prisoner is a subject of the British Crown may be established by his admission, or by the testimony of one witness.[8]

[1] 25 Hen. 8, c. 14.
[2] Ld. Stafford's case, 1680 (Ld. Nottingham. C.).
[3] 4 Bl. Com. 358.
[4] 3 Benth. Ev. 391, 392.
[5] 33 & 34 V. c. 23 ("The Forfeiture Act, 1870"), §§ 1, 31.
[6] Ld. Stafford's case, 1680.
[7] Fost. C. L. 242; 1 East, P. C. 130.
[8] R. *v.* Vaughan, 1696 (Ld. Holt).

§ 956.[1] In treason, and misprision of treason, no evidence can be given of any overt act not expressly laid in the indictment.[2] The meaning of this rule is, not that the whole detail of facts shall be set forth, but that no overt act amounting to a *distinct independent charge*, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment, or unless it conduce to the proof of any of the overt acts which are laid.[3] Accordingly, in one case,[4] prisoner's correspondence with the Pretender was allowed to be read in evidence, although it was a substantive treason in itself,[5] and was not charged as an overt act in the indictment, because it tended directly to prove one overt act laid, namely, the conspiring to depose the King and to place the Pretender on the throne. On similar grounds the publication of the Pretender's manifesto by a prisoner was read against him in 1746, since it was strong proof of the intention with which he had joined the rebel army, and so was evidence in support of the overt act laid in the indictment charging him with marching in a warlike manner to depose the King.[6] On the other hand, however, when a prisoner was indicted for adhering to the King's enemies, and the overt act laid was his cruising on the King's subjects in the Royal Clancarty, the court rejected the evidence of his cruising in another vessel; as, if it were true, it would be no sort of proof of the act for which he was then to answer.[7]

§ 957.[8] This rule is moreover not peculiar to trials for treason; though expressly enacted in the later statutes of treason. But it is nothing more than a particular application of the well-known doctrine, that the proof must correspond with the allegations, and be confined to the point in issue.[9] The issue in treason is, whether the prisoner committed that crime by doing one or more of the treasonable acts stated in the indictment; just as in defamation it is, whether defendant injured plaintiff by maliciously uttering any

[1] Gr. Ev. § 256, in part, as to first six lines.

[2] 7 W. 3, c. 3 ("The Treason Act, 1695"), § 8. This section is not incorporated in the Irish Act of 1 & 2 G. 4, c. 24, but as the rule is also recognized at common law, this would seem to be immaterial.

[3] Fost. C. L. 245; 1 East, P. C. 121—123.

[4] Layer's case, 1722.

[5] By 13 W. 3, c. 3 ("The Act of Settlement"), § 2.

[6] R. *v.* Deacon, 1746; R. *v.* Wedderburn, 1746.

[7] R. *v.* Vaughan, 1696.

[8] Gr. Ev. § 256, in part.

[9] Ante, §§ 218, 298.

of the slanders laid in the statement of claim. In either case evidence of collateral facts is admitted or rejected on the like principle, accordingly as it does or does not tend to establish the specific charge. The declarations of the prisoner, and seditious language used by him, are accordingly admissible in evidence as explanatory of his conduct, and of the nature and object of the conspiracy in which he was engaged;[1] and, in support of the overt act of treason in the county mentioned in the indictment, other acts of treason, though done in other counties, may be given in evidence, subject, however, to such proof being ultimately rejected if the overt act, in corroboration of which they are tendered, is not proved to have been done in the county as laid.[2]

§ 958. In connection with this subject it only remains to be noticed that the protective provisions of the Statutes of Treason which have just been mentioned,[3] do not apply to treasons which consist in compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming or wounding, of the Queen, where the overt act or acts alleged are the assassination of her Majesty, or any attempt to injure in any manner whatsoever her Royal person; or to the misprisions of any such treason. In all these cases the accused is indicted, arraigned, tried and attainted, *upon the like evidence*, as if he stood charged with murder.[4]

§ 959.[5] In proof of the crime of *perjury* two witnesses were, it seems, formerly thought to be necessary.[6] This strictness, however, if it ever was law, has long since been relaxed.[7] The true principle is merely this, that the evidence showing the falsity must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence.[8] The oath of the opposing witness, therefore, will not avail, unless corroborated

[1] R. *v.* Watson, 1817; United States *v.* Hanway, 1851 (Am.).

[2] R. *v.* Layer, 1722; R. *v.* Deacon, 1746; R. *v.* Vane, 1662.

[3] 7 A. c. 21 ("The Treason Act, 1708"); 7 W. 3, c. 3 ("The Treason Act, 1695"); 6 G. 3, c. 53, § 3.

[4] 39 & 40 G. 3, c. 93 ("The Treason Act, 1800"); 1 & 2 G. 4, c. 24, § 2. Ir.; 5 & 6 V. c. 51 ("The Treason Act, 1842"), § 1. § 2 of this last Act makes it a high misdemeanor to discharge or aim fire-arms, or throw or use any offensive matter or weapon with intent to injure or alarm her Majesty.

[5] Gr. Ev. § 257, in part.

[6] This is said to have been the opinion of Ld. Tenterden: 3 St. Ev. 860, n. *g.*; R. *v.* Champney, 1836 (Coleridge, J.).

[7] The supposed history of its relaxation is given in *n.* 2 to § 257 of Greenleaf on Ev. (15th edit.) 1892.

[8] See R. *v.* Lee, 1766, cited 2 Russ. C. & M. 650.

by material and independent circumstances; for otherwise, there would be nothing more than the oath of one man against another, and the scale of evidence being thus in one sense balanced, the jury could not safely convict.[1] So far the rule is founded on substantial justice.[2] It would not, however, be precisely accurate to say, that the corroborative circumstances must be tantamount to another witness; for they need not be such as that proof of them, standing alone, would justify a conviction, in a case where the testimony of a single witness would suffice for that purpose.[3] For instance, a letter written by the defendant, contradicting his statement on oath, will render it unnecessary to call a second witness.[4] But the confirmatory evidence will not be sufficient to warrant a conviction if it be so only in some slight particulars;[5] but it must at least be strongly corroborative;[6] or, as has been said in quaint but energetic language, "a strong and clear evidence, and more numerous than the evidence given for the defendant."[7]

§ 960.[8] When several assignments of perjury are included in the same indictment, it does not seem clearly settled whether, in addition to the testimony of a single witness, corroborative proof must be given with respect to each. The better opinion is that such proof is necessary; and *that*, too, although all the perjuries assigned were committed at one time and place.[9] For instance, if a person, on putting in his statement of affairs in bankruptcy, or on other the like occasion, has sworn that he has made certain

[1] 4 Bl. Com. 358; R. *v.* Gaynor, 1839 (Ir.); R. *v.* Braithwaite, 1859 (Watson, B., and Hill, J.).

[2] R. *v.* Yates, 1841 (Coleridge, J.).

[3] R. *v.* Gardiner, 1839 (Patteson, J.); R. *v.* Shaw, 1865.

[4] R. *v.* Mayhew, 1834 (Ld. Denman). See, also, R. *v.* Towey, 1860.

[5] R. *v.* Yates, 1841 (Coleridge, J.); R. *v.* Boulter, 1852.

[6] R. *v.* Champney, 1836, and R. *v.* Wigley, 1835 (Coleridge, J.); Jorden *v.* Money, 1854 (Ld. Brougham), H. L.; Woodbeck *v.* Keller, 1826 (Sutherland, J.) (Am.); Reg. *v.* Braithwaite, 1864; Reg. *v.* Boulter, infra; State *v.* Buie, 1875 (Am.); State *v.* Held, 1874 (Am.). Any attempt to define the degree of corroboration required will be illusory: Reg. *v.* Shaw, 1867.

[7] R. *v.* Muscot, 1713 (Parker, C.J.). See The State *v.* Molier, 1826-34 (Am.): The State *v.* Hayward, 1819 (Am.); Clark's Exors. *v.* Van Reimsdyk, 1815 (Am.).

[8] Gr. Ev. § 257A, nearly verbatim.

[9] R. *v.* Virrier, 1840 (Ld. Denman); Williams *v.* Comm., 1879 (Am.); Reg. *v.* Parker, 1842, Staff. Summer Assizes, ubi supra; and also cited Russell on Crimes, vol. iii. (5th edit.) p. 80. But where the act denied is of a continuous nature, e.g., "treating," proof of one act in pursuance of it at one part of the day proved by one witness, and of another act in pursuance of it at another part of the day proved by another witness, will be sufficient: R. *v.* Hare, 1876.

payments, and is then indicted for perjury on several assignments, each specifying a particular payment which has not been made, a single witness with respect to each debt will not, it seems, suffice, though it may be very difficult to obtain any fuller evidence.[1]

§ 961.[2] The principle, that one witness, with corroborating circumstances, is sufficient to establish the charge of perjury, leads to the conclusion, that *without any witness directly to disprove what is sworn, circumstances alone*, when they exist in a documentary shape, may combine to the same effect; as they may combine, though altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact connected with the declarations of persons or the business of life. In accordance with these views, it has been held in America that a man may be convicted of perjury on documentary and circumstantial evidence alone,—*first*, where the falsehood of the matter sworn to by him is directly proved by written evidence springing from himself, with circumstances showing the corrupt intent; *secondly*, where the matter sworn to is contradicted by a public record, proved to have been well known to the prisoner when he took the oath; and *thirdly*, where the party is charged with taking an oath, contrary to what he must necessarily have known to be true; the falsehood being shown by his own letters relating to the fact sworn to, or by any other writings which are found in his possession, and which have been treated by him as containing the evidence of the fact recited in them.[3]

§ 962.[4] If the evidence adduced in proof of the crime of perjury consists of *two opposing statements by the prisoner*, and nothing

[1] R. *v.* Parker, 1842 (Tindal, C.J.). In R. *v.* Mudie, 1831, Ld. Tenterden refused to stop such a case, saying that defendant, if convicted, might move for a new trial. He was acquitted, however.

[2] Gr. Ev. § 258, in part.

[3] U. S. *v.* Wood, 1840 (Am.). In this case, under the latter head of the rule here stated, it was held that, if the jury were satisfied of the corrupt intent, the prisoner might well be convicted of perjury in taking, at the custom-house in New York, the "owner's oath in cases where goods, wares, or merchandize have been actually purchased," upon the evidence of the invoice-book of his father, John Wood, of Saddleworth, Eng., and of thirty-five letters from the prisoner to his father, disclosing a combination between them to defraud the Government of the United States, by invoicing and entering the goods shipped at less than their actual cost. The whole of this case deserves attentive perusal.

[4] Gr. Ev. § 259, in great part.

more, he cannot be convicted. For if one only was delivered under oath, it must be presumed, from the solemnity of the sanction, that the declaration was the truth, and the other an error, or a falsehood; though the latter, being inconsistent with what he has sworn, may form important evidence, with other circumstances against him.[1] And if both the contradictory statements were delivered under oath, there is still nothing to show which of them is false, when no other evidence of the falsity is given.[2] If, indeed, it can be shown that, before making the statement on which perjury is assigned, the accused had been *tampered* with,[3] or if any other circumstances tend to prove that the statement offered as evidence against the prisoner was true, a legal conviction may be obtained.[4] Where, too, the nature of the statements was such, that one of them must have been false to the *prisoner's knowledge*, slight corroborative evidence of the falsehood of the one deposed to by the prisoner would probably be sufficient. But it does not necessarily follow that because a man has given contradictory accounts of a transaction on two occasions, he has therefore committed perjury. For cases may well be conceived in which a person might very honestly swear to a particular fact, from the best of his recollection and belief, and might afterwards from other circumstances be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time.[5] Moreover, when a man merely swears to the best of his

[1] See Alison, Cr. L. (Sc.) 481.

[2] R. *v.* Wheatland, 1838 (Gurney, B.); R. *v.* Gaynor, 1839 (Ir.); R. *v.* Harris, 1822.

[3] Anon., 1764 (Yates, J., Ld. Mansfield, Wilmot and Aston, JJ., concurring). See observations of Mr. Greaves on this case, in 2 Russ. C. & M. 653, n.

[4] R. *v.* Knill, 1822; R. *v.* Hook, 1857.

[5] Holroyd, J., in R. *v.* Jackson, 1823. This very reasonable doctrine is in perfect accordance with the rule of the criminal law of Scotland, as laid down by Mr. Alison, in his excellent treatise on that subject, in the following terms:—"When contradictory and inconsistent oaths have been emitted, the mere contradiction is not decisive evidence of the existence of perjury in one or other of them; but the prosecutor must establish which was the true one, and libel on the other as containing the falsehood. Where depositions contradictory to each other have been emitted by the same person on the same matter, it may with certainty be concluded, that one or other of them is false. But it is not relevant to infer perjury in so loose a manner; but the prosecutor must go a step further, and specify distinctly which of the two contains the falsehood, and peril his case upon the means he possesses of proving perjury in that deposition." See Alison, Cr. L. (Sc.) 476.

memory and belief, it of course requires very strong proof to show that he is wilfully perjured.[1]

§ 963. The rule requiring something more than the testimony of a single witness on indictments for perjury, is confined to the proof of the *falsity* of the matter on which the perjury is assigned. Therefore, the holding of the court, the proceedings in it, the administering the oath, the evidence given by the prisoner, and, in short, all the facts, exclusive of the falsehood of the statement, which must be proved at the trial, may be established by any evidence that would be sufficient, were the prisoner charged with any other offence.[2] Moreover, when several facts must be proved to make out an assignment of perjury, each of these facts may, in strict law, be established by the uncontroverted testimony of a single witness. For instance, if the false swearing be that two persons were together at a certain time, and the assignment of perjury be that they were not together at that time, evidence by one witness that at the time named the one person was at London, and by another witness that at the same time the other person was in York, will be sufficient proof of the assignment of perjury.[3]

§ 964. Cases of *bastardy* form another class of cases in which the evidence of more than one witness is required. A man cannot be adjudged to be the putative father of an illegitimate child on the single testimony of the mother; but before an order of affiliation can be made by the petty sessions,[4] or confirmed by the quarter sessions,[5] the mother must not only be a witness,[6] but her evidence must be corroborated,[7] *in some material particular*, by other testimony, to the satisfaction of the justices; and the order will be bad, if it does not allege that the confirmatory evidence was material.[8] This rule protects men from accusations which profligate, designing, and interested women might easily make, which, however false, it might be extremely difficult to disprove. Still, it must not be

[1] Tindal, C.J., in R. *v.* Parker, 1842.

[2] 2 Russ. C. & M. 654; 2 Hawk. P. C. c. 46, § 10; Com. *v.* Pollard, 1847 (Am.).

[3] R. *v.* Roberts, 1848 (Patteson, J.).

[4] 35 & 36 V. c. 65 ("The Bastardy Laws Amendment Act, 1872"), § 4; 36 V. c. 9 ("The Bastardy Laws Amendment Act, 1873"), § 5. Therefore, if she be dead there is no jurisdiction. The Queen *v.* Armitage, supra.

[5] 8 & 9 V. c. 10 ("The Bastardy Act, 1845"), § 6.

[6] R. *v.* Armitage, 1872.

[7] See Hodges *v.* Bennett, 1860.

[8] R. *v.* Read, 1839.

strained so as to render corroboration necessary with respect to the actual begetting of the child, but it will suffice if any evidence be forthcoming calculated to raise a probability that illicit intercourse may have taken place, as, for example, proof of acts of familiarity between the mother and the putative father, though these may have occurred long prior to the date when the child was begotten.[1]

§ 964A. In actions for breach of promise of marriage, again, more than one witness other than the plaintiff is needed. The plaintiff, though now an admissible witness, cannot recover a verdict on his or her own uncorroborated testimony, but some other *material* evidence in support of the promise must be forthcoming.[2]

§ 964B. Moreover, in certain settlement cases, one witness is not sufficient. For no order for the removal of a pauper, in respect of a settlement acquired by three years' residence in a parish, can be made "upon the evidence of the person to be removed, without such corroboration as the justices or court *may think sufficient*."[3]

§ 965. It has sometimes been supposed that it is an absolute rule of law that a court *cannot* act on the unsupported testimony of any person in his own favour.[4] But there is no actual rule of law to the effect suggested; though a court ought to regard a claim against a dead man's estate which is only supported by the evidence of the claimant with jealous suspicion, and neither itself act upon it nor allow a jury to do so without corroboration,[5] and this irrespective of persons.[6]

§ 966. Again, in *Ecclesiastical Courts* the testimony of a single witness, though "omni exceptione major," is insufficient to support a decree, when such testimony stands unsupported by what the civilians pedantically call "adminicular circumstances."[7] This doctrine is now of little practical importance,

[1] Cole *v.* Manning, 1877.

[2] 32 & 33 V. c. 68, § 2. See Hickey *v.* Campion, 1872 (Ir.); Bessela *v.* Stern, 1877, C. A.

[3] 39 & 40 V. c. 61, § 34; R. *v.* Abergavenny Union, 1880.

[4] In re Harnett, Leahy *v.* O'Grady, 1886 (Ir.); Down *v.* Ellis, 1865; Grant *v.* Grant, 1865; Nunn *v.* Fabian, 1866; Hartford *v.* Power, 1869 (Ir.); U. falsely called J. *v.* J., 1867.

[5] In re Garnett, Gandy *v.* Macaulay, 1885, C. A.; In re Hodgson, Beckett *v.* Ramsdale, 1885, C. A.; Finch *v.* Finch, 1882, C. A.; Rogers *v.* Powell, 1869 (James, V.-C.); Hartford *v.* Power, 1869 (Ir.).

[6] Re Harnett, Leahy *v.* O'Grady, 1886 (Ir.); Mahain *v.* McCullagh, 1891 (Ir.).

[7] Donellan *v.* Donellan, 1795; Simmonds *v.* Simmonds, 1817 (Dr. Lushington); Id. (Sir H. Fust);

as the spiritual courts have, by a series of legislative improvements, been shorn of most of their jurisdiction over the laity, though they still possess it over the clergy. In prosecutions under the Church Discipline Act,[1] the Court of Arches will still be guided by the old ecclesiastical rules as to evidence, and will require the testimony of a single witness to be corroborated at least to a certain extent.[2]

§ 966A. In the Probate and Divorce Division of the High Courts, whether for England or Ireland, the rules of evidence observed in the old superior Courts of Common Law are applied to the trial of all questions of fact.

§ 967. Cases which depend upon the evidence of *accomplices* form another class of cases in which corroboration is usually required; for accomplices, are usually interested,[3] and always infamous, witnesses, whose testimony is admitted from necessity, since it is often impossible to bring the principal offenders to justice without having recourse to such evidence. In[4] point of law, an accomplice is a competent witness. Even when he is upon his trial with his fellows, if the case against him be only slight, an acquittal, as against him, will usually be directed, and his evidence taken.[5] But the admission of the evidence of an accomplice, who is on his trial, is entirely a matter for the discretion of the judge, who will generally refuse to accept the evidence of an accomplice who appears to have really been the principal offender.[6] After conviction for an offence which has merely been punished by inflicting a fine, an accomplice is a competent witness after he has paid his fine.[7] But in any case, where the evidence of an accomplice is received, the *degree of credit* which ought to be given to his testimony is a matter exclusively within the province of the jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by

Crompton *v.* Butler, 1790; Hutchins *v.* Denziloe, 1792.

[1] 55 & 56 V. c. 32.

[2] Berney *v.* Bp. of Norwich, 1866, P. C. This case seems to overrule Burder *v.* O'Neill, 1863.

[3] It used to be "a popular saying, that they fished for prey, like tame cormorants, with ropes round their necks": Macaulay's History of Engl. vol. 1, ch. 5, p. 666.

[4] Gr. Ev., in great part.

[5] Greenleaf on Ev., 15th edit., (1892), § 379.

[6] People *v.* Whipple, 1827 (Am.); Id.

[7] Rex *v.* Burley, 1818; Commonwealth *v.* Knapp, 1830 (Am.).

prudence and reason. But no positive rule of law exists on the subject; and the jury may, if they please, act upon the evidence of the accomplice, even in a capital case, without any confirmation of his statement.[1] Judges, however, in their discretion, generally advise a jury not to convict a prisoner upon the testimony of an accomplice alone; and although the adoption of this practice will not be enforced by a Court of Review,[2] its omission will, in most cases, be deemed a neglect of duty on the part of a judge.[3] Considering, too, the respect which is always paid by the jury to such advice from the bench, it may be regarded as the settled course of practice, not to convict a prisoner, excepting under very special circumstances, upon the uncorroborated testimony of an accomplice.[4] The judges do not, in such cases, withdraw the cause from the jury by positive directions to acquit, but they only advise them not to give credit to the testimony.

§ 968. It has been suggested that this practice is not applicable to *misdemeanour*.[5] There appears, however, to be no foundation, either in reason or law, for such a distinction between misdemeanours and felonies; and if it ever existed, it now no longer prevails. And the fact that the accomplice has, before giving his evidence, been convicted summarily of another offence under the same Act, affords no ground for dispensing with corroboration of his evidence.[6] At the same time, the practice of the caution from the bench is not so uniform in cases of misdemeanours as in felonies. For if the offence be one of a purely legal character, as, for instance, the non-repair of a highway,—or if it imply no great moral delinquency, as the fact of having been present as a spectator at a prize-fight,[7] which unfortunately terminated in manslaughter,[8]—the parties concerned, though in the eye of the law criminal, will not be considered such accomplices as to render necessary any confirmation of their evidence. Neither, in actions for penalties, does the law apprehend any danger from the mere fact of jurors being

[1] R. *v.* Stubbs, 1855; R. *v.* Hastings, 1835 (Ld. Denman); R. *v.* Jones, 1809 (Ld. Ellenborough); R. *v.* Atwood, 1789; R. *v.* Durham, 1787; R. *v.* Dawber, 1821; R. *v.* Sheehan, 1826; R. *v.* Jarvis, 1837.

[2] R. *v.* Boyes, 1861.

[3] R. *v.* Barnard, 1823; R. *v.* Wilkes, 1836.

[4] R. *v.* Gallagher, 1883.

[5] Per Gibbs, Att.-Gen., arg. in R. *v.* Jones, 1809.

[6] R. *v.* Farler, 1837.

[7] See R. *v.* Coney, 1882.

[8] R. *v.* Hargrave, 1831 (Patteson, J.); R. *v.* Young, 1866.

left, without any special caution from the bench, to weigh the uncorroborated testimony of an accomplice.[1]

§ 969.[2] But although, on ordinary criminal trials, it is the settled practice to require evidence in corroboration of that of an accomplice, yet the *manner and extent of the corroboration* required are not very clearly defined. Some judges have deemed it sufficient, if the witness be confirmed in any material part of the case; others have been satisfied with confirmatory evidence as to the *corpus delicti* only; others, again, have thought it essential that corroborative proof should be given of the *prisoner* having actually participated in the offence; and that when several prisoners are tried, confirmation should be required as to all of them, before all can be safely convicted.[3] This last is undoubtedly now the prevailing opinion; the confirmation of the witness, as to the commission of the crime, being considered no confirmation at all, as it respects the prisoner. For, in describing the circumstances of the offence, he may have no inducement to speak falsely, but on the contrary every motive to declare the truth, if he wishes to be believed when he shall afterwards endeavour to fix the crime upon the prisoner.[4]

§ 970. A late learned judge said[5] that in his 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 himself will always be able to relate the facts of the case, and if the confirmation be only on 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 a knife to the throat, and did steal the property. It would not at all tend to show that the party accused participated in it. * * * The danger is, that when a man is fixed, and knows that his own guilt is detected, he will purchase impunity by falsely accusing others." The real rule, however, appears to be that the extent of the corro-

[1] M'Clory *v.* Wright, 1860 (Keogh, J.) (Ir.); Magee *v.* Mark, 1860-1 (Ir.).
[2] Gr. Ev. § 381, in great part.
[3] R. *v.* Stubbs, 1855.
[4] R. *v.* Farler, 1837 (Ld. Abinger); R. *v.* Wilkes, 1836 (Alderson, B.); R. *v.* Moores, 1836; R. *v.* Addis, 1834 (Patteson, J.); R. *v.* Wells, 1829 (Littledale, J.); R. *v.* Sheehan, 1826 (Ir.); R. *v.* Carey, 1837 (Ir.).
[5] R. *v.* Farler, 1837 (Ld. Abinger).

boration required will depend upon the gravity of the crime.[1] In any case, moreover, in which two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same confirmation is required as if they were but one.[2] The testimony, too, of the wife of an accomplice will not be considered corroborative of the evidence of her husband.[3]

§ 971.[4] To one class of persons, *apparently accomplices*, the rule requiring corroborative evidence does not apply; namely, persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance, or an original determination to frustrate the enterprise, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, till the matter can be so far matured as to insure their conviction. The early disclosure is considered as binding the party to his duty; and though a great degree of disfavour may attach to him for the part he has acted as an *informer*,[5] yet his case is not treated as that of an accomplice. Moreover, it has been held in America that one who only enters into communication with criminals without any criminal intent himself, and solely for the purpose of detecting them in a criminal act, is not an accomplice.[7] It has also been there held that in any case to be an accomplice, one must be indictable as a participator in the offence.[8] Yet it has been laid down in America that officers of justice and detectives have no right to decoy others into crime in order to capture them as offenders, and that, indeed, to do so may even be criminal.[9] Moreover, if property be taken with a man's *consent*, even though such consent be given in order that the taker may be convicted of theft, such taking has, in America, been held to be no larceny.[10]

[1] R. *v.* Jervis, 1837. Whether a woman who voluntarily submits to an attempt to procure abortion is an accomplice or not, probably depends in each case on the facts. See R. *v.* Cramp, 1880. In America, it is said to have been decided (it is hard to see on what grounds) that she usually must not be so regarded: Greenleaf on Ev. 15th edit. (1892), § 332, and note thereto. Why is she not an accomplice, on the same grounds as if when two attempt suicide together the survivor is guilty of murder?

[2] R. *v.* Noakes, 1832 (Littledale, J.); R. *v.* Magill, 1842 (Perrin, J.) (Ir.).

[3] R. *v.* Neal, 1835 (Park, J.).

[4] Gr. Ev. § 382, almost verbatim.

[5] *Valore.* "But these are called Informers; men that live
By treason, as rat-catchers do by poison."
Beaumont's "Woman Hater," Act V., Sc. 2.

[6] R. *v.* Despard, 1803 (Ld. Ellenborough).

[7] Com. *v.* Downing, 1855 (Am.); State *v.* McKean, 1873 (Am.).

[8] Com. *v.* Wood, 1858 (Am.); Com. *v.* Boynton, 1874 (Am.).

[9] See Cannon *v.* People (Am.).

[10] Ibid.

AMERICAN NOTES.

Corroboration Required. — The policy of English law, while wisely refusing undue importance to mere numbers among witnesses, has prescribed that in certain instances a single oath shall not suffice for affirmative action.

Treason. — By Article III., section 3 of the Constitution of the United States, it is provided that "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court."

Fries' Case, Wharton's State Trials, 482, 585 et seq. (1799); U. S. *v.* Hanway, 2 Wall. Jr. 139 (1851); 1 Burr's Trial (Hopkins & Earles Edition) 196.

Perjury. — If on an indictment for perjury the falsity of the oath alleged to be perjured upon is proved merely by an oath of a single witness, the defendant is entitled to be discharged.

So also by statute. Beach *v.* State, 32 Tex. App. 240 (1893); People *v.* Wells, 103 Cal. 631 (1894).

"It is a right rule, founded upon that principle of natural justice which will not permit one of two persons, both speaking under the sanction of an oath, and, presumptively, entitled to the same credit, to convict the other of false swearing, particularly when punishment is to follow." U. S. *v.* Wood, 14 Pet. 430, 440 (1840). "It is a well-established rule of evidence, that the testimony of a single witness is insufficient to warrant a conviction on a charge for perjury. But it does not appear to be anywhere laid down that two witnesses are necessary to disprove directly the fact sworn to by the Defendant, although in addition to the testimony of a single witness, some other independent evidence ought to be adduced." State *v.* Molier, 1 Dev. 263 (1827).

The rule is not so construed as to require the scale to be turned in favor of the prosecution by the evidence of another witness as to the falsity of the oath of defendant. Woodbeck *v.* Keller, 6 Cowen, 118 (1826); Hendricks *v.* State, 26 Ind. 493 (1866).

It is not necessary that "to establish the giving of the testimony upon which the perjury is assigned" there should be more than one witness. State *v.* Wood, 17 Ia. 18 (1864); Com. *v.* Pollard, 12 Metc. 225 (1847); State *v.* Hayes, 70 Hun, 111 (1893).

Independent circumstances of corroboration are sufficient. Woodbeck *v.* Keller, 6 Cowen, 118 (1826). "In what cases may a living witness to the *corpus delicti* of a defendant, be dispensed with, and documentary or written testimony be relied upon to convict? We answer, to all such where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent. In

cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; the oath only being proved to have been taken. In cases where a party is charged with taking an oath, contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to; or by other written testimony existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited in it." U. S. *v.* Wood, 14 Pet. 430, 441 (1840). "Proof that the defendant has made statements verbally or in writing, under oath, or not under oath, conflicting with the statement under oath upon which the indictment is founded, is competent evidence on an indictment for perjury, and such evidence, in connection with the testimony of one other witness, has been held sufficient to warrant a conviction." Dodge *v.* State, 24 N. J. L. 455 (1854).

It is error to instruct the jury that this corroboration on the issue of falsity must be equivalent to a second witness. "The oath of the opposing witness therefore, will not avail, unless it be corroborated by other independent circumstances. But it is not precisely accurate to say that these additional circumstances must be tantamount to another witness. The same effect being given to the oath of the prisoner as though it were the oath of a credible witness, the scale of evidence is exactly balanced, and the equilibrium must be destroyed by material and independent circumstances, before the party can be convicted. The additional evidence need not be such as standing by itself, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose; but it must be at least strongly corroborative of the testimony of the accusing witness; or in the quaint, but energetic, language of Parker, C. J., 'a strong and clear evidence, and more numerous than the evidence given for the defendant.'" State *v.* Heed, 57 Mo. 252 (1874).

"On this point the court below charged the jury, that 'the corroborative evidence need not be of sufficient force to equal the positive testimony of another witness, or such as would require the jury to convict in a case in which a single witness is sufficient, but that it must be such as gives a clear preponderance to the evidence in favor of the state,' and, in view of this rule, establishing the perjury beyond a reasonable doubt. This charge of the court below is sustained by the weight of modern authorities, and is, we think, substantially correct." Crusen *v.* State, 10 Oh. St. 258 (1859).

Evidence that the defendant testified differently on a former trial is sufficient corroboration. State *v.* Blize, 111 Mo. 464 (1892).

"The corroboration must be by independent circumstances, tend-

ing to show the same results, and not merely that the account is probable." State *v.* Raymond, 20 Ia. 582 (1866).

A more liberal statement of the rule has been laid down by the supreme court of Arkansas. "The old rule that to convict of perjury two witnesses were necessary, has been relaxed; and a conviction may be had upon any legal evidence of a nature and amount sufficient to outweigh that upon which perjury is assigned." Marvin *v.* State, 53 Ark. 395 (1890).

The same rule applies on an indictment for subornation of perjury. People *v.* Evans, 40 N. Y. 1 (1869). And to civil cases where perjury is to be proved.

For example, in establishing the defence of truth in an action for slandering the plaintiff by asserting that she had committed perjury. Woodbeck *v.* Keller, 6 Cowen, 118 (1826).

On a special action on the case, given by statute, against one summoned as a trustee in foreign attachment for knowingly and wilfully answering falsely upon his examination on oath, the action cannot be maintained upon the testimony of one witness only as to the falseness of the answer; but the same amount of evidence is required as would be necessary to convict the defendant of perjury. Laughran *v.* Kelly, 8 Cush. 199 (1851). "By the well-settled rules of law, there is a class of cases which do not come within the general principles of evidence, but which must be proved by a greater amount of testimony than is ordinarily required to establish a case in a court of justice. Whenever a false oath is the gist of the matter to be proved, or it becomes necessary to control the statement of a party who is compelled to answer under oath allegations made against him, something more than the testimony of a single witness is necessary to constitute legal proof. The reason for this rule is consonant to the plainest dictates of justice. The law attributes such force and effect to the oath of every man given in the course of judicial proceedings, that it cannot be overcome or outweighed, to his prejudice, by the simple, naked, unsupported oath of another person. In such cases there is oath against oath; the scale of evidence is exactly balanced, and something more is necessary to destroy the equilibrium, which must be done by other witnesses or corroborating testimony. So strictly was this rule formerly held, that in proof of the crime of perjury two witnesses were necessary; and although, by the course of modern decisions, this rule is now modified, it is still essential, that the oath of the opposing witness should be corroborated by independent evidence of such a character as clearly to turn the scale and overcome the oath of the defendant." Laughran *v.* Kelly, 8 Cush. 199 (1851).

It is merely on the point of the falsity of the oath alleged to be perjured that corroboration is required. Other necessary allega-

tions in the indictment may be proved under the usual rule. "Nor is any other testimony necessary in a case of perjury than in other cases, except to disprove the fact sworn to by the defendant: That he did take the oath, and the terms of the oath, may be proved by one witness." State *v.* Hayward, 1 N. & McC. 546 (1819).

Bastardy and Seduction. — As in England, it has frequently been required by statute that for an affiliation order the evidence of the prosecutrix must be corroborated.

For example, by accusation during travail. Stiles *v.* Eastman, 21 Pick. 132 (1838).

So corroboration has been required by statute, in an action for seduction. State *v.* Wells, 48 Ia. 671 (1878).

Divorce. — To secure an absolute divorce, it is required by the laws of many states that the statements of the libellant should be corroborated in some material particular. "It is the settled rule of this court that a divorce *a vinculo* will not be granted on the testimony of the complainant alone, as to the cause of divorce." Tate *v.* Tate, 26 N. J. Eq. 55 (1875). But this "rule, upon which the judges have usually acted in these cases, of not granting a divorce upon the uncorroborated testimony of the libellant, is merely a general rule of practice, and not an inflexible rule of law. When other evidence can be had, it is not ordinarily safe or fit to rely upon the testimony of the party only. But sometimes no other evidence exists, or can be obtained. The parties are made competent witnesses by statute, and there is no law to prevent the finding of a fact upon the testimony of a party whose credibility and good faith are satisfactorily established." Robbins *v.* Robbins, 100 Mass. 150 (1868).

To the same effect is Flattery *v.* Flattery, 88 Pa. St. 27 (1878).

Accomplices. — The rule is well settled that, the jury being the sole judge of the credibility of witnesses, they may convict, in a criminal case, upon the uncorroborated evidence of an accomplice. State *v.* Russell, 33 La. Ann. 135 (1881); Watson *v.* Com., 95 Pa. St. 418 (1880); People *v.* Costello, 1 Denio, 83 (1845); State *v.* Watson, 31 Ia. 361 (1861); Com. *v.* Bosworth, 22 Pick. 397 (1839); Com. *v.* Kibling, 63 Vt. 636 (1891); State *v.* Miller, 97 N. C. 484 (1887); Parsons *v.* State, 43 Ga. 197 (1871); State *v.* Stebbins, 29 Conn. 463 (1861); R. *v.* Beckwith, 8 C. P. U. C. 274 (1859), confined in R. *v.* Andrews, 12 Ont. Rep. 184 (1886); People *v.* Evans, 40 N. Y. 1 (1869); Cheatham *v.* State, 67 Miss. 335 (1889); State *v.* Dawson, 124 Mo. 418 (1894); Porath *v.* State, 90 Wis. 527 (1895); Lamb *v.* State, 40 Neb. 312 (1894); State *v.* Patterson, 52 Kans. 335 (1893); Jenkins *v.* State, 31 Fla. 196 (1893); State *v.* Barber, 113 N. C. 711 (1893).

"The degree of credit, to be given to an accomplice, was submitted to the jury with proper instructions. There is no rule

of law that they may not convict upon such testimony. There should be none such. The degree of credit to be given to a witness, whatever may be his character or positon in a cause, should not be arbitrarily determined in advance of his testimony and in ignorance of the circumstances affecting its credibility." State *v.* Litchfield, 58 Me. 267 (1870).

"Although it has often been said by judges and elementary writers, that no person should be convicted on the testimony of an accomplice unless corroborated by other evidence, still there is no such inflexible rule of law. It is a question for the jury, who are to pass upon the credibility of an accomplice, as they must upon that of every other witness. His statements are to be received with great caution, and the court should always so advise; but, after all, if his testimony carries conviction to the mind of the jury and they are fully convinced of its truth, they should give the same effect to such testimony as should be allowed to that of an unimpeached witness, who is in no respect implicated in the offence. Such testimony will authorize a conviction in any case. The court certainly should advise great caution on the part of the jury, where the prosecution depends upon the uncorroborated evidence of an accomplice; but they are not to be instructed, as matter of law, that the prisoner must in such case be acquitted." People *v.* Costello, 1 Denio, 83 (1845).

"The whole extent of the rule is this, that such testimony is of a suspicious character, and calls for scrutiny on the part of the jury and for a particular caution to the jury on the part of the judge in his charge. The evidence, if standing alone, is not to be rejected, and whether corroborated or not, (and to what degree it needs corroboration the jury must judge), may be sufficient to satisfy the minds of the jury. So important however is it that the jury should be cautioned as to the weight of the evidence by the court, that to omit it is now held a clear omission of judicial duty, and becomes a ground, perhaps, for granting a new trial." State *v.* Stebbins, 29 Conn. 463, 473 (1861).

A witness does not become an accomplice by being charged with a similar offence. U. S. *v.* Van Leuven, 65 Fed. Rep. 78 (1894).

The question whether a witness is an accomplice may be left to the jury. People *v.* Strybe, (Cal.) 36 Pac. 3 (1894).

Corroboration Required. — In certain states the evidence of an accomplice must be corroborated. Such corroboration is frequently required by statute. State *v.* Allen, 57 Ia. 431 (1881); Dunn *v.* State, 15 Tex. App. 560 (1884); Melton *v.* State, 43 Ark. 367 (1884); Vaughan *v.* State, 58 Ark. 353 (1894); Craft *v.* Com., 81 Ky. 250 (1883); Evans *v.* State, 78 Ga. 351 (1886); State *v.* Streeter, 20 Nev. 403 (1889); People *v.* O'Neil, 109 N. Y. 251 (1888); See also R. *v.* Perry, 1 Lower Can. Law Journal, 60 (1864).

Slight evidence identifying the defendant with the crime, after the *corpus delicti* has been proved, will be a sufficient corroboration of the evidence of an accomplice. Evans *v.* State, 78 Ga. 351 (1886).

What is Corroboration? "But what amounts to corroboration? We think the rule is, that the corroborative evidence must relate to some portion of the testimony which is material to the issue. To prove that an accomplice had told the truth in relation to irrelevant and immaterial matters which were known to everybody, would have no tendency to confirm his testimony involving the guilt of the party on trial. If this were the case, every witness, not incompetent for the want of understanding, could always furnish materials for the corroboration of his own testimony. If he could state where he was born, where he had resided, in whose custody he had been, or in what jail or what room in the jail he had been confined, he might easily get confirmation of all these particulars. But these circumstances having no necessary connexion with the guilt of the defendant, the proof of the correctness of the statement in relation to them, would not conduce to prove that a statement of the guilt of the defendant was true." Com. *v.* Bosworth, 22 Pick. 397 (1839). "The accuracy of this statement has never been questioned, and, 'Taking the whole paragraph together,' says Chief Justice Gray in Commonwealth *v.* Holmes, 127 Mass. 424, 'it is manifest that the phrase 'material to the issue' is used as equivalent to 'involving the guilt of the party on trial,' or 'having necessary connection with the guilt of the defendant.'" Com. *v.* Chase, 147 Mass. 597 (1888).

Corroboration on immaterial points, therefore, does not satisfy the rule. State *v.* Callahan, 47 La. Ann. 444 (1895).

"But evidence which tends to prove the guilt of a defendant is sufficient by way of corroboration, although it does not directly confirm any particular fact stated by the accomplice." Com. *v.* Chase, 147 Mass. 597 (1888).

"The corroboration of an accomplice ought to be as to some fact or facts, the truth or falsehood of which goes to prove or disprove the offence charged against the prisoner." State *v.* Miller, 97 No. C. 484 (1887). It is not however, essential that the corroboration shall be equivalent to the "swearing of one credible witness." Clapp *v.* State, 94 Tenn. 186 (1894).

One accomplice cannot corroborate another, merely by a correspondence in their stories. Melton *v.* State, 43 Ark. 367 (1884); Phillips *v.* State, 17 Tex. App. 169 (1884).

A confession by the accused, with proof of the *corpus delicti* is sufficient corroboration of the evidence of an accomplice. Melton *v.* State, 43 Ark. 367 (1884); Patterson *v.* Com., 86 Ky. 313 (1887).

The jury are the sole judges as to the weight to be given corroborating evidence in states where such corroboration is required.

Crafts *v.* Com., 81 Ky. 250 (1883); State *v.* Streeter, 20 Nev. 403 (1889).

An attempt has been made to establish a distinction between cases of felony and those of misdemeanor: that corroboration is absolutely needed in cases of felony but may be dispensed with in the case of offenses of a less grade. "In felonies — crimes involving the deepest hue of depravity and moral turpitude — the testimony of an accomplice is more open to impeachment than in mere misdemeanors, or offenses of a less revolting character. In the former class of crimes, a jury ought, in no case, to convict on the uncorroborated evidence of an accomplice. There may be some rare exceptions to this rule, but as a general proposition it is well founded." U. S. *v.* Harries, 2 Bond, 311, 317 (1869).

A Cause for Comment. — While the jury are justified in convicting upon the uncorroborated evidence of an accomplice, it is frequently obvious that the incriminating witness is a much more despicable person, morally, than the one whom he accuses; adding, upon his own statement, to the guilt of a common crime the baseness of a self-serving treachery. These and similar considerations warrant and sometimes almost demand comment from the court. "It is competent for a jury to convict on the testimony of an accomplice alone. But the source of this testimony is so corrupt that it is deemed unsafe to rely upon, and the court always consider it their duty to advise a jury to acquit, where there is no evidence corroborative of the accomplice. Corroboration need not extend to the whole testimony of the accomplice; but it being shown that he has testified truly in some particulars, the jury may infer that he has in others. It is almost the universal opinion that the testimony of the accomplice should be corroborated as to the person of the prisoner against whom he speaks. Some fact should be proved by testimony, independent of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it. To prove that the accomplice had told the truth in relation to irrelevant and immaterial matters which were known to everybody, would have no tendency to confirm his testimony involving the guilt of the party on trial." Watson *v.* Com. 95 Pa. St. 418, 424 (1880); State *v.* Crab, 121 Mo. 554 (1894).

"The source of this evidence is so corrupt, that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation. Hence the court ever consider it their duty to advise a jury to acquit where there is no evidence other than the uncorroborated testimony of an accomplice." Com. *v.* Bosworth, 22 Pick. 397 (1839).

The supreme court of Georgia after ruling that the legality of a conviction upon the uncorroborated evidence of an accomplice is "well settled as the law of this state," go on to say: — "It is, how-

ever, the almost universal practice of the Judges to instruct juries that they should be cautious in convicting upon the uncorroborated testimony of accomplices." State *v.* Miller, 97 N. C. 484 (1887).

"It is the practice in England, and probably in this country where judges are still entrusted with the duty of charging the jury on the facts as well as the law of the case, to advise juries to acquit where the prosecution rests on the sole and uncorroborated testimony of the accomplice. This practice, however, appears to depend somewhat upon the discretion of the judge. It will be found, upon examining the cases, that it is usually, if not exclusively, confined to cases where the prosecution is sought to be supported by the sole testimony of the accomplice, or where there is an entire absence of any other testimony tending to implicate the party on trial. In cases where there is testimony introduced for the purpose of corroborating the evidence of the accomplice, in a matter implicating the defendant, an instruction to the jury not to convict, unless they are satisfied that the statements of the accomplice are corroborated, is not usual. The strength of the corroborating evidence is left to the jury." State *v.* Watson, 31 Mo. 361 (1861).

It has been held in Upper Canada that it was not error to fail to caution the jury. "Such a witness stands in a situation differing from one whose general character is shewn to be bad; he is immediately connected with the crime, the subject of enquiry, and has an obvious interest in obtaining the conviction of those whom he represents to have acted with him in committing it, and therefore, I think it to be regretted that there should be an omission to submit his evidence to the jury, coupled with a caution which the practice and authority of the most eminent judges in England recommend. But after the case of the Queen *v.* Stubbs, it cannot be treated as a point of law, and if not, then it is not a ground to apply for a new trial, for it certainly is not a question of fact." R. *v.* Beckwith, 8 U. C. C. P. 274 (1859). So in other jurisdictions. Porath *v.* State, 90 Wis. 527 (1895). And such seems to be the general rule.

"The suspicion with which the testimony of accomplices is received by the courts, and their unwillingness to sustain convictions resting wholly upon the uncorroborated evidence of such persons has led to the very general practice of advising juries to act with great prudence and suspicion upon such evidence, and to acquit unless there is corroboration in material particulars. But our researches have failed to discover a case in which a conviction has been set aside by reason of the court refusing so to instruct or to advise." Cheatham *v.* State, 67 Miss. 335, 344 (1889). The caution should not be given when the accomplice testifies for the defendant. Joseph *v.* State, (Tex.) 30 S. W. 1067 (1895); People *v.* O'Brien, 96 Cal. 171 (1892).

CONTINUATION OF PART IV.

EVIDENCE SUBJECT TO SPECIAL RULES OF LAW.

CHAPTER III.

MATTERS REQUIRING TO BE EVIDENCED BY WRITINGS.

§ 972. In the present chapter will be considered briefly those matters which the law requires to be proved by the evidence afforded by a *written document* more or less formally executed. Writings are of two kinds, namely, (1) writings under seal, which are called "*deeds*," and (2) ordinary writings not under seal.

§§ 973-4. First, as to deeds. There are some transactions which are, by the Common Law, required to be evidenced by deed. The most important of such transactions are those which relate to *incorporeal rights*; all of which, whether they amount to an interest in land or not, lie in *grant*, and accordingly can be neither created, assigned, demised, nor surrendered, except by *deed*.[1] Such things as advowsons, ferries,[2] rents, profits à prendre, easements, and the like, are "incorporeal rights"; as, also, are interests in lands not in possession, like remainders, or reversions for life or years. The principle, which requires incorporeal rights to be evidenced by documents under seal, depends on the *nature* of the subject-matter, and not on the quality or amount of interest granted, transferred, or surrendered. Accordingly, a right of common (which is a profit à prendre), or a right of way (which is an easement or a right in nature of an easement), can no more be granted or conveyed for

[1] Wood *v.* Leadbitter, 1845; Hewlins *v.* Shippam, 1826; Co. Litt. 337 b, 338 a; 2 Shep. Touch. 300; 1 Wms. Saund. 236 a; Lyon *v.* Reed, 1844; Bird *v.* Higginson, 1837; Mayfield *v.* Robinson, 1845; Roffey *v.* Henderson, 1851. The better opinion is that the cancellation or destruction of the deed will *not* draw after it the loss of the interest itself, even where it is one which is necessarily in writing. See Greenleaf on Ev. 15th edit. (1892), §§ 265 and 568.

[2] Mayfield *v.* Robinson, 1845.

life, for years, or even for days, without a deed, than in fee-simple.[1] So strict is this rule that even a ticket of admission to a theatre during a season, or to a grand-stand during races, affords no irrevocable title to the party purchasing it, who, after notice of revocation, can be removed by the owner of the premises, without any reason assigned, and without so much as the price of the ticket being returned; and whose only remedy, if any, is to bring an action, founded on a breach of contract, against the person who sold the ticket, or against those who authorised its sale.[2] And *any* mere personal licence of pleasure, as the privilege of hunting, will be revocable, whether granted by parol, or under seal.[3] Such privileges as those of hunting, fishing or shooting, *coupled with a right of taking away the game when killed*, are indeed profits à prendre, and as such can only be irrevocably granted by deed to a person and his assigns.[4] But, although a parol demise of an incorporeal hereditament passes no estate, a grantor is entitled to recover from a grantee, who has actually occupied and enjoyed the thing so demised, such reasonable sum as the jury shall assess, for the latter's actual enjoyment.[5]

§ 975. Deeds are also in certain cases required as evidence to prove a transfer of personal property, the law as to which is, in substance, as follows:—A gift which is clearly[6] proved to have been given in contemplation of death,[7] is called a donatio mortis causâ, and unless made bonâ fide twelve months before the donor died must be accounted for at the Inland Revenue Office, and will be liable to probate duty.[8] A mere verbal gift of such a nature, without actual delivery, passes no property to the donee;[9] and this whether

[1] Wood *v.* Leadbitter, 1845 (Alderson, B.). See Williams *v.* Morris, 1841; Perry *v.* Fitzhowe, 1846.

[2] Wood *v.* Leadbitter, 1845; overruling Taylor *v.* Waters, 1817; and explaining Webb *v.* Paternoster, 1620; Wood *v.* Lake, 1751; and Wood *v.* Manley, 1839. See, also, Taplin *v.* Florence, 1851.

[3] Wood *v.* Leadbitter, 1845; Wickham *v.* Hawker, 1840; Thomas *v.* Sorrell (undated).

[4] Doe *v.* Lock, 1835; Wickham *v.* Hawker, 1840; recognized in Durham & Sunderl. Rail. Co. *v.* Walker 1842; Bird *v.* Higginson, 1837; Barker *v.* Davis, 1861.

[5] Bird *v.* Higginson, 1837; Thomas *v.* Fredericks, 1847. See post, §§ 981—984, 1036, 1043.

[6] See M'Gonnell *v.* Murphy, 1869 (Ir.).

[7] Cosnahan *v.* Grice, 1862 (P. C.).

[8] 44 V. c. 12 ("The Customs and Inland Revenue Act, 1881"), §§ 38, 39, as amended by 52 & 53 V. c. 7, § 11.

[9] Smith *v.* Smith, 1733-4; Bunn *v.* Markham, 1841; Powell *v.* Hellicar, 1858; M'Gonnell *v.* Murphy,

the chattel was at the time of the gift in the actual possession of the donor or of the donee.[1] Moreover, the gift of a chattel inter vivos, whether made verbally or in writing without deed, is not binding, unless there be either an actual delivery of possession of the property,[2] or a declaration of trust respecting it.[3] Neither will the courts substitute one of these modes of dealing for the other in order to effectuate the gift, when by so doing the real intentions of the donor would be defeated.[4] No rule of equity, moreover, perfects an imperfect gift by such a contrivance, even in favour of a bonâ fide present by a husband to his wife. A gift such as that just referred to will, however, be deemed irrevocable, if effected by a declaration of trust, or if accompanied by delivery of possession,[5] or possibly if followed by some statement or act on the part of the donee testifying his acquiescence in the gift.[6] A similar gift, if made by deed, is, moreover, complete without any delivery by the donor or acceptance by the donee, until disclaimer by the latter;[7] but such disclaimer may be by parol.[8] An assignment of chattels for a valuable consideration by way of mortgage will be binding upon the parties, though made by instrument not under seal, and though unaccompanied by any actual or symbolical delivery.[9]

§ 976. Contracts made and acts done by corporations form another class of transactions, in general required by the common law to be evidenced by deed.[10] The general rule of law is, that a corporation aggregate cannot express its will or do any act except under seal, and this rule (which may be traced to a remote antiquity) is founded on the assumption, that the concurrence of the whole body corporate in any particular act, can best be authenticated by the

1869 (Ir.). See Moore *v.* Moore, 1874; Rolls *v.* Pearce, 1877; Austin *v.* Mead, 1880 (Fry, J.).

[1] Shower *v.* Pilck, 1849.

[2] See Kilpin *v.* Ratley, 1892; Cochrane *v.* Moore, 1890.

[3] Milroy *v.* Lord, 1862 (Turner, L.J.).

[4] Breton's Estate, In re, 1881 (Hall, V.-C.).

[5] See Bourne *v.* Fosbrooke, 1865.

[6] Serjeant Manning's note, 1846, in 1 C. B. 381, n. (*d*), and note to same effect in 2 M. & Gr. 691, n. (*a*), 1842; cited by Parke, B., in Flory *v.* Denny, 1852; questioning Irons *v.* Smallpiece, 1819.

[7] Id.; Siggers *v.* Evans, 1855. See Hobson *v.* Thellusson, 1867.

[8] Id.; Shep. Touch. 285.

[9] Flory *v.* Denny, 1852.

[10] Arnold *v.* May. of Poole, 1842; May. of Ludlow *v.* Charlton, 1840; Church *v.* Imp. Gas Light & Coke Co., 1838; Paine *v.* Strand Union, 1846; Lamprell *v.* Billericay Union, 1849. As to contracts made by the Metrop. Board of Works, see 18 & 19 V. c. 120 ("The Metropolis Management Act, 1855"), § 149.

affixing of the corporate seal to the document relating to such act.[1] Its common seal has, in the quaint phraseology of olden times, been termed "the hand and mouth of the corporation."[2] This rule has been discarded in the United States as highly impolitic, and is now almost entirely superseded in practice.[3] In England, it has been described by one of our most accomplished judges as "a relic of barbarous antiquity,"[4] but still partially holds its ground.

§ 977. The rule has, however, from the earliest traceable period, been subject to certain *exceptions*, which rest upon a principle of convenience, amounting almost to necessity,[5] and which relate either to *trivial matters of frequent recurrence*, or to *such affairs* as from their nature *do not admit of delay*.[6] As said in a well-considered case,[7]—"A corporation which has a *head* may give a personal command and do small acts; as it may retain a servant. It may authorise another to drive away cattle damage feasant, or to 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."

§ 978. To the exceptions mentioned in the preceding case a further class of exceptions must now be added. In the case[8] from which a quotation has just been taken, it is remarked, that, "in modern times a new class of exceptions has arisen. Corporations have of late been established, sometimes by royal charter, more frequently by Act of Parliament, for the purpose of carrying on *trading speculations*; and where the nature of their constitution has

[1] May. of Ludlow *v.* Charlton, 1840 (Rolfe, B.); Church *v.* Imp. Gas Light & Coke Co., 1838.

[2] R. *v.* Bigg, 1717, cited by Tindal, C.J., in Gibson *v.* E. India Co., 1839. As to when a corporation may adopt a private seal, see ante, § 149.

[3] See 2 Kent, Com. 289, citing Bk. of Columbia *v.* Patterson, 1813 (Am.). See, also, Beverley *v.* Lincoln Gas Co., 1837, as reported 6 A. & E. 837, 838 (Patteson, J.).

[4] South of Irel. Colliery Co. *v.* Waddle, 1869 (Cockburn, C.J.).

[5] Church *v.* Imp. Gas Light and Coke Co., 1838 (Ld. Denman), cited by Rolfe, B., in May. of Ludlow *v.* Charlton, 1840.

[6] Arnold *v.* May. of Poole, 1842 (Tindal, C.J.); De Grave *v.* May. of Monmouth, 1830.

[7] May. of Ludlow *v.* Charlton, 1840 (Rolfe, B.).

[8] Id.

been such as to render the *drawing of bills*, or the *constant making of any particular sort of contracts necessary for the purposes of the corporation*, there the courts have held that they would imply in those, who are, according to the provisions of the Charter or Act of Parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist."

§ 979. Moreover, though the observations last quoted only speak of *trading* companies, later decisions seem to show that they may now be stated to be generally applicable alike to all *corporations aggregate*, whenever the making of a certain description of contract is necessary and incidental to the purposes for which the corporation was created.[1] For modern decisions establish the following propositions: An action *will* lie against a gas company for meters sold to them,[2] and by them against the consumer, either for not accepting gas according to his agreement,[3] or for the price of gas supplied to him;[4] a colliery company which had verbally contracted with an engineer for the erection of machinery to work their mine, and had paid him part of the price, was permitted to recover damages for breach of this agreement;[5] actions also lie against the guardians of the poor of an union[6] for iron gates,[7] for water-closets,[8] or for coals,[9] supplied for the union workhouse under parol contracts; an accountant, employed to audit the books of a poor-law union, can maintain an action for work done as against the guardians, although the contract was not under seal;[10] a surgeon retained by the general manager of a railway to attend a servant of the company injured by an accident on the line can recover his charges, though only verbally engaged;[11] a parol contract by the directors of a chartered Navigation Company to

[1] Clarke *v.* Cuckfield Union, 1851-2 (Wightman, J., in an elaborate argument). See, also, Nicholson *v.* Bradfield Union, 1866; Wells *v.* Kingston-upon-Hull, 1875.

[2] Beverley *v.* Lincoln Gas Light and Coke Co., 1837.

[3] Church *v.* Imp. Gas Light and Coke Co., 1838.

[4] City of Lond. Gas Light and Coke Co. *v.* Nicholls, 1826.

[5] South of Irel. Colliery Co. *v.* Waddle, 1869.

[6] Who are constituted a corporation by "The Union and Parish Property Act, 1835" (5 & 6 W. 4, c. 69, § 7).

[7] Sanders *v.* St. Neots' Union, 1846. But see Smart *v.* West Ham Union, 1855.

[8] Clarke *v.* Cuckfield Union, 1851-2. See Pauling *v.* Lond. & N. West. Rail. Co., 1853.

[9] Nicholson *v.* Bradfield Union, 1866.

[10] Haigh *v.* North Bierley Union, 1858.

[11] Walker *v.* Gt. West. Rail. Co., 1867, overruling Cox *v.* Midl. Rail. Co. 1849, so far as relates to the necessity of a sealed contract.

pay a person a certain salary in consideration of his going to Sydney and bringing home one of their ships, has been enforced as against the company, the plaintiff having performed his part of the agreement;[1] and the same company has recovered damages for ale bought for the use of the passengers on board one of their steam vessels, being unfit for use, though the agreement for the purchase was not under seal.[2]

§ 980. On the other hand, some contracts are considered *not* to be of such frequent occurrence, or of such small importance, or so essentially necessary for the purposes for which the corporations were respectively instituted, as to be taken out of the general rule requiring the contracts of corporations to be under seal.[3] Amongst these are a contract with a *copper* mining company for a supply by them of *iron* rails;[4] a contract with a water company for the supply to them of iron pipes;[5] a contract for erecting engines and machinery for a water company;[6] a contract with a railway company to execute extensive repairs on their permanent line of rails;[7] a contract with guardians of the poor to make a map of the rateable property of a parish in the union;[8] a contract with guardians to do some extra work in building a poor-house;[9] and a contract with guardians for the engagement of a clerk to the master of a workhouse.[10] Moreover, even before the East India Company ceased to be merchants, an allowance by them of a retiring pension to a military officer was held not to be recoverable in a court of law, unless granted by deed.[11]

§ 981. Moreover, to render a corporation liable in tort for the acts of its servants it is not necessary that the authority of such

[1] Henderson *v.* Austral. Roy. Mail St. Nav. Co., 1855. See, also, Reuter *v.* Elect. Teleg. Co., 1856.

[2] Austral. Roy. Mail St. Nav. Co. *v.* Marzetti, 1855.

[3] Church *v.* Imp. Gas Light & Coke Co., 1838 (Ld. Denman, explaining E. Lond. Waterw. Co. *v.* Bailey, 1827). See, also, Paine *v.* Strand Union, 1846; Ernest *v.* Nicholls, 1857; Lond. Dock Co. *v.* Sinnott, 1857; Prince of Wales Life Ass. Co. *v.* Harding, 1858.

[4] Copper Miners' Co. *v.* Fox, 1851.

[5] E. Lond. Waterw. Co. *v.* Bailey, 1827 (explained (Ld. Denman) in Church *v.* Imp. Gas Light & Coke Co., 1838), would seem now to be overruled. See ante, § 979, and n. [5].

[6] Homersham *v.* Wolverh. Waterw. Co. 1851 (probably not law). See ante, § 979, and n. [5].

[7] Diggle *v.* Lond. & Blackwall Rail. Co., 1850. See, also, as to this case, ante, § 979, and n. [5].

[8] Paine *v.* Strand Union, 1846.

[9] Lamprell *v.* Billericay Union, 1849.

[10] Austin *v.* Guard. of Bethnal Green, 1874.

[11] Gibson *v.* E. India Co., 1839. See Cope *v.* Thames Haven Dock & Rail. Co., 1849.

servants should be conferred by an instrument under seal;[1] and the rule requiring them to act by deed will not protect them, either where goods have been wrongly taken by their agent,[2] or from liability where they have wrongfully possessed themselves of money belonging to the plaintiff.[3] This last exception rests on necessity; for a corporation would scarcely put its seal to a promise to return money wrongfully received, so that if a seal were necessary, the injured party would be without remedy. Conversely and consistently with this rule, it is held that a corporation may even be liable for a libel,[4] or for a malicious prosecution,[5] by its servants—although it can maintain an action for a libel affecting the corporate property, but cannot maintain one for a libel charging it with an offence—such as corruption—of which only the individuals constituting it can be guilty, and not the corporation itself in its corporate capacity.[5]

§ 981A. An action is clearly maintainable *by* a corporation,[6] for the use and occupation of premises; and one is probably maintainable *against* it,[7] whenever it has *actually* occupied the plaintiff's premises, although no demise under seal has been executed. This, however, seems to rest on the peculiar language and object of the statute enabling landlords to bring such a form of action,[8] and does not extend to cases of mere constructive holding.[9]

[1] East. Cos. Rail. Co. *v.* Broom, 1851; Whitfield *v.* S. East. Rail. Co., 1858. This was an action for a libel transmitted by telegraph from one station to another on the defendants' line of rails. See, also, Green *v.* Lond. Gen. Omnibus Co., 1859; Roe *v.* Birkenhead, Lanc. & Chesh. Junc. Rail. Co., 1851; Goff *v.* Gt. North. Rail. Co., 1869; Moore *v.* Metrop. Rail. Co., 1872; Poulton *v.* Lond. & S. West. Rail. Co., 1867; Stewart *v.* Anglo-Califor. Gold Mining Co., 1852; Stevens *v.* Midl. Rail. Co. and Lander, 1854.

[2] Yarborough *v.* Bank of Engl., 1812.

[3] Hall *v.* May. of Swansea, 1844.

[4] In Kelly *v.* Mid. G. W. Rail. Co., 1872 (Ir.), (Whiteside, C.J.), and in Abrath *v.* N. E. Rail. Co., 1886, Ld. Bramwell in H. L. expressed grave doubts whether an action for malicious prosecution could be maintained against a corporation aggregate. Notwithstanding this, it is believed that the general opinion is that such an action may be maintained, and it was so held (Pollock, B.) in Kent *v.* Courage & Co., 1891. And see, also, Bank of New South Wales *v.* Owston, 1879, P. C.; and Edwards *v.* Midl. Rail. Co., 1880 (Fry, J.).

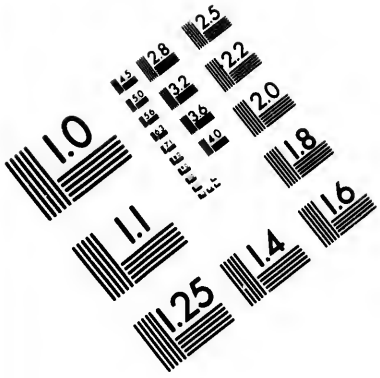
[5] Mayor, &c. of Manchester *v.* Williams, 1891.

[6] May. of Stafford *v.* Till, 1827; Dean and Ch. of Rochester *v.* Pierce, 1808; Southwark Bridge Co. *v.* Sills, 1826; May. of Carmarthen *v.* Lewis, 1834. See Doe *v.* Bold, 1847.

[7] Finlay *v.* Bristol & Ex. Rail. Co., 1852; Lowe *v.* Lond. & N. West. Rail. Co., 1852. See ante, § 974.

[8] 11 G. 2, c. 19 ("The Distress for Rent Act, 1737"), § 14, amended by "The Statute Law Revision Act, 1888" (51 V. c. 3).

[9] Finlay *v.* Bristol & Ex. Rail. Co., 1852.



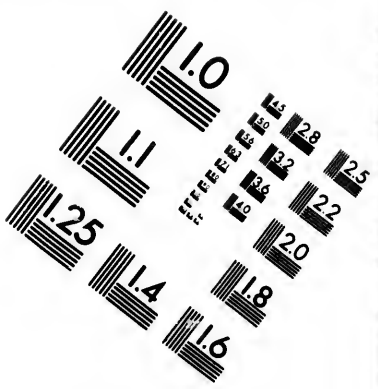
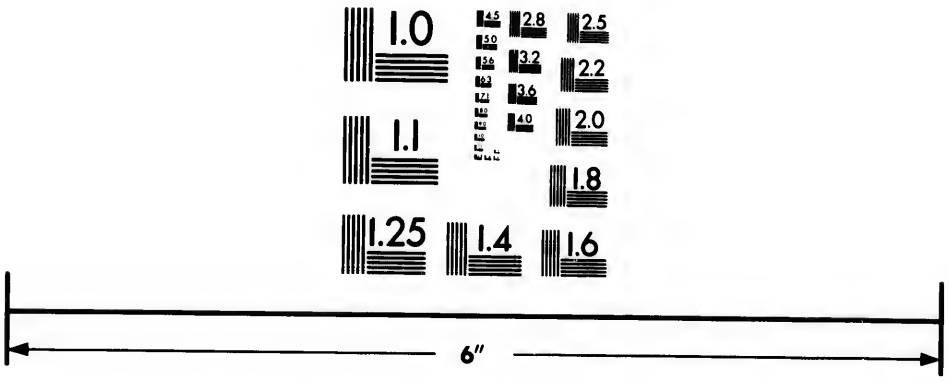


IMAGE EVALUATION TEST TARGET (MT-3)



Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

§ 982. The question has often been discussed, as to how far, in applying the rule by which its seal is generally required to contracts with corporations and its exceptions, a distinction can be recognised between *executed* and *executory* contracts.[1] The decisions on this subject are confessedly irreconcilable. Where the contract falls within one of the exceptions, and, consequently, need not be under seal, the corporation may, no doubt, equally sue or be sued upon the parol agreement, whether it be executed or be merely executory.[2] The question, however, is, what is the law, where a parol contract, which should have been under seal, has been *executed* by the one side before action brought, so that the other has received the whole benefit of the consideration for which it bargained?[3] For example, can a corporate body, after having actually received goods ordered by its servants, refuse to pay for them on the technical pretext that no contract under seal has been executed? The old Court of Queen's Bench,—apparently shocked at the gross injustice that might be perpetrated were such a system of repudiation allowable, and peradventure, bearing in mind the sage apophthegm of a great judge of the last century, that corporations, having neither bodies to be kicked nor souls to be damned, are not wont to be over nice observers of either honour or honesty,—decided this question in the negative on several occasions.

§ 983. Accordingly, in an action against guardians of an union for the price of some gates erected at the poor-house under a parol order, the court just named not only (as already mentioned) overruled an objection that the order was not by deed, the work in question having, after completion, been adopted by the corporation for purposes connected with it,[4] but in a subsequent action said: "To enforce an *executory* contract against a corporation, it might be necessary to show that it was by deed; but where the corporation have acted as upon an *executed* contract, it is to be presumed against them that everything has been done that was necessary

[1] See ante, § 974, and post, §§ 1036, 1043.

[2] Church *v.* Imp. Gas Light & Coke Co., 1838; recognised in Gibson *v.* East India Co., 1839; and in Arnold *v.* May. of Poole, 1842.

[3] See Eccles. Commiss. *v.* Merral, 1869.

[4] Sanders *v.* St. Neots' Union, 1846. See, also, Clarke *v.* Cuckfield Union, 1851-2; Beverley *v.* Lincoln Gas, &c. Co., 1837; De Grave *v.* May. of Monmouth, 1830 (Ld. Tenterden); Pauling *v.* Lond. & N. West. Rail. Co., 1853.

to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. This is by no means inconsistent with the rule that, in general, a corporation can only contract by deed; it is merely raising a presumption against them, from their acts, that they have contracted in such a manner as to be binding upon them, whether by deed or otherwise; and we are not aware of any decision or authority against this view of the case."[1]

§ 983A. In the Chancery courts, too, corporations may be bound by acquiescence in a continuing contract.[2]

§ 984. On the other hand, the old Court of Exchequer more than once held that a corporation is not precluded from relying on the absence of a seal, when works have been *executed* under a parol contract, even though such works have received the approval of the corporation, which enjoyed the full benefit of them.[3] And the old Common Pleas held that a solicitor, who had been appointed, but not under seal, by the mayor and town council of a borough to conduct suits, could not recover costs incurred in such suits.[4]

§ 985. Another instance in which the law requires that a transaction shall be evidenced *by deed* is where an agent is employed to execute a deed for his principal, for, in this case, the authority must be given by an instrument under seal.[5] But such an instrument, or power of attorney, *transfers* no interest, the agent or attorney being merely put thereby in the place of the principal. The deed which the agent is authorised to execute must consequently be executed by the agent in the name and as the act of him who gave the power.[6] Neither can a parol ratification, not amounting to a re-delivery,[7] by the principal in a deed executed by his agent give validity to the deed, when the agent has not been

[1] Judgment in Doe *v.* Taniere, 1848. See, also, Henderson *v.* Australian, &c. Nav. Co., 1855; Australian, &c. Nav. Co. *v.* Marzetti, 1855; Reuter *v.* Elect. Teleg. Co., 1856.

[2] Crook *v.* Corporation of Seaford, 1871.

[3] Lamprell *v.* Billericay Union, 1849. See, also, Diggle *v.* Lond. & Blackwall Rail. Co., 1850; Homersham *v.* Wolverh. Waterw. Co., 1851; May. of Ludlow *v.* Charlton, 1840.

[4] Arnold *v.* May of Poole, 1842. See, also, Clemenshaw *v.* Corp. of Dublin, 1875 (Ir.).

[5] Berkeley *v.* Hardy, 1826; White *v.* Cuyler, 1795; Steiglitz *v.* Eggington, 1815; Williams *v.* Walsby, 1803; Callaghan *v.* Pepper, 1840 (Ir.).

[6] Hunter *v.* Parker, 1840 (Parke, B.); M'Ardle *v.* Irish Iodine Co., 1864 (Ir.).

[7] Tupper *v.* Foulkes, 1861.

authorised to act by an instrument under seal;[1] though it seems that evidence of an express, if not of an implied, recognition or adoption of the deed by the principal, will, as against him, raise a presumption that the agent was thus formally authorised to act, so as to dispense with the necessity of proving that fact.[2]

§ 986. There are, moreover, some cases in which deeds are rendered necessary by *statute law*. For example, transfers of shares in *companies incorporated by Act of Parliament* are, by the Companies Clauses Consolidation Act, 1845,[3] required to be by *deed* duly stamped, in which the consideration shall be duly stated; and such deed may be according to the form given by the Act, or to the like effect. But, singularly enough, there exists no provision requiring transfers of shares in companies *incorporated under the Joint Stock Companies Act*,[4] to be made by deed.

§ 987-8. On the other hand, some exceptions have been created by statute to the common law rule which requires that the contracts of corporations shall be made by deed. Thus, with regard to the contracts of companies incorporated by Act of Parliament since its date, it is, by the Companies Clauses Consolidation Act, 1845,[5] provided that "the powers which may be granted to any committee [of directors] 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, then such committee, or the directors, may make such contract on behalf of the company in writing, signed by such

[1] Hunter *v.* Parker, 1840 (Parke, B.).

[2] Tupper *v.* Foulkes, 1861. But see Ld. Gosford *v.* Robb, 1845 (Ir.).

[3] 8 & 9 V. c. 16, § 14. This Act regulates all companies which have been incorporated by Act of Parliament since its date.

[4] Such incorporation is now effected under 25 & 26 V. c. 89, 1st Sch. Table A, No. 9.

[5] 8 & 9 V. c. 16, § 97.

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 actions or suits may be brought, either by or against the company, as might be brought had the same contracts been made between private persons only." Under the above section, it may, from the fact of sleepers having been actually received and used by a railway company, in pursuance of a contract made with an agent of the company upon certain terms, be inferred by a jury that the directors agreed on behalf of the company to accept the goods on the terms which had been so agreed.[1]

§ 989. Another exception to the common law rule requiring the contracts of corporations to be under seal, arises in the case of contracts by joint-stock companies which have been registered under the Companies Acts.[2] These may be made in nearly the same manner as contracts by companies incorporated by Act of Parliament passed in or since 1845.[2] Special provisions, too, exist as to the making, accepting, or indorsing of promissory notes or

[1] Pauling *v.* Lond. & N. West. Rail. Co., 1853.

[2] 25 & 26 V. c. 89. 30 & 31 V. c. 131, § 37 (adopting the repealed 19 & 20 V. c. 47, § 41), enacts, that "contracts on behalf of any company registered under the Act of 25 & 26 V. c. 89, 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;

"(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 per-

bills of exchange on account of such companies,[1] and also with respect to the execution abroad of deeds made on their behalf.[2] Moreover, the memoranda of association, by which joint-stock companies are incorporated, and the articles of association, by which the affairs of such companies may be regulated, are not required to be executed under seal; but after registration they become as binding as deeds on every shareholder who has signed them in the presence of a single attesting witness.[3]

§ 990. Returning to the consideration of instances in which particular evidence (by document or otherwise) of particular transactions is required by statute, the following further instances are to be noted.

§ 991. A *deed* was, by the Act to simplify the transfer of property,[4] rendered necessary in all cases of partitions, exchanges, [illegible]uments, or surrenders in writing of freehold or leasehold lands, or of leases in writing of freehold, copyhold, or leasehold lands,[5] where the transfer has been effected between the 1*st of January*,[6] and the 1*st of October*,[7] 1845.

§ 992. It has, moreover, been enacted[8] "that after the 1st day of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery;" or, in other words, shall pass by the delivery of the deed of conveyance, in the same manner as incorporeal hereditaments have heretofore passed. It is further enacted,[9] "that a *feoffment*, made after the said 1st day of October, 1845, other than a feoffment made under a custom by an

son 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." See Eley *v.* The Positive Governm. &c. Co., 1875.

[1] 25 & 26 V. c. 89 ("The Companies Act, 1862"), § 47. See Peruvian Rail. Co. *v.* Thames and Mersey Mar. Ins. Co., 1867.

[2] Id. § 55; 27 & 28 V. c. 19 ("The Companies Seals Act, 1864").

[3] By 25 & 26 V. c. 89 ("The Companies Act, 1862"), §§ 11, 16.

[4] 7 & 8 V. c. 76. This Act was, within a year of its passing, repealed by 8 & 9 V. c. 106 ("The Real Property Act, 1845").

[5] 7 & 8 V. c. 76, §§ 3 and 4; Burton *v.* Reevell, 1847; Doe *v.* Moffatt, 1850.

[6] 7 & 8 V. c. 76, § 13.

[7] 8 & 9 V. c. 106 ("The Real Property Act, 1845"), § 1.

[8] Id. § 2.

[9] Id. § 3.

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,[1] of any tenements or hereditaments,—and an *assignment of a chattel interest*, not being copyhold, in any tenements or hereditaments,—and a *surrender* in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing,—made after the 1st of October, 1845, shall also be *void* at law, unless made by *deed:* Provided always, that the said enactment, so far as the same relates to a release[2] or a surrender, shall not extend to Ireland."

§ 993. This enactment is of little practical importance as to feoffments, partitions, exchanges, assignments, and surrenders, since, before its passing, transfers effecting these were almost invariably by deed. With respect, however, to *leases*, it has proved highly beneficial;[3] for by requiring all demises for a period exceeding three years[4] to be under seal, it has gradually diminished, and at last dried up, that fruitful source of litigation, which used to spring from the difficulty of distinguishing between an actual lease and an agreement for a lease. At present, if the instrument be not under seal, it operates only as an agreement for a lease;[5] that is, either party may enforce its specific performance and turn it into a lease;[6] but, in the event of this course not being pursued, the party taking possession of land under it is a mere tenant at will, liable to become, by the payment and acceptance of rent,[7] a

[1] See post, § 1001.

[2] This is obviously a misprint for "lease;" but the blunder has been remedied by 23 & 24 V. c. 154, § 104, and Sched. B. (Ir.), which repeats, so far as Ireland is concerned, that part of § 3 of 8 & 9 V. c. 106, which relates to leases, assignments, and surrenders.

[3] The statute does not apply to agreements for letting tolls of turnpike roads under 3 G. 4, c. 126, §§ 55, 57: Shepherd *v.* Hodsman, 1852, recognized (Byles, J.) in Markham *v.* Standford, 1863.

[4] A lease for eighteen months, with power to lessee, by giving a month's notice, to prolong the term for a further period of two years, is not within the meaning of the statute: Hand *v.* Hall, 1877, C. A.

[5] Parker *v.* Taswell, 1858; Bond *v.* Rosling, 1861; Rollason *v.* Leon, 1862; Tidey *v.* Mollett, 1864; Stranks *v.* St. John, 1867.

[6] Parker *v.* Taswell, 1858. But see Wood *v.* Beard, 1876.

[7] See, further, as to the operation of this Act, Davidson, Conc. Prec. of Convey. 50—71; Platt on Leases, passim. See, also, post, §§ 1001, 1002.

tenant from year to year, and thenceforth to be subject to all those stipulations in the agreement which are applicable to such a tenancy.[1]

§ 994. Although leases for any term exceeding three years are now void unless granted by deed, an equally formal instrument is not required for the purpose of confirming those leases, which are invalid by reason of some deviation from the terms of the power under which they were granted; for it is expressly enacted,[2] that the *confirmation*, which shall suffice to establish the validity of any such defective lease, "may be by memorandum or note in writing signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorised."

§ 995. By "The Public Health Act, 1875," all contracts, "whereof the value or amount exceeds 50*l.*," which shall be made by an urban sanitary authority, *must* be in writing, and be sealed with the common seal of such authority.[3] "The Public Health (Ireland) Act, 1878," contains a similar clause.[4]

§ 995A. Debentures issued under the Mortgage Debenture Acts of 1865 and 1870 must be deeds.[5]

§ 996. Secondly.[6] As regards writings not under seal. It is in many cases (for the most part by statute) required that certain transactions be in writing.

§ 997. Thus absolute assignments of debts and other choses in action must be made "by writing under the hand of the assignor."[7]

[1] Martin *v.* Smith, 1874. See post, § 1001, ad fin.

[2] By 13 & 14 V. c. 17, § 3.

[3] 38 & 39 V. c. 55, § 174, subs. 1. See Hunt *v.* Wimbledon Local Bd., 1878; Eaton *v.* Basker, 1881; Young *v.* Leamington, Corp. of, 1883; Att.-Gen. *v.* Gaskill, 1882.

[4] 41 & 42 V. c. 52, § 201, subs. 1, (Ir.).

[5] 28 & 29 V. c. 78; 33 & 34 V. c. 20, § 15. But debentures, stock certificates to bearers, or annuity certificates issued in pursuance of "The Local Loans Act, 1875," will, it seems, be valid, if duly signed, without the impression of any seal (38 & 39 V. c. 83, § 22). Under this last Act, debentures, stock certificates, and annuity certificates, when respectively payable to bearer, are transferable by delivery (Id. §§ 5, 6, 7); while what are called "nominal securities" must be transferred "by *writing* in manner directed by the local authority" (Id.). Irrespective of the statute law, debentures under the seal of a corporation will not, as it seems, be regarded as promissory notes, or even as negotiable instruments, though they may be drawn in express terms as payable to bearer. Crouch *v.* Crédit Foncier of Engl., 1873.

[6] Supra, §§ 273-4.

[7] As to what will amount to an

If express notice in writing of any such assignment be given to the debtor, trustee, or other person liable, such assignment will, from the date of the notice, transfer the legal right to the assignee.[1]

§ 998. The assignment of a copyright of a book is, again, not valid unless it be in writing.[2] The law is the same as to an assignment of any patent, or of any copyright in a registered design or trade mark.[3]

§ 998A. The *sale* of a British *ship* or of any share therein, is also required[4] to be in writing, it being enacted that "(1) a registered ship or a share therein (when disposed of to a person qualified to own a *British* ship) shall be transferred[5] by bill of sale; (2) the bill of sale shall contain such description of the ship as is contained in the surveyor's certificate, or some other description sufficient to identify the ship to the satisfaction of the registrar, and shall be in the form marked A. in the First Part of the First Schedule to this Act, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of, and be attested by, a witness or witnesses."[6] This enactment[7] applies as well to an executory contract for the sale, as to the absolute sale, of a ship.[8] It renders an actual bill of sale necessary.[9] Such bill of sale must usually be executed by the transferor himself, in the presence of a witness or witnesses.[10] When a registered owner is desirous of

assignment of a debt, see Buck *v.* Robson, 1878; and to the assignment of a chose in action, see Brice *v.* Bannister, 1878; Ex p. Hall, Re Whitting, 1878; Walker *v.* Bradford Old Bk., 1884. See, also, Tancred *v.* Delagoa Bay Rail. Co., 1889.

[1] "The Judicature Act, 1875" (36 & 37 V. c. 66), § 25, subs. 6; 40 & 41 V. c. 57, § 28, subs. 6, (Ir.). See Burlinson *v.* Hall, 1884.

[2] Leyland *v.* Stewart, 1876; Jewitt *v.* Eckhardt, 1878 (Jessel, M.R.).

[3] See 5 & 6 V. c. 45 ("The Copyright Act, 1842"); 46 & 47 V. c. 57 ("The Patents, Designs and Trade Marks Act, 1883"), § 87; amended by 51 & 52 V. c. 50, § 21, and cases cited in last note.

[4] 57 & 58 V. c. 60 ("The Merchant Shipping Act, 1894"), § 24. This applies only to British ships. Union Bk. of London *v.* Lenanden, 1878.

[5] As to how a ship may be *mortgaged*, and the effect on it of an unregistered mortgage, see Keith *v.* Burrows, 1876.

[6] The bill of sale does not require a stamp: 54 & 55 V. c. 39 ("The Stamp Act, 1891"), Sched. tit. "General Exemptions (2)."

[7] As to provisions formerly in force (8 & 9 V. c. 89, § 34), see Duncan *v.* Tindal, 1853; Hughes *v.* Morris, 1852; M'Calmont *v.* Rankin, 1852.

[8] Batthyany *v.* Bouch, 1881, where the Court declined to follow Liverpool Borough Bk. *v.* Turner, 1860. See also Chapman *v.* Callis, 1861; Stapleton *v.* Haymen, 1865.

[9] Though under the old law any instrument in writing which recited the certificate of registry was sufficient: Hunter *v.* Parker, 1840 (Parke, B.).

[10] See 57 & 58 V. c. 60 ("The Merchant Shipping Act, 1894"), § 24.

selling or mortgaging an interest in a ship at a place out of the country, the registrar can allow the power of sale or mortgage to be exercised on the registered owner's behalf by another person, previously mentioned by the owner to the registrar, and whose name has been entered by the latter on the register.[1] Lastly, it is at least doubtful whether any description of vessel used in navigation, not propelled by oars,[2] can be sold without a bill of sale, though boats under fifteen tons burthen might, prior to that date, have been transferred by parol,[3] and though such vessels do not now require to be registered, if solely employed in river or coast navigation.[4]

§ 999. It is also required that an assignment of a policy of insurance be made by indorsement on the policy.[5] The assignee under an assignment so made may sue on the policy in his own name.[6] The statute, while furnishing a short form of indorsement,[7] leaves it uncertain whether it must not be sealed as well as signed. An assignment under this Act may be made after a loss by the perils insured against.[8] In practice the Act has been rendered unnecessary by those provisions of the Judicature Act which have been already set out.[9]

§ 1000. The most important of the Acts requiring the transactions specified in them to be in writing or by deed (as the case may be) is, however, the "*Statute of Frauds*," which has been extended to Ireland,[10] and has also been enacted, generally in the same words, in nearly all the United States.[11] Lord Nottingham framed it with the

[1] See 57 & 58 Vict. c. 60 ("The Merchant Shipping Act, 1894"), §§ 39, 40. Formerly a ship might be transferred by an agent acting under a parol authority. But now the proper form must be used, and the directions in the certificate of registry strictly followed: Orr *v.* Dickenson, 1858; Hunter *v.* Parker, 1810.

[2] See § 742 of "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), tit. "Ship"; and § 24.

[3] Benyon *v.* Cresswell, 1848.

[4] As to this, see 57 & 58 V. c. 60, § 2. See, also, id. §§ 3, 77, subs. 6; § 692, subs. 3; § 745, subs. 1E.

[5] See "The Policies of Marine Insurance Act, 1868" (31 & 32 V. c. 86), § 2.

[6] Id. § 1.

[7] Id. Sched. The form ends with the words "In witness whereof," &c.

[8] Lloyd *v.* Fleming, 1872.

[9] Supra, § 997.

[10] By 7 W. 3, c. 12.

[11] 29 C. 2, c. 3 (which by "The Short Titles Act, 1892" (55 V. c. 10), legally received the title by which it is cited above). See, also, 4 Kent, Com. 95, and n. *b* (4th edit.). The Civ. Code of Louis. art. 2415, without adopting in terms the provisions of the Stat. of Frauds, declares generally, that all verbal sales of

assistance of Sir Leolin Jenkins and Lord Hale.[1] Its noble author declared that every line of it was *worth* a subsidy,[2]—and the present generation may add that every line of it has *cost* a subsidy.[3] The rules of evidence contained in this statute, are, for the most part, well calculated for the exclusion of perjury, by requiring, in the cases there mentioned, some more satisfactory evidence than mere oral testimony affords. The statute dispenses with no proof of consideration, which was previously required, and gives no efficacy to written contracts, which they did not previously possess.[5] Its policy is to impose such requisites upon private transfers of property, as, without being hindrances to fair transactions, may either be totally inconsistent with dishonest projects, or may tend to multiply the chances of detection.[6] The scope of the present work will only allow a notice of the rules of evidence, which the statute has introduced.

§ 1001. By the provisions of the Statute of Frauds, as since amended, all *leases*, estates, and interests in lands,[7] created by livery and seisin only,—that is by mere matter in pais, without deed,[8]—or by parol and not put in writing, and signed by the parties creating the same, or their agents duly authorised in writing, have only the force and effect of estates at will; except leases for terms not exceeding three years at a rent amounting to two-thirds of the improved value.

immoveable property shall be void: 4 Kent, Com. 450, n. *a* (4th edit.).

[1] 3 Campbell's Lives of the Chancellors, 418.

[2] R. North's Life of Guildford, 209.

[3] In Doe *v.* Harris, 1838, Ld. Denman speaks of the Statute of Frauds as "one of the wisest laws in principle, though far from being complete in its details, or fortunate in its execution."

[4] Gr. Ev. § 262, almost verbatim.

[5] 2 St. Ev. 472; Rann *v.* Hughes (in H. L. and undated, but between 1764 and 1797); Barrell *v.* Trussell, 1811.

[6] Rob. on Frauds, Pref. xxii. A learned note, at p. 359 of the 15th edit. (1892) of Greenleaf, points out various systems of law in which the principle of the Statute of Frauds may be traced, and also that the Roman law required written evidence in every one of the cases in which it is rendered necessary by the Statute of Frauds, citing De Lesent De Exam. Testium [illegible] rinæ, Op. Tom. II., App. 243).

[7] Prior to 1st January, 1845, when 7 & 8 V. c. 76, came into operation (see ante, § 991), various of these could be created by parol.

[8] See per Patteson, J., and Ld. Denman, in Cooch *v.* Goodman, 1842.

[9] The actual words of "The Statute of Frauds" (29 C. 2, c. 3, § 1), are that "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 or 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

It seems, though the point is not wholly free from doubt, that the statute is not applicable to *demises under seal;*[1] and consequently, that an indenture of lease for more than three years need not be signed. It has been said that the tenancy described as "*an estate at will*," must be construed as a tenancy from year to year;[2] but this is not strictly accurate; since a party who enters under an agreement void by the statute is, in point of law, tenant at will at first, though, like any other tenant at will, he will be converted into a tenant from year to year, as soon as a rent measured by the year or portions of it has been paid and accepted.[3] In both characters he will be subject to such of the terms of the agreement as are not inconsistent with the species of tenancy which the law under the circumstances creates.[4] Therefore, if one of the terms be that the tenant shall keep the premises in repair during his occupation,[5] or that he shall paint in the seventh year of his tenancy,[6] or that he shall pay his rent in advance,[7] he will be liable to an action for a breach of any such stipulation, notwithstanding the agreement itself is made void by the statute.

§ 1002. Although a parol lease for a longer period than the Act

thereunto lawfully authorised 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, or any former law or usage, to the contrary notwithstanding." § 2 "excepts, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, duri g such term, shall amount unto two third parts at the least of the full improved value of the thing demised." These provisions were enacted in § 1 of 7 W. 3, c. 12, Ir.; but that section has been repealed since the 1st Jan., 1861, see 23 & 24 V. c. 154 (§§ 104, 105, and Sch. B. Ir.); and § 4 of the last-mentioned Act now regulates the law in Ireland, enacting that "every lease or contract with respect to lands, whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for any definite period of time, not being from year to year or any lesser period, shall be by deed executed, or note in writing signed, by the landlord, or his agent thereunto lawfully authorised in writing." See Bayley *v.* M. of Conyngham, 1863 (Ir.); Chute *v.* Busteed, 1862-3 (Ir.).

[1] Aveline *v.* Whisson, 1842; Shep. Touch. 56, n. 24; Cooch *v.* Goodman, 1842; Cherry *v.* Heming, 1849. Contrà, 2 Bl. Com. 306.

[2] Clayton *v.* Blakey, 1798 (Ld. Kenyon); 2 Smith, L. C. 118; Berrey *v.* Lindley, 1841 (Coltman and Maule, JJ.).

[3] Richardson *v.* Gifford, 1834 (Parke, J.); 2 Smith, L. C. 110, 111.

[4] Berrey *v.* Lindley, 1841 (Maule, J.); Doe *v.* Bell, 1793; Arden *v.* Sullivan, 1850. See Tooker *v.* Smith, 1857.

[5] Richardson *v.* Gifford, 1834. See Beale *v.* Sanders, 1837; Arden *v.* Sullivan, 1850.

[6] Martin *v.* Smith, 1874.

[7] Lee *v.* Smith, 1854.

permits is inoperative as to its duration, still, if a tenant holds under it during the entire period, he may quit *without notice* at the expiration of the term contemplated by the void demise.[1] The term[2] of three years, for which a parol lease may be good, must, on the other hand, be computed from the date of the agreement; and a term of three years to commence in future will consequently not satisfy the statute.[3] If a parol lease is made, to hold from year to year during the pleasure of the parties, this is adjudged to be a lease for only one year certain, and every subsequent year is a new springing interest, arising upon the first contract, and parcel of it; so that if the tenant should occupy ten years, still it is prospectively but a lease for a year certain, and therefore good, within the exception of the statute; though, as to the time past, it is considered as one entire and valid lease for so many years as the tenant has enjoyed it.[4]

§ 1003.[5] By the *third* section of the same statute,[6] no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, in messuages, manors, lands, tenements, or hereditaments, could,—prior to the first of January, 1845,[7]—be *assigned, granted, or surrendered*, unless by deed, or note in writing, signed by the party so assigning, granting, or surrendering the same, or his agent authorised by writing, or by act and operation of law. At common law, surrenders of estates for life or years in possession in things corporeal were good, though made by parol; but things incorporeal,

[1] Berrey *v.* Lindley, 1841; Doe *v.* Stratton, 1828; Doe *v.* Moffatt, 1850; Tress *v.* Savage, 1854.

[2] Gr. Ev. § 263, in part.

[3] Rawlins *v.* Turner, 1699.

[4] Rob. on Frauds, 241—244.

[5] Gr. Ev. § 264, in part.

[6] "The Statute of Frauds" (29 C. 2, c. 3). 7 W. 3, c. 12, § 1, Ir. was to the like effect; but that section has been repealed since the 1st Jan., 1861, see 23 & 24 V. c. 154, §§ 104, 105, and Sch. B., Ir. The law in Ireland is now contained in §§ 7 and 9 of the Act just cited. § 7 enacts, that "the estate or interest of any tenant under any lease or other contract of tenancy shall not be *surrendered* otherwise than by a deed executed, or note in writing signed, by the tenant or his agent thereto lawfully authorised in writing, or by act and operation of law." § 9 enacts, that "the estate or interest of any tenant in any lands under any lease or other contract of tenancy, shall be *assigned*, *granted*, or *transmitted* by deed executed, or instrument in writing signed, by the party assigning or granting the same, or his agent thereto lawfully authorised in writing, or by devise, bequest, or act and operation of law, and not otherwise."

[7] When 7 & 8 V. c. 76, came into operation. See ante, §§ 991—993.

as advowsons, rents, and the like, and interests in lands not in possession, as remainders and reversions for life or years, lying *in grant*, could not, and still cannot, be surrendered except by deed.[1] The effect of this section is not to dispense with any evidence required by the common law; but to add to its provisions somewhat of security, by requiring a new and a more permanent species of evidence. Wherever, therefore, at common law a deed was necessary, the same solemnity is still requisite under this Act; but with respect to lands and tenements in possession, which, before the statute, might have been surrendered by words only, some note in writing, duly signed, is by the statute made essential to a valid surrender.[2]

§ 1004. This section does not contain,—like the first two sections of the Act,—any exception in favour of leases not exceeding the term of three years; and, consequently, it excludes alike parol assignments and parol surrenders of mere leases from year to year, though such leases have been created by verbal agreement.[3] It seems, also, that a parol agreement by a lessee, for the transfer of his interest in a term not exceeding three years, which is intended to take effect as an *assignment*, and is invalid as such, cannot operate as an *underlease*.[4] If, however, both parties *intend* to create the relation of landlord and tenant, the mere fact of the parol demise passing all the lessor's interest in the premises will not prevent it from operating as a lease, at least for some purposes.[5] The lessor, therefore, under these special circumstances, may sue the lessee as for use and occupation during the entire term, even should such lessee quit the premises before its expiration;[6] and this, too, although the lessor, in consequence of having no reversion, cannot distrain for the rent in arrear.[7]

§ 1005. The *surrender by act and operation of law*, mentioned in the statute, is a phrase to which it is difficult to assign a precise meaning. Its most obvious application is, "to cases where the

[1] Co. Lit. 337 b, 338 a; 2 Shep. Touch. 330; 1 Wms. Saund. 236 a; Lyon *v.* Reed, 1844; ante, §§ 973-4.

[2] Rob. on Frauds, 248.

[3] Botting *v.* Martin, 1808 (M'Donald, C.B.); Mollett *v.* Brayne, 1809 (Ld. Ellenborough); Thomson *v.* Wilson, 1818 (id.). See Doe *v.* Wells, 1839.

[4] Barrett *v.* Rolfe, 1845; questioning Poultney *v.* Holmes, 1733-4.

[5] Pollock *v.* Stacy, 1847; upholding Poultney *v.* Holmes, 1733-4. But see Beardman *v.* Wilson, 1868.

[6] Pollock *v.* Stacy, 1847.

[7] Parmenter *v.* Webber, 1818; Smith *v.* Mapleback, 1786.

owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be a tenant for life, remainder to another in fee, and the remainder-man comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainder-man; and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if a tenant for years accepts from his lessor a grant of a rent, issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent; and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor."[1] In all these cases no question of *intention* can arise. The surrender is not the result of intention, but is the act of the law, and it takes place independently, and even in spite of, intention the most express.[2]

§ 1006. Neither is it material, whether the new interest taken by the surrenderor, be or be not equivalent to that enjoyed under the surrendered term. Therefore, if a lessee for life, or for a long term of years, accepts from his landlord a new demise for a shorter period, this will amount to a surrender of his original lease.[3] The better opinion now is, that nothing short of an express demise will operate as a surrender of an existing lease,[4] and the doctrine that a tenancy under a lease would be surrendered by operation of law, if the parties were to make a verbal agreement, for a sufficient consideration, that, instead of the existing term, there should be a tenancy from year to year at a different rent, or even a tenancy at

[1] Lyon *v.* Reed, 1844 (Parke, B.).
[2] Id.
[3] Mellow *v.* May, 1601; recognised (Holroyd, J.) in Hamerton *v.* Stead, 1824; and (Lefroy, B.) in Lynch *v.* Lynch, 1843 (Ir.).
[4] Foquet *v.* Moor, 1852; Crowley *v.* Vitty, 1852.

will,[1] has been much shaken. Still, it is not necessary that the new demise should in all events be incapable of being defeated. For example, if a lessee were to accept, *in accordance with his contract*, a second lease voidable upon condition, this, even in the event of its avoidance, would amount to a surrender of the former term; because such second lease would pass ab initio the actual interest contracted for, though that interest would be liable to be defeated at some future period.[2]

§ 1007. On the other hand, the acceptance of a *void* lease, which creates no new estate whatever,[3] or even the acceptance of a *voidable* lease, which, being afterwards made void *contrary to the intention* of the parties, does not pass an interest *according to the contract*, will not operate as a surrender of a former lease.[4] Nor will it make any difference whether the surrender be express or implied; for as was once observed,[5] "In the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and in case of an express surrender, so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void, in case the grant should be made void."

§ 1008. The mere fact of a tenant entering into an agreement to *purchase* the estate will not, moreover, work a surrender of his tenancy by operation of law; because such a contract contains an implied condition that the landlord should make out a good title; and it would be most unreasonable to suppose, that the tenant intended absolutely to surrender an existing term, while it was uncertain whether the purchase would be completed or not.[6] If,

[1] See cases cited in note [3], last page.

[2] Roe *v.* Abp. of York, 1805; Doe *v.* Bridges, 1831; Doe *v.* Poole, 1848; Fulmerston *v.* Steward, 1554 (Bromley, C.J.); Co. Lit. 45 a; Lloyd *v.* Gregory, 1638; Whitley *v.* Gough, 1556-7.

[3] Roe *v.* Abp. of York, 1805; explained (Abbott, C.J.) in Hamerton *v.* Stead, 1824; Lynch *v.* Lynch, 1843 (Ir.) (Lefroy, B.); Wilson *v.* Sewell, 1766; Davison *v.* Stanley, 1768 (Ld. Mansfield).

[4] Doe *v.* Poole, 1848; Doe *v.* Courtenay, 1848.

[5] Doe *v.* Courtenay, 1848; overruling Doe *v.* Forwood, 1842.

[6] Doe *v.* Stanion, 1835; Tarte *v.* Darby, 1846.

however, from the peculiar wording of the agreement, it could fairly be inferred that the tenant from its date was to be absolutely a debtor for the purchase-money, paying interest upon it, and to cease to pay rent, a tenancy at will would probably be created after that time; and the acceptance of such new demise would then operate as a surrender of the former interest.[1] An agreement between a landlord and tenant during the existence of a lease, that the former should lay out money on the premises, and the latter pay an additional rent in consequence, does not create a new tenancy at an increased rent, so as to amount to a surrender of the old lease by operation of law.[2]

§ 1009.[3] The simple *cancellation* of a lease, even though both parties consent,[4] cannot work a surrender by operation of law, to divest the tenant's estate, because the intent of the statute is to take away the mode of transferring interests in lands by symbols and words only, as formerly used; and therefore, a surrender by cancellation, which is but a sign, is also taken away; though a symbolical surrender may perhaps be still recognised in certain cases as the basis of equitable relief.[5] This rule seems equally to apply, whether the cancelled deed relates to things lying in livery, or to those which lie only in grant.[6] Neither will the fact of the lease being found cancelled in the possession of the lessor, furnish in itself any presumption of an actual surrender by deed or note in writing; though it may be a circumstance fit for the consideration of the jury, if coupled with proof that the lessee has been out of possession for a series of years, or that the lessor's papers have been destroyed, or that other occurrences may account for, or excuse, the non-production of the written surrender.[7]

§ 1010. Though the doctrine of surrender by operation of law was originally confined to cases where the tenant accepted from

[1] Doe *v.* Stanion, 1836, as reported 1 M. & W. 701.

[2] Donellan *v.* Read, 1832; Lambert *v.* Norris, 1837.

[3] Gr. Ev. § 265, slightly.

[4] Ld. Ward *v.* Lumley, 1860.

[5] Magennis *v.* MacCullough (undated); Roe *v.* Abp. of York, 1805; Wootley *v.* Gregory, 1828; Bolton *v.* Bp. of Carlisle, 1793; Doe *v.* Thomas, 1829; Walker *v.* Richardson, 1837; Natchbelt *v.* Porter, 1689, 4 Kent, Com. 104; Rob. on Frauds, 251, 252; id. 248, 249; Holbrook *v.* Tirrell, 1829.

[6] Bolton *v.* Bp. of Carlisle, 1793; Walker *v.* Richardson, 1837.

[7] Doe *v.* Thomas, 1829; Walker *v.* Richardson, 1837; ante, § 138.

his lessor a new interest, inconsistent with that which he previously had, it has been considerably extended by modern decisions. It is now applied, not only to the case where the second lease is granted to the lessee himself, or to the lessee and his wife, or to the lessee and a stranger,[1] but to any act done by the landlord, which creates a new interest in a third party, inconsistent with the tenant's former interest; provided the tenant and third party concur in such act, and the former *actually gives up possession* in consequence of it.[2] For example, a demise by the lessor to a stranger, with the lessee's assent, coupled with an actual change of possession, is a surrender by operation of law of the lessee's interest, at least, if it be merely a chattel interest.[3] Whether a similar doctrine would apply to a case where the former lessee had a freehold interest admits of doubt. The Irish Court of Exchequer[4] held that it would, but that decision has been much shaken, if not overruled.[5] But in the case of a leasehold interest, although a parol licence to quit, even when followed by an actual quitting, will not of itself operate as a surrender of the tenant's interest;[6] yet if the tenant, in pursuance of such a licence, gives up possession, and the landlord accepts it, the licence, coupled with the change of possession, will amount to a surrender by operation of law, and the landlord will not be able to recover any rent becoming due after his acceptance of the possession.[7]

§ 1011. The modern extension of this doctrine of surrender, ex-

[1] Shep. Touch. 301; Hamerton *v.* Stead, 1824.

[2] Thomas *v.* Cook, 1818; Stone *v.* Whiting, 1817; Dodd *v.* Acklom, 1843; Lynch *v.* Lynch, 1843 (Ir.); Walker *v.* Richardson, 1837; Davison *v.* Gent, 1856; Grimman *v.* Legge, 1828; Bees *v.* Williams, 1835; Graham *v.* Whichelo, 1832; Reeve *v.* Bird, 1834; Hall *v.* Burgess, 1826; Nickells *v.* Atherstone, 1847; M'Donnell *v.* Pope, 1852.

[3] Cases cited in last note. In Doe *v.* Wood, 1845, tenant from year to year having died, leaving his widow in possession, and A. having some time after taken out administration, the widow continued in possession paying rent within A.'s knowledge, without his objecting. It was held that these facts did not amount to a surrender on A.'s part, by operation of law, and that A., on proof of deceased's tenancy and death, and his own title as administrator, could recover in ejectment against the widow.

[4] In Lynch *v.* Lynch, 1843 (Ir.).

[5] By Ld. St. Leonards in Creagh *v.* Blood, 1845 (Ir.).

[6] Mollett *v.* Brayne, 1809 (Ld. Ellenborough). See, also, Doe *v.* Milward, 1838, and Johnstone *v.* Hudlestone, 1825.

[7] Grimman *v.* Legge, 1828; Dodd *v.* Acklom, 1843; Phene *v.* Popplewell, 1862; Whitehead *v.* Clifford, 1814. See Cannan *v.* Hartley, 1850; Oastler *v.* Henderson, 1877, C. A.

plained in the early part of the preceding section, was questioned by Lord Wensleydale, who suggested that the cases on which it apparently rests may be supported on the ground that the occupation of the premises by the landlord's new tenants might "have the effect of eviction by the landlord himself, in superseding the rent or compensation for use and occupation during the continuance of that occupation."[1] Several of the cases may certainly be explained in this manner; and one was expressly decided on a somewhat similar ground.[2] But in the leading authority on the subject,[3] this point was neither suggested in argument, nor alluded to by the court. Moreover, in a case,[4] which was much discussed in Ireland, the point could not have been taken at all, it being an action of ejectment brought by the former lessees for life, against the party who, with their consent, had been substituted in their place by the landlord. And the old Courts of Queen's Bench[5] and Exchequer[6] both declared their dissent from the line of argument advanced by Lord Wensleydale, and confirmed the doctrine laid down in the leading case above referred to,[3] that the rule rests on the tenants in fact, and voluntarily assenting to an actual change in the possession.

§ 1012. On the whole it is submitted that the rule is good law; and that, confined, as it is, to cases where an actual, and consequently a notorious, shifting of possession has occurred, no danger need be apprehended from its continuance. Its adoption, however, where reversions or incorporeal hereditaments, which pass only by deed, are disposed of, or its extension to cases where corporeal estates are dealt with by the consent of the tenant, but no actual change of possession takes place, would certainly let in all the dangers for avoiding which the statute was passed. In such cases Lord Wensleydale's observation that the application of the rule would very seriously affect titles to long terms of years has much force. In mortgage terms, for instance, it frequently happens that there is a consent, express or implied, by the legal termor to a demise from the mortgagor to a third person.[7] However, as in such

[1] Lyon *v.* Reed, 1844.
[2] Gore *v.* Wright, 1838.
[3] Thomas *v.* Cook, 1818.
[4] Lynch *v.* Lynch, 1843 (Ir.).
[5] Nickells *v.* Atherstone, 1847.
[6] Davison *v.* Gent, 1856.
[7] Lyon *v.* Reed, 1844.

cases the rule as to surrenders implied by operation does not at present apply,[1] nothing further need be said on the subject.

§ 1013. A surrender by operation of law may be effected under the provisions of particular Acts of Parliament. For instance, the Bankruptcy Acts empower[2] the trustee of a bankrupt lessee to relieve himself from all responsibility under the lease, by simply disclaiming it in writing under his hand,[3] provided he do so with the leave[4] of the Court of Bankruptcy, within twelve[5] months after his appointment, and within twenty-eight days after the lessor has applied to him to decide whether he will disclaim or not; and upon the execution of such disclaimer[6] the lease is deemed to have been surrendered on the date of the disclaimer, and the lessor is deemed to be a creditor of the bankrupt to the extent of any injury he may have sustained by the operation of this enactment, and he may prove the same as a debt under the bankruptcy.[7] The trustee of a bankrupt may, in like manner, get rid of any shares or stock in companies, unprofitable contracts, or unsaleable property, which have passed to him under the Bankruptcy Act, and this, too, notwithstanding he may have taken possession of such property, or exercised any act of ownership over it.[8] Somewhat similar provisions will also be found in "The Irish Bankrupt and Insolvent Act, 1857,"[9] and "The Bankruptcy, Ireland, Amendment Act, 1872."[10] Under the Building Societies Act, 1874, also, the society may indorse on any mortgage given to them by a member a receipt under their seal, and countersigned by the secretary or manager,

[1] Lyon *v.* Reed, 1844, as to estates lying in grant; Doe *v.* Johnston, 1825, as to the assent of the tenant, when not coupled with change of possession; recognized in Dodd *v.* Acklom, 1843. In Walker *v.* Richardson, 1837, there was a lease of tolls, but the point that this was a right which lay in grant was never taken.

[2] 46 & 47 V. c. 52, § 55.

[3] A trustee who has taken possession of the leasehold property of the bankrupt cannot divest himself of personal liability to the landlord for the rent, except in the mode indicated in the text: In re Solomon, ex parte Dressler, 1878, C. A. See, also, Wilson *v.* Wallani, 1880; and Lowrey *v.* Barker, 1880, C. A.

[4] Leave to disclaim is not required in all cases. See "Bankruptcy Rules, 1883," r. 232.

[5] See 53 & 54 V. c. 71 ("The Bankruptcy Act, 1890"), § 13.

[6] But this disclaimer will not affect the rights of third parties: Ex parte Walton, re Levy, 1881, C. A. See, also, 46 & 47 V. c. 52, § 55, subs. 2.

[7] 46 & 47 V. c. 52, § 55 (amended by 53 & 54 V. c. 71, § 13), and § 56; In re Hide, 1871, C. A. A trustee, after disclaimer, cannot remove fixtures: In re Lavies, ex parte Stephens, 1877, C. A. See In re Roberts, ex parte Brook, 1879, C. A.

[8] Id. §§ 55, 56.

[9] 20 & 21 V. c. 60, §§ 271, 272, Ir.

[10] 35 & 36 V. c. 58, §§ 97, 98, Ir.

and such receipt will have the effect of vacating the security, and of vesting the property comprised therein in the party entitled to the equity of redemption, without any reconveyance.[1] "The Industrial and Provident Societies Act, 1893,"[2] and "The Friendly Societies Act, 1875,"[3] contain similar enactments.

§ 1014. The law no longer allows any *merger* by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.[4]

§ 1015. *Assignments by operation of law* may be effected in a variety of ways. For instance, when a lessor owner in fee dies intestate, the reversion vests in his heir at law, and when a lessee dies intestate, the lease vests in his administrator, by operation of law. Nay, as against himself, even an executor de son tort may be treated as the assignee of a lease. In all these cases, when an action is brought against the heir, or administrator, or executor de son tort, it will probably be sufficient to charge in the statement of claim that the reversion or lease respectively came to the defendant "by assignment thereof then made."[5] And by the Conveyancing and Law of Property Act, 1881, an estate or interest of inheritance in any hereditaments on the death of the trustee or mortgagee, notwithstanding any testamentary disposition, vests, like a chattel real, in his legal personal representative.[6] The chattels real of any woman married before the 27th of August, 1870,[7] or even between that date and the 1st of January, 1883,[8] may be said, in the absence of a settlement, to have been assigned to her husband by operation of law.[9] Women married since the latter date are however entitled to hold as their separate estate all the real and personal property belonging to them at the time of marriage.[10] When, too, a person is adjudged a *bankrupt*, his property, whether real or personal, in or out of England, present or future,

[1] 37 & 38 V. c. 42, § 12; Harvey *v.* Munic. &c. Building Soc., 1884, C. A.

[2] 56 & 57 V. c. 39, § 43.

[3] 38 & 39 V. c. 60, § 16, subs. 7.

[4] 36 & 37 V. c. 66 ("The Judicature Act, 1873"), § 25, subs. 4; 40 & 41 V. c. 57, § 28, subs. 4, Ir.

[5] Paull *v.* Simpson, 1846; Derisley *v.* Custance, 1790.

[6] 44 & 45 V. c. 41, § 30.

[7] When "The Married Women's Property Act, 1870" (33 & 34 V. c. 93), came into operation.

[8] When "The Married Women's Property Act, 1882" (45 & 46 V. c. 75), came into operation.

[9] See Ashworth *v.* Outram, 1877, C. A.

[10] 45 & 46 V. c. 75 ("The Married Women's Property Act, 1882"), §§ 1, 2.

vested or contingent,[1] becomes vested, without any deed of assignment or conveyance, in the trustee upon his appointment;[2] and on the death, resignation, or removal of any such trustee, and the appointment of another in his stead, a similar vesting takes place.[3] So, when the affairs of a debtor are being settled by composition, or scheme of arrangement, all his property vests in the trustee from the date of his appointment.[4] In the same way, where an official receiver is removed, dies, or resigns, all estates, rights, and powers, vested in him, without any conveyance or transfer, vest in such official receiver as the Board of Trade may appoint.[5] Under "The Friendly Societies Act, 1875," too, upon the death, resignation or removal of a trustee, the property vested in him vests in his successor without conveyance or assignment.[6] Upon the appointment, again, of an administrator of a convict's property, all the estate of the convict therein becomes vested in such official,[7] and remains so vested till the expiration of the sentence, when it revests in the convict or his representative.[8] In connection with this subject it may be noted, too, that though a parol assignment by a sheriff of leasehold premises, taken in execution under a fieri facias, is void at law, even where the assignee has entered and paid rent to the head landlord, and though the execution debtor consequently at law may still regain possession of the premises in an action to recover land against the assignee,[9] there appears ground for contending that if the latter plead the facts by way of defence on equitable grounds, he may possibly be enabled to support the assignment and so defeat his opponent.

§ 1016.[10] It is further required by the Statute of Frauds that the declaration or creation of *trusts* of land[11] shall be manifested by

[1] 46 & 47 V. c. 52 ("The Bankruptcy Act, 1883"), § 168. See Stanton *v.* Collier, 1854; Beckham *v.* Drake, 1847-9, H. L.; Rogers *v.* Spence, 1846, H. L.; Herbert *v.* Sayer, 1844; Jackson *v.* Burnham, 1852.

[2] 46 & 47 V. c. 52, § 54. See, as to the Irish law, 20 & 21 V. c. 60, §§ 267, 268, Ir.

[3] Id. § 54, subs. 3. See, as to the Irish law, 20 & 21 V. c. 60, §§ 267, 268, Ir.; 35 & 36 V. c. 58, § 121, r. 5, Ir.

[4] See 53 & 54 V. c. 71 ("The Bankruptcy Act, 1890"), § 3, subs. 17, and § 43 of "The Bankruptcy Act, 1883" (46 & 47 V. c. 52). See, as to the Irish law, 35 & 36 V. c. 58, § 91, Ir.

[5] Bankruptcy Rules, 1886, r. 322, subs. 2.

[6] 38 & 39 V. c. 60, § 16, subs. 4.

[7] 33 & 34 V. c. 23 ("The Forfeiture Act, 1870"), § 10.

[8] § 18.

[9] Doe *v.* Jones, 1842.

[10] Gr. Ev. § 266, in part.

[11] Trusts of personalty are not affected by the statute. Greenleaf

some writing, signed by the party "who is by law enabled to declare such trust;"[1] and that all grants and assignments of any such trust shall also be in writing, signed in the same manner.[2] The statute does not require that the trust itself should be created by writing; but only that it should be *manifested* by writing; plainly meaning that documentary evidence should be forthcoming, to prove first the existence, and next the nature of the trust.[3] A letter acknowledging the trust, and à fortiori, an admission in an answer in Chancery, is therefore sufficient to satisfy the statute.[4] An employment by a person of another to bid for him at an auction is within the statute.[5] Declarations of trust otherwise than of land are not required to be so evidenced,[6] and may be shown in various ways.[7]

§ 1017.[8] *Resulting trusts*, which arise by implication of law, are specially excepted from the operation of the Act.[9] Trusts of this nature may be reduced to three classes.

§ 1017A. The first class of resulting trusts is where an estate is purchased in the name of one person, but the purchase-money is

on Ev., 15th edit. (1892), note to § 266.

[1] These words refer to the *beneficial*, and not to the mere *legal* owner of the estate. Tierney *v.* Wood, 1854; Kronheim *v.* Johnson, 1877 (Fry, J.).

[2] By 29 C. 2, c. 3 ("The Statute of Frauds"), § 7, as amended by "The Statute Law Revision Act" (51 V. c. 3). "all declarations or creations of trusts or confidences, 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."

By § 8, "where 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."

By § 9 "all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting the same, or by such last will or devise, or else shall likewise be utterly void and of none effect." See the corresponding Irish Act of 7 W. 3, c. 12, §§ 10, 11, 12.

[3] Smith *v.* Matthews, 1861 (Lds. JJ.). See Booth *v.* Turle, 1873; Dye *v.* Dye, 1884, C. A.

[4] Forster *v.* Hale, 1798 (Ld. Alvanley); Randall *v.* Morgan, 1805; Rob. on Frauds, 95; Sug. V. & P. 700; 4 Kent, Com. 305.

[5] James *v.* Smith, 1890.

[6] See, as to these, notes as to executed and executory trusts to Glenorchy *v.* Bosville, 1733, 1 White & Tudor, Lead. Cas., vol. i. p. 1; as to voluntary trusts, to Ellison *v.* Ellison, 1802, id. 291; as to constructive trusts, to Keech *v.* Sandford, 1776, id. 53; as to resulting trusts, to Dyer *v.* Dyer, 1788, id. 236.

[7] In re Vernon, Ewens & Co., 1886, C. A.

[8] Gr. Ev. § 266, in part.

[9] See n. [2], supra.

paid by another,[1]—and here, it matters not whether the legal estate be freehold, copyhold, or leasehold; whether it be taken in the names of the purchaser and others jointly, or in the names of others, without that of the purchaser; or in one name, or in several, jointly or successive. In all such cases a trust will result to the man who advances the purchase-money,[2] unless such a resulting trust would break in upon the policy of some statute,[3] or unless the purchase be effected by a father,[4] or perhaps a mother,[5] in the name of an unprovisioned child, legitimate or illegitimate,[6] or in the joint names of the purchaser and such child,[7] or of such child and another person.[8] In the case of the purchase by a parent, the trust, in the absence of clear evidence to the contrary,[9] —and the parent's subsequent declarations cannot furnish such evidence,[10]—will not be deemed a resulting trust for the purchaser, but a gift or advancement for the child;[11] because parents are bound in conscience to provide for their children.[12]

§ 1017B. The second class of cases in which resulting trusts arise is where a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it.

§ 1017C. The third class of resulting trusts arises in cases of fraud.[13]

§ 1018. In all cases of resulting trusts, parol evidence,—though received with great caution, and not deemed sufficient unless of a clear character,[14]—is admissible to establish the collateral facts (not

[1] Lloyd *v.* Spillet, 1740 (Ld. Hardwicke).

[2] Dyer *v.* Dyer, 1788 (Eyre, C.B.); Sug. V. & P. 701; Wray *v.* Steele, 1814; Baxter *v.* Brown, 1845.

[3] Ex parte Houghton, 1810; Redington *v.* Redington, 1794.

[4] The doctrine probably extends to a purchase by any person who stands in loco parentis, Powys *v.* Mansfield, 1836-7 (Ld. Cottenham).

[5] But, in the case of a mother, the equitable presumption must be supported by some evidence of intention, Bennet *v.* Bennet, 1879 (Jessel, M.R.), commenting on Sayre *v.* Hughes, 1868 (Stuart, V.-C.); and In re De Visme, 1864.

[6] Beckford *v.* Beckford, 1774; Sug. V. & P. 703. See Soar *v.* Foster, 1758; Tucker *v.* Burrow, 1865 (Wood, V.-C.).

[7] Fox *v.* Fox, 1863 (Ir.); Sidmouth *v.* Sidmouth, 1840.

[8] Lamplugh *v.* Lamplugh, 1709.

[9] Stock *v.* M'Avoy, 1872 (Wickens, V.-C.).

[10] O'Brien *v.* Sheil, 1873 (Ir.).

[11] See Forrest *v.* Forrest, 1865; Hepworth *v.* Hepworth, 1870.

[12] Sug. V. & P. 703. See Devoy *v.* Devoy, 1858; Jeans *v.* Cooke, 1857; Dumper *v.* Dumper, 1862; Williams *v.* Williams, 1863.

[13] Lloyd *v.* Spillet, 1740 (Ld. Hardwicke).

[14] Wilkins *v.* Stephens, 1842; Groves *v.* Groves, 1829.

contradictory to the deed, unless in the case of fraud), from which a trust may legally result;[1] and it makes no difference as to its admissibility whether the nominal purchaser be living or dead.[2] It was, indeed, once doubted whether parol evidence is admissible against the answer of the trustee denying the trust.[3] But there is no sufficient reason for such doubt.[4] As a resulting trust may be established by parol evidence, it may also be rebutted by the same species of proof. Parol evidence will, therefore, be admitted to prove the purchaser's intention, that the person to whom the conveyance was made should take beneficially,[5] and where circumstances render it probable that a gift was intended, the presumption of a resulting trust may be even rebutted by the sole testimony of the party interested in supporting the gift.[6]

§ 1019. § 4 of the Statute of Frauds,[7] like § 1,[8] would seem inapplicable to deeds.[9] By it no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or any person upon any special promise to answer for the debt, default, or miscarriage of another; or upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within one year from the making thereof; 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 authorised.[10]

§ 1020. The provisions of § 17 of the Statute of Frauds have

[1] Marshal *v.* Crutwell, 1875 (Jessel, M.R.).

[2] Sug. V. & P. 701, 702; 2 Story, Eq. Jur. § 1201, n.; Leneh *v.* Leneh, 1805; 3 Law Mag. 131—139; 4 Kent, Com. 305; Boyd *v.* M'Lean, 1815 (Am.); Pritchard *v.* Brown, 1828 (Am.); Goodwin *v.* Hubbard, 1818 (Am.).

[3] Sug. V. & P. 702.

[4] 3 Law Mag. 136—138; Bartlett *v.* Pickersgill, 1759-60 (Henley, L.K.).

[5] Sug. V & P. 702; Edwards *v.* Edwards, 1836; Brady *v.* Cubitt 1778; Beecher *v.* Major, 1865; Goodright *v.* Hodges, 1773 (Buller, J.).

[6] Fowkes *v.* Pascoe, 1875, C. A.

[7] Viz., "The Statute of Frauds," or 29 C. 2, c. 3, as amended by "The Statute Law Revision Act, 1888" (51 V. c. 3); § 7 of 7 W. 3, c. 12, Ir., corresponds with this section.

[8] Ante, § 1001.

[9] Cherry *v.* Heming, 1849.

[10] As to the meaning of these last words, see Norris *v.* Cooke, 1857 (Ir.); Smith *v.* Webster, 1876, C. A.

been repealed by "The Sale of Goods Act, 1893."[1] The last-mentioned Act provides[2] that a contract for the sale of any goods[3] of the *value*[4] *of ten pounds* or upwards, shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party[5] to be charged, or his agent[6] in that behalf. It is expressly provided[7] that these provisions of "The Sale of Goods Act, 1893," shall extend to every such contract, "notwithstanding that 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."

§ 1021. The meaning of § 4 of the Statute of Frauds is substantially the same[8] as that of § 4 of "The Sale of Goods Act, 1893." To satisfy either enactment, the *consideration* for the *agreement* in the one case, and for the *bargain*[9] in the other, must,

[1] 56 & 57 V. c. 71, § 60. § 21 of 7 W. 3, c. 12, Ir., corresponded with this section.

[2] 56 & 57 V. c. 71, § 4, sub. 1.

[3] "The Statute of Frauds" here added, "wares or merchandize." By its interpretation clause (§ 62), the words "goods" in "The Sale of Goods Act, 1893," includes "all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

[4] "The Statute of Frauds" here said, "*for the price* of ten pounds or upwards." The changed language is not important, in view of the change made by Lord Tenterden's Act as long ago as 1828, and subs. 2 of § 4.

[5] A. signed a contract to buy a ship of B. B. altered the contract, signed it and returned it to A., who thereupon assented by parol to the alteration, but did not re-sign. Held, that the statute was satisfied. Steward *v.* Eddowes, 1874.

[6] One party to a contract cannot sign the name of the other as his agent, so as to bind him within the statute: Sharman *v.* Brandt, 1871, Ex. Ch. Neither, in the absence of express authority, can the vendor's traveller sign the bargain in the purchaser's name as his agent: Murphy *v.* Boese, 1875. See post, § 1109.

[7] 56 & 57 V. c. 71, repealing (§ 60) and re-enacting (§ 4, subs. 2) a similar provision originally contained in Lord Tenterden's Act of 1828 (9 G. 4, c. 14, § 7), and extended to Ireland by § 21 of 7 W. 3, c. 12, Ir.

[8] Kenworthy *v.* Schofield, 1824 (Bayley, J.).

[9] Egerton *v.* Mathews, 1805, may appear at variance with this rule, but the bargain there, like all bargains for the purchase of goods, imported consideration on the face of it. See Jenkins *v.* Reynolds, 1821 (Park, J.); Hunt *v.* Adams, 1809 (Am.).

—except in the case of a special promise made by one person to answer for the debt, default, or miscarriage of another,[1]—appear expressly or impliedly in writing signed by the party to be charged, or by his agent. This requirement applies, not only to bargains for the sale of goods, to agreements upon consideration of marriage,[2] to contracts for the sale or lease of lands, and to agreements not to be performed within a year;[3] but also to special promises made by executors or administrators to answer damages out of their own estate. This doctrine is held with a view of effectuating the object of the statute. Instead, however, of preventing, it has, to a great extent, increased, the commission of fraud. Many of the States of America,[4] influenced by these considerations, have repudiated it as highly impolitic; and some argue that the Legislature of this country should adopt similar views.

§ 1022—3. At present, however, the doctrine prevails in full force both in England and in Ireland (except as to guarantees[5]). But it is somewhat qualified by the further doctrine that the consideration need not be stated on the face of the written memorandum in *express* terms; but will sufficiently appear if it can be collected, not indeed by mere conjecture, however plausible,[6] but by fair and reasonable, if not necessary, intendment from the whole tenor of the writing.[7]

§ 1024. It is, however, essential to the validity of the written

[1] As to this, see 19 & 20 V. c. 97 ("The Mercantile Law Amendment Act, 1856"), § 3, cited post, § 1030n.

[2] See Saunders *v.* Cramer, 1842 (Ir.).

[3] Lees *v.* Whitcomb, 1828; Sykes *v.* Dixon, 1839; Sweet *v.* Lee, 1841.

[4] For example, it is stated (Gr. Ev. § 268, n.) that the English rule is followed in New York and New Hampshire, but that it has been rejected in Massachusetts, first by the State court, in Packard *v.* Richardson, 1821 (Am.), and subsequently by the Legislature of the State—the revised stat. c. 74, § 2, providing, that the consideration of the promise, contract, or agreement, need not be set forth in the writing signed by the party to be charged therewith, but may be proved by any other legal evidence; that the rule is also rejected in Maine (Levy *v.* Merrill, 1826 (Am.)); in Connecticut (Sage *v.* Wilcox, 1826 (Am.)); in New Jersey (Buckley *v.* Beardslee, 1819 (Am.)); in North Carolina (Miller *v.* Irvine, 1834 (Am.)); and in South Carolina (Fyler *v.* Givens, 1835 (Am.)). The writer also refers to Violett *v.* Patton, 1809 (Am.); Taylor *v.* Ross, 1832 (Am.); 3 Kent, Com. 122.

[5] As to which, see post, § 1030B.

[6] Hawes *v.* Armstrong, 1835 (Tindal, C.J.); James *v.* Williams, 1834 (Patteson, J.); Raikes *v.* Todd, 1838 (Ld. Denman).

[7] Joint *v.* Mortyn, 1823 (Ir.); Saunders *v.* Cramer, 1842 (Ir.); Price *v.* Richardson, 1845; Caballero *v.* Slator, 1854.

document, that all the material terms of the contract,[1] and the promise,[2] should be stated therein, either directly or by reference.[3] For example, an agreement for a lease must contain all the essential terms of the lease; and therefore, if it cannot be discovered from it at what date the tenancy is to commence, the document will be rejected as not satisfying the requirements of the statute.[4] Still, any memorandum will suffice, which, employing mere general language, without condescending to minute particulars, contains all that leads to future certainty. For instance, if a man undertake in writing to purchase a particular article at a named price, this will satisfy the statute, though it be agreed at the same time that the article in question shall have some alteration or addition made to it before delivery.[5] When, too, an auctioneer has signed a memorandum, acknowledging the receipt from A. B. of 21*l.* as deposit on *property* belonging to C. D., purchased at 420*l.* on a certain day at a named place, this is a sufficient description of a house that has been sold by auction, parol evidence being admissible to identify the particular premises;[6] and if a party agree to pay rent for a certain farm at a specified sum per acre,[7] or, in consideration of forbearance, to pay for all goods supplied to a third party during the antecedent month, or even to liquidate his *debt*, the written memorandum need not specify the number of the acres, the quantity of the goods, or the amount of the debt; because each of these facts is capable of being ascertained with certainty by subsequent inquiry.[8] In the last instance given the court will not presume the existence of more debts than one, but will call upon a party impeaching the document for uncertainty to furnish proof of that fact, and, in the absence of such proof, will apply the maxim, de non apparentibus et de non

[1] Archer *v.* Baynes, 1850; Wood *v.* Midgley, 1854; Holmes *v.* Mitchell, 1859.

[2] Carroll *v.* Cowell, 1838 (Ir.); Morgan *v.* Sykes (Ld. Abinger, C.B.), not reported, and undated, cited in Coats *v.* Chaplin, 1842.

[3] "I admit that an agreement is not perfect, unless in the body of it, or by necessary inference, it contains the names of the two contracting parties, the subject-matter of the contract, the consideration, and the promise:" Tindal, C.J., in Laythoarp *v.* Bryant, 1836.

[4] Marshall *v.* Berridge, 1882; In re Lander and Bagley's Contract, 1892.

[5] Sarl *v.* Bourdillon, 1856.

[6] Shardlow *v.* Cotterill, 1881, C. A.

[7] Shannon *v.* Bradstreet, 1803 (Ir.) (Ld. Redesdale).

[8] Bateman *v.* Phillips, 1812; Shortrede *v.* Cheek, 1834; Bleakley *v.* Smith, 1840. See post, § 1030.

existentibus eadem est ratio.[1] Moreover, the omission of the particular mode [2] or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale;[3] and a written order for goods "on moderate terms" will satisfy the statute,[4] though, if a specific price be agreed upon, it must be mentioned in the contract.[5] But where a memorandum of a contract was void for omitting all reference to the price, plaintiff has been allowed to rely on part performance of the contract, and then to establish by parol evidence the price on which the parties had verbally agreed.[6]

§ 1025. The names of both contracting parties must, however, be specified in the memorandum [7] either nominally, or by description, or by reference. But the courts show little inclination to enforce any strict rule on this point. For instance, in two sales of land by auction, where the particulars stated that the property was put up for sale "by direction of the proprietor," the requirements of the 4th section of the Act were held to be satisfied, so far as the description of the vendor was concerned.[8] The same point has been ruled on other occasions, in which a description of the vendor as "the executor of Admiral F.," [9] or as "a trustee selling under a trust for sale," [10] or "landlord" [11] has been held to be under the circumstances sufficient. The description "owner" has also been held to be sufficient;[12] and so has the word "tenant," where it can reasonably be taken that one of the parties signed as such.[13] And, under the Sale of Goods Act,[14] if a defendant purchase various

[1] Shelton *v.* Braithwaite, 1841; Shortrede *v.* Cheek, 1834; Dobell *v.* Hutchinson, 1835; Powell *v.* Dillon, 1814 (Ir.); Spiekernell *v.* Hotham, 1854.

[2] Sarl *v.* Bourdillon, 1856.

[3] Valpy *v.* Gibson, 1847 (Wilde, C.J.).

[4] Ashcroft *v.* Morrin, 1842.

[5] Elmore *v.* Kingscote, 1826; Goodman *v.* Griffiths, 1857.

[6] Jeffcott *v.* North Brit. Oil Co., 1873 (Ir.).

[7] Champion *v.* Plummer, 1805; Vandenbergh *v.* Spooner, 1866; Williams *v.* Byrnes, 1863; Warner *v.* Willington, 1856; Wheeler *v.* Collier, 1827 (Ld. Tenterden); Skelton *v.* Cole, 1857; Williams *v.* Lake, 1859; Newell *v.* Radford, 1867; Boyce *v.* Green, 1826 (Ir.); Williams *v.* Jordan, 1877 (Jessel, M.R.).

[8] Rossiter *v.* Miller, 1878, H. L.; Sale *v.* Lambert, 1874 (Jessel, M.R.). See, also, Commins *v.* Scott, 1875.

[9] Hood *v.* Ld. Barrington, 1868.

[10] Catling *v.* King, 1877, C. A.

[11] Coombs *v.* Wilkes, 1891. The cases above cited appear to dispose of a case in which it was decided that the mere term "vendor" was not a sufficient description: Potter *v.* Duffield, 1874 (Romilly, M.R.). See, also, Thomas *v.* Brown, 1876.

[12] Butcher *v.* Nash, 1889.

[13] Stobell *v.* Niven, 1889, C. A.

[14] § 4 (1) of "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), corresponds with § 17 of the Statute of Frauds.

articles in the plaintiff's shop, and sign his name and address to an entry in an "Order-book" which specifies the articles and the prices, the statute is satisfied if plaintiff's name is printed on the fly-leaf of the Order-book, where it may be seen if looked for.[1]

§ 1026.[2] The written evidence rendered necessary by the Statute of Frauds and similar statutes, need not, however, be comprised in a single document, or be drawn up in any particular form. A draft, if duly signed, will suffice even where a more formal document was intended.[3] It will suffice if the contract can *be plainly made out in all its terms from any writings* of the party,[4] or even from his *correspondence*,[5] provided such writings or correspondence contain internal evidence connecting them together.[6] A signed letter will even be sufficient which does not contain in itself any one of the terms of the agreement if it distinctly refers to and recognises any writing which does contain them all.[7] In such case the well-known maxim, "verba illata inesse videntur," will apply.[8] A written memorandum, however, which in any material point differs from the terms of the verbal contract, or which either introduces any new term, or leaves any material term open to doubt,[9] will not satisfy the requirements of the statute.[10] Neither will a letter suffice, which, instead of ratifying, repudiates the written but unsigned contract relied on;[11] though a letter which enumerates all the essential terms of the bargain will be sufficient, notwith-

[1] Sarl *v.* Bourdillon, 1856.

[2] Gr. Ev. § 268, in part.

[3] Gray *v.* Smith, 1890, C. A. But see Bristol Aerated Bread Company *v.* Maggs, 1890, C. A.; Bolton *v.* Lambert, 1889.

[4] See Shardlow *v.* Cotterill, 1881, C. A.

[5] Bellamy *v.* Debenham, 1891; Allen *v.* Bennet, 1810; Jackson *v.* Lowe, 1822; Phillimore *v.* Barry, 1808 (Ld. Ellenborough); Warner *v.* Willington, 1856; Skelton *v.* Cole, 1857; Oliver *v.* Hunting, 1890.

[6] Secus, if not connected together. Taylor *v.* Smith, 1892, C. A.

[7] Dobell *v.* Hutchinson, 1835; Jones *v.* Victoria Graving Dock Co., 1877; Gibson *v.* Holland, 1865; Macrory *v.* Scott, 1850; Ridgway *v.* Wharton, 1856-7, H. L.; Sug. V. & P. 137; Baumann *v.* James, 1868; Long *v.* Millar, 1878, C. A.; Cave *v.* Hastings, 1881; Crane *v.* Powell, 1868; Oliver *v.* Hunting, 1890. See post, § 1061. In Stanley *v.* Dowdeswell, 1874, the court was unusually astute in suggesting reasons why an answer to a letter was not a sufficient acceptance of an offer.

[8] See per Parke, B., in Llewellyn *v.* Ld. Jersey, 1843.

[9] In Hussey *v.* Horne-Payne, 1878, the C. A. held that a proposal to sell, accepted "subject to the title being approved," was no sufficient acceptance; but in H. L., 1879, this was questioned (Ld. Cairns).

[10] Mahalen *v.* Dublin & Chap. Distil. Co., 1877 (Ir.).

[11] Archer *v.* Baynes, 1850; Richards *v.* Porter, 1827; Cooper *v.* Smith, 1812. See Goodman *v.* Griffiths, 1857; Jackson *v.* Oglander, 1865.

standing it may also contain some reason for the non-acceptance of the goods, which form the subject-matter of the contract.[1] A simple acceptance by letter of a written offer to purchase may, indeed, constitute a contract to sell, although it refers to the preparation of a more formal contract; unless such reference be so expressed as to indicate an intention not to be bound by the bargain until the formal instrument be duly executed.[2] It must, however, be possible to collect the entire contract from the *writings;*[3] verbal testimony not being admissible to supply any defects or omissions in the written evidence.[4] Parol evidence may, nevertheless, be admitted to show the situation of the parties at the time the contract was made;[5] to identify any plans or other documents or things referred to in the contract;[6] or to explain the language employed,[7] or, it seems, even to fix the date at which it was committed to writing.[8]

§ 1027. It does not, moreover, signify to whom the memorandum which states the terms of the agreement is addressed, because a memorandum is not necessary to *constitute* the contract, but merely to furnish satisfactory *proof* of it. Therefore, a letter addressed to a third party,[9] or a recital of the arrangement contained in the will of the party to be charged,[10] or an answer to a bill in Chancery under the old forms of pleading, or an affidavit in any legal proceeding,[11] or written and signed instructions given to a telegraph

[1] Bailey *v.* Sweeting, 1861; Wilkinson *v.* Evans, 1866; Buxton *v.* Rust, 1872; Leather Cloth Co. *v.* Hieronimus, 1875; Munday *v.* Asprey, 1880; Elliott *v.* Dean, 1884 (Smith, J.).

[2] Bonnewell *v.* Jenkins, 1878, C. A.; Crossley *v.* Maycock, 1874 (Jessel, M. R.); Rossiter *v.* Miller, 1878, H. L.; Brion *v.* Swainson, 1877 (Ir.); Lewis *v.* Brass, 1878, C. A.

[3] Chinnock *v.* Lady Ely, 1865; Winn *v.* Bull, 1877; Rishton *v.* Whatmore, 1878; Dolling *v.* Evans, 1867; Nesham *v.* Selby, 1872; Peirce *v.* Corf, 1874.

[4] Boydell *v.* Drummond, 1809; Cox *v.* Middleton, 1855; Ridgway *v.* Wharton, 1854; Caddick *v.* Skidmore, 1858 (Ld. Cranworth); Fitzmaurice *v.* Bayley, 1857, Ex. Ch.; Clarke *v.* Fuller, 1864; Parkhurst *v.* Van Cortlandt, 1814; Abeel *v.* Radcliff, 1816 (Am.).

[5] Sweet *v.* Lee, 1841 (Tindal, C.J.).

[6] Horsfall *v.* Hodges, 1824 (Sir J. Leach); Cave *v.* Hastings, 1881.

[7] Sweet *v.* Lee, 1841. See Waldron *v.* Jacob, 1871 (Ir.), where parol evidence was admitted to show what "this place" meant.

[8] Edmunds *v.* Downes, 1834; Hartley *v.* Wharton, 1840; Lobb *v.* Stanley, 1844.

[9] Longfellow *v.* Williams, 1804 (Lawrence, J.); Rose *v.* Cunynghame, 1805; Gibson *v.* Holland, 1865.

[10] In re Hoyle, Hoyle *v.* Hoyle, 1892, C. A.

[11] Barkworth *v.* Young, 1857.

clerk for transmission,[1] or the minutes of a board meeting, signed by the chairman ;[2] will suffice, provided the documents sufficiently refer to the terms of the original verbal promise ; and, indeed, even the attestation by the party to be charged of a deed which recites the oral agreement is sufficient, if it appear that he in fact knew of the recital.[3] A written memorandum, made after the action is brought, will not, however, satisfy the statute.[4]

§ 1028. The *place of signature* is likewise immaterial when a statute merely requires that a writing should be *signed* by the party, and not that it should be *subscribed*. Therefore, if a party, or his duly authorised agent,[5] insert his name, either at the beginning, or in the body, of a document, for the purpose of authenticating or governing every part of it, this will be equally valid with a signature at the foot.[6] But in these cases it will always be a question for the jury, whether the party, not having signed it regularly at the foot, meant to be bound by a document as it stood, or whether it was left so unsigned because he refused to complete it.[7] Consequently, where an agreement, drawn up by the secretary of one of the contracting parties, contained the names of both of them in the body of the instrument, but concluded "As witness our hands," and no signatures were subscribed, it was held that the statute was not satisfied, as it was obviously intended that the agreement should not be perfect till the names were added at the foot.[8]

§ 1029. With respect, again, to the *mode of signature*, it matters not whether the *Christian* name be set out at length or denoted by the initial, or omitted altogether.[9] It seems, however, that the *surname* must be written at length, and that a letter signed by mere

[1] Godwin *v.* Francis, 1870. In America even a telegram sent by *verbal* instructions has been held to be sufficient. Dunning *v.* Roberts, 1862 (Am.).

[2] Jones *v.* Victoria Graving Dock Co., 1877.

[3] Welford *v.* Beezley, 1747.

[4] Bill *v.* Bament, 1841.

[5] Evans *v.* Hoare, 1892.

[6] Caton *v.* Caton, 1867, H. L.; Lobb *v.* Stanley, 1844; Johnson *v.* Dodgson, 1837 (Ld. Abinger); Durrell *v.* Evans, 1862; Knight *v.* Crockford, 1794 (Eyre, C. J.); Lemayne *v.* Stanley, 1681; Ogilvie *v.* Foljambe, 1817; Saunderson *v.* Jackson, 1800 (Ld. Eldon); Hammersley *v.* Baron de Biel, 1845, H. L. (Ld. Cottenham); Holmes *v.* Mackrell, 1858; Bleakley *v.* Smith, 1840. See post, § 1075.

[7] Johnson *v.* Dodgson, 1837 (Ld. Abinger).

[8] Hubert *v.* Treherne, 1842.

[9] Lobb *v.* Stanley, 1844; Ogilvie *v.* Foljambe, 1817.

initials of the party,[1] or subscribed, without signature, "by your affectionate mother,"[2] or the like, will not suffice. A *printed* signature has, too, been held sufficient where the party to be charged has written other parts of the memorandum, or has done other acts amounting to a recognition of his printed name.[3] As before pointed out, even a telegram, if sent in the usual way by the party to be charged, and containing his name, would satisfy the Act.[4] Again, it is generally unnecessary that the agreement or memorandum should be signed *by both parties;* for in most cases the statute only requires that it should be signed "by the party to be charged therewith," that is, by the defendant, against whom the performance or damages are demanded.[5] If it be said that, unless the plaintiff also signs, there is a want of mutuality, the answer is, that the defendant had it in his power to require the plaintiff's signature; and that, if he has not done so, it is his own fault.[6] Even a written and signed proposal accepted by parol will be sufficient,[7] provided the offer be accepted in its entirety.[8]

§ 1030. These general observations apply to most of the Acts that render documentary proof necessary.

§ 1030A. It will now be convenient to notice briefly some of the transactions enumerated in the Statute of Frauds which seem to require explanation.

§ 1030B. First, then, as to *guarantees.*[9] The law as to these

[1] Hubert *v.* Moreau, 1826; Sweet *v.* Lee, 1841.

[2] Selby *v.* Selby, 1817 (Sir W. Grant).

[3] Schneider *v.* Norris, 1814; Saunderson *v.* Jackson, 1800; Tourret *v.* Cripps, 1879.

[4] See supra, § 1027.

[5] Laythoarp *v.* Bryant, 1836; Liverpool Borough Bk. *v.* Eccles, 1859; Seton *v.* Slade, 1802 (Ld. Eldon); Egerton *v.* Mathews, 1805; Allen *v.* Bennet, 1810. The last two cases were decisions on § 17 of the Stat. of Frauds (now § 4 of "The Sale of Goods Act, 1893"), which uses the word *parties.* They overrule the dicta of Ld. Redesdale and Sir T. Plumer in Lawrenson *v.* Butler, 1802 (Ir.); and O'Rourke *v.* Perceval, 1811 (Ir.). See 3 M. & Gr. 462, n., 1841, and 2 Kent, Com. 510. As to when a covenantee may sue for a breach of covenant, although he has not executed the deed, see Wetherell *v.* Langston, 1847; Pitman *v.* Woodbury, 1848; Brit. Emp. Ass. Co. *v.* Browne, 1852; Morgan *v.* Pike, 1854; Swatman *v.* Ambler, 1852.

[6] Laythoarp *v.* Bryant, 1836 (Tindal, C.J.).

[7] Cresswell, J., in Ashcroft *v.* Morrin, 1842; Watts *v.* Ainsworth, 1862; Smith *v.* Neale, 1857; Peek *v.* N. Staffords. Rail. Co., 1849; Warner *v.* Willington, 1856; Reuss *v.* Picksley, 1866.

[8] See Forster *v.* Rowland, 1861.

[9] Guarantees must now be in writing under the Scotch law. See 19 & 20 V. c. 60, § 6.

was materially altered by the Mercantile Law Amendment Act of 1856.[1] Prior to the 29th of July, 1856, a guarantee—like other agreements, which the Statute of Frauds requires to be in writing,[2] —was invalid, unless the consideration for the promise was expressly set forth in the document, or at least could be implied therefrom. Gross injustice was caused by this rule, and accordingly a clause was inserted in the Act just cited,[3] enacting, that "no special promise to be made by any person after the passing of this Act, to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." This provision is silent as to what the result of the needless insertion in the memorandum of a *past* or other legally insufficient consideration would be. In such a case would the courts admit parol evidence to contradict or vary the terms of the written document, by showing that the real consideration for the promise was other than that stated?[4] Further, although parol evidence is by the statute admissible to supply the consideration, it cannot be received now, any more than formerly, to *explain* the promise.[5]

§ 1031. The main difficulty in the law as to guarantees is to distinguish between *original* and *collateral* promises; that is, between cases where, though goods are supplied to a third party, credit is given solely to the defendant, and cases where the person for whose use the goods are furnished is primarily liable, and the defendant only undertakes to pay for them in the event of the other party making default.[6] This is a question of fact for the jury on which it is not possible to lay down any precise rule of construction. In general, cases of this kind must separately be

[1] 19 & 20 V. c. 97.
[2] Ante, § 1021.
[3] § 3 of the Act.
[4] See post, § 1197, ad fin.
[5] Holmes *v.* Mitchell, 1859.
[6] Birkmyr *v.* Darnell, 1704; Forth *v.* Stanton, 1698; Barrett *v.* Hyndman, 1840 (Ir.); Fitzgerald *v.* Dressler, 1859; Mallett *v.* Bateman, 1865. See Orrell *v.* Coppock, 1857.

determined on their own merits;[1] it being remembered that original promises will be valid, though verbally made,[2] while collateral promises must be in writing in order to satisfy the statute.[3] Both in England and America, moreover, agreements by factors to sell upon del credere commission, are held not to fall within the fourth section of the Statute of Frauds, or to be required to be in writing.[4]

§ 1032. Further, as to fall within the Statute of Frauds (§ 4) the promise must be one "to answer for the debt, default, or miscarriage *of another*,"[5] the liability of that other must continue notwithstanding the promise, or the defendant will not be allowed to rely on the absence of a written document.[6] Therefore a promise by a defendant to pay the debt if a plaintiff will discharge out of custody a debtor taken on a ca. sa., is an original one which need not be in writing; for the moment the debtor is discharged *his* liability is at an end;[7] where, too, a creditor had issued execution against a debtor, an arrangement, with the assent of all parties, that the debtor should convey his property to a third party, who undertook, in consideration of the creditor relinquishing his execution, to pay the amount of the debt, was held not to be within the statute, since its effect was to discharge the original debtor;[8] while a promise by A. to B. to pay him a certain sum if he withdrew his record in an action against C. for assault and battery, is likewise an original one.[9]

§ 1033. On the other hand, a promise which contemplates that the original debtor's liability should be kept falls within the statute. This, for example, was held to be the case where an execution debtor was discharged out of custody upon giving a warrant of attorney to secure the payment of his debt by instalments, and the

[1] 1 Wms. Saund. 211 b; 1 Smith, L. C. 334.

[2] Unless for the sale of goods for the price of 10*l.* or upwards. See ante, § 1020.

[3] See Lakeman *v.* Mountstephen, 1874, H. L.

[4] Couturier *v.* Hastie, 1852; Wickham *v.* Wickham, 1855 (Wood, V.-C.); Wolff *v.* Koppel, 1843 (Am.).

[5] As to the meaning of these words, see Macrory *v.* Scott, 1850.

[6] See Gull *v.* Lindsay, 1849.

[7] Goodman *v.* Chase, 1818; Butcher *v.* Stewart, 1843; Lane *v.* Burghart, 1841. See Reader *v.* Kingham, 1862.

[8] Bird *v.* Gammon, 1837.

[9] Read *v.* Nash, 1751; recognized in Bird *v.* Gammon, 1837, as reported 3 Bing. N. C. 889; but questioned and said to be in effect overruled by Kirkham *v.* Marter, 1819. See 1 Wms. Saund. (1871 edit.), p. 231.

defendant, knowing of this warrant of attorney, undertook, in consideration of the discharge, to see the debt paid;[1] and where a plaintiff, his attorney, and a defendant agreed (leaving the attorney still at liberty to recover his costs), that in consideration of the discontinuance of the suit, the defendant should pay the attorney the costs due from the plaintiff.[2] Even a promise to answer for the debt of another person, who himself never becomes legally indebted to the promisee, is possibly within the Act, if, at the time of the making of the promise, both parties intended that a contract of suretyship should be created.[3] Moreover, it makes no difference whether the goods were delivered to the third party,[4] or the debt incurred, or the default committed by him, *before* or *after* the promise by the defendant; for a promise to *indemnify*, if not within the words, is at least within the spirit, of the statute. Consequently, where the language is, in effect, this:—"If you will become bail in a civil suit for A., and he forfeits his bail bond, I will save you harmless," it is a promise to answer for the default of another.[5] A promise by a man to indemnify another against all liability, if he will enter into recognizances for the appearance of a misdemeanant, as relating to a *criminal* proceeding, does not, however, fall within the Statute of Frauds.[6]

§ 1034. The statute applies to promises to answer for the *tortious* default or miscarriage of another, as well as for his breach of *contract*. Therefore, where A. had killed plaintiff's horse, a third party's verbal promise to pay the damage, in consideration of plaintiff's forbearing to sue A., was held void.[7]

§ 1034A. Where an entire promise is invalid as to a part for not being in writing, no action can be brought on the remainder which is not within the statute, but the whole promise, being indivisible, will be void.[8]

§ 1034B. A promise to him to pay the promisee's own debt to a

[1] Lane *v.* Burghart, 1841.
[2] Tomlinson *v.* Gell, 1837.
[3] See Mountstephen *v.* Lakeman, 1874, H. L. (Ld. Selborne), disputing the proposition in the text.
[4] Matson *v.* Wharam, 1787; Anderson *v.* Hayman, 1789.
[5] Green *v.* Cresswell, 1839, overruling dicta of Bayley and Parke, JJ., in Thomas *v.* Cook, 1828; and explaining Adams *v.* Dansey, 1830.
[6] Cripps *v.* Hartnoll, 1863.
[7] Kirkham *v.* Marter, 1819.
[8] Lexington *v.* Clark, 1690; Chater *v.* Beckett, 1797; Thomas *v.* Williams, 1830; Mechelen *v.* Wallace, 1837.

third person need not be in writing, for the Act merely applies to a promise to be answerable for a debt of, or a default in some duty by, some *other* person *towards the promisee*.[1]

§ 1035. The provision in the Statute of Frauds (§ 4), requiring "*agreements made in consideration of marriage*" to be in writing, does not embrace mutual promises to marry; but such promises may be verbally made.[2] But marriage is not a "part performance" of a contract[3] within the general rule of equity that a contract void by statute will be enforced if it be a *complete* agreement,[4] of which there has been such a part performance on the side of the plaintiff that it would be a fraud on him if the defendant could object that the agreement was not in writing.[5] Therefore, if a suitor verbally agrees to settle property on his intended wife, and the lady marries him, relying on his honour, she cannot compel the performance of his agreement.[6] Neither can a suitor, after simply marrying his intended wife, enforce the specific performance of a parol agreement previously made by her father with reference to settlements.[7] At the same time, in the event of a clear case of fraud being established, the court, notwithstanding the Act, would compel a father to perform verbal promises on the faith of which the marriage was contracted.[8] If a father were to say to a suitor, "Marry my daughter, and settle so much a year on her for her jointure, in which case I will give you so much for her portion," with a fraudulent intent to deceive him, it is possible that this proposal, though not reduced to writing, if the marriage were actually to take place, and the jointure were settled, would amount to a valid equitable contract to give the portion.[9] Probably, too,

[1] Eastwood *v.* Kenyon, 1840; Hargreaves *v.* Parsons, 1844 (Parke, B.); Thomas *v.* Cook, 1828; Reader *v.* Kingham, 1862; Wildes *v.* Dudlow, 1875 (Malins, V.-C.).

[2] B. N. P. 280, c.

[3] Hammersley *v.* Baron de Biel, 1845 (Ld. Cottenham); Redding *v.* Wilks, 1791; Lassence *v.* Tierney, 1849 (Ld. Cottenham); Warden *v.* Jones, 1857.

[4] Lady E. Thynne *v.* E. of Glengall, 1847-8, H. L.

[5] Clinan *v.* Cooke, 1802 (Ir.); Kine *v.* Balfe, 1813 (Ir.); Surcome *v.* Pinniger, 1853; Taylor *v.* Beech, 1749; Ungley *v.* Ungley, 1877, C. A.

[6] Montacute *v.* Maxwell, 1720; Caton *v.* Caton, 1867, H. L.

[7] Dundas *v.* Dutens, 1790; Goldicutt *v.* Townsend, 1860.

[8] Baron de Biel *v.* Hammersley, 1845, H. L. (Ld. Brougham).

[9] Hammersley *v.* Baron de Biel, 1845, H. L. (Lds. Cottenham, Campbell, and Lyndhurst); Williams *v.* Williams, 1868 (Stuart, V.-C.). See, also, Maunsell *v.* White, 1854; Bold *v.* Hutchinson, 1855; Jameson *v.* Stein, 1855. See Kay *v.* Crook, 1857. But there must at all events be actual fraud. Johnstone *v.* Mappin, 1891.

though two recent cases throw some doubt upon the subject,[1] a verbal agreement made before marriage will be enforced, if subsequently to the marriage it has been recognised and adopted in writing.[2] The court, however, will not interfere, even in cases where there has been a written memorandum of the promise, unless it appears that the marriage was contracted expressly on the faith of the agreement.[3] Therefore, a letter by a father to his daughter, saying that he had agreed with her intended husband to give her 3,000*l.* as her portion, which letter was never shown to the husband before the marriage, was held not to be sufficient, since the husband could not have married on the faith of the letter.[4]

§ 1036. The provision in the Statute of Frauds which renders void any agreement that is "*not to be performed within a year*" from the making thereof, which is not evidenced by writing, does not apply where the contract is *capable* of being wholly performed on the one side or on the other within a year.[5] Neither does it extend to an agreement by a contractor to allow a stranger to share in the profits of a contract incapable of being completed within a year, since such an agreement amounts to nothing more than the vendition of a right which is performed instanter on the bargain being struck.[6] It would also seem to be inapplicable in any case where the action is brought upon an *executed* consideration;[7] since the object of the statute clearly being only to prevent the setting up, by fraud and perjury, of contracts or promises by parol, upon which parties might otherwise have been charged for their whole lives, its operation must be limited to such actions as are brought to recover damages for the *non-performance* of contracts, which are not intended to be completely performed on

[1] Warden *v.* Jones, 1857 (Ld. Cranworth, C.); Trowell *v.* Shenton, 1878 (Jessel, M.R.).

[2] Barkworth *v.* Young, 1857 (Kindersley, V.-C.); Hammersley *v.* Baron de Biel, 1845, H. L. (Ld. Cottenham, citing Hodgson *v.* Hutchenson, 1712); Taylor *v.* Beech, 1749; and Montacute *v.* Maxwell, 1732-3; and questioning Randall *v.* Morgan, 1805, where Sir W. Grant expressed serious doubt. See Hammersley *v.* Baron de Biel, 1845, as reported 12 Cl. & Fin. 86 (Ld. Brougham); and De Biel *v.* Thomson, 1844, as reported 3 Beav. 475, 476 (Ld. Langdale). Also Caton *v.* Caton, 1867, C. A.

[3] See Viret *v.* Viret, 1880 (Malins, V.-C.).

[4] Ayliffe *v.* Tracy, 1722. See Dashwood *v.* Jermyn, 1879.

[5] Cherry *v.* Heming, 1849; and Smith *v.* Neale, 1857; both recognising Donellan *v.* Read, 1832.

[6] M'Kay *v.* Rutherford, 1848, P. C.

[7] Knowlman *v.* Bluett, 1874. See ante, §§ 974, 981—984; post, § 1043.

either side within a year from the time of their being made.[1] Subject to this limitation, a *part-performance* is not sufficient to take the case out of the statute. Whenever it appears, either by express stipulation, or by inference from the circumstances, to have been contemplated that a contract could not be *completed* on either side within the year, documentary proof of such contract must be given.[2] Thus, a servant verbally hired for a year's service, *commencing at a future day*, cannot maintain an action against the master for discharging him before the expiration of the year, though he has faithfully performed his duty as such servant up to the date of his discharge.[3] But though no action can be brought on it, the parol agreement will not be void for all purposes; for the servant may, by a sufficient service under it, acquire a poor law settlement.[4]

§ 1037. A contract which expressly contemplates a duration of more than a year will not be taken out of the operation of the statute by the mere fact that it *may* be determined by the parties within the year.[5] Therefore, a contract to employ a solicitor during his professional life is within the statute, though it may be determined in less time than a year by the lawyer's death, or retirement, or misconduct.[6] And in such a case, it matters not whether it were made in this or in any other country; for, as the Act does not bar the right as well as the remedy, or in other words, does not render the agreement void, but only prevents its being enforced by action here, it applies to all foreign contracts equally with those entered into in England.[7] But where an agreement is altogether silent as to the time within which it is to be per-

[1] Souch *v.* Strawbridge, 1846 (Tindal, C.J.). See Re Pentreguinea Coal Co., 1862.

[2] Boydell *v.* Drummond, 1809.

[3] Bracegirdle *v.* Heald, 1818; Snelling *v.* Huntingfield, 1834; Britain *v.* Rossiter, 1879, C. A.; Giraud *v.* Richmond, 1846. See Cawthorne *v.* Cordrey, 1863; Banks *v.* Crossland, 1874.

[4] Bracegirdle *v.* Heald, 1818 (Bayley, J.).

[5] Birch *v.* Ld. Liverpool, 1829; Roberts *v.* Tucker, 1849; Dobson *v.* Collis, 1856; Re Pentreguinea Coal Co., 1862.

[6] Eley *v.* The Positive, &c. Co., 1875. For the rule of law here is the same as in the case of a defeasible estate, where, if a party enters, he is *in* of the whole estate, though an event may afterwards occur, which would prevent the estate from continuing during the entire term contemplated in the original grant. (R. *v.* Herstmonceaux, 1827 (Bayley, J.). See ante, §§ 1006—1008.)

[7] Leroux *v.* Brown, 1852. But see Williams *v.* Wheeler, 1860 (Willes, J.).

formed, and its duration rests upon a contingency, which may or may not happen within the year, as, for instance, if it depends on the death or marriage of a party, the length of a voyage, the giving of a notice, or the like, it is not within the operation of the statute, though the event, which is to terminate the agreement, does not in fact occur within the year.[1]

§ 1038. The expression *interest in lands*, used in § 4 of the Statute of Frauds, has given rise to much litigation. It appears to extend to contracts to abate a tenant's rent;[2] to submit to arbitration the question whether a lease shall be granted;[3] to relinquish a tenancy, and let another party into possession for the residue of a term;[4] to permit the profits of a clergyman's living to be received by a trustee;[5] to repay a loan out of the future rent of a farm;[6] to become a partner in a colliery, which was to be demised by the partnership upon royalties;[7] to assign a share in partnership assets which include an interest in land;[8] to take furnished lodgings;[9] or to exercise sporting rights over land, and carry off a portion of the game killed;[10] to convey an equity of redemption;[11] or to procure, as a broker, the sale of a lease.[12] On the other hand, it appears the words "interest in land" do not extend to an equitable mortgage by deposit of title-deeds;[13] a collateral agreement by a lessee to pay a percentage on money laid out by the landlord on the premises;[14] a contract relating to the investigation of a title to land;[15] an agreement for board and lodging, no particular rooms being demised;[16] an agreement between a land-

[1] Souch *v.* Strawbridge, 1846; Knowlman *v.* Bluett, 1874; Ridley *v.* Ridley, 1865; Wells *v.* Horton, 1826; Gilbert *v.* Sykes, 1812; Peter *v.* Compton, 1693; Fenton *v.* Emblers, 1762. See Mavor *v.* Payne, 1825; Murphy *v.* Sullivan, 1866 (Ir.); Farrington *v.* Donohue, 1866 (Ir.); Davey *v.* Shannon, 1879 (Hawkins, J.).

[2] O'Connor *v.* Spaight, 1804 (Ir.).

[3] Walters *v.* Morgan, 1792.

[4] Buttemere *v.* Hayes, 1839; Smith *v.* Tombs, 1839; Cocking *v.* Ward, 1845; Kelly *v.* Webster, 1852; Smart *v.* Harding, 1855; Hodgson *v.* Johnson, 1859; Ronayne *v.* Sherrard, 1877 (Ir.).

[5] Alchin *v.* Hopkins, 1834.

[6] Ex p. Hall, Re Whitting, 1878, C. A.

[7] Caddick *v.* Skidmore, 1857 (Ld. Cranworth, C.).

[8] Gray *v.* Smith, 1890, C. A.

[9] Edge *v.* Strafford, 1831; Inman *v.* Stamp, 1815 (Ld. Ellenborough); Mechelen *v.* Wallace, 1837; Vaughan *v.* Hancock, 1846.

[10] Webber *v.* Lee, 1882, C. A.

[11] Massey *v.* Johnson, 1847 (Rolfe B.). See Toppin *v.* Lomas, 1855.

[12] Horsey *v.* Graham, 1869.

[13] Russel *v.* Russel, 1783.

[14] Hoby *v.* Roebuck, 1816.

[15] Jeakes *v.* White, 1851.

[16] Wright *v.* Stavert, 1850.

lord and tenant, that the former shall take at a valuation certain fixtures left by the latter in the house;[1] an undertaking by a landlord to build a water-closet for his tenant;[2] or to put the house in repair and put more furniture into it;[3] an agreement for the use of a graving dock during the repairs of a ship;[4] or a contract that an arbitrator shall determine the amount of damages sustained by a party, in consequence of a road having been made through his lands.[5] How far the words in question make the Act apply to profits à prendre, easements, and other incorporeal rights relating to lands, is by no means clear; though they ought, on principle, to extend to all agreements respecting rights of common, rights of way, grants of rent-charge, tolls, or licences coupled with an interest, however trifling, in lands.[6]

§ 1039. The question, whether *shares* in a joint-stock company,[7] possessed of *real estate*, were an interest in lands, was formerly much discussed.[8] But it is now enacted that all shares issued either under the old Joint-Stock Companies Act of 1856, or under the present Companies Acts, "shall be personal estate, and shall not be of the nature of real estate."[9] In many cases, too, where a company has been incorporated by statute, Parliament has expressly declared that the shares shall be deemed personal estate.[10] Even in the absence of any such declaration, if a company be *incorporated* by statute or by charter, and real property be vested in it, of which it is to have the sole management, the shares of

[1] Hallen *v.* Runder, 1834; Lee *v.* Gaskell, 1876.

[2] Mann *v.* Nunn, 1874.

[3] Angell *v.* Duke, 1875.

[4] Wells *v.* Kingston-upon-Hull, 1875.

[5] Gillanders *v.* Ld. Rossmore, 1835, Griffiths *v.* Jenkins, 1864 (Crompton and Shee, JJ.).

[6] Cook *v.* Stearns, 1814 (Am.); R. *v.* Salisbury, 1838.

[7] As to shares in an ordinary private partnership owning real estate, see Ashworth *v.* Munn, 1878, C. A.

[8] Bligh *v.* Brent, 1836-7; Bradley *v.* Holdsworth, 1838; Hibblewhite *v.* M'Morine, 1840 (Parke, B.); Humble *v.* Mitchell, 1839; Baxter *v.* Brown, 1845 (Tindal, C.J.); Hilton *v.* Giraud. 1847; Watson *v.* Spratley, 1854 (Martin and Parke, BB.); Bulmer *v.* Norris, 1860. See Edwards *v.* Hall, 1855; overruling Ware *v.* Cumberlege, 1855; and see, also, Powell *v.* Jessopp, 1856; and Taylor *v.* Linley, 1860.

[9] 19 & 20 V. c. 47, § 15; 25 & 26 V. c. 89, § 22.

[10] As, for instance, in the case of all companies subject to the provisions of "The Cos. Clauses Consolid. Act, 1845" (8 & 9 V. c. 16), § 7; in the case of the Lancaster Canal Co.; of the Lond. & Birmingham Rail. Co. (see Bradley *v.* Holdsworth, 1838); and of many others. Again, stock, to which "The Colonial Stock Act, 1877," applies, is personal estate (40 & 41 V. c. 59, § 22).

the individual proprietors will be personalty, and will consist of nothing more than a right to participate in the net produce of the property of the company. The same doctrine will apply, even where the company is *unincorporated*,—as, for instance, if it be a mining co-partnership conducted on the cost-book principle,—provided that the real estate be vested in trustees in trust to use it for the benefit of the shareholders, and to make profits out of it, as part of the stock in trade; and provided that the interest of the shareholders be confined to those profits.[1] If, however, the trustees hold the real estate in trust for themselves and the co-adventurers, present and future, in proportion to their number of shares, then there will be a direct interest in the realty; and, consequently, neither a bargain for, nor a transfer of, a share in such interest can be made without a note in writing.[2] Where the real property is held upon trusts, the question—under which of these two species of trusts above indicated it is held—is in general one merely of fact, to be determined in each case by the jury.[3] But if the freehold which forms the basis and subject-matter of the trade of an unincorporated company, be vested in the collective body, the shares of the individual co-partners seem clearly to then fall as matter of law within the meaning of the 4th section of the Statute of Frauds.[4]

§§ 1039A—1040. It is now settled, too, that neither railway debenture stock created under the provisions of the Companies Clauses Act, 1863,[5] nor railway debentures, are an interest in lands.[6]

[1] Watson *v.* Spratley, 1854. See Myers *v.* Perigal, 1851-2; Walker *v.* Bartlett, 1856; Hayter *v.* Tucker, 1857; Bennett *v.* Blain, 1863; Freeman *v.* Gainsford, 1865; Entwistle *v.* Davis, 1867.

[2] Id.; Baxter *v.* Brown, 1845; Boyce *v.* Green, 1826 (Ir.). See Morris *v.* Glynn, 1859.

[3] Watson *v.* Spratley, 1854 (Parke and Alderson, BB.).

[4] See, further, as to the transfer of shares in joint stock companies, ante, § 993.

[5] 26 & 27 V. c. 118, § 22.

[6] Attree *v.* Hawe, 1878, C. A.; Holdsworth *v.* Davenport, 1876; Walker *v.* Milne, 1849. These cases overrule Ashton *v.* Ld. Langdale, 1851; and Chandler *v.* Howell, 1877. In connection with this subject it may be convenient to mention that while, as stated above, debentures are not within § 4 of the Statute of Frauds, *scrip* and *shares* in joint-stock companies, whether incorporated or unincorporated, are not "*goods, wares and merchandises*" within § 17 of the same statute (now replaced, as already mentioned in § 1020, by § 4, subs. 1, of "The Sale of Goods Act, 1893"). (Humble *v.* Mitchell, 1839; Hibblewhite *v.* M'Morine, 1840 (Parke, B.); Knight

§ 1041.[1] Returning to the consideration of what is an "interest in lands" within the statute, it may be noted that the principal difficulties in interpreting what is meant by an "interest in lands," arise in cases where trees, *growing crops*, building materials, or other things annexed to the freehold, form the subject of the contract. Lord Abinger said, as to these cases, that "no general rule is laid down in any of them, that is not contradicted by some other,"[2] and to this day the judges have not agreed upon any uniform test for the determination of this question.[3] In some cases they have endeavoured to solve it by reference to the law of emblements; holding that whatever will go to the executor, the tenant being dead, cannot be considered as an interest in land.[4] In other cases they have considered the test to be, whether the property in dispute could have been seized in execution at common law.[5] In others, again, they have drawn a distinction between fructus industriales, and the natural products of the soil.[6] In not a few, too, of the cases, they have rested their decisions partly on the legal character of the principal subject-matter of the contract, but principally on the consideration whether, in order to effectuate *the intention* of the parties, it were necessary to give the vendee an interest in the land.[7]

§ 1042. From this confusion of decisions it is thought, however, that two broad principles may now be extracted. The first of these broad principles may be deduced from a decision of the Common Pleas Division[8] in 1876, and appears to be that a sale of *growing things* which are upon land is only within the

v. Barber, 1846; Tempest *v.* Kilner, 1846; Bowlby *v.* Ball, 1846; Duncuft *v.* Albrecht, 1841; Watson *v.* Spratley, 1854.) As the judgment determining this proceeds on the ground that such shares are mere choses in action (but In re Jackson, Ex parte Bk. of Manchester, 1871, Bacon, V.-C., held that shares in a company were not "things in action" within the meaning of 32 & 33 V. c. 71, § 15, subs. 5 (now re-enacted by 46 & 47 V. c. 52, § 44, subs. 3)), it also inferentially determines (Hoseltine *v.* Siggers, 1848) that contracts for the sale of stock or exchequer bills are not within the Act. (Pickering *v.* Appleby, 1720-1, cited in Colt *v.* Nettervill, 1725 (Ld. Ch. King).).

[1] Gr. Ev. § 271, in part as to first four lines.

[2] Rodwell *v.* Phillips, 1842.

[3] See Sug. V. & P. 124—8.

[4] Rodwell *v.* Phillips, 1842; Jones *v.* Flint, 1839.

[5] Dunne *v.* Ferguson, 1832 (Ir.); Rodwell *v.* Phillips, 1842; Jones *v.* Flint, 1839.

[6] Jones *v.* Flint, 1839; Evans *v.* Roberts, 1826; Rodwell *v.* Phillips, 1842 (Ld. Abinger).

[7] Jones *v.* Flint, 1839.

[8] Marshall *v.* Green, 1875.

statute as conferring an interest in land when it is part of the bargain that the things sold are to remain on the land till maturity, or for any other stipulated time, or when it is collateral to a transfer of the land itself; but that such a sale does not confer an interest in land, and is consequently not within the statute when growing things are sold as chattels and are to be removed from the land forthwith after the sale. Endeavouring to view all the cases as to sales of growing crops by the light of this principle, it is submitted, with some diffidence, that a fair summary of the results of these decisions is as follows:—First, a contract for the purchase of *fruits of the earth, ripe*, though not yet gathered, is not a contract for any interest in lands, though the vendee is to enter and gather them.[1] Secondly, a sale of any growing crops which would be emblements—that is to say, are growing crops which are *reared by labour and expense*, and usually repay within the year in which it is bestowed the labour by which they are produced, as, for instance, crops of corn,[2] hops,[3] potatoes,[4] or turnips,[5]—is not within the statute, though the purchaser is to harvest or dig them. Similarly, a contract for the sale of other growing things (for example, trees) *as chattels*, when the subject of the sale is ready to be cut and gathered at once, and the contract stipulates that they shall be removed immediately, and does not confer the possession or use of the land for any given time, either in order that it may contribute to the growth of the thing sold till its maturity, or for any other given purpose, is not a contract for an interest in land within the statute.[6] This principle may possibly also afford a solution of the question which was once raised[7] as to contracts respecting the sale of teasles, liquorice, madder, clover, or other crops of a like nature, which do not ordinarily repay the labour by which they are produced *within the year* in which that labour is bestowed, and consequently, as it seems, do not fall within the law of emblements,

[1] Parker *v.* Staniland, 1809; Cutler *v.* Pope, 1836 (Am.).

[2] Jones *v.* Flint, 1839.

[3] Parke, B., in Rodwell *v.* Phillips, 1842, questioning Waddington *v.* Bristow, 1801. See, also, Graves *v.* Weld, 1833.

[4] Sainsbury *v.* Matthews, 1838; Evans *v.* Roberts, 1826; Warwick *v.* Bruce, 1813.

[5] Dunne *v.* Ferguson, 1832 (Ir.). Emmerson *v.* Heelis, 1809, contra, must be considered as overruled by Evans *v.* Roberts, 1826, and by Jones *v.* Flint, 1839.

[6] Marshall *v.* Green, 1875, C. A.; Smith *v.* Surman, 1829; explained by Ld. Abinger in Rodwell *v.* Phillips, 1842.

[7] Graves *v.* Weld, 1833, 1 Sug. V. & P. 156 (10th edit.).

and show that such contracts do not *necessarily* fall within the statute, and only do so where they necessitate as a consequence the enjoyment of land for some given time. Thirdly, an agreement respecting the sale of growing crops, *when fit to be cut and taken*, such as growing fruit,[1] grass,[2] underwood,[3] poles,[4] or timber, which either necessitates the use of the land for the purpose of supporting the crops till they reach maturity, or for any other purpose, is a contract touching an interest in land, which, as such, falls within the fourth section of the Statute of Frauds, and, consequently, must be in writing.[5] Fourthly, when a contract is made for the sale or letting of land, and the vendee or tenant at the same time contracts to purchase the growing crops on it, this last contract, even though the crops taken under it form the subject of a distinct valuation, is so incorporated with the agreement relating to the land as to be inseparable from it, and to consequently fall within the fourth section of the Act.[6] The second broad principle appears to be that the sale of an *inanimate object* which at the time of such sale forms part of an hereditament, even though the subject of the sale be treated by the contract as a chattel, is within § 4 of the Statute of Frauds—*e. g.*, a sale, as building materials, of a house to be taken down by the purchaser.[7]

§ 1043. Where a sale of growing crops does not amount to a sale of an interest in land, it may, however, be a transaction which falls within the provisions[8] which require a sale of goods to be in writing. This being so, it perhaps, at first sight, seems unimportant to raise any question upon the subject. But two material

[1] Rodwell *v.* Phillips, 1842; resolving a doubt suggested by Littledale, J., in Graves *v.* Weld, 1833.

[2] Crosby *v.* Wadsworth, 1805; Carrington *v.* Roots, 1837.

[3] Scorell *v.* Boxall, 1827.

[4] Teal *v.* Auty, 1820.

[5] In two cases, indeed, where an agreement to sell growing timber was held not to convey any interest in the land, in one of them the timber was to be felled and taken away "as soon as possible" by the purchaser: Marshall *v.* Green, 1875; and in the other the vendor had contracted to sell the timber at so much per foot, and the court regarded that contract in the same light as if it had related to the sale of timber already felled: Smith *v.* Surman, 1829; explained by Ld. Abinger in Rodwell *v.* Phillips, 1842.

[6] Ld. Falmouth *v.* Thomas, 1832; Mayfield *v.* Wadsley, 1824 (Littledale, J.).

[7] Lavery *v.* Pursell, 1888 (Chitty, J.).

[8] Viz., "The Sale of Goods Act, 1893," § 4, superseding § 17 of the Statute of Frauds. See ante, § 1020.

distinctions exist between the fourth section of the Statute of Frauds—which still governs sales of an interest in land—and the provisions now in force as to sales of goods. Contracts under the former must be stamped, while those under the latter are exempt.[1] Further, no writing is required by the provisions governing sales of goods, if the subject-matter of the contract is under the value of 10*l.*, or if there has been a part-payment, or a part-acceptance, by the purchaser.[2] Parol agreements touching lands will, moreover, not be enforced, unless they have been unequivocally performed in some *material* part; as, for instance, possession has been distinctly taken under them and rent paid, or the like;[3] and such agreements will fall within the operation of the statute, where it would not amount to a fraud upon the acting party if the contract were not completed.[4]

§ 1044. A contract, which is substantially one for work and labour,[5] or an agreement to procure goods for another, and to convey them to a certain place,[6] is not subject to the provisions[7] governing sales of goods. Neither is a contract as to fixtures governed by the above provisions or by those of sect. 4[8] of the Statute of Frauds, for fixtures, though chattels, are not goods, wares, or merchandise.[9] But where the principal subject-matter of a contract is the sale of goods of the price or value of 10*l.* or upwards, such contract falls within the Sale of Goods Act, 1893,[7] though it includes other matters,—as, for instance, the agistment of cattle,—to which the Act does not apply.[10] Moreover, if a person purchase several articles at one time, though at distinct prices, such transaction is regarded as one entire contract; and, if the total

[1] 54 & 55 V. c. 39 ("The Stamp Act, 1891"), Sch. I. tit. Agreement.

[2] Ante, § 1020.

[3] Maddison *v.* Alderson, 1883, H. L., deserves attentive perusal; Lanyon *v.* Martin, 1884 (Ir.). See also Humphreys *v.* Green, 1882, C. A.; Dale *v.* Hamilton, 1846; Lincoln *v.* Wright, 1859; Nunn *v.* Fabian, 1865, H. L. (Ld. Cranworth, C.); Howe *v.* Hall, 1870 (Ir.); Williams *v.* Evans, 1875, and as to which qu.

[4] Maddison *v.* Alderson, 1883; Clinan *v.* Cooke, 1802 (Ir.) (Ld. Redesdale). See Haigh *v.* Kaye, 1872 (Lds. JJ.); Pulbrook *v.* Lawes, 1876.

[5] Clay *v.* Yates, 1856. But a contract to make a set of teeth to fit the employer is not a contract for work and labour, so as to dispense with the statute; Lee *v.* Griffin, 1861.

[6] Cobbold *v.* Caston, 1824.

[7] "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), § 4, superseding § 17 of the Statute of Frauds. See ante, § 1020.

[8] Ante, § 1038.

[9] Horsfall *v.* Hey, 1848.

[10] Harman *v.* Reeve, 1856.

purchase-money amounts to 10*l.*, it will be within the statute, though none of the articles taken separately may be of that value.[1]

§ 1045. The *acceptance* and *actual receipt* mentioned by the provisions in force as to the sale of goods,[2] have given rise to much litigation. Without entering into any lengthened discussion, it may be observed that each of these two terms has a distinct and separate meaning;[3] that a compliance with both requisites is necessary to satisfy the statute;[4] that an acceptance and receipt of *part* of the goods will be as operative as an acceptance and receipt of the whole;[5] that in cases relating to the purchase of *specific* goods the acceptance may precede the receipt as well as follow it or be contemporaneous with it;[6] that an agent authorised to receive goods is not consequently authorised to accept them;[7] that the receipt, which itself implies delivery,[8] must be such as will preclude the vendor from retaining any lien on the goods,[9] and that the acceptance and receipt together must be such as will preclude the purchaser from objecting to their quantity or quality.[10] The broad question in such cases,—which must be submitted as one of fact to the jury,[11]—is whether the circumstances prove a delivery by the vendor, and an acceptance and actual receipt by the vendee, intended by *both parties* to have the effect of transferring the right of possession from the one to the other.[12] Therefore the mere

[1] Baldey *v.* Parker, 1823. See, also, Elliott *v.* Thomas, 1838; Bigg *v.* Whisking, 1853.

[2] "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), § 4, superseding § 17 of the Statute of Frauds. See ante, § 1020.

[3] Cusack *v.* Robinson, 1861.

[4] Id.

[5] Morton *v.* Tibbett. 1850 (Ld. Campbell); Kershaw *v.* Ogden, 1865.

[6] Cusack *v.* Robinson, 1861, resolving a doubt expressed in Saunders *v.* Topp, 1849, and adopting in part a dictum of Ld. Campbell's in Morton *v.* Tibbett, 1850.

[7] Nicholson *v.* Bower, 1858; Hanson *v.* Armitage, 1822; Norman *v.* Phillips, 1845.

[8] Saunders *v.* Topp, 1849 (Parke, B.).

[9] Baldey *v.* Parker, 1823; Maberley *v.* Sheppard, 1833 (Tindal, C.J.); Smith *v.* Surman, 1829 (Parke, J.); Tempest *v.* Fitzgerald 1820 (Holroyd, J.); Carter *v.* Toussaint, 1822 (Bayley, J.); Holmes *v.* Hoskins, 1854; Cusack *v.* Robinson, 1861 (Blackburn, J.); Grice *v.* Richardson, 1877.

[10] Norman *v.* Phillips, 1845 (Alderson, B.); Smith *v.* Surman, 1829 (Parke, J.); Howe *v.* Palmer, 1820 (Holroyd, J.); Hanson *v.* Armitage, 1822 (Abbott, C.J.); Acebal *v.* Levy, 1834 (Tindal, C.J.). In Morton *v.* Tibbett, 1850, the Ct. of Q. B. denied that the proposition stated in the text was law; but, though very elaborate, the judgment is by no means satisfactory. See, also, Parker *v.* Wallis, 1855; and Currie *v.* Anderson, 1859 (Crompton, J.).

[11] Morton *v.* Tibbett, 1850; Bushel *v.* Wheeler, 1844.

[12] Phillips *v.* Bistolli, 1824; recog-

marking of goods, by the vendee in the vendor's shop when they are to be paid for by ready money, is not enough, as this act, though it may constitute a valid acceptance,[1] is not such a receipt by the vendee as will deprive the vendor, even when he assents to it, of his right of lien.[2]

§ 1046. Where, however, a party, having agreed to purchase some wool, sent it to another warehouse for deposit, and then weighed it *and packed it* in his own sheeting, his acts were held to be a sufficient acceptance and receipt, though by the course of dealing, he was not to remove the wool to its ultimate destination before payment and no payment had been made. For the court considered that, under the circumstances, the vendor had not what could properly be called a lien on wool, but merely a special interest growing out of his original ownership, independent of the actual possession, and consistent with the property being in the purchaser.[3] Again, where some horses were purchased of a dealer who kept a livery stable, and the buyer directed the seller to keep them at livery, upon which they were transferred from the sale to the livery stable; this direction was held equivalent to an acceptance and receipt of the horses, as the buyer became liable for their keep, which would not have been the case, unless they had actually gone into his possession;[4] where a timber merchant, having bought some growing trees by verbal contract, cut down six of them and sold the lops and tops, it was held to be too late for the vendor of the trees to countermand the sale;[5] and where a vendee had sold to a third person part of a stack of hay purchased by parol, and this subpurchaser had actually taken away his part, a jury were held

nised in Maberley *v.* Sheppard, 1833. See Curtis *v.* Pugh, 1847; Saunders *v.* Topp, 1849; and Tomkinson *v.* Staight, 1856.

[1] Cusack *v.* Robinson, 1861.

[2] Baldey *v.* Parker, 1823; Bill *v.* Bament, 1841; Proctor *v.* Jones, 1826; Kealy *v.* Tennant, 1861 (Ir.); which seem virtually to overrule Hodgson *v.* Le Bret, 1808; and Anderson *v.* Scot, 1806. See Saunders *v.* Topp, 1849; and Acraman *v.* Morrice, 1849.

[3] Dodsley *v.* Varley, 1840; Langton *v.* Higgins, 1859; Aldridge *v.* Johnson, 1857; Kershaw *v.* Ogden, 1865. See Simmonds *v.* Humble, 1862. As to the effect of handing over a sample of the goods, see Gardner *v.* Grout, 1857.

[4] Elmore *v.* Stone, 1809; explained and recognised by Bayley, J., in Smith *v.* Surman, 1829. See Castle *v.* Sworder, 1861; Carter *v.* Toussaint, 1822; Beaumont *v.* Brengeri, 1847; Holmes *v.* Hoskins, 1854; Marvin *v.* Wallace, 1856. See, also, Taylor *v.* Wakefield, 1856.

[5] Marshall *v.* Green, 1875.

justified in finding that there had been an acceptance and actual receipt of the whole stack.[1]

§ 1047. A person, intrusted with goods to sell, may himself become the purchaser by parol, and do subsequent acts amounting to an acceptance and receipt; as, for instance, if he sells them to a stranger on his own account.[2] The evidence to sustain such a case must, however, be extremely clear.[3]

§ 1048. Where goods are ponderous and incapable of being handed over from one to another, a constructive delivery,—such, for example, as the giving up the key of the warehouse in which they are deposited, or the delivery of other indicia of property,—will be sufficient.[4] But, in all these cases, the acts of the parties, in order to be tantamount to a delivery and actual receipt, must be unequivocal.[5] Therefore, where goods are at the time of sale in the possession of a warehouseman as agent for the vendor, the mere acceptance and retainer by the purchaser of the warrant or delivery order, will not amount to an actual receipt of the goods, so as to bind the bargain.[6] To have this effect, the document must be lodged by the purchaser with the warehouseman, who must then, as it were, attorn to him, or in other words, agree to hold the property henceforth as his agent.[7]

§ 1049. One of the chief difficulties upon questions as to the actual receipt and acceptance of goods which have been the subjects of sale, arises where goods, verbally purchased, are delivered to a carrier or wharfinger named by the vendee. It seems to have been once considered, that such delivery was sufficient to satisfy the statute.[8] It has since, however, been held, that though the delivery to the carrier may be a delivery to and "receipt" by the purchaser, the acceptance of the carrier is not an "acceptance" by such purchaser.[9] Therefore, where timber, verbally ordered, was

[1] Chaplin *v.* Rogers, 1800; recognised by Bayley, J., in Smith *v.* Surman, 1829, as reported 9 B. & C. 570. See Stoveld *v.* Hughes, 1811; and Searle *v.* Keeves, 1797.

[2] Eden *v.* Dudfield, 1841; Lillywhite *v.* Devereux, 1846.

[3] Id.

[4] Chaplin *v.* Rogers, 1800 (Ld. Kenyon).

[5] Nicholle *v.* Plume, 1824 (Best, C.J.); Edan *v.* Dudfield, 1841.

[6] M'Ewan *v.* Smith, 1849, H. L.

[7] Farina *v.* Home, 1846 (Parke, B.); Bentall *v.* Burn, 1824.

[8] Hart *v.* Sattley, 1814 (Chambre, J.). See Dawes *v.* Peck, 1799; and Dutton *v.* Solomonson, 1803.

[9] Johnson *v.* Dodgson, 1837 (Parke, B.). See Acebal *v.* Levy, 1824;

forwarded in this manner to the purchaser, but he refused to take it in, a jury were held not to be warranted in finding an acceptance, though an invoice had been sent to the purchaser and retained by him, and though he had omitted to give notice to the vendor of his refusal to take the goods till after the expiration of more than *one* month.[1] Under somewhat similar circumstances, however, where no rejection of the goods had taken place for *seven* months, an opposite decision was arrived at, Coleridge, J., resting his judgment on the ground that the inspection of the goods was to be made within a reasonable time.[2] Whether this particular distinction can be supported is perhaps a question. But it is at least clear that, as a general rule, if a purchaser, who has the right of approval, retains for an unreasonable time goods which have been delivered to him, he will lose his right to object to them, and his conduct will amount to an acceptance;[3] and further, the same principle will also hold, if the goods have been delivered to a general agent of the purchaser, who was authorised by him to examine their quality.[4] It also is clear, that, if the purchaser of goods takes upon himself to exercise a dominion over them, and deals with them in a manner inconsistent with the right of property continuing in the vendor,—as, for instance, if he changes their original destination, or resells them to a third party at a profit,—the jury will be justified in finding that he has accepted the goods and actually received them, though they have been merely delivered to his carriers, and he himself has never seen them.[5]

§ 1050. We may now leave the consideration of the Statute of Frauds. The next statute by which matters are required to be evidenced by writing, in the cases specified, is "*The Wills Act*, 1837."[6]

Coats *v.* Chaplin, 1842; Nicholson *v.* Bower, 1858.

[1] Norman *v.* Phillips, 1845; Meredith *v.* Meigh, 1853; Hunt *v.* Hecht, 1853; Hart *v.* Bush, 1858; Coombs *v.* Bristol & Ex. Rail. Co., 1858; Smith *v.* Hudson, 1865.

[2] Bushel *v.* Wheeler, 1844; explained by Alderson, B., in Norman *v.* Phillips, 1845, as reported 14 M. & W. 282. See, also, Currie *v.* Anderson. 1860.

[3] Coleman *v.* Gibson, 1832 (Ld. Tenterden); Norman *v.* Phillips, 1845 (Alderson, B.); Bowes *v.* Pontifex, 1863 (Bramwell, B.).

[4] Norman *v.* Phillips, 1845 (Alderson, B.).

[5] Morton *v.* Tibbett, 1850, explained by Martin, B., in Hunt *v.* Hecht, 1853.

[6] 7 W. 4 & 1 V. c. 26.

This came into operation 1st January, 1838,[1] and effected extensive amendments in the law respecting these instruments. It will here be expedient to notice such of the alterations as relate to the *execution of wills*. By the Act, every will, codicil, or other testamentary disposition,—including appointments made by will, or by writing in the nature of a will, in exercise of any power,[2] whether such power were created before or after the Act came into operation,[3] but excluding nuncupative wills, disposing of personal estate, made by soldiers in actual military service, or by seamen and mariners at sea,[4]—if made, or re-executed, or re-published, or revived by any codicil, on or after the 1st January, 1838,[5] must be in writing, "and be signed at the foot or end thereof by the testator, or by some other person in his presence,[6] 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 attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."[7] Appointments by will, if executed in this manner, are valid, although the power, under which they were made, expressly requires some additional solemnity in the execution;[8] and all wills, executed as above stated, are to be deemed good without other publication.[9]

§ 1051. With the view, however, of preventing frauds, to which seafaring men are supposed to be more than ordinarily subject, the Act requires the wills of petty officers and seamen in the Royal

[1] The Act is due to the exertions of Ld. Langdale.

[2] §§ 1 and 10.

[3] Hubbard *v.* Lees, 1866.

[4] § 11. As to nuncupative wills, see post, § 1062, and 1 Will. on Ev. 62—89.

[5] § 34.

[6] Kevil *v.* Lynch, 1873 (Ir.).

[7] § 9. A will written in *pencil* has been decided to be a good will; Dickenson *v.* Dickenson, 1814; Re Dyer, 1828; but not (as decided in America) one written on a *slate*. Reed *v.* Woodward (Am.). But it may be in the form of a letter if intended to be testamentary and properly executed. Cowley *v.* Knapp. 1886 (Am.). § 7 of the Indian Will Act, No. 25, of 1838, contains the same language, with the single omission of the words "shall attest and" after "witnesses," and before "shall subscribe." This alteration makes no difference in the construction. Ld. Brougham in Casement *v.* Fulton, 1845, P. C.

[8] § 10. See, however, and compare Buckell *v.* Bleakhorn, 1846; Collard *v.* Sampson, 1853; West *v.* Ray, 1854; Taylor *v.* Meads, 1865; and Smith *v.* Adkins, 1872.

[9] § 13. As to the meaning of the phrase "publication of a will," see Vincent *v.* Bp. of Sodor and Man, 1851, and cases there cited.

Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty-money, allowances, and moneys payable in respect of services in her Majesty's Navy,[1] to be drawn, executed, and attested in a more formal manner than instruments made by other persons, who are presumed to have greater experience.[2]

§ 1052. In contrasting the provisions in "The Wills Act, 1837," with those formerly contained in the Statute of Frauds,[3] it will be observed, first, that the present Wills Act is not confined (as the Act of Charles II. was) to devises of freehold realty, but it applies equally to *all* wills, whether of freehold, copyhold, or personalty; secondly, that it makes two attesting witnesses sufficient and necessary in all cases, whereas the former statute required the signature of at least three to all devises of freehold realty, but was silent as to other wills; thirdly, that the testator must make or acknowledge[4] his signature in the *actual contemporaneous presence* of the witnesses, though this was not necessary under the former Act; and fourthly, that the will must be signed "at the foot or end thereof," whereas, formerly, the signature was sufficient if appearing in any part of the instrument.[5] It also has been further laid down that under the Wills Act both the attesting witnesses must *subscribe* the will *at the same time* and *in each other's presence*; and that a will signed in the presence of a single witness who then attested it, his signature to which the testator acknowledged subsequently, in the presence of this witness and another, who thereupon also witnessed it, was not properly attested notwithstanding that on the second occasion the first witness had acknowledged, although he had not re-written his own signature.[6] Again, where one of the witnesses to a will, on the occasion of its being re-executed in his presence, retraced his signature with a dry pen,[7] and also where

[1] § 12.

[2] 11 G. 4 & 1 W. 4, c. 20, §§ 48--50; 28 & 29 V. c. 72, and c. 112, § 1.

[3] 29 C. 2, c. 3, § 5; 7 W. 3, c. 12, § 3, Ir.

[4] See Morritt *v.* Douglass, 1872.

[5] Post, § 1057.

[6] Casement *v.* Fulton, 1845, P. C.; Moore *v.* King, 1842; In re Simmonds, 1842; In re Allen, 1839; Slack *v.* Busteed, 1856 (Ir.). See, however, Faulds *v.* Jackson, 1845; and In re Webb, 1855, in which last case, Sir J. Dodson, on the authority of an unreported decision of Sir H. Fust, in Chodwick *v.* Palmer, 1851, held that the witnesses need not subscribe the will in the presence of each other.

[7] Payne *v.* Scriven, 1849 (Sir H. Fust). See post, § 1113.

another witness, under similar circumstances, corrected an error in his name as previously written, and added the date,[1] the court in both these cases held that there had not been a sufficient compliance with the statute.[2]

§ 1053. The word "presence," mentioned in the statute, means not only a bodily, but a mental presence. Therefore, the Act will not be satisfied, if either of the witnesses be insane, intoxicated, asleep, or, it would seem, even blind[3] or inattentive, at the time when the will is signed or acknowledged.[4] So strictly indeed has this rule been interpreted, that probate was rejected where a testator had only acknowledged a paper to be his will in the presence of two witnesses, neither of whom had seen him sign it, nor seen his signature at the time of their subscription, though both witnesses said that they had seen the testator writing on the paper, and the will, when produced, actually bore his signature.[5]

§ 1054. A somewhat less stringent construction has, however, been put on that part of the Act which requires the witnesses to subscribe in the presence of the testator. For although if their signatures were not attached in the testator's room, proof would be required to show that he was in such a position as to have been able to see them write,[6] yet a will was admitted to probate where a testator, being in bed, did not exactly see one of the witnesses sign, in consequence of a curtain being drawn, but both the witnesses had really signed in his room, and in each other's presence.[7] This distinction is adopted in consequence of the vast difference which exists in the relative importance of the two acts, and in the objects they are intended to answer. The witnesses are to see the signature made or acknowledged, because they are subsequently to attest it; but they are to subscribe the will in the presence of the testator, chiefly for the purpose of formally completing it; and although they cannot depose to the signature of the testator being made or acknowledged in their presence, unless they see the act,

[1] Hindmarsh *v.* Charlton, 1861, H. L.

[2] In re Eynon, 1873.

[3] See In re Mullen, 1871, where a blind testator was held capable of acknowledging his signature to his will.

[4] Hudson *v.* Parker, 1844 (Dr. Lushington).

[5] Hudson *v.* Parker, 1844; Blake *v.* Blake, 1882, C. A. But see Smith *v.* Smith, 1868.

[6] Norton *v.* Bazett, 1856. Ante, § 163.

[7] Newton *v.* Clarke, 1839. But see Tribe *v.* Tribe, 1849; In re Killick, 1865. Ante, § 163.

they may bear witness to their subscription in the presence of the testator, though he did not actually see them sign.[1] An attestation while the alleged testator is insensible is, however, of course, bad,[2] and his subsequent declarations that he did not *knowingly* see them sign a will, are admissible.[3]

§ 1055. In enacting that the testator must "make or acknowledge" his signature in the presence of witnesses, the Legislature did not intend to confine the acknowledgment to cases where the signature was made "by some other person" than the testator, but meant it to apply equally to those cases where the signature had been previously made by himself.[4] In making the acknowledgment,[5] it is not necessary that the testator should actually point out to the witness his name, and say, "This is my name, or my handwriting;" but if he states that the whole instrument was written by himself,[6] or if he produces a paper as his will, and requests the witnesses to put their names *underneath his*,[7] or if he intimates by gestures that he has signed the will, and that he wishes the witnesses to attest it,[8] or even, it seems, if he shows a paper in his handwriting to the witnesses and desires, or allows a bystander to desire,[9] them to sign it, though he does not state and the witnesses do not know that such paper is his will,[10] this will be a sufficient acknowledgment of his signature, if it clearly appears that, at the time of making the statement or producing the document, the signature was really affixed, and was actually seen at the same time by the necessary witnesses when they signed at the testator's request. Unless, however, the judge is satisfied that the witnesses before they subscribed the will, either saw the testator sign it or saw his signature attached to it, he must pronounce

[1] Hudson *v.* Parker, 1844 (Dr. Lushington).
[2] Right *v.* Price, 1779.
[3] Canada's Appeal, 1880 (Am.).
[4] In re Cornelius Regan, 1838, recognised in Hott *v.* Genge, 1842.
[5] The acknowledgment *may* be made by a blind testator, In re Mullen, 1871 (Ir.).
[6] Blake *v.* Knight, 1843.
[7] Gaze *v.* Gaze, 1843.
[8] In re Davies, 1849.
[9] See Faulds *v.* Jackson, 1845 (Ld. Brougham); Inglesant *v.* Inglesant, 1874.
[10] Keigwin *v.* Keigwin, 1843; In re Ashmore, 1843 (Sir H. Fust); In re Bosanquet, 1852; In re Dinmore, 1853; In re Jones, 1855; White *v.* Trustees of British Museum, 1829; Wright *v.* Wright, 1831; Johnson *v.* Johnson, 1832. It may, however, be pointed out that in such cases there is nothing to direct the attention of the witnesses to the alleged testator's mental state.

against its validity; for the statute requires, not that the *will*, but that the *signature*, should be attested.[1] It follows from this rule, that if the witnesses sign before the testator the will is void, though the testator affixes his signature in their presence immediately afterwards, and though they subsequently seal the document.[2]

§ 1056. But it is not absolutely essential to the validity of a will that positive affirmative evidence should be given by the subscribing witnesses that the testator either signed it, or acknowledged his signature to it, in their presence, since the court may *presume due execution* under the circumstances.[3] Thus, where, three years after the supposed execution, the witnesses deposed that they went to the house of the deceased, who, as writer to an attorney, was presumed to be conversant with business, to see him sign his will; that he then produced a paper, telling them that it was his will and in his handwriting; that he read over the attestation clause, and the introductory words, and pointed out a mistake which had been rectified in the body of the instrument; that he did not sign in their presence; that when they attested the paper no seal was upon it, but they could not positively swear that there was no signature; Sir Herbert Jenner Fust granted probate, though the will, when produced, was not only signed but sealed.[4] So, also, if a will contain an attestation clause, and purport to be duly signed by the testator and two witnesses, the court will primâ facie presume, when it is proved that the witnesses are dead or cannot be found, or in the event of their not remembering the facts attendant on the execution, that the statute has been complied with, and that omnia ritè esse acta.[5] If, however, *one* witness assert that

[1] Hudson *v.* Parker, 1844; Blake *v.* Blake, 1882, C. A.; Ilott *v.* Genge, 1842; Countess de Zichy Ferraris *v.* M. of Hertford, 1843; In re Summers, 1850; In re Pearsons, 1864; Fischer *v.* Popham, 1875.

[2] In re Byrd, 1842; In re Olding, 1841; Cooper *v.* Bockett, 1843; Burke *v.* Moore, 1875 (Ir.).

[3] See Doe *v.* Davies, 1846 (Ld. Denman); ante, § 149.

[4] Blake *v.* Knight, 1843. See, also, Beckett *v.* Howe, 1869; Olver *v.* Johns, 1870; Kelly *v.* Keatinge, 1871 (Ir.); In re Janaway, 1875.

[5] Baxendale *v.* De Valmer, 1887; Wright *v.* Sanderson, 1884, C. A.; Burgoyne *v.* Showler, 1844 (Dr. Lushington); Hitch *v.* Wells, 1846; In re Leach, 1848 (Sir H. Fust); Leech *v.* Bates, 1849; In re Rees, 1865; Brenchley *v.* Still, 1850; Thomson *v.* Hall, 1852; In re Hodgate, 1859; Lloyd *v.* Roberts, 1858, P. C.; Foot *v.* Stanton, 1856; Reeves *v.* Lindsay, 1869 (Ir.); Vinnicombe *v.* Butler, 1865; Smith *v.* Smith, 1866; O'Meagher *v.* O'Meagher, 1883 (Ir.). See Croft *v.* Croft, 1865; and Wright *v.* Rogers, 1869.

he does remember, and positively negatives signing or acknowledgment of signature by the alleged testator in his presence, the document set up cannot be admitted to probate.[1] The presumption omnia præsumuntur ritè esse acta may also be recognised even in cases where no attestation clause is attached to the will,[2] and where circumstances exist, which a non legal mind might well deem sufficiently suspicious to justify a very different inference.[3]

§ 1057. It was at one time thought, and has always been held in Ireland,[4] that the clause requiring the testator to sign "at the foot or end" of the testament would be satisfied, though the will itself were wholly written on the first side of a sheet of paper, and the attestation and signature were attached to the second, or even the third side.[5] Ultimately, however, a much stricter construction was put upon the Act, and very many wills were refused probate, because the testator had inadvertently permitted a trifling blank space to be interposed between the final word of the instrument and his signature.[6] But in 1852, Lord Chancellor St. Leonards carried an Act,[7] which has remedied the principal evils that arose from the former state of the law.

§ 1058. The first section of this Act enacts that "Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite[8] to the end of the will, that it shall be apparent on the face of the will that the testator intended to give

[1] Greenleaf on Ev. 15th edit. (1892), 369, citing Noding *v.* Alleston, Shaw *v.* Neville, Bennett *v.* Sharpe.

[2] In re Thomas, 1859 (Sir C. Cresswell); Gwillim *v.* Gwillim, 1860; Vinnicombe *v.* Butler, 1865.

[3] Trott *v.* Skidmore, 1860; In re Huckvale, 1867; In re Pearn, 1875. But see Pearson *v.* Pearson, 1872.

[4] Derinzy *v.* Turner, 1851 (Ir.).

[5] In re Gore, 1843; In re Carver, 1842.

[6] See Smee *v.* Bryer, 1848, P.C.; In re Howell, 1848; In re Corder, 1848; In re Attridge, 1848. Where testator signed between the testimonium clause and words descriptive merely of the witnesses, probate was granted; In re Cotton, 1848. See, also, In re Beadle, 1849; In re Standley, 1849; In re Brown, 1849; In re Banly, 1849; In re Hellings, 1849; In re Hearn, 1849; In re Odell, 1849; In re Batten, 1849; Holbech *v.* Holbech, 1849; In re Minty, 1850; In re Hill, 1849; In re White, 1850.

[7] 15 & 16 V. c. 24.

[8] In re Williams, 1865; In re Coombs, 1866.

effect by such his signature to the writing signed as his will,[1] and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation,[2] or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after,[3] or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature,[4] or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side, or page, or other portion of the same paper on which the will is written, to contain the signature;[5] and the enumeration of the above circumstances shall not restrict the generality of the above enactment;[6] but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath[7] or which follows it,[8] nor shall it give effect to any disposition or direction inserted after the signature shall be made."[9]

§ 1059. Although the testator is, for obvious reasons, required by the Wills Act to sign the will "at the foot thereof," the Act points out no place for the signature of the witnesses, and a testament is duly executed, even where the attestation clause and the signatures of the witnesses are indorsed upon it.[10] The Court, how-

[1] See Cook *v.* Lambert, 1863, where a signature written on a piece of paper, previously wafered to the foot of the will, was held sufficient. See, also, In re Gausden, 1862; In re Hammond, 1863; In re West, 1862; In re Wright, 1865. But see In re M'Koy, 1876 (Ir.).

[2] In re Mann, 1859; In re Casmore, 1869.

[3] In re Puddephatt, 1870; In re Jones, 1877.

[4] In re Archer, 1871.

[5] Hunt *v.* Hunt, 1866; In re Rice, 1870 (Ir.).

[6] See In re Wotton, 1874.

[7] See In re Kimpton, 1864 (Wilde, J.O.); In re Woodley, 1864; In re Jones, 1864; In re Powell, 1864; In re Ainsworth, 1870.

[8] See Sweetland *v.* Sweetland, 1865; In re Birt, 1871; In re Dilkes, 1874.

[9] These provisions apply to wills already made, see § 2.

[10] In re Chamney, 1849. See In re Taylor, 1851.

over, in all such cases must be satisfied that the signatures, wherever placed, were really intended to attest the operative signature of the testator.[1]

§ 1060. Under the Wills Act of 1838, as under the Statute of Frauds, a testator may have his hand guided by another person,[2] or he may sign by his mark or initials only,[3] though his name does not appear, or though a wrong name does by mistake appear,[4] in the body of the will;[5] and the attesting witnesses, whether they can write or not, may also sign as marksmen;[6] and if one of them can neither read nor write, he may still sign his name by having his hand guided by the other.[7] It is even sufficient for witnesses to subscribe the will by their initials.[8] In consequence of the provisions in the Wills Act that "no form of attestation shall be necessary," a mere subscription of two names, without any memorandum to show that the parties have subscribed as witnesses, will satisfy the statute.[9] Even writing their names in its margin opposite to alterations, &c., in a will, where the Court is satisfied that it was done with intent to attest it, is a sufficient attestation.[10] Under either Act, any person, as, for instance, one of the two attesting witnesses may write,[11] or even stamp,[12] the testator's signature by his direction. Even where the drawer of a will, being requested by the testator to sign for him, put *his own* signature to the instrument, this was held to be sufficient.

[1] Phipps *v.* Hale, 1874.

[2] Wilson *v.* Beddard, 1846.

[3] Baker *v.* Dening, 1838; In re Blewitt, 1880. Where a testator has signed by a mark, no collateral inquiry will be allowed as to his capacity to have written his name; and no proof is required that the will was read over to him; Clarke *v.* Clarke, 1868 (Ir.). Sealing a will is not a sufficient signing; Smith *v.* Evans, 1851; Grayson *v.* Atkinson, 1852.

[4] In re Douce, 1862; In re Clarke, 1858.

[5] In re Bryce, 1839.

[6] In re Amiss, 1849; Clarke *v.* Clarke, 1879 (Ir.). But an attesting witness cannot subscribe a will in another person's name. Pryor *v.* Pryor, 1860.

[7] Harrison *v.* Elvin, 1842; In re Lewis, 1862; In re Frith, 1858; Lewis *v.* Lewis, 1861; Roberts *v.* Phillips, 1855.

[8] In re Christian, 1849 (Sir H. Fust); In re Blewitt, 1880. See In re Trevanion, 1850; Hindmarsh *v.* Charlton, 1849, H. L., cited ante, § 1052. See, too, In re Sperling, 1864, where a witness, instead of signing his name, wrote "servant to M. S.," and this was held sufficient. But where an infirm witness, intending to sign his name, could only write "Saml.," and omitted his surname, the signature was held to be insufficient. In re Maddock, 1874.

[9] Bryan *v.* White, 1850. See Griffiths *v.* Griffiths, 1871.

[10] In the goods of Streathley, 1891.

[11] Smith *v.* Harris, 1845; In re Bailey, 1838.

[12] Jenkins *v.* Gaisford, 1863. See Bennett *v.* Brumfitt, 1867; and ante, § 1029.

cient, as the Act does not say that the signature must bear the testator's name.[1] The witnesses, however, must attest the will, either by their signature or their marks, and when a stranger, at the request of the testator, signed for one of the witnesses who was unable to write, probate was refused.[2]

§ 1061. A paper imperfect in itself may, by *clear reference* to it as an *existing* document,[3] be identified with a will which has been validly executed in such a way as to form part of such will, and if this be the case, the defect of authentication arising from such paper being unattested or unexecuted will be cured.[4] Unattested wills and codicils have thus constantly been set up by subsequent attested codicils which have confirmed them.[5] Where, however, a testator at the foot of a valid will of 1833 made two codicils prior to the 1st of January, 1838, and five more after that date, but the whole seven of these codicils were altogether unattested, and the testator then in 1847 duly executed an eighth codicil on a separate paper, which he described as "a codicil to his *will*," it was held that the five unattested codicils were not rendered valid by the eighth codicil, as they, legally and technically speaking, formed no part of the testator's will.[6]

§ 1062. By § 11 of "The Wills Act, 1837," all wills of personal estate made by "any soldier being in actual military service, or any mariner or seaman being at sea," are exempted from the operation of the Act. The word "soldier" here includes all officers

[1] In re Clark, 1839. See, also, In re Blair, 1848.

[2] In re Cope, 1850; In re Duggins, 1870.

[3] Singleton *v.* Tomlinson, 1878, H. L.; In re Kehoe, 1884 (Ir.); Dickinson *v.* Stidolph, 1861; Van Straubenzee *v.* Monck, 1863; In re Groves, 1859; Allen *v.* Maddock, 1858; In re Almosnino, 1860; In re Brewis, 1864; In re Lake, 1865; In re Lady Truro, 1866; In re Sunderland, 1866; In re Watkins, 1865; In re Dallow, 1866. See post, § 1195, ad fin.

[4] Countess de Zichy Ferraris *v.* M. of Hertford, 1843 (Sir H. Fust); In re Lady Durham, 1842; In re Dickins, 1842; In re Willesford, 1842; Habergham *v.* Vincent, 1793; In re Edwards, 1848; In re Ash, 1856; In re Lady Pembroke, 1856; In re Stewart, 1863. See ante, § 1026.

[5] Aaron *v.* Aaron, 1849; Utterton *v.* Robins, 1834; Gordon *v.* Ld. Reay, 1832; Doe *v.* Evans, 1832; Allen *v.* Maddock, 1858; In goods of Heathcote, 1881. See In re Allnutt, 1864; Anderson *v.* Anderson, 1872; and especially Burton *v.* Newbery, 1875 (Jessel, M.R.); and Green *v.* Tribe, 1878 (Fry, J.).

[6] Haynes *v.* Hill, 1849. See, also, Johnson *v.* Ball, 1851; In re Drummond, 1880; In re Tovey, 1878; Stockil *v.* Punshon, 1880; In re Mathias, 1863; In re Wyatt, 1862; In re Lady Truro, 1866; In re Hall, 1871.

and soldiers who have been in the employ of the East India Company, as well as those in her Majesty's service.[1] The privilege is confined to such soldiers as are actually *on an expedition*;[2] consequently, officers quartered with their regiments in barracks, or otherwise forming part of a stationary force, whether at home or in the colonies, are not within the exception.[3] The Act applies to seamen in the merchant, as well as in the Queen's, service,[4] and the purser of a man-of-war[5] and a surgeon in the navy[6] are both included in the term "seamen." The exception extends to an invalided seaman, who is returning home from foreign service in a passenger ship,[7] and also to a naval captain on board a Queen's ship in harbour or a *river*, provided he be actually engaged on active service.[8] But it does not extend to an admiral in command of a fleet in the colonies, who lives with his family on shore at his official residence.[9] Material alterations contained in soldiers' wills may, in the absence of evidence, be presumed to have been made while the respective testators were employed in actual military service.[10]

§ 1062A. The Wills Act was originally held to apply to the testamentary papers of all domiciled Englishmen excepting those specified in the last section, even when such papers were executed in foreign countries.[11] This, however, being found in practice productive of injustice, the Legislature in 1861 passed "The Wills Act, 1861,"[12] which in substance enacts that every will made out of the United Kingdom by a British subject, whatever his domicile may be, shall, as regards personal estate, be entitled to probate, if made according to the forms required either by the law of the place where it was made, or by the law of the place where the testator was domiciled.[13]

[1] Shearman *v.* Pyke, 1724, cited 3 Curt. 539—542.
[2] See Herbert *v.* Herbert, 1855.
[3] Drummond *v.* Parish, 1843; In re Hill, 1845; White *v.* Repton, 1844; Bowles *v.* Jackson, 1854.
[4] In re Milligan, 1849.
[5] In re Hayes, 1839 (Am.).
[6] In re Saunders, 1855.
[7] Id.
[8] In re Admiral Auston, 1853; In re M'Murdo, 1867. See, also, In goods of Rae, 1891 (Ir.).
[9] Ld. Euston *v.* Ld. H. Seymour, 1802, cited 2 Curt. 339, and recognised in Drummond *v.* Parish, 1843.
[10] In re Tweedale, 1874.
[11] Croker *v.* M. of Hertford, 1844, P. C.
[12] 24 & 25 V. c. 114.
[13] The Act only applies to such persons: In goods of Keller, 1891. It will not apply to a testamentary exercise of a power: Re Kirwan's

§ 1063. In addition to those enactments in it which have been already mentioned, "The Wills Act, 1837," further provides, "that every will made by a man or woman shall be *revoked* by his or her *marriage*, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled, as his or her next of kin, under the Statute of Distributions;"[1] and "that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances;"[2] and "that no will, or codicil,[3] or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required,[4] or by some writing declaring an intention to revoke the same,[5] and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same."[6] Where a testator had destroyed his will on the supposition that he had substituted another for it, but the latter instrument turned out to be invalid as not being duly executed, a copy of the first will was held to be entitled to probate.[7] With respect to the *re-execution* of a will, in which alterations have been made, it cannot be too well understood that a tracing by a testator with a dry pen over his former signature in the presence of witnesses cannot be regarded as equivalent to a re-signature.[8]

§ 1064. To revoke a former will by a later one, no revocation

Trusts, 1883. Nor to a person who, though his domicile of origin was English, was at his death domiciled in Germany, leaving a will in English form: Bloxam *v.* Favre, 1884, C. A.

[1] 7 W. 4 & 1 V. c. 26, § 18. See In re Sir C. Fitzroy, 1858; Re M'Vicar, 1869.

[2] § 19. Or by any change of domicile, 24 & 25 V. c. 114 ("The Wills Act, 1861"), § 3.

[3] In re Turner, 1872. See ante, § 165.

[4] Ante, § 1050.

[5] De Pontès *v.* Kendall, 1862 (Romilly, M.R.). See In re Hicks, 1869; In re Fraser, 1869; In re Durance, 1872. A verbal authority, given by a Hindu testator to another person to destroy his will, will revoke the instrument, even though it be not destroyed: Maharajah Pertab Narain Singh *v.* Maharanee Subhao Koeer, 1877, P. C.

[6] § 20. See Mills *v.* Milward, 1890.

[7] Scott *v.* Scott, 1859; Clarkson *v.* Clarkson, 1862; Giles *v.* Warren, 1872; Dancer *v.* Crabb, 1873; Powell *v.* Powell, 1866; overruling Dickinson *v.* Swatman, 1861. See Eckersley *v.* Platt, 1866; Re Weston, 1869; and post, § 1070.

[8] In re Cunningham, 1860.

clause is absolutely necessary; but any paper duly executed, by which the testator disposes of his *whole* property, is,—except under very special circumstances,[1]—a revocation in toto of all previous wills. This doctrine is applicable, even where the last testamentary paper contains no appointment of executors.[2] Indeed, in one case where a testator by his "*last will*," in which executors were appointed, disposed of *part* of his personalty, a former will was held to be revoked, though it contained provisions not wholly inconsistent with the later instrument.[3] The onus of establishing revocation lies, however, on the party who impeaches the first will; and no inference in his favour can be drawn from the mere fact that the later instrument contains equivocal expressions, or that the legacies bequeathed by it are *partially* inconsistent with prior testamentary dispositions.[4] Still, if two documents taken together would dispose of property far larger than that possessed by the testator, that fact in itself raises a fair inference that the first was intended to be revoked by the second;[5] and, indeed, in every inquiry of this nature, if any real ambiguity can be shown to exist respecting the testator's intentions, recourse may be had to parol evidence to clear up the doubt.[6]

§ 1065. Where a second will, which was not produced, contained a different disposition of real estate from a former one, "but in what particulars is unknown," the House of Lords, on writ of error, decided that the first will was not revoked, so as to let in the title of the heir-at-law;[7] and in another case in which the contents

[1] See O'Leary *v.* Douglass, 1878 (Ir.).

[2] Honfrey *v.* Honfrey, 1842, P. C.

[3] Plenty *v.* West, 1845. See, also, S. C. in Ch. 1853. Little, if any, weight, however, can now be attached to this decision. For, in the first place, it appears clear that the phrase "last will" will simply be regarded as one of form. (Stoddart *v.* Grant, 1851-2, H. L. (Ld. Truro); Freeman *v.* Freeman, 1855.) And in the next place, according to a maxim which has received the solemn sanction of the Court of last resort, a former will cannot be revoked by one of later date, unless the later instrument contains a clause of express revocation, or unless the two wills are incapable of standing together. (Stoddart *v.* Grant, 1851-2, H. L. See Williams *v.* Williams, 1877, C. A.; In re Graham, 1863; Dempsey *v.* Lawson, 1877; Shiel *v.* O'Brien, 1872 (Ir.); Leslie *v.* Leslie, 1872 (Ir.); Lemage *v.* Goodban, 1865; In re Fenwick, 1867; Geaves *v.* Price, 1863; Birks *v.* Birks, 1865; In re Petchell, 1874; i. Macfarlane, 1884 (Ir.).)

[4] Stoddart *v.* Grant, 1851-2, H. L. See, also, Doe d. Heardo *v.* Hicks, 1831-2, H. L.; Wallace *v.* Seymour, 1871 (Ir.); Doe *v.* Ward, 1852; Williams *v.* Evans, 1853; Freeman *v.* Freeman, 1854; Barclay *v.* Maskelyne, 1859; Robertson *v.* Powell, 1864; Pilsworth *v.* Mosse, 1862 (Ir.).

[5] Jenner *v.* Finch, 1879 (Sir J. Hannen).

[6] Id.

[7] Goodright *v.* Harwood, 1774-5,

of the second will were utterly unknown, save that it commenced with the words "This is the last will and testament," the Judicial Committee of the Privy Council held that the prior will remained unrevoked.[1] A general clause in a will revoking all former wills does not of itself necessarily operate to revoke a will made in execution of a power;[2] though it will be held to have that effect, unless such a result can be shown to be utterly unreasonable.[3] It seems that the re-execution of a will, containing a clause of revocation, will not in general be deemed to have revoked any of its codicils; for, unless the contrary appears to have been the intention of the testator, the court will hold, that all the codicils have been republished by the re-execution of the principal instrument.[4]

§ 1066. With respect to the revocation of a will by its destruction, it should be observed that a testator cannot revoke his will by authorising any person to destroy it *out of his presence;* and it follows as a corollary from this proposition, that he has no power to make his will contingent, by giving authority even by the will itself to any person to destroy it after his death.[5]

§ 1067. It is difficult to fix à priori what extent of *burning* or *tearing* will amount to the revocation of a will. It is clear that the revocation will not be complete, unless the act of spoliation be deliberately done upon the instrument, in the belief that it is a valid will,[6] and animo revocandi.[7] This is expressly rendered necessary by the Wills Act,[8] and was impliedly required by the statute of Charles.[9] It is further clear that the burthen of showing that a once valid will has been revoked by mutilation, will lie upon the party who sets up the revocation of the instrument.[10] There may, moreover, be a partial revocation.[11] Moreover, it seems plain, on general principle, that the declarations of the testator, accompanying the act of spoliation,—unlike those which he may subsequently make,[12]—will be admissible in evidence as

H. L. See Thomas *v.* Evans, 1802; Brown *v.* Brown, 1858; Dickinson *v.* Stidolph, 1861; In re Brown, 1858.

[1] Cutto *v.* Gilbert, 1854, P. C.

[2] In re Merriit, 1858.

[3] Sotheran *v.* Deming, 1881, C. A.

[4] Wade *v.* Nazer, 1848. See In re De la Saussaye, 1873.

[5] Stockwell *v.* Ritherdon, 1848 (Sir H. Fust).

[6] Giles *v.* Warren, 1872.

[7] See In re Cockayne, 1856.

[8] Ante, § 1063.

[9] Bibb *v.* Thomas, 1776-7.

[10] Harris *v.* Berrall, 1858; Benson *v.* Benson, 1870; In goods of Taylor, 1890.

[11] In goods of Leach, 1890.

[12] Staines *v.* Stewart, 1862. But see Cheese *v.* Lovejoy, 1877, C. A.

explanatory of his intention.[1] Still the question remains, Must there be a total or substantial burning or tearing of the writing itself, or will the revocation be complete, if the testator, intending to revoke, tears or burns a portion of the paper on which the will is written, but does not destroy or deface any part of the writing?[2] Where a testator, being angry with the devisee, began to tear his will, and had actually torn it into four pieces before he was pacified; but afterwards *himself* fitted the several pieces together, and put them by, saying he was glad it was no worse; the court refused to disturb a verdict by which the jury had found *that the act of cancellation was incomplete*.[3]

§ 1068. Such acts as the *cutting* out his signature by a testator, or tearing off the *seal* from a will, needlessly executed as a sealed instrument, have been deemed sufficient, both in England and in America, to destroy the will in its entirety, and to effect its revocation,[4] if not by force of the word "tearing," at least as being a manner of "otherwise destroying the same."[5] Where, however, a will was found in a mutilated state, being both torn and cut, but the signatures of the testator and of the attesting witnesses remained uninjured, the court, guided by the peculiar nature of the mutilations, and, in the absence of any extrinsic evidence, held the instrument not to be revoked.[6]

§ 1069. The provisions of the Statute of Frauds which related to wills, made "*cancelling*" one of the modes of revoking a will.[7] But it is enacted by "The Wills Act, 1837,"[8] "that no obliteration, or interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be

[1] Dan *v.* Brown, 1825 (Am.); Clarke *v.* Scripps, 1852.

[2] See Doe *v.* Harris, 1837.

[3] Doe *v.* Perkes, 1820. It will be observed that this case proceeded on the ground that the cancellation was incomplete. But in an older case of Bibb *v.* Thomas, 1776-7, where a testator, having given the will "something of a rip with his hands, and having torn it so as almost to tear a bit off," rumpled it up and threw it into the fire, *but a bystander saved it without his knowledge*, before, as it seems, it was at all burnt, the revocation was held complete. This last-mentioned case has, however, been doubted. See Doe *v.* Harris, 1837 (Ld. Denman).

[4] Price *v.* Powell, 1858; Avery *v.* Pixley, 1808 (Am.). See, also, Williams *v.* Tyley, 1858; In re Harris, 1864.

[5] Hobbs *v.* Knight, 1838; Evans *v.* Dallow, 1862. See ante, § 165.

[6] Clarke *v.* Scripps, 1852 (Sir J. Dodson); In re Woodward, 1871; In re Wheeler, 1880.

[7] § 4. See In re Brewster, 1860; Cheese *v.* Lovejoy, 1877, C. A.

[8] § 21.

apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will;[1] but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will, opposite or near to such alteration,[2] or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end[3] or some other part of the will." The word "apparent" here used, simply applies to what is apparent to ordinary eyesight on the face of the instrument, and does not mean what is capable of being made apparent by extrinsic evidence. Consequently, if a testator, animo revocandi, entirely obliterates any part of the will, so that such part of the original will is no longer apparent to ordinary eyesight, this operates as a revocation of that part, and no evidence dehors the will can be received, in order to show how the defaced passage originally stood.[4] For example, where a testator had covered a bequest in his will by pasting a piece of paper over it, which rendered the original bequest no longer apparent (or visible to ordinary eyesight) on the face of the will, the court declined to order the removal of the paper, and granted probate of the will with the part which was then not "apparent" left in blank.[5] Again, the erasure by a testator of his own signature, or of the signature of either or both of the witnesses, if done animo revocandi, amounts to a revocation of the whole will, and is in fact tantamount to its actual destruction.[6] It has already been shown[7] that, in the absence of any direct evidence, it will be presumed that any alteration or erasure in a will was made after its execution, and probate of the will in its original form will consequently be granted.[8]

§ 1070. The provisions of "The Wills Act, 1837," as to the revocation or alteration of wills, notwithstanding § 34,[9] apply equally to

[1] See ante, § 1050. See, also, In goods of Shearn, 1880.

[2] In re Wilkinson, 1881.

[3] See In re Treeby, 1876.

[4] Townley *v.* Watson, 1844; In re M'Cabe, 1873.

[5] Re Horsford, 1874. As to what happened when some twenty years later it was discovered that the words which had been written beneath the paper had become visible to the ordinary eyesight of a careful observer, they were admitted to probate, see post, § 1071.

[6] Hobbs *v.* Knight, 1838 (Sir H. Fust); Evans *v.* Dallow, 1862. See, also, In re Harris, 1866.

[7] "Presumptions," ante, § 164.

[8] Cooper *v.* Bockett, 1844-6, P. C.; Greville *v.* Tylee, 1851, P. C.

[9] See ante, § 1050.

all wills, whether executed before or after the 1st of January, 1838, provided the act of assumed revocation has been done, or the alteration has been made, after that date.[1] Although the section cited above[2] does not expressly state that, to effect a revocation of the will or any part of it, the erasure or obliteration must be made with that *intention*, yet it is held that (as under the Statute of Frauds) the animus revocandi is indispensable; consequently where a testator had erased the amount of a legacy, and had inserted a smaller sum, but the alteration took no effect, as it had not been duly executed, probate of the will in its original form was decreed, since it was clear that the testator intended only a *substitution*, and not a revocation, of the bequests altered.[3] The testator was, in short, considered to have intended a complex act, viz., to undo a previous gift, for the purpose of making another gift in its place. The latter branch of his intention was not effected, and, consequently, no sufficient reason existed for believing that he meant to vary the former gift at all,[4] and the erasure was treated as an act done by mere mistake, sine animo cancellandi.[5]

§ 1071. When this doctrine of dependent relative revocation arises, the court has recourse to any legal proof by which it can ascertain the disposition of the testator. Therefore, in the case already mentioned, in which a testator, to vary the amount of a legacy, had pasted a piece of paper over the sum bequeathed, on which he had written a substituted amount (which not being duly attested could not be taken as part of the will), the court, when (though this was some years after probate of the rest of the will had been granted) it found that the original legacy could be read by the unassisted eyesight, gave effect to the will as originally framed, and admitted to probate the words which[6] had originally been omitted in the probate.[7]

[1] Hobbs *v.* Knight, 1838; Countess de Zichy Ferraris *v.* M. of Hertford, 1843; Brooke *v.* Kent, 1840, P. C.; Croker *v.* M. of Hertford, 1844, P. C.; Andrews *v.* Turner, 1842.

[2] § 21, cited ante, § 1069.

[3] Brooke *v.* Kent, 1840 P. C.; Burtenshaw *v.* Gilbert, 1774 (Ld. Mansfield); Onions *v.* Tyrer, 1716; In re Nelson, 1872 (Ir.); In re Cockayne, 1856; In re Parr, 1860; In re Harris, 1860; In re Middleton, 1865; In re M'Cabe, 1873.

[4] See Rawlins *v.* Rickards, 1860; Ibbott *v.* Bell, 1865; Quinn *v.* Butler, 1868.

[5] Locke *v.* James, 1843 (Parke, B.). See Tupper *v.* Tupper, 1855; and ante, § 1063, ad fin.

[6] See § 1069.

[7] Finch *v.* Combe, 1894. See ante, § 1069, n. [5].

§ 1072. "The Wills Act, 1837," enacts, that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise[1] than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same;[2] and when any will or codicil, which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."[3] In consequence of this enactment, a conditional will, which has become invalid in consequence of the condition not having been performed, cannot now be established by any evidence of "adherence";[4] neither can the will of a married woman, which was originally void because it was made without her husband's consent, be set up by any parol recognition made by her subsequently to the husband's death.[5] Again, the destruction of the revoking instrument is no longer sufficient to revive a former will;[6] and the question of revival or non-revival from this cause,—which under the old system was a fruitful source of litigation,[7]—can never again arise.[8]

§ 1073. It is next necessary to refer to the statute generally known as Lord Tenterden's Act.[9] The first section of this Act has already been set out and partially discussed in the Chapter *On Admissions*.[10] It must be read as amended by the Mercantile Law Amendment Act,[11] 1856. When so read its provisions are that in actions grounded on simple contract, no case shall be taken out of the Statute of Limitations, except by *acknowledgment* or *promise* in *writing* to be *signed by the party chargeable thereby*, or by his

[1] See ante, § 165.

[2] See In re Harper, 1849; Marsh *v.* Marsh, 1861; Rogers *v.* Goodenough, 1862; In re May, 1868; In re Steele, May & Wilson, 1868; In re Reynolds, 1873.

[3] 7 W. 4 & 1 V. c. 26, § 22. See Andrews *v.* Turner, 1842.

[4] Roberts *v.* Roberts, 1862.

[5] Id. (Sir C. Cresswell). See, also, Willock *v.* Noble, 1875, H. L.

[6] Major *v.* Williams, 1843; Brown *v.* Brown, 1858; In re Brown, 1858; Wood *v.* Wood, 1867.

[7] This question, under the old system, depended on the intention of the testator, as gathered from the circumstances of each particular case. James *v.* Cohen, 1844 (Sir H. Fust), citing Usticke *v.* Bawden, 1824.

[8] Except in the very improbable event of a still earlier will having been revoked by a will made before 1st January, 1838, which second will has itself been revoked in some valid manner.

[9] 9 G. 4, c. 14.

[10] Ante, § 744. See, also, § 600.

[11] 19 & 20 V. c. 97, § 13, cited ante, § 745.

authorised agent, or by part payment.[1] The question whether the language employed in each particular case is or is not sufficient to take a case out of the statute is a question for the court.[2] But having regard to the endless variety of language which may be used, it is obviously impossible to lay down distinct rules of interpretation, by following which a sound decision may be arrived at in every instance. The following ten general principles appear, however, to have been established:—

§ 1074. First, the Act contains nothing to alter the legal construction of acknowledgments or promises made by defendants. It merely requires a different mode of proof, and substitutes the certain evidence of a writing signed by the party chargeable for the insecure and precarious testimony to be derived from the memory of witnesses.[3] Every inquiry, therefore, whether a written document amounts to an acknowledgment or promise, is no other than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar operation.[4]

§ 1074A. Secondly, to take a case out of the operation of the statute, the written and signed acknowledgment must amount either to an express promise to pay the debt, or to a clear and *unqualified* admission of a still subsisting liability, from which a promise to pay *on request* will be implied by law.[5] The insertion, therefore, of a debt in the statement of assets and debts, made under the bankrupt law by a debtor whose affairs are in course of arrangement, is not a sufficient acknowledgment, as it simply

[1] The law is the same in Ireland; 16 & 17 V. c. 113, § 24, as amended by 19 & 20 V. c. 97, § 13. See Archer *v.* Leonard, 1863 (Ir.); Leland *v.* Murphy, 1865 (Ir.).

[2] That this is a question for the court, and not for the jury, see ante, § 43.

[3] See Spollan *v.* Magan, 1851 (Ir.) (Monahan, C.J.).

[4] Haydon *v.* Williams, 1830 (Tindal, C.J.).

[5] Morrell *v.* Frith, 1838 (Parke, B.); Bucket *v.* Church, 1840 (id.); Tanner *v.* Smart, 1827 (Ld. Tenterden); Smith *v.* Thorne, 1852; Everett *v.* Robertson, 1859; Francis *v.* Hawkesley, 1859; Goate *v.* Goate, 1856; Brigstocke *v.* Smith, 1833 (Bayley, J.); Hart *v.* Prendergast, 1845; where Alderson, B., questioned Gardner *v.* M'Mahon, 1842. In Prance *v.* Sympson, 1854, the statute was held to be ousted by a written acknowledgment that an account was pending coupled with a promise to pay the balance, if any should be found due from the writer (Wood, V.-C.). See Hughes *v.* Paramore, 1855; Crawford *v.* Crawford, 1867 (Ir.); In re River Steamer Co., Mitchell's claim, 1871.

amounts to an admission of a debt, which is to be paid in part or in some qualified mode.[1]

[1] See Ex parte Topping, Re Levey and Robson, 1865 (Ld. Cranworth, C.). On the other hand, letters have been held to be *unqualified admissions* of a debt, and to take the case out of the operation of the statute, when they, in substance, contained such expressions as the following:—"I can never be happy till I have paid you; your account is correct, and would that I were now going to inclose the amount" (Dodson *v.* Mackey, 1834); —"I wish I could comply with your request, for I am anxious to pay your bill. I hope that out of the present harvest it will be paid; if not, the concern must be broken up to meet it" (Bird *v.* Gammon, 1837; Martin *v.* Geoghegan, 1850 (Ir.));—"I am in your debt, and will not avail myself of the statute; but we do not agree as to the amount, and until this be ascertained, I cannot move a step towards giving you satisfaction, and doing justice to my other creditors" (Gardner *v.* M'Mahon, 1842; questioned (Alderson, B.) in Hart *v.* Prendergast, 1845. See Leland *v.* Murphy, 1865 (Ir.); Crawford v. Crawford, 1867 (Ir.); Burrows *v.* Baker, 1869 (Ir.); Bewley *v.* Power, 1833 (Ir.); and Prance *v.* Sympson, 1854, cited ante, § 1074, n.);—"I will pay you your debt by instalments, but I demur to pay the interest" (Shah Mukhun Lall *v.* Nawab Imtiazood Dowlah, 1865, P.C. See Wilby *v.* Elgee, 1875);—"Your bill does not sufficiently specify the work done, and I shall feel obliged if you will more particularly explain it. I will settle your account immediately; but being at a distance, I want everything explicit. Tell H. to send me the agreements, and I will return them by the first post with instructions to pay, if correct" (Sidwell *v.* Mason, 1857; Godwin *v.* Culley, 1859);—"The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps, in the meantime, you will let your clerk send me an account of how it stands" (Chasemore *v.* Turner, 1875 but see Green *v.* Humphreys, 1884, C. A.);—"I shall be obliged to you to send in your account, and can give no further orders till this be done" (Quincey *v.* Sharpe, 1876);—"If you send me the particulars of your account with vouchers, I will examine it and send cheque. But the amount cannot be anything like the amount you now claim" (Skeet *v.* Lindsay, 1877);—"I am ashamed your account has stood so long; I must trespass on your kindness a little longer, till a turn in trade takes place" (Cornforth *v.* Smithard, 1859; Lee *v.* Wilmot, 1866);—"Your demand is not just; I am not in your debt anything like 90*l.*; I will settle the difference when we meet" (Colledge *v.* Horn, 1825; Edmonds *v.* Goater, 1852);—"I have received your letter," [which stated that some items in the bill sent with it were of more than six years' standing]; "P. will attend for me to tax your costs, and one will then know what to pay, the other what to receive" (Murphy *v.* Meredith, 1842 (Ir.), holding the above was *not* a conditional acknowledgment, on which the plaintiff could only recover on proof of taxation of costs. See Archer *v.* Leonard, 1863 (Ir.));—"I send you my account, leaving a blank for your counter-demand on me, and beg that you will favour me with the balance" (Waller *v.* Lacy, 1840; Williams *v.* Griffith, 1849);—"I will at any time pay my proportion of the joint debt" (Lechmere *v.* Fletcher, 1833);—"I cannot comply with your request yet; the best way for you will be to send me the bill you hold, and draw another for 30*l.*, the balance of your money" (Dabbs *v.* Humphries, 1834. See, also, Evans *v.* Simon, 1853; Collis *v.* Stack, 1857). The older authorities are not here referred to, as few of them are law. They are noticed in 2 St. Ev. 662—667. Letters, in substance as follows, have been held *not* to take the case out of the operation of the statute, as only amounting to *qualified acknow-*

§ 1074a. Thirdly, a *conditional promise*, in the absence of proof of the fulfilment of the condition, will not suffice; but if such proof be afforded, the promise, whether express or implied, will be converted into an absolute one, and as such will support a statement of claim, averring a promise to pay on request.[1] In the case of a conditional promise the statute begins to run, not from the date of the promise, but from the time when the condition is fulfilled.[2]

§ 1075. Fourthly, since a mere acknowledgment of a debt, which

ledgment:—"I intend to pay A.'s claim if allowed time; if I am proceeded against, any exertion of mine will be rendered abortive" (Fearn *v.* Lewis, 1850);—"I have been expecting to be able give a satisfactory reply to your application respecting B.'s demand against me. I will call upon you to-morrow on the matter" (Morrell *v.* Frith, 1838; Hamilton *v.* Terry, 1852; Cawley *v.* Furnell, 1852);—"I will have nothing to do with your claim; you can make me a bankrupt, but I had rather go to gaol than pay you" (Linsell *v.* Bonsor, 1835);—"I owe the money, but I will never pay it" (A'Court *v.* Cross, 1825);—"I am sure my account was settled; but as you say it was not, I will pay you 10*l.* a year, if you like to accept that sum" (Buckmaster *v.* Russell, 1861);—"If in funds I would immediately pay the money, and take the bill of exchange out of your hands" (Richardson *v.* Barry, 1860);—"I admit as executor your claim on the estate, and think it just, but I am compelled to refuse payment as the legatees object" (Briggs *v.* Wilson, 1854);—"I will not fail to meet you on fair terms, and hope, within perhaps a week, to be able to pay you at all events a portion of the debt, when we shall settle about the liquidation of the balance" (Hart *v.* Prendergast, 1845; Smith *v.* Thorne, 1852; Rackham *v.* Marriott, 1857);—"I send you an account of some debts due to me; collect them, and pay yourself, and you and I shall then be clear" (Routledge *v.* Ramsay, 1838);—"Arrangements have been made to enable me to discharge your debt; funds have been appointed for that purpose, of which A. is trustee, and to him I refer you for further information" (Whippy *v.* Hillary, 1832; overruling Baillie *v.* Ld. Inchiquin, 1796, as the court admitted in Routledge *v.* Ramsay, 1838);—"Send me in any demand you have to make on me, and, *if just*, I shall not give you the trouble of going to law" (Spong *v.* Wright, 1842. See Collinson *v.* Margesson, 1853; Cassidy *v.* Firman, 1867 (Ir.));—"I will not pay your demand, for it is of more than six years' standing" (Brigstocke *v.* Smith, 1832; Coltman *v.* Marsh, 1811);—"I have sent you a note for the money I owe you," the note so sent being inadmissible in evidence for want of a proper stamp (Parmiter *v.* Parmiter, 1866).

[1] Humphreys *v.* Jones, 1845; Hart *v.* Prendergast, 1845. The following *conditional acknowledgments* have been deemed insufficient, in the absence of proof that the conditions had respectively been fulfilled:—"I cannot pay the debt now, but I will as soon as I can" (Tanner *v.* Smart, 1827; Haydon *v.* Williams, 1830 (Tindal, C.J.); Ayton *v.* Bolt, 1827; Gould *v.* Shirley, 1829);—"We are waiting a remittance from Liverpool against beef we want to sell; when it comes, we shall send you the amount of the bill" (Hodgens *v.* Graham, 1831 (Ir.));—"I shall be most happy to pay you principal and interest as soon as convenient" (Edmunds *v.* Downes, 1834; Meyerhoff *v.* Froehlich, 1878, C. A.).

[2] Waters *v.* E. of Thanet, 1842; Maunsell *v.* Hedges, 1851 (Ir.); Hammond *v.* Smith, 1864.

does not amount in law to an implied promise to pay, will not take a case out of the Statute of Limitations, an admission to a *stranger* that a sum is due will not suffice.[1] Consequently, an acknowledgment by the maker of a promissory note to the payee, of the existence of a debt due thereon, cannot be made available by a subsequent holder of the note to defeat the Statute of Limitations.[2]

§ 1075A. Fifthly, a general written promise to pay, not specifying either any amount, or containing any absolute admission of *some* debt being due, is sufficient, and the amount may be ascertained by extrinsic evidence; but if no proof be given on this head, the plaintiff will be entitled merely to nominal damages.[3]

§ 1075B. Sixthly, the promise or acknowledgment in writing need not specify either the person to whom, or the time when, it was made, but both these points may be established by parol evidence.[4]

§ 1075C. Seventhly, even an infant, by giving a written acknowledgment of a debt due for *necessaries*, will take such debt out of the statute.[5]

§ 1075D. Eighthly, it matters not under this statute, any more than under the Statute of Frauds,[6] to what part of the document the signature of the party making the acknowledgment is attached.[7]

[1] Stamford, &c. Bank *v.* Smith, 1892, C. A.; Grenfell *v.* Girdlestone, 1837 (Alderson, B.); Godwin *v.* Culley, 1859; Fuller *v.* Redman, 1859; In re Hindmarsh, 1860; Bush *v.* Martin, 1863. Older authorities, throwing doubt on the proposition in the text, are to be found in Clark *v.* Hooper, 1834 (Tindal, C.J., and Park, J.); Ecke *v.* Nokes, 1834 (Tindal, C.J.); Peters *v.* Brown, 1801 (Ld. Kenyon); Smith *v.* Poole, 1841; Spollan *v.* Magan, 1851 (Ir.); M'Carthy *v.* O'Brien, 1839 (Ir.); Morrogh *v.* Power, 1842 (Ir.). See, also, post, § 1091.

[2] Stamford, &c. Bank *v.* Smith, supra; Cripps *v.* Davis, 1843; Mountstephen *v.* Brooke, 1819. In Bourdin *v.* Greenwood, 1872 (Wickens, V.-C.), the maker of a promissory note bearing date January, 1846, was in 1866 pressed for payment, whereupon he altered the date by converting the 4 of 1846 into a 6, indorsed his name as follows: "W. H. Langley, 1866," and then returned the note to the holder. In a creditor's suit, the V.-Ch. held that the indorsement was a sufficient acknowledgment to bar the statute, and that the note, notwithstanding the alteration of the date, was still a valid document. Sed qy.

[3] Spong *v.* Wright, 1822 (Alderson, B.); Lechmere *v.* Fletcher, 1833; Cheslyn *v.* Dalby, 1840; Waller *v.* Lacy, 1840; Dickinson *v.* Hatfield, 1831 (Ld. Tenterden); Bewley *v.* Power, 1833 (Ir.); and Shickernell *v.* Hotham, 1854, overruling the dicta in Kennett *v.* Milbank, 1831. See Hartley *v.* Wharton, 1840; post, § 1091; and ante, § 1024.

[4] Hartley *v.* Wharton, 1840; Edmunds *v.* Downes, 1834. See Lobb *v.* Stanley, 1844.

[5] Willins *v.* Smith, 1854. But see post, § 1084.

[6] Ante, § 1028.

[7] Holmes *v.* Mackrell, 1858.

§ 1075E. Ninthly, the promise, acknowledgment, or part-payment, must be made before action brought, since they severally bar the statute, not (as was formerly supposed) because they rebut the presumption of payment, but because they amount to a new promise.[1]

§ 1076-8. Tenthly, and lastly, the promise proved, whether express or implied, must correspond with that laid in the statement of claim:[2] therefore, proof of an acknowledgment to or by an executor or administrator will not support an allegation of a promise to or by the testator or intestate.[3]

§ 1079. It will be remembered[4] that a case may be taken out of the Statute of Limitations by a *part-payment*. For a payment to have the effect of doing this, it is not necessary that at the time of the payment the exact amount remaining due should be distinctly ascertained.[5] Still, it must appear that the payment was made, not only on account of *a* debt, but on account of *the* debt for which the action is brought. Therefore, if there be two undisputed but entirely separate debts, a part-payment within six years, not specifically appropriated, will not, as it seems, bar the statute as to either.[6] Moreover, it must appear that the payment was made in *part* discharge of the debt declared on; for the meaning of *part-payment* is not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum*, due from the person making the payment to him to whom it is made; which part-payment implies an admission of such greater sum being then due, and a promise to pay it.[7] The circumstances, too, must be such as to warrant the jury in inferring a promise to pay the remainder; and therefore, if part-payment be accompanied by a

[1] Bateman *v.* Pinder, 1842, overruling Yea *v.* Fouraker, 1760-1.

[2] Tanner *v.* Smart, 1827 (Ld. Tenterden); Cripps *v.* Davis, 1843 (Parke, B.).

[3] Sarell *v.* Wine, 1803; Browning *v.* Paris, 1839 (Parke, B.); Tanner *v.* Smart, 1827.

[4] See § 1073, supra. The effect of a part payment is not affected by Lord Tenterden's Act, the reason for this being, it would appear, that a part payment is *an act* the meaning of which cannot be open to any reasonable doubt. See Waters *v.* Tompkins, 1835 (Parke, B.); Hodger *v.* Arch, 1854 (id.).

[5] Walker *v.* Butler, 1856.

[6] Burn *v.* Boulton, 1846. But see Walker *v.* Butler, 1856. See, also, Nash *v.* Hodgson, cited post, § 1081.

[7] Tippets *v.* Heane, 1834; Waters *v.* Tompkins, 1835; Waugh *v.* Cope, 1840. See Worthington *v.* Grimsditch, 1845.

positive refusal to pay any more, it will not take the case out of the statute, though the debtor admits that the remainder is due [1] The payment, also, of a dividend under the Bankruptcy law,[2] or the payment of interest in pursuance of a judgment obtained in a former action, to which the Statute of Limitations has been unsuccessfully pleaded,[3] is open to the same objection.

§ 1080. The sale and delivery of goods will not take a case out of the Statute of Limitations, unless done under circumstances which would render the delivery equivalent to payment,[4] as, for example, under an express agreement by the parties that goods delivered by the one should be taken by the other in part payment of the debt.[5] The statute would, in such a case, certainly be barred, for the Legislature never intended that the "part-payment" should necessarily be in actual money, but it will suffice if it be made in any mode which the parties agree shall be treated as equivalent to a money payment.[6] And it has been urged that the sale and delivery of goods which, equally with the payment of money, are acts done, ought to be in general per se sufficient to exempt a debt from the operation of Lord Tenterden's Act; but however this may be in theory, the statute in fact contains no exception in favour of the sale or delivery of goods.

§ 1081. Neither, again, will the mere existence in an open account accrued of items which have arisen within six years, but in respect of which there has not been any actual payment in cash, or anything equivalent to it, take those items of the account which are more than six years old out of the operation of the Statute of Limitations.[7] Moreover, in such a case, the mere payment by the debtor of a sum generally in respect of the account, without any evidence of an appropriation of it on his part, or of any intention by him to apply it in part discharge of the items

[1] Wainman *v.* Kynman, 1847.

[2] Ex parte Topping, In re Levey and Robson, 1865 (Ld. Cranworth, C.); Davies *v.* Edwards, 1851.

[3] Morgan *v.* Rowlands, 1872.

[4] Cottam *v.* Partridge, 1842; overruling Catlin *v.* Skoulding, 1795, as only applicable previously to Lord Tenterden's Act. See, also, Williams *v.* Griffiths, 1835 (Parke, B.).

[5] Hart *v.* Nash, 1835; Hooper *v.* Stephens, 1835; Blair *v.* Ormond 1851. See Hughes *v.* Paramore, 1855.

[6] Hodger *v.* Arch, 1854 (Parke, B.); Amos *v.* Smith, 1867; Maber *v.* Maber, 1867.

[7] Cottam *v.* Partridge, 1842; Williams *v.* Griffiths, 1835; Mills *v.* Fowkes, 1839; Waller *v.* Lacy, 1840; Williams *v.* Griffith, 1849.

which accrued more than six years before, will not exempt these from the operation of the Statute of Limitations; though, in such case, the creditor may, unless expressly prohibited by the debtor of his own motion, at any time apply the payment to the statute-barred debts.[1] A payment on account of interest generally by a party who is the maker of three promissory notes, two of which are barred by the statute, but the other of which is not barred, must primâ facie be attributed exclusively to the note which is not barred.[2] A statute-barred debt will not be revived merely by an account furnished by one party, even though such account contain cross items, and fix the balance due;[3] or by an account containing items on one side only,[4] being actually stated and settled by both parties, for this will be no more than a mere parol statement of, and promise to pay, an existing debt.[5] But the going through an account with items on both sides, and striking a balance, is an act equivalent to part-payment, as such a proceeding converts the *set-off* into *payments*, and raises a new consideration for the liquidation of the balance.[6]

§ 1082. The payment, to take the case out of the operation of the statute, may be one either of principal or of interest. But if a debt be made up of sums due on both these accounts, the payment of the principal, if accompanied by a refusal to pay interest, will raise no implied promise to also pay interest.[7] The payment of interest on a debt barred by the statute, is some evidence that the principal is due, though it does not necessarily prove that fact.[8] If such payment of interest was coupled with special circumstances, as, for instance, if it was paid upon a note, which was allowed to remain in the hands of the payee, it may be fairly regarded as a sufficient acknowledgment of the currency of the note, to revive the claim for the principal.[9] A bill drawn in part payment of a debt operates to defeat the statute from the time of its delivery to the

[1] Mills *v.* Fowkes, 1839. See Re Rainforth, 1880, C. A.
[2] Nash *v.* Hodgson, 1856.
[3] Bristow *v.* Miller, 1828 (Ir.).
[4] Ashby *v.* James, 1843 (Alderson, B.), apparently overruling Smith *v.* Forty, 1829 (Vaughan, B.).
[5] Jones *v.* Ryder, 1838; Reeves *v.* Hearne, 1836; Hopkins *v.* Logan, 1839 (Parke and Alderson, BB.); Clark *v.* Alexander, 1844.
[6] Ashby *v.* James, 1843.
[7] Collyer *v.* Willock, 1827.
[8] Purdon *v.* Purdon, 1842.
[9] Bealy *v.* Greenslade, 1831; Bamfield *v.* Tupper, 1851; Re Rutherford, 1880, C. A.

creditor,[1] and this, too, whether such bill be subsequently honoured or not; for the word "payment" in Lord Tenterden's Act is used in a popular sense, and is large enough to include not only actual cash payments, but also conditional payments.

§ 1083. The courts for many years put a forced, though salutary, construction on Lord Tenterden's Act, and held that the *fact* of payment could not be established by *any admission* of the debtor short of an acknowledgment in writing duly signed.[2] However, it is now settled that a mere parol acknowledgment, either of part payment of principal, or of payment of interest, within six years, will suffice to take a case out of the Statute of Limitations.[3] When the actual fact of some payment having been made has once been proved, recourse can be had to the parol admissions of the debtor, whether made before, or after, or at the time of payment, for the purpose of showing on what account that payment was made.[4] Reasonable proof must in general be given of the identity of the debt, on account of which the payment was made, with that which forms the subject-matter of the action.[5] But a jury will be warranted in inferring such identity, in the absence of any proof of more debts than one being acknowledged to be due.[6]

§ 1084. "The Infants Relief Act, 1874,"[7] prohibits the bringing of any action "upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." A ratification after the coming into

[1] Turney *v.* Dodwell, 1854; Irving *v.* Veitch, 1837; Gowan *v.* Foster, 1832.

[2] Bayley *v.* Ashton, 1840; Willis *v.* Newham, 1830; Maghee *v.* O'Neil, 1841; Eastwood *v.* Saville, 1842.

[3] Cleave *v.* Jones, 1851. See, also, Edwards *v.* Janes, 1855.

[4] Waters *v.* Tompkins, 1835; Bevan *v.* Gething, 1842; Edan *v.* Dudfield, 1841 (Ld. Denman). See Baildon *v.* Walton, 1847.

[5] Waters *v.* Tompkins, 1835 (Parke, B.).

[6] Evans *v.* Davies, 1836; Burn *v.* Boulton, 1846. As to the law, where payment is made by one of several joint debtors, see ante, §§ 744—746.

[7] 37 & 38 V. c. 62, § 2. This enactment supersedes § 5 of 9 G. 4, c. 14, or Ld. Tenterden's Act (which section is actually repealed by 38 & 39 V. c. 66). By § 5 of Ld. Tenterden's Act "no action could be maintained whereby to charge any person upon any *promise made after full age to pay any debt contracted during infancy*, or upon any ratification after full age of any promise or simple contract made during infancy, unless such *promise* or *ratification* were made by *some writing signed* by *the party to be charged* therewith."

operation of the Act,[1] of a contract made before that date, is within the prohibition contained in the Act.[2] So also is the ratification of a promise to marry.[3] A set-off or counter-claim, arising from an alleged ratification of a contract by an infant, is also within the Act.[4]

§ 1085. By § 6 of Lord Tenterden's Act,[5] "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,[6] unless such representation or assurance be made in writing, signed by the party to be charged therewith."[7] This provision was rendered necessary by the well-known case of Pasley *v.* Freeman,[8] which decided that the provisions of the Statute of Frauds, requiring guarantees to be in writing,[9] could be evaded by the plaintiff's claim being not upon a special *promise* to him, to answer for the debt or default of another, but upon a *tort* or wrong done by some false or fraudulent representation made by the defendant, in order to induce the contract.

§ 1086. The word "ability," in the above § 6 of Lord Tenterden's Act, has been discussed more than once. In an action[10] against certain trustees, for falsely representing that a life-tenant's interest in certain trust property was only charged with three annuities, whereby the plaintiff was induced to purchase an annuity from such life-tenant, whereas defendant well knew that such life-tenant's interest was also charged with a mortgage of 20,000*l.*, it having appeared at the trial that the representations were by parol,

[1] See Smith *v.* King, 1892.

[2] Ex parte Kibble, Re Onslow, 1875.

[3] Coxhead *v.* Mullis, 1878. But see Northcote *v.* Doughty, 1879; Ditcham *v.* Worrall, 1880. The fixing of the wedding-day by the parties was regarded as tantamount to a fresh promise.

[4] Rawley *v.* Rawley, 1876, C. A.

[5] 9 G. 4, c. 14; now in substance extended to Scotland by 19 & 20 V. c. 60, § 6.

[6] The word "upon" here is obviously a misprint.

[7] See Swift *v.* Jewesbury, 1874, C. A. (where the signature of a manager of a banking company was held not the signature of the bank within the meaning of this Act); overruling Swift *v.* Winterbotham, 1873.

[8] Decided in 1789.

[9] Ante, §§ 1019, 1330—1034.

[10] Lyde *v.* Barnard, 1836.

the judges of the court were equally divided in opinion as to whether they related to the ability of the life-tenant in question. Parke and Alderson, B.B., thought that they simply had reference to the state of the fund; Lord Abinger and Gurney, B., held that they related to the state of the fund, as an element only of the life-tenant's personal credit, and that the question which they purported to answer was in substance one regarding his ability to give security of adequate value. The latter opinion is somewhat confirmed by a subsequent decision of the Queen's Bench,[1] where a false representation by a solicitor, that his client might be safely trusted, because he had lately purchased an estate, and the title-deeds were in his (the solicitor's) possession, so that the client could do nothing without his knowledge, was held to be a representation respecting the ability of the client, and to, consequently, require to be in writing.

§ 1087. For a representation to come within the Act, it is not necessary that an action should be brought directly upon it. Therefore, where a plaintiff sought in an action for money had and received, to recover the value of goods which, on the defendant's representation as to him, had been sold to a third party, who had then paid their proceeds over to the defendant, it was held that as the plaintiff's case rested on the misrepresentation alone, it fell directly within the Act.[2] Had the misrepresentation formed only one link in the chain of fraud, by which the plaintiff had been deprived of his goods, the result might possibly have been different.[3] The Act also applies to a misrepresentation made by one partner respecting the credit of his firm.[4] When several false representations respecting a man's character have been made by different persons, or when the same person has made one representation in writing and another in conversation, the action will be maintainable, if the jury are of opinion that the plaintiff was mainly or even partially induced by the writing declared on to give the credit which occasioned the loss.[5]

§ 1088. Another case in which it is required by statute that acknowledgments should be in writing and duly signed, is that of

[1] Swann *v.* Phillips, 1838.
[2] Hasluck *v.* Fergusson, 1837.
[3] Id.
[4] Devaux *v.* Steinkeller, 1839.
[5] Wade *v.* Tatton, 1856.

acknowledgments of title to real property relied on to take an adverse possession out of the operation of the Real Property Limitation Acts, 1833[1] and 1874.[2] By the Act of 1833,[3] "an acknowledgment of the title of the person entitled to any land, or rent," must, to neutralize the effect of his discontinuance of the possession, or of the receipt of the profits, or of rent, be "given to him or his agent in writing, signed by the person in possession, or in the receipt of the profits of such land, or in receipt of such rent." By the Act of 1874,[4] "an acknowledgment in writing of the title of the mortgagor, or of his right of redemption," must, to keep alive his rights, in the event of the mortgagee obtaining the possession or receipt of the profits of any land, or the receipt of any rent, be "given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him."[5] While it is also required,[6] that "no action, or suit, or other 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[7] or rent, at law or in equity, or any legacy, but within twelve 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,[8] 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*,[9] *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

[1] 3 & 4 W. 4, c. 27; extended to Ireland by 6 & 7 V. c. 54 (as amended by 54 & 55 V. c. 67), and 7 & 8 V. c. 27. See ante, § 74, and n.

[2] 37 & 38 V. c. 57. See ante, § 74, and n.

[3] § 14 of 3 & 4 W. 4, c. 27.

[4] § 7 of 37 & 38 V. c. 57. Set out verbatim, ante, in note to § 747.

[5] As to what is a sufficient acknowledgment to satisfy these words, see Stansfield *v.* Hobson, 1852; Trulock *v.* Robey, 1841; Thompson *v.* Bowyer, 1863 (Romilly, M.R.).

[6] 37 & 38 V. c. 57, § 8, which has been substituted for § 40 of 3 & 4 W. 4, c. 27 (repealed by § 9 of 37 & 38 V. c. 57).

[7] Money due on a bond executed by an ancestor is not a sum "charged upon, or payable out of, any land," within the meaning of this section: Roddam *v.* Morley, 1857; Morley *v.* Morley, 1856.

[8] As to the meaning of these words, see Hurty *v.* Davis, 1850 (Ir.).

[9] As to the meaning of these words, see and compare Toft *v.* Stephenson, 1851; Pears *v.* Laing, 1871 (Bacon, V.-C.); Bolding *v.* Lane, 1863; and In re Fitzmaurice, 1864 (Ir.).

twelve[1] years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."[2]

§ 1089. No acknowledgment of any title mentioned in these Acts will be operative to restore such title after it has once been extinguished by the effluxion of time.[3] The acknowledgments, also, must be distinct and unconditional. An acknowledgment conditional on an arrangement which was never carried into effect cannot be regarded as an acknowledgment of title within the Act of 1833.[4] Where, however, an acknowledgment is distinct, no objection can be taken to it on the ground that it was obtained by compulsion and given upon oath. Therefore, an answer to a bill in Chancery under the old pleading, acknowledging the plaintiff's title, is sufficient.[5]

§ 1090. Actions for debt for rent upon an indenture of demise, or of covenant or debt upon any bond or other specialty, or of debt or scire facias upon recognizance, must be brought within twenty years after the cause of such actions or suits.[6] And "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[7] or part-satisfaction, on account of any principal or interest being then due thereon," the plaintiff may bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment.[8]

§ 1091. In acknowledgments by signed writings under this Act, the amount need not be specified (any more than in acknowledgments under Lord Tenterden's Act); but if *anything* be due, the amount may be proved by parol evidence.[9] Such an acknowledg-

[1] See Sutton *v.* Sutton, 1882; Fearnside *v.* Flint, 1882.

[2] See 23 & 24 V. c. 38 ("The Law of Property Amendment Act, 1860"), § 13, as to claims to the estates of persons dying intestate; also, Reed *v.* Fenn, 1866.

[3] Sanders *v.* Sanders, 1882, C. A.

[4] Doe *v.* Edmonds, 1840. See Doe *v.* Beckett, 1843, and cases cited in the last five notes.

[5] Goode *v.* Job, 1858.

[6] See "The Act for the Amendment of the Law, 1833," being 3 & 4 W. 4, c. 42, § 3, cited ante, § 75n, n. [2]. The Irish Act (16 & 17 V. c. 113) contains a somewhat similar provision, in § 20.

[7] See Ashlin *v.* Lee, 1875 (L.JJ.).

[8] 3 & 4 W. 4, c. 42 ("The Act for the Amendment of the Law, 1833"), § 5; and 16 & 17 V. c. 113, § 23, Ir.

[9] Howcutt *v.* Bonser, 1849 (Parke, B.). See ante, § 1075.

ment, too, need not amount to a promise to pay,[1] though it must contain an admission of an actually existing debt, and will not suffice if it merely shows that a debt was due at some prior time.[2] It will (unlike admissions of simple contract debts under the old Statute of Limitations)[3] be sufficient if addressed to a third party.[4] So that a recital by a mortgagor, in an assignment of his equity of redemption, that all interest was paid upon a mortgage, was in an action by the mortgagee against the mortgagor on the original mortgage deed, within twenty years from the date of the assignment, held to be ample evidence of an acknowledgment by part-payment of interest, so as to take the case out of the statute.[5] In the same case it was also held that the payment to the mortgagee by the assignee, in pursuance of a covenant so to do contained in it, of interest accrued subsequently to the assignment, was a sufficient acknowledgment as against the mortgagor.[6]

§ 1092. By the *Prescription Acts*,[7] claims to rights of common and other profits à prendre,[8] to rights of way or other easements, to the use of light, to the payment of a modus, or to exemption from tithes, are rendered indefeasible after the lapse of certain defined periods, unless it shall appear that the respective privileges were enjoyed "by some consent or agreement expressly made or given for that purpose by deed or writing."

§ 1093. By "The Railway and Canal Traffic Act, 1854,"[9] no special contract between any railway or canal company and any other party respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things, shall be binding upon or affect any such party, unless it be just and reasonable, and signed by such party, or by the person delivering such things for carriage.[10]

[1] Moodie *v.* Bannister, 1859 (Kindersley, V.-C.). See ante, § 1075.

[2] Howcutt *v.* Bonser, 1849.

[3] See ante, § 1075.

[4] Moodie *v.* Bannister, 1859; resolving a point left undecided in Howcutt *v.* Bonser, 1849. See Wilby *v.* Elgee, 1875 (Ir.).

[5] Forsyth *v.* Bristowe, 1853.

[6] Id.

[7] 2 & 3 W. 4, c. 71 ("The Prescription Act, 1832"), §§ 1—3, extended to Ireland by 21 & 22 V. c. 42; 2 & 3 W. 4, c. 100, § 1. See ante, § 75A, n.

[8] The Act does not apply to profits à prendre in gross: Shuttleworth *v.* Le Fleming, 1865; or to rights claimed by a copyholder in his own tenement according to the custom of the manor: Hanmer *v.* Chance, 1865.

[9] 17 & 18 V. c. 31, § 7; Gregory *v.* W. Midl. Rail. Co., 1864.

[10] See Wise *v.* Gt. West. Rail. Co., 1856; Simons *v.* Gt. West. Rail. Co.,

§ 1094. An acceptance of a bill is by The Bills of Exchange Act, 1882,[1] invalid, unless, among other conditions, "it be written on the bill and be signed by the drawee;" but "the mere signature of the drawee without additional words is sufficient."

§ 1095. By the Truck Acts, 1831 to 1887,[2] no stoppage or deduction shall in any case be made from the wages of any artificer protected by that statute, unless the agreement "for such stoppage or deduction shall be in writing, and signed by such artificer."[3]

§ 1096. A "declaration in writing" by such "lodger"[4] to the effect stated in such Act is, by the "Lodgers Protection Act,"[5] necessary to be made by a lodger who seeks to protect his goods from being distrained upon for rent due to the superior landlord. To such declaration must[6] be annexed a correct inventory subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration. The declaration will be inoperative, unless made *after* the distress has been levied, or at least, authorised or threatened.[7]

§ 1097. An agreement "in writing, signed by the person to be bound thereby or by his agent in that behalf," is, by the "Solicitors Remuneration Act, 1881,"[8] required as evidence of any contract between a solicitor and his client as to the form and amount of remuneration to be paid for professional services rendered in conveyancing or other non-contentious business out of court. Any special agreement between a solicitor and his client "respecting the amount and manner of payment" for such solicitor's services, whether past or future, is by the "Attorneys'

1857; Lond. & N. West. Rail. Co. *v.* Durham, 1856; Pardington *v.* S. Wales Rail. Co., 1856; Peek *v.* N. Stafford. Rail. Co., 1863, H. L.; M'Manus *v.* Lanc. & Yorkshire Rail. Co., 1859; Lewis *v.* Gt. West. Rail. Co., 1860, C. A.; same name, but different case, 1877, C. A.; Beal *v.* S. Devon Rail. Co., 1864; Lloyd *v.* Waterford & Lim. Rail. Co., 1862 (Ir.).

[1] 45 & 46 V. c. 61, § 17.

[2] 1 & 2 W. 4, c. 37; 50 & 51 V. c. 46.

[3] See §§ 23, 24 of 1 & 2 W. 4, c. 37. On its construction, see Cutts *v.* Ward, 1867; Pillar *v.* Llynvi Coal Co., 1869.

[4] As to the meaning of the word "lodger," see Phillips *v.* Henson, 1877; but quære. See, also, Heawood *v.* Bone, 1884.

[5] 34 & 35 V. c. 97, § 1.

[6] It is, however, not quite clear whether the declaration must be "subscribed" as well as the inventory.

[7] Thwaites *v.* Wilding, 1883.

[8] 44 & 45 V. c. 44, § 8.

and Solicitors' Act, 1870,"[1] required to be in *writing*, and be signed by both parties,[2] and must be pronounced, either by the taxing master or by the court, to be fair and reasonable. An undertaking by a solicitor to "charge nothing if he lost the action," does not fall within these provisions, and need not be in writing.[3]

§ 1093. An agreement in writing is by "The Merchant Shipping Act, 1894,"[4] required to be entered into by the master of every ship[5] with every seaman whom he carries to sea from any port of the United Kingdom as one of his crew, which must be in a form sanctioned by the Board of Trade,—must be dated at the time of the first signature being attached to it,—must contain a variety of particulars specified in the Act,—and must be signed first by the master and afterwards by the seaman; and the signature of the seaman to which must be duly attested in the case of a foreign-going ship by a shipping-master, and in the case of a home-trade ship, either by a shipping-master or by some other witness; and in either event, read over and explained to him, before the seaman executes the instrument, or, at least, ascertained by the witness to be understood by him. The same statute also enacts[6] that "every indenture of apprenticeship to the sea service made in the United Kingdom by a board of guardians, or persons having the authority of a board of guardians, shall be executed by the boy and the person to whom he is bound in the presence of, and shall be attested by, two justices of the peace, and those justices shall ascertain that the boy has consented to be bound, and has attained the age of twelve years, and is of sufficient health and strength, and that the master to whom the boy is to be bound is a proper person for the purpose."

[1] 33 & 34 V. c. 28, §§ 4, 9.

[2] Re Lewis, Ex parte Munro, 1876. Such an agreement cannot, indeed, be enforced by action (see 33 & 34 V. c. 28, § 8), but the remuneration agreed upon may, if the terms be fair and reasonable, be recovered in a summary way.

[3] Jennings *v.* Johnson, 1873.

[4] 57 & 58 V. c. 60, §§ 113—116. As to how the agreement is to be attested if the seaman is engaged in a colonial or foreign port, see § 124. As to what attestation is necessary when the agreement is altered by the consent of all parties, see § 122. As to how releases between master and seaman are to be attested and proved, see § 138. As to agreements by sea fishermen with boys under sixteen, and apprenticeships to the sea fishing service, see §§ 369—371, 391—408, 412.

[5] Ships of less than eighty tons, exclusively employed in the coasting trade, excepted.

[6] By § 107.

§ 1099. It is necessary by "The Pawnbrokers Act, 1872,"[1] in every case of a special contract by a pawnbroker with a pawner, that a special ticket signed by the pawnbroker be delivered to the pawner, and that the pawner sign a duplicate of such ticket. Special contracts may only be made by pawnbrokers with pawners as to pledges for loans above 40*s*.

§ 1099A. Under both the Dublin and London Hackney Carriage Acts,[2] a contract in writing, signed by such driver or conductor in the presence of a competent witness, is required to enable a proprietor of such carriages to enforce the payment of any sum, claimed from any driver or conductor on account of his earnings.

§ 1100. An order for the reception of a lunatic will be only valid if duly made in writing on one of the forms given in the Schedule to the Lunacy Act, 1890.[3]

§ 1101. By the Bankruptcy Act and Rules of 1886 and 1890,[4] a general proxy must be in writing in a form provided, and in favour of either the Official Receiver, or the manager, or clerk, or other person in the regular employ of the creditor;[5] though a special proxy may be in favour of any one whom the creditor thinks fit to name,[6] while in either case such writing must be signed by the creditor and attested by a witness,[7] and all blanks in it must be filled up in the creditor's own handwriting, or in that of a clerk or manager in his regular employment, or of a Commissioner to administer oaths in the Supreme Court.[8] The agent of a corporation may fill up blanks, and sign for his principals, but he must expressly state that he is "duly authorised under the seal of the company."[9] It is further required that voting letters, which are now available by creditors who have proved their debts, for the purpose of assenting to, or dissenting from, a debtor's or a bank-

[1] 35 & 36 V. c. 93, § 24. Tickets and duplicates under this Act are exempt from stamp duty by § 24 of the Act.

[2] 6 & 7 V. c. 86 ("The London Hackney Carriages Act, 1843"), § 23; 16 & 17 V. c. 112, § 36, Ir. Under the London Act the agreement requires no stamp. § 23.

[3] 53 V. c. 5.

[4] See Sche. 1 of 1883 Act (46 & 47 V. c. 52) rr. 15—21; see, also, Bkptcy Rules, 1886 and 1890.

[5] Sched. 1 of Act of 1883, rr. 17, 21.

[6] Sched. 1 of Act of 1883, and § 22, clause 3, of Bankruptcy Act, 1890.

[7] For form of general proxy, Form 75; form of special proxy, Form 76.

[8] Bankruptcy Act, 1890 (53 & 54 V. c. 71), § 22, subs. 1.

[9] See Forms 75, 76.

rupt's proposal for a composition or a scheme of arrangement, shall be in a prescribed form, and signed and witnessed.[1]

§ 1101A. Every notice to quit to be served on a tenant of a holding, must, under "The Landlord and Tenant, Ireland, Act, 1870,"[2] be in writing or print, bearing a half-crown stamp, "and signed by the landlord or his agent lawfully authorised thereunto."

§ 1102. All notices of objection to persons remaining on the list of Parliamentary voters, must[3] be individually signed at the foot of the notice by the person objecting; and if the notice is sent by the post, and the service of it is sought to be established by the production of a duplicate stamped at the Post-office, this duplicate must be personally subscribed, and externally directed, in the same manner as the copy sent.[4] Under the same Act, notices of intention to prosecute an appeal, whether transmitted to the Central Office of the Supreme Court, or sent to the respondent, must be signed by the appellant himself.[5]

§ 1102A. It is again required by a further Act,[6] that all Notices of Appeal to any court of general or quarter sessions, other than those against summary convictions, orders of removal, orders under any statute relating to pauper lunatics, orders in bastardy, or any proceedings by virtue of any Act relating to the revenue, shall specify in writing the particular grounds of appeal, and be signed by the person giving the same, or his solicitor on his behalf.

§§ 1103-4. A pauper cannot, under the Poor Law Amendment

[1] 53 & 54 V. c. 71, § 3, subs. 4, and Form 82.

[2] 33 & 34 V. c. 46, § 54, Ir.

[3] By 6 & 7 V. c. 18 ("The Parliamentary Voters Registration Act, 1843"), § 7, and Sched. A., Nos. 4 and 5, as to counties; § 17, Sched. B., Nos. 10 and 11, as to cities and boroughs: Toms *v.* Cuming, 1845; Prnen *v.* Cox, 1845. As to the Irish law, see 13 & 14 V. c. 69, §§ 26, 36.

[4] 6 & 7 V. c. 18 ("The Parliamentary Voters Registration Act, 1843"), § 100; Toms *v.* Cuming, 1845; Birch *v.* Edwards, 1847; Lewis *v.* Robert, 1861; Smith *v.* James, 1851. See Barclay *v.* Parrott, 1856; Benesh *v.* Booth, 1864. See, also, 13 & 14 V. c. 69 ("The Representation of the People (Ireland) Act, 1850"), § 113, as to the Irish law.

[5] 6 & 7 V. c. 18 ("The Parliamentary Voters Registration Act, 1843"), § 62; Petherbridge *v.* Ash, 1846. See Rawlins *v.* West Derby, 1846. As to the Irish law, see 13 & 14 V. c. 69, § 75.

[6] 12 & 13 V. c. 45 ("The Quarter Sessions Act, 1849"), §§ 1, 2. See, also, 47 & 48 V. c. 43 ("The Summary Jurisdiction Act, 1884"), Sched. In R. *v.* JJ. of Kent, 1873, the Court held that the statute was complied with though the notice of appeal was signed only by the *clerk* of appellants' attorney. Sed qy.

Acts,[1] be removed from one parish to another, unless by written consent, until twenty-one days after notice of chargeability *in writing*, accompanied by a copy or counterpart of the order of removal, and by a statement of the grounds of removal under the hands of *the overseers or guardians of the parish* obtaining such order, or any *three or more of such guardians*, shall have been sent by them through the post or otherwise to the overseers of the parish to whom any such order shall be directed. Moreover, no appeal can be heard against such an order, unless the *overseers* or *guardians* of the appellant parish, or any three or more of such *guardians*, shall have sent or delivered to the overseers of the respondent parish *a statement in writing under their hands* of the grounds of appeal with the notice of appeal, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried.[2] In construing these provisions it has been held that, although notices of appeal may be signed by the solicitor on behalf of the appellant parish,[3] notices of chargeability, and statements of grounds of removal and of appeal, must respectively bear the signatures of the overseers or guardians.[4] They will, however, be valid if signed by a majority of the aggregate body of the overseers and churchwardens;[5] though they must be signed by at least such a majority.[6] Still, it is not necessary that the document should show on its face that it proceeds from a majority of the parish officers,[7] but it is certainly very desirable that this fact should appear.[8] The guardians mentioned in these clauses are not guardians of a union, but are guardians expressly appointed[9] to act for particular parishes.[10] As a parish is generally bound by the acts of those persons whom it represents to be its officers, the adverse parish, on a principle of reciprocity, is pre-

[1] 4 & 5 W. 4, c. 76, § 79; 11 & 12 V. c. 31 ("The Poor Law Procedure Act, 1847"), §§ 2, 9.

[2] 4 & 5 W. 4, c. 76, § 81. Both the notice of appeal, as also the statement of grounds of appeal, may be transmitted through the post (14 & 15 V. c. 105, or "The Poor Law Amendment Act, 1851," § 10), and the fourteen days will be calculated from the time when, according to the usual course of post, the notice ought to reach the respondents: R. *v.* Shawstone, 1852.

[3] R. *v.* Middlesex, 1850; R. *v.* Carew, 1850.

[4] R. *v.* Derby, 1850 (Patteson, J.); R. *v.* Middlesex, 1850 (id.); R. *v.* Worcester, 1838; R. *v.* Surrey, 1844.

[5] R. *v.* Warwickshire, 1837; R. *v.* Derbyshire, 1837.

[6] R. *v.* Westbury, 1844.

[7] R. *v.* Colerne, 1850.

[8] R. *v.* Westbury, 1844.

[9] Under 4 & 5 W. 4, c. 76.

[10] R. *v.* Surrey, 1844; R. *v.* Lambeth, and R. *v.* Southampton, 1845.

cluded from disproving the legality of the appointments of such officers, unless the notice signed by them be invalid on its face.[1]

§ 1105. By the Metropolis Management Act, 1855,[2] it is enacted that "every notice, demand, or like document given by or on behalf of the Metropolitan Board of Works, or any vestry or district Board under that Act, may be in writing or print, or partly in writing and partly in print, and shall be sufficiently authenticated if signed by their clerk, or by the officer by whom the same is given."[3]

§ 1105A. It is also, by the Companies Act, 1862,[4] enacted that "any summons, notice, order, or proceeding requiring authentication by the Company, may be signed by any director, secretary, or other authorised officer of the Company, and need not be under the common seal of the Company, and the same may be in writing or in print, or partly in writing and partly in print."

§ 1105B. Similar provisions to those already cited may be found in a multitude of other statutes.[5]

§ 1106. Warrants and other instruments issuing from the *Treasury* may now in all cases be issued under the hands of any *two* or more of the commissioners.[6] A like convenient rule has been adopted in reference to all orders and other documents emanating from the Commissioners of Customs.[7] Again, the rules, orders, or regulations of the Local Government Board for England, will be valid if made under seal, and signed by the president or one of the ex officio members, and countersigned by a secretary or his assistant.[8] The validity of rules and orders made by the Local Government Board for Ireland,[9] or by the late Irish Poor Law Commissioners[10] will be also found to depend on somewhat similar provisions.

§ 1107. Whenever it is sought to know whether, when an Act of Parliament renders the signature of a person necessary, a signa-

[1] R. *v.* Leominster, 1845.
[2] 18 & 19 V. c. 120, § 222.
[3] See In re Balls and Met. Board of Works, 1866.
[4] 25 & 26 V. c. 89, § 64.
[5] See, for example, "The Telegraph Act, 1878" (41 & 42 V. c. 76, § 12).
[6] 12 & 13 V. c. 89 ("The Treasury Instruments (Signature) Act, 1849").
[7] 39 & 40 V. c. 36 ("The Customs Consolidation Act, 1876"), § 10.
[8] 34 & 35 V. c. 70 ("The Local Government Board Act, 1871"), § 5.
[9] 35 & 36 V. c. 69 ("The Local Government Board (Ireland) Act, 1872"), § 4, Ir.
[10] 10 & 11 V. c. 90 ("The Poor Relief (Ireland) Act, 1847"), §§ 3, 12, 18, Ir., as amended by 19 & 20 V. c. 14, Ir.

ture by his agent or by procuration will suffice, particular attention must of course be paid to the language employed by the Legislature in each case. In some cases the signature of an agent will not suffice at all.[1] In other cases, though the paper may be signed by an agent, yet his *authority* to do so must be *evidenced in writing*.[2] In yet further cases, agents to sign the documents are *not required to act under any written authority*.[3]

§ 1108. Even though an agent has acted in the first instance without any authority whatever, a subsequent recognition, even merely by conduct, of his act by the principal will satisfy the respective statutes.[4]

§ 1109. The application of these rules rests on no principle, but is the result of arbitrary, if not of accidental, legislation. Its result is, in some cases, absurd. Thus, while no action can be brought against a man for falsely representing his friend to be a person of substance, *unless such representation be in writing signed by himself*, any person may be sued on an ordinary guarantee to be answerable for another's debt, *if the promise to pay be given in writing by his authorised agent*.[5] An agent cannot bind his principal by surrendering a lease not exceeding the term of three years,

[1] Stated alphabetically, some of the more important of the cases in which the signature of an agent will not suffice at all are as under: — Frauds, § 7 of the Statute of (supra, § 1016); Hackney Carriage Acts for London and Dublin (supra, § 1099A); Lord Tenterden's Act (supra, § 1085); "The Merchant Shipping Act, 1894" (supra, § 1098); "The Pawnbrokers Act, 1872" (supra, § 1099); "The Prescription Act, 1832" (supra, § 1092); Real Property Limitation Acts (supra, § 1088); and see Corp. of London *v.* Judge, 1847; "The Sculpture Copyright Act, 1854" (54 G. 3, c. 56, § 4); "The Voters Registration Act" (supra, § 1102).

[2] For instance, this is expressly required in the 1st and 3rd sections of the Statute of Frauds (ante, §§ 1001, 1003), and also in the 3rd section of the Act relating to copyright in paintings, drawings, and photographs (25 & 26 V. c. 68 ("The Fine Arts Copyright Act, 1862").)

[3] Stated alphabetically, some of the principal of the cases in which the signature of an agent need not be in writing are those under: — "Act for the Amendment of the Law, 1833" (supra, § 1090); Baines's Act (12 & 13 V. c. 45, § 1, supra, § 1102A); "The Dramatic Copyright Act" (3 & 4 W. 4, c. 15, as to construction of which see Morton *v.* Copeland, 1855), while as to "The Sculpture Copyright Act," see supra, note to § 1107); Frauds, § 4 of the Statute of (as to which see Heard *v.* Pilley, 1869, and Cave *v.* Mackenzie, 1877); Frauds, § 17 of the Statute of (supra, §§ 1019, 1020); "The Mercantile Law Amendment Act, 1856" (supra, § 1073; "The Railway and Canal Traffic Act, 1854" (supra, § 1093; and see Aldridge *v.* G. W. Ry., 1864); and "The Real Property Limitation Act, 1874" (supra, § 1088).

[4] Maclean *v.* Dunn, 1828; Gosbell *v.* Archer, 1835; Fitzmaurice *v.* Bayley, 1856.

[5] Lyde *v.* Barnard, 1836 (Gurney, B.).

unless he be duly authorised in writing, but may enter into a contract for the sale of lands or of merchandise, whatever their respective values,[1] under a mere oral authority. An *auctioneer*,[2] however, is, at the time of the auction,[3] regarded as the agent of both vendor and purchaser (whether the subject of the sale be lands or goods), and if a complete contract can be made out from the memoranda and entries at the auction signed by him, it is sufficient to bind them both.[4] A broker, too, is generally considered to be the agent of both buyer and seller; but a factor, except under special circumstances, is the agent of the seller alone.[5]

§ 1109A. From these latter examples it may be perceived that there is no rule to prevent any man from signing a document in a double capacity, first, as agent for one of the contracting parties, and next, in his own right.[6] Neither is it necessary in such a case that he should sign his name twice over, but the law will be satisfied, if it can be proved by parol evidence that, although apparently signing as a mere agent, he really intended to bind himself as well as his principal.[7]

§ 1110. Besides the Acts noticed above (and many others of a like nature), by which various transactions are required to be evidenced by writing, numerous other statutes render it necessary to the validity of certain documents that they should be executed or attested in a particular form.[8] Two or more credible witnesses are, for instance, necessary to attest registers of marriages, whether in this country,[9] or,—since the 1st of January, 1852,—in India;[10] assignments[11] of bail bonds;[12] the protest by any person other than

[1] See ante, §§ 1003, 1019, 1020; Sug. V. & P. 145; and Hunter *v.* Parker, 1840, as reported 7 M. & W. 343.

[2] This does not, save under special circumstances (see Bird *v.* Boulter, 1833), extend to the auctioneer's clerk: Peirce *v.* Corf, 1874.

[3] But at that time only: Mews *v.* Carr, 1856.

[4] Emmerson *v.* Heelis, 1809; White *v.* Proctor, 1811; Kenworthy *v.* Schofield, 1824; Wood *v.* Midgley, 1854; Carrigy *v.* Brock, 1871 (Ir.); Peirce *v.* Corf, 1874; Rishton *v.* Whatmore, 1878; Sug. V. & P. 146, 147.

[5] See Darrell *v.* Evans, 1862. See ante, § 1020, n.

[6] Young *v.* Schuler, 1883, C. A.

[7] Young *v.* Schuler, 1883, C. A.

[8] As to the mode of executing deeds under *powers*, see 22 & 23 V. c. 35 ("The Law of Property Amendment Act, 1859"), § 12.

[9] 6 & 7 W. 4, c. 85 ("The Marriage Act, 1836"), § 23; 6 & 7 W. 4, c. 86 ("The Births and Deaths Registration Act, 1836"), § 31.

[10] 14 & 15 V. c. 40, § 11.

[11] It is now finally decided that assignments of copyright, though granted before the 1st of July, 1842, (when 5 & 6 V. c. 45 ("The Copyright Act, 1842"), came into operation) do not require to be attested by two witnesses. See Cumberland *v.* Copeman, 1843.

[12] 4 A. c. 16, § 20.

a notary public, of a bill of exchange, whether such protest be for non-acceptance or non-payment;[1] memorials of deeds registered under the Middlesex Registration Act;[2] the deed[3] of a father appointing a guardian of his child;[3] all deeds by which new trustees of property conveyed for religious or educational purposes may now be appointed;[4] and conveyances to charitable uses under the Mortmain Act.[5] Under the Bills of Sale Acts, 1878 and 1882, "the execution of every bill of sale by the grantor must be attested by one or more credible witness or witnesses, not being a party or parties thereto;[6] but, since the 18th of August, 1882,—except in the case of an *absolute* bill of sale,[7]—it is no longer necessary, as it was under the Act of 1878,[8] that any such witness should be a solicitor.[9] And every lease made under "The Leasing Powers Act for religious worship in Ireland, 1855," must be "by indenture, sealed and delivered by or on behalf of the lessor in the presence of one or more than one witness," although, singularly enough, the statute does not require that such witness should attest the instrument by attaching his signature to it.[10]

§ 1111. It is, moreover, enacted by the English Debtors Act, 1869,[11] and the Irish Debtors Act, 1872,[12] that "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 [solicitor] of one of the superior courts on

land, 1861, Ex. Ch. See, also, Jefferys *v.* Boosey, 1854, H. L.; and Kyle *v.* Jeffreys, 1859, H. L. (Ld. Wensleydale).

[1] 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), §§ 51, 52, 94, and Sched. 1. These protests, so far as inland bills are concerned, are very unusual, and of little, if any, use. See Windle *v.* Andrews, 1819.

[2] 7 A. c. 20 ("The Middlesex Registry Act, 1708"), § 1, amended by "The Land Registry (Middlesex Deeds) Act, 1891" (54 & 55 V. c. 64); R. *v.* Reg. of Deeds for Middlesex, 1856.

[3] 12 C. 2, c. 24, §§ 8, 9, as amended by "The Statute Law Revision Act, 1888" (51 V. c. 3). The guardian himself may be one of the witnesses; Morgan *v.* Hatchell, 1855 (Romilly, M.R.).

[4] 13 & 14 V. c. 28 ("The Trustee Appointment Act, 1850"), extended by 53 & 54 V. c. 19.

[5] See Wickham *v.* M. of Bath, 1865.

[6] 45 & 46 V. c. 43, § 10; 46 V. c. 7, § 10, Ir.

[7] Casson *v.* Churchley, 1884; Swift *v.* Parnell, 1883.

[8] 41 & 42 V. c. 31, § 10.

[9] 45 & 46 V. c. 43, § 10; 46 V. c. 7, § 10, Ir.

[10] 18 & 19 V. c. 39, § 10, which enacts also, that "the counterpart of every such lease shall be executed by the lessee thereof." These words would seem to preclude an agent from executing the counterpart under a power of attorney from the lessee.

[11] 32 & 33 V. c. 62, § 24.

[12] 35 & 36 V. c. 57, § 23.

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 [solicitor] shall subscribe his name as a witness to the due execution thereof, and *thereby declare himself to be* [*solicitor*] *for the person executing the same, and state that he subscribes as such* [*solicitor*.]" And no warrant or cognovit executed in any other manner shall be "rendered valid, by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same."[1]

§ 1112. The attesting witness to a warrant of attorney or cognovit must be an actual solicitor,[2] though it is not necessary for him to have taken out his certificate.[3] But a defendant who introduces a person as a solicitor will be estopped from afterwards denying his character, at least, unless he can clearly show that he acted in ignorance.[4] The solicitor attending on behalf of the defendant must be some person other than the legal adviser, or the agent of the legal adviser, acting for the plaintiff;[5] and though the statute does not require that the plaintiff should employ a solicitor, yet as he seldom, in fact, proceeds in these matters without the assistance of one, it ought to be perfectly clear, in the event of a single solicitor being present, that he was acting exclusively on behalf of the defendant.[6] It is not necessary that the solicitor should be originally or spontaneously named by the defendant, or should come to the place of meeting at his request; but if he remains there at the defendant's request, and is clearly and expressly adopted by him as his solicitor, this will suffice, though he may have been introduced by the plaintiff himself, or by his legal adviser.[7] Still, as an introduction from such a quarter will always be regarded with distrust, and may often, when taken in con-

[1] 32 & 33 V. c. 62, § 25; 35 & 36 V. c. 57, § 24, Ir.

[2] Paul *v.* Cleaver, 1840.

[3] Holgate *v.* Slight, 1851.

[4] Cox *v.* Cannon, D'Es; Jones *v.* Booth, 1797; Wallace *v.* Buckley, 1837; Price *v.* Carter, 1845.

[5] Mason *v.* Riddle, 1839; Bishop *v.* Dolphin, 1840; Pryor *v.* Swaine, 1841; Hurst *v.* Hannah, 1851.

[6] Sanderson *v.* Westley, 1840 (Alderson, B.); Cooper *v.* Grant, 1852; Hurst *v.* Hannah, 1851; Walsh *v.* Nally, 1857 (Ir.).

[7] Walton *v.* Chandler, 1845; Taylor *v.* Nicholls, 1840; Bligh *v.* Brewer, 1834; Oliver *v.* Woodroffe, 1839; Pease *v.* Wells, 1840; Joel *v.* Dicker, 1847; Nolan *v.* Gumley, 1863 (Ir.).

junction with other suspicious circumstances, raise a strong inference of fraud, it is never advisable for a plaintiff or his solicitor to interfere in this manner;[1] and the imprudence of such a course will be more apparent, when it is considered, that in all cases of this kind it must distinctly appear, that the defendant was fully aware of his having an option in the choice of his solicitor, and, moreover, that he had an opportunity of exercising such option, and did in fact exercise it.[2]

§ 1113. The solicitor who attests it is not bound to read the warrant of attorney or cognovit over to his client unless desired to do so; but he attends for the purpose of explaining its nature and effect; and even this explanation may be waived if the client does not require it.[3] The subscription by the witness must be an actual visible subscription; and a retracing of a previous attestation and signature with a dry pen is not sufficient.[4] The law does not prevent the solicitor to whom a warrant is addressed, and who is therefore entitled to enter up judgment upon it, from acting as solicitor for the defendant to attest the execution.[5] Lastly, in the memorandum of attestation the subscribing witness must distinctly state, first, that he is the solicitor of the party executing the instrument, and next, that he subscribes as such.

§ 1114. No precise form of words is indeed necessary. But those used must enable the courts, either directly or by necessary inference, to collect *both* the facts above stated to be necessary.[6] Where, therefore, the attestation does not *distinctly* state that the witness subscribed as the defendant's attorney, the instrument is invalid.[7]

§ 1115. Where, however, the attestation distinctly states the attesting solicitor to be the defendant's solicitor, the instrument will be valid.[8]

[1] Taylor *v.* Nicholls, 1840 (Parke, B.).

[2] Gripper *v.* Bristow, 1840; Barnes *v.* Pendrey, 1839; Walker *v.* Gardner, 1832.

[3] Taylor *v.* Nicholls, 1840 (Parke, B.); Oliver *v.* Woodroffe, 1839 (Parke, B.); Joel *v.* Dicker, 1847.

[4] Bailey *v.* Bellamy, 1841. See ante, § 1052.

[5] Lovinson *v* Syer, 1852.

[6] Hibbert *v.* Barton, 1842 (Parke, B.).

[7] See invalid forms in Poole *v.* Hobbs, 1839 (Coleridge, J.); recognized in Everard *v.* Poppleton, 1843, as reported 5 Q. B. 184. See, also, Potter *v.* Nicholson, 1841; Everard *v.* Poppleton, 1843; Lacey *v.* Murphy, 1873 (Ir.); Hibbert *v.* Barton, 1842. See, also, Porcock *v.* Pickering, 1852; Elkington *v.* Holland, 1842.

[8] See examples of valid forms in

§ 1116. Where the person executing a warrant of attorney, or cognovit, is *himself a solicitor*, he may dispense with the presence of another solicitor on his behalf; for solicitors being expressly selected to impart information to others respecting the nature of these instruments, are presumed to require no advice on such a subject; as they are consequently not within the mischief of the statute, its provisions do not apply to them.[1]

§ 1116A. The Act extends to warrants of attorney executed abroad, and sought to be enforced in this country, since the evil, which is intended to be remedied, affects such instruments, equally with those which are executed at home.[2] The Legislature, apparently by an oversight, has drawn a distinction between warrants of attorney and cognovits; the Act applying equally to all the latter class of instruments, but being confined to such of the former class as relate to personal actions. The result is, that if a defendant in an action to recover land gives a warrant of attorney to confess judgment, no statutory execution is required;[3] but if he gives a cognovit for the same purpose, it will be set aside unless duly attested in conformity with the Act.[4]

§ 1117. The above provisions were made exclusively for the benefit of defendants, and therefore third parties, even though prejudiced by them, cannot object to warrants of attorney, or cognovits, given by their debtors on the ground that no solicitor attested their execution.[5] Even a surety cannot get a judgment entered up on a warrant of attorney, executed by a principal and his sureties, set aside on the ground that the warrant was irregularly executed.[6]

§ 1119. In conclusion, a few of the principal statutes, which either require or permit the *enrolment* or registration of particular instruments, may be properly noticed.[7] Amongst others of these,

Lewis *v.* Lord Kensington, 1846; Phillips *v.* Gibbs, 1846; Gay *v.* Hill, 1849; Nolan *v.* Gumley, 1863 (Ir.); Lindley *v.* Girdler, 1843 (Patteson, J.); Knight *v.* Hasty, 1843; recognized in Everard *v.* Poppleton, 1843, as reported 5 Q. B. 183. See, further, Ledgard *v.* Thompson, 1843.

[1] Chipp *v.* Harris, 1839; Downes *v.* Garbutt, 1843 (Coleridge, J.).

[2] Davis *v.* Trevanion, 1845 (Wightman, J.).

[3] Doe *v.* Kingston, 1841 (Patteson, J.).

[4] Doe *v.* Howell, 1840.

[5] Chipp *v.* Harris, 1839. See Pinches *v.* Harvey, 1841.

[6] Price *v.* Carter, 1845.

[7] As to the general mode of proof of enrolments, see post, §§ 1646 and 1647.

the Mortmain and Charitable Uses Act, 1888,[1] enacts that all conveyances to charitable uses shall be void, unless, among other formalities,[2] they be enrolled in the Central Office of the Supreme Court of Judicature,[3] "within six calendar months next after the making of the assurance of the land."[4] This enactment, however, does not apply to any conveyance or assurance of lands, &c., to or in trust for the overseers of the poor, or the guardians of any parish or union, for the purpose of providing a workhouse or asylum for the accommodation of the poor.[5] Another important Act rendering enrolment necessary is the Clerical Disabilities Act, 1870,[6] which contains some special provisions for enrolling deeds of relinquishment executed by parsons.[7]

§ 1120. An old Act[8] requires every bargain and sale passing an estate of inheritance, or freehold in any lands, tenements, or hereditaments, by deed, to be enrolled within six months next after its date, either in the Enrolment Department of the Central Office,[9] or in the county where the land lies, before the custos rotulorum, and two justices, and the Clerk of the Peace, or any two of them, the Clerk of the Peace being one.[10]

§ 1120A. With the view of preventing frauds upon creditors by the secret transfer of personal property, various Acts also render void[11] every warrant of attorney to confess judgment in any personal action, every cognovit actionem given by any person, every judge's order made by consent, and given by a defendant in a personal action, authorising the plaintiff to sign judgment, or issue execution,[12] and every bill of sale of personal chattels,[13]—which

[1] 51 & 52 V. c. 42, § 4, subs. 1.
[2] See ante, § 1110.
[3] 42 & 43 V. c. 78, § 5; R. S. C. 1883, Ord. LXI. r. 1.
[4] As to proof of such enrolment, see post, § 1650.
[5] 7 & 8 V. c. 101 ("The Poor Law Amendment Act, 1844"), § 73.
[6] 33 & 34 V. c. 91.
[7] As to proof of the executing and enrolment of such a deed, see post, § 1653.
[8] 27 H. 8, c. 16; extended to counties palatine by 5 E. c. 26.
[9] As to proof of such enrolment, see post, § 1649.
[10] 42 & 43 V. c. 78, § 5; R. S. C. 1883, Ord. LXI. r. 1.
[11] See Acraman v. Herniman, 1851; Farrow v. Mayos, 1852; Bryan v. Child, 1850.
[12] 32 & 33 V. c. 62, §§ 26, 27; 3 G. 4. c. 39, §§ 1—3; 6 & 7 V. c. 66. For the corresponding Irish enactments, see 3 & 4 V. c. 105 ("The Debtors (Ireland) Act, 1840"), § 12, Ir.; 20 & 21 V. c. 60, §§ 334, 335, Ir.
[13] 45 & 46 V. c. 43, § 8. For a somewhat corresponding Irish enactment, see 42 & 43 V. c. 50, § 8, Ir.; and 46 V. c. 7, § 8, Ir.

phrase, it may be noted in passing, will now include fixtures and growing crops when separately assigned or charged,[1]—unless within twenty-one days after the security or the consent has been given, in the case of a warrant, cognovit, or judge's order, or within seven days after execution in the case of a bill of sale,[2] the instrument, or a true copy thereof, be filed, together with an affidavit[3] of the time when it was executed or given, in the Bills of Sale Department of the Central Office.[4]

§ 1121. All deeds and instruments, whereby any estates or hereditaments shall be purchased, sold, leased, charged, or exchanged under the authority of any Act relating to the possessions and land revenues of the Crown, must be enrolled, within six months after their several dates, in the office of Land Revenue Records and Enrolments.[5] Similar enactments are contained in the statutes which respectively relate to the possessions of the Duchy of Cornwall,[6] and to the possessions of Her Majesty in respect of the Duchy of Lancaster;[7] but the instruments requiring enrolment under these Acts must be enrolled in the offices of the respective duchies.[8]

§ 1122. The Fines and Recoveries Act,[9] 1833, enacts,[10] that no assurance, by which any disposition of lands shall be effected under that Act by a tenant in tail, except a lease not exceeding twenty-one years at a rent not less than five-sixths of a rack-rent, shall have any operation by virtue of the Act, unless it be enrolled in what is now called the Enrolment Department of the Central Office[11] within six calendar months after its execution; while § 46

[1] 41 & 42 V. c. 31, §§ 4, 5; 42 & 43 V. c. 50, § 4, Ir.; 46 V. c. 7, § 6, Ir. As to the old law so far as it related to growing crops, see Branton *v.* Griffits, 1877, C. A.

[2] The registration of every bill of sale must now be renewed every five years, under the authority of 41 & 42 V. c. 31, § 11; 42 & 43 V. c. 50, § 11, Ir.

[3] As to what the affidavit must contain, see Jones *v.* Harris, 1871; Murray *v.* Mackenzie, 1875; Blount *v.* Harris, 1879, C. A.; Castle *v.* Downton, 1879, and cases there cited.

[4] 42 & 43 V. c. 78, § 5; R. S. C. 1883, Ord. LXI. r. 1. As to proof of the various matters mentioned in this section, see post, § 1654.

[5] 10 G. 4, c. 50, § 63 ("The Crown Lands Act, 1829"); 2 W. 4, c. 1, ("The Crown Lands Act, 1832"), § 21; 14 & 15 V. c. 42 ("The Crown Lands Act, 1851"), § 6.

[6] 26 & 27 V. c. 49, §§ 30—33; 7 & 8 V. c. 65, §§ 30—36; 11 & 12 V. c. 83, § 6.

[7] 11 & 12 V. c. 83, § 14.

[8] As to proof of such enrolments, see post, § 1648.

[9] 3 & 4 W. 4, c. 74.

[10] § 41.

[11] See 42 & 43 V. c. 78, § 5; R. S. C. 1883, Ord. LXI. r. 1.

provides, that the consent of a protector to the disposition of a tenant in tail shall, if given by a distinct deed, be void, unless the deed be enrolled either at or before the time when the assurance by the tenant in tail shall be enrolled.[1]

§ 1125. A clause in the Judgments Act[2] of 1855 enacts, in substance, that no annuity or rent-charge, otherwise than by marriage settlement,[3] for life or lives, or for any term or estate determinable on life or lives, shall affect any hereditaments as to purchasers, mortgagees, or creditors, unless a memorandum containing the name, residence, and description of the person whose estate is intended to be affected, and the date of the instrument, and the annual sum payable, be left for registration in the Enrolment Department of the Central Office.[4] Notwithstanding the language of this enactment, the Court of Appeal has held that an unregistered annuity-deed may still be enforced as against a subsequent incumbrancer or purchaser who may have taken with notice of its existence.[5]

§ 1126. The written contract between the articled clerk and the solicitor to whom he is bound, must be enrolled with the clerk of the Petty Bag, within six months after its date, together with an affidavit to be made by the solicitor, verifying the fact of the deponent having been duly admitted, and the further fact of the articles having been duly executed.[6]

§ 1127. Two principal statutes which *permit*[7] enrolments to be made, are first, the Yorkshire Registries Act;[8] secondly, the

[1] See also §§ 49, 51, 52, and 59 of 3 & 4 W. 4, c. 74, for further provisions respecting enrolment. As to proof of such enrolment, see post, § 1650A.

[2] 18 & 19 V. c. 15, § 12.

[3] Annuities and rent-charges given by will are also excluded from the provision. See § 14 of the Act.

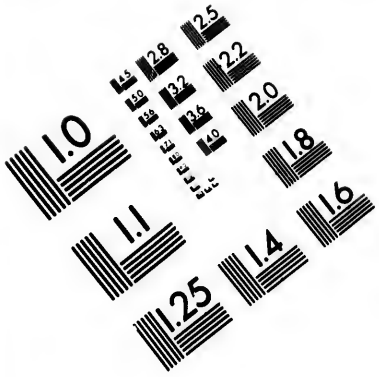
[4] The words of the Act are, "with the senior Master of the Court of Common Pleas." As to how enrolment of annuity deeds is proved, see post, § 1651.

[5] Greaves *v.* Tofield, 1880, C. A.; diss. dossd. M.R., dubitante Bramwell, L.J.

[6] 6 & 7 V. c. 73 ("The Solicitors Act, 1843"), §§ 8, 20; 29 & 30 V. c. 84, § 12. Ir., and rule "as to custody of rolls and documents." As to proof of such enrolment, see post, § 1653A.

[7] See Agra Bk. *v.* Barry, 1874, H. L.; and In re Lambert's Estate, 1884 (Ir.), C. A., as to the prejudicial results which may occur by omitting to register an instrument capable of registration in a registry county.

[8] 47 & 48 V. c. 54; see especially § 54; and see also notes, post, to §§ 1645, 1648, 1651, and 1840. As to proof of the enrolment, see § 1652A. Under the former Acts, for which this Act is now substituted, there were [illegible] duly between



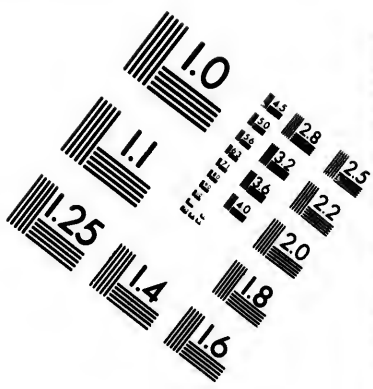
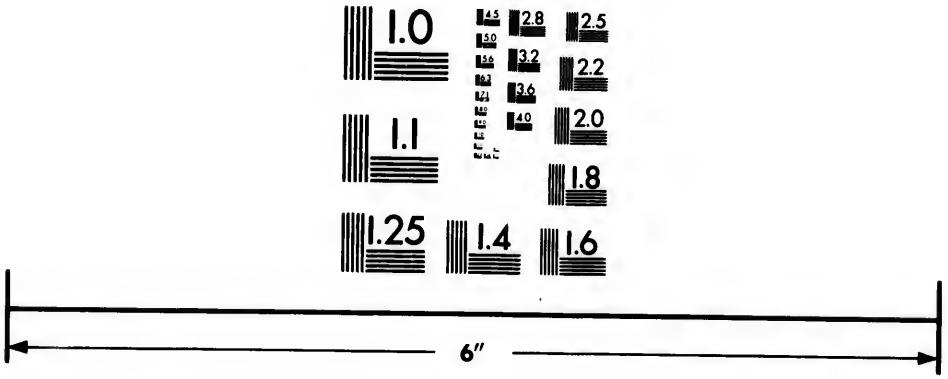
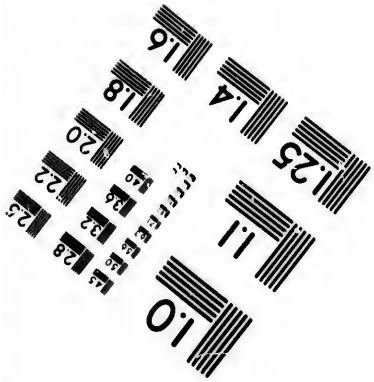
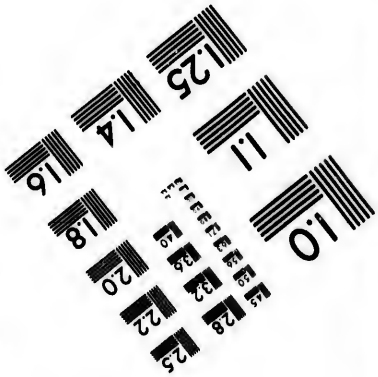


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Act[1] applicable to the registration of lands in Middlesex; thirdly, the Act which governs the registration of deeds, &c., in Ireland;[2] fourthly, the Charitable Trusts Act, 1855, allowing enrolments of any deed, will, or document relating to any charity, in the office of the Charity Commissioners, and subsequent proof thereof by copies certified under the hand of the secretary or one of the Commissioners;[3] and fifthly, the Act[4] remedying defective titles to certain inclosures,—after reciting that by divers Acts of Inclosure the awards of the Commissioners were required to be enrolled, but that such enrolments have in many instances been omitted,—enacts, that the awards not enrolled shall still be valid, but that the parties interested may enrol them if they think proper.[5]

a registered and unregistered mortgage, even though they were not under seal, and therefore only equitable charges, a registered charge had the priority over an unregistered one: In re Wight's Mortgage Trust, 1873; a further charge in favour of even a first mortgagee of land in the registry county requires registration. And see, also, Chadwick *v.* Turner, 1866, and Credland *v.* Potter, 1874.

[1] Viz., 7 A. c. 20 ("The Middlesex Registry Act, 1708"), amended by "The Land Registry (Middlesex Deeds) Act, 1891" (54 & 55 V. c. 10), by which the duties of the Middlesex Registry have been transferred to the Land Registry. An instrument charging lands in Middlesex, though it be not a deed, ought to be registered: Neve *v.* Pennell, 1863 (Wood, V.-C.); Moore *v.* Culverhouse, 1860. See last note; and as to proof of enrolment, post, § 1652B.

[2] 6 A. c. 2, Ir., on the construction of which see Carlisle *v.* Whaley, 1867, H. L.; and see as to Irish judgments as to mortgages, post, § 1652.

[3] 18 & 19 V. c. 124, § 42. As to proof of the enrolment, see post, § 1650.

[4] 3 & 4 W. 4, c. 87, §§ 1 and 2.

[5] As to proof of the enrolment, see post, §§ 1646 and 1647.

AMERICAN NOTES.

Statutory Writings. — The statute requirements of the different states of the American Union as to the necessity of written evidence in certain cases, though presenting a certain similarity do not apparently admit of useful classification within the compass of an annotation. It is essential, however, that these statutory rules be not confused with the "Parol Evidence Rule" to be considered in the following chapter. It is quite frequently said that "parol evidence is not admissible" to prove certain facts, as if under the application of the "Parol evidence Rule" when, in point of fact, it is the Statute of Frauds or the Statute of Wills which causes the exclusion.

CHAPTER IV.

ADMISSIBILITY OF PAROL EVIDENCE TO AFFECT WRITTEN INSTRUMENTS.

§ 1128. THE *admissibility of extrinsic parol testimony to affect written instruments* is, perhaps, the most difficult branch of the law of evidence. In discussing the law as to this, one or two established principles, which govern the interpretation of all writings, may be mentioned. First, parol evidence is admissible to show under what surrounding *circumstances* an instrument was executed;[1] next, in order to put a just construction upon any document, the court must *read the whole* of it, and determine the meaning of the words employed in any passage, not only by a careful examination of the immediate context, but also by considering the sense in which the same words have been used in other parts of the instrument.[2] The language of a particular passage may clearly bear a wider or narrower signification, when read in connexion with other parts of the instrument where the same language is employed, than it would have borne had no such reflected light been thrown upon it. As Lord Cairns forcibly put it, the writer of the instrument has often himself "made us a dictionary" by which to read it.[3] For instance, suppose a question respecting the meaning of the word "close," as used in a will. If this expression only occurs once, evidence is admissible to show that, in the county where the property is situate, it denotes a farm: if, however, the word be found in other parts of the will, in any one of which this enlarged meaning cannot be applied to it, such evidence will be rejected, as the court can see that the testator used the word in its ordinary

[1] Grahame *v.* Grahame, 1887 (Ir.), post, § 1194.

[2] Blundell *v.* Gladstone, 1841; Bateman *v.* Ld. Roden, 1844 (Ir.) (Sugden, C.).

[3] Hill *v.* Crook, 1873, H. L.; adopted by Jeune, Pres.; In the goods of Ashton, 1892. And see Grant *v.* Grant, 1869; § 1195.

sense, as denoting an enclosure.[1] Similar principles have been applied to interpret the words "nephews and nieces;"[2] "relatives" or "cousins."[3] Similarly, the context may show the word "month," which usually in law denotes a lunar month, to mean a calendar month.[4] In like manner, when ambiguous words are used in the operative part of a deed, the recitals and other parts of the instrument furnish an excellent test for discovering the real intention and fixing their true meaning.[5]

§ 1129. Again, on a question whether a legacy, given by a codicil to a legatee under the will, is cumulative or substitutionary, the court may look, not only to other parts of the same codicil, but to bequests in other later testamentary instruments. If, for instance, it should appear that, in these later codicils, the testator had used the words "in addition," when making bequests to other parties which were intended to be cumulative, the absence of these words, or of equivalent expressions, in the legacy in question, would be a circumstance far short, indeed, of conclusive, but tending to show, in connexion with other facts and arguments, that the later legacy was intended not to be additional but in substitution. The court, in such case, would carry back and apply to the first codicil the knowledge acquired by examining the language of the later bequests.[6]

§ 1130.[7] If an instrument consist partly of a printed formula, and partly of written words, and any reasonable doubt is felt[8] as to the meaning of the whole, *written words* have *greater effect* in the interpretation than those which are printed.[9] The written words are the immediate language selected by the parties themselves for the expression of their meaning; but the *printed formula* is simply general, applying not only to the particular case, but to that of all other similar contracts.[10]

[1] Richardson *v.* Watson, 1833 (Parke, J.).
[2] Grant *v.* Grant, 1869, supra.
[3] Seale-Hayne *v.* Jodrell, 1891, H. L.; Re Blower's Trusts, 1871; In the goods of Ashton, 1892.
[4] Lang *v.* Gale, 1813; R. *v.* Chawton, 1841. See ante, § 16.
[5] Walsh *v.* Trevanion, 1850; Pallikolagatha Marcar *v.* Sigg, 1880, P. C.
[6] Lee *v.* Pain, 1844 (Wigram, V.-C.); Russell *v.* Dickson, 1842 (Sugden, C.); Darley *v.* Martin, 1853.
[7] Gr. Ev. § 278, almost verbatim.
[8] But not otherwise. See The Nifa, 1892; Scrutton *v.* Childs, 1877.
[9] This rule is embodied in the N. York Civ. Code, § 1695.
[10] Robertson *v.* French, 1803 (Ld.

§ 1131. Next, the terms of every document must, in the absence of all parol testimony, be construed in their *primary* sense, unless the context evidently points out that they need, in the particular instance, in order to effectuate the immediate intention of the parties, to be understood in some other and peculiar sense.[1] The question, what is the primary sense of a word? is often more easily asked than answered.[2] Generally, if the language be technical or scientific, and be used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary meaning;[3] but expressions having reference to the common transactions of life will be interpreted according to their plain, ordinary, and popular meaning.[4] Evidence that expressions

Ellenborough); Gumm *v.* Tyrie, 1864 (Crompton and Blackburn, JJ.). See Jessel *v.* Bath, 1867. In America it has, with apparent inconsistency, been held that if a letter refer to a verbal contract, the terms of such verbal contract may be shown, even though they are inconsistent with the letter (Holt *v.* Pic, 1888 (Am.)); but that if a contract refer to a plan which is inconsistent with it, the contract itself will prevail: Smith *v.* Flanders, 1880 (Am.).

[1] Robertson *v.* French, 1803 (Ld. Ellenborough); Mallan *v.* May, 1844 (Pollock, C.B.); Carr *v.* Montefiore, 1864; Ford *v.* Ford, 1848 (Wigram, V.-C.); Hicks *v.* Sallitt, 1854 (Wood, V.-C.); Boorman *v.* Johnston, 1834 (Am.). See, also, Rhodes *v.* Rhodes, 1882, P. C.; Gray *v.* Pearson, 1851, H. L. (Ld. Wensleydale); Abbott *v.* Middleton, 1858, H. L. (id.); Slingsby *v.* Grainger, 1859, H. L. (id.); Wing *v.* Angrave, 1860, H. L. (id.); Gordon *v.* Gordon, 1871, H. L.; Ex parte Walton, re Levy, 1881 (Jessel, M.R.). See Bathurst *v.* Errington, 1877, H. L.; Holt *v.* Collyer, 1881. Accordingly, evidence that the parties only meant that it had not lapsed by non-payment of certain patent fees is not admissible to qualify a covenant that a patent "is in full force and effect": Chemical Electric Light, &c. Co. *v.* Howard, 1890 (Am.). And where a contract is for "half" of certain property, it cannot be shown by parol evidence that the parties really meant less than half: Butler *v.* Gale, 1855 (Am.). If it be doubtful whether a word is used in its ordinary sense or not, it is for a jury to say how this is: Simpson *v.* Margetson, 1847.

[2] See Doe *v.* Perratt, 1843, where the judges differed whether the word "heir" in a will was to be construed in its technical or popular sense. See, also, Wells *v.* Wells, 1874, where Jessel, M.R., held, in opposition to some authorities, that "nephew" meant blood nephew, and did not include the son of a husband's sister. See, also, Merrill *v.* Morton, 1881 (Malins, V.-C.), and cases cited supra, § 1128.

[3] Shore *v.* Wilson, 1842, H. L. (Coleridge, J.); Doe *v.* Perratt, 1843 (Parke, B.).

[4] Robertson *v.* French, 1803 (Ld. Ellenborough); Shore *v.* Wilson, 1842, H. L. (Tindal, C.J.). The rules for the interpretation of wills laid down in Wigram may be safely applied, mutato nomine, to all other private instruments, and are, as the result both of principle and authority, expressed in the following seven propositions: "1. A testator is always presumed to use the words, in which he expresses himself, according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense, in which he thus appears to have used them, will be the sense

were used in a technical sense ought not to be admitted without a distinct averment as to the particular words to which such evidence is proposed to be directed, and as to the precise technical or trade meaning which it is sought to attribute to them.[1]

§ 1132. Bearing the above principles in mind, the leading general rule respecting the admissibility of extrinsic evidence to

in which they are to be construed. II. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, but his words so interpreted are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable. IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the court of the proper meaning of the words. V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property, which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same, it is conceived, is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words. VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases—see Proposition VII.) will be void for uncertainty. VII. Notwithstanding the rule of law which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning — courts of law, in certain special cases, admit extrinsic evidence of *intention*, to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (i. e. *person* or *thing* intended) is described in terms, which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator": Wigr. Wills, 10—13.

[1] Sutton *v.* Ciceri, 1890, H. L. (Ld Watson).

affect what is in writing is, that *parol testimony cannot be received to contradict, vary, add to, or subtract from, the terms of a valid written instrument.*[1] This common law rule may be traced back to a remote antiquity. It is founded on the inconvenience that might result, if matters in writing, made by advice, and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Ld. Coke calls "the uncertain testimony of slippery memory."[2] When parties have deliberately put their mutual engagements into writing, in language which imports a legal obligation, or, in other words, a complete contract,[3] it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance. Consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before, or after, or at the time of, the completion of the contract, will be rejected; because such evidence, while deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus, without any corresponding benefit, work infinite mischief and wrong.[4]

§ 1133. Apart from all considerations of convenience, positive enactment has imposed the same rule[5] in several cases. It has, by requiring certain transactions to be evidenced by writing,—as, for instance, wills, contracts within the Statute of Frauds, and the like,[6]—rigidly excluded all parol testimony tending to vary the terms contained in the written instrument.[7] The statutory rule will perhaps be more strictly enforced than that which rests on the common law alone, because, in the former case, to relax the rule in

[1] Goss *v.* Ld. Nugent, 1833; Wigr. Wills, 5; 2 Ph. Ev. 339. So, by the Scotch law, "a writing cannot be cut down or taken away by the testimony of witnesses": Tait Ev. (Sc.) 326, 327; 1 Dickson, Ev. 92, et seq., 118; Inglis *v.* Buttery, 1878, H. L. (Sc.). See American authorities collected in note to § 275 of 15th edit. (1892) of Greenleaf on Evidence, at pp. 372-3. The rule applies to all records of judgments or official proceedings. See Id.

[2] Lady Rutland's case, 1604-5.

[3] See Johnson *v.* Appleby, 1874.

[4] Preston *v.* Merceau, 1775; Rich *v.* Jackson, 1794 (Ld. Thurlow); Adams *v.* Wordley, 1836; Parteriche *v.* Powlet, 1742 (Ld. Hardwicke); Bogert *v.* Cannan, 1807-51 (Am.); Bayard *v.* Malcolm, 1806 (Am.) (Kent, C.J.).

[5] That set out in § 1132.

[6] See ante, § 986 et seq.

[7] Wigr. Wills, 4, 6—8, 125, 126.

any degree, is to the like extent to repeal the particular Act which renders the writing necessary.[1] The term, "written instrument," for this purpose, includes not only records, deeds, wills, and other instruments required by statute or common law to be in writing, but every document which contains the terms of a *contract* between different parties, and is designed to be the repository and evidence of their final intentions.[2]

§ 1134. To less formal documents than those above-named, the rule[3] does not extend. Therefore, except in some few special cases,[4] a receipt, so far as it is a mere *admission*,[5] is not conclusive evidence of the payment therein acknowledged, but the party signing it may invalidate it by oral evidence of fraud, or of mistake or surprise on his part; for the document amounts only to primâ facie proof, and is capable of being explained;[6] an order for goods, insufficient to satisfy the Statute of Frauds, or a loose memorandum, not intended to contain the terms of the contract, will not exclude parol evidence on the subject—so that where a defendant, having ordered goods by an unsigned letter, not mentioning any time for payment, and therefore not in itself sufficient to satisfy the Statute of Frauds, afterwards accepted the goods which the plaintiff forwarded to him with the invoice, in an action for their price, parol evidence was admitted to show that the goods were really supplied on a credit, which had not expired at the commencement of the suit;[7] in an action for breach of warranty, where plaintiff had bought and paid for a horse on a verbal warranty by the defendant, and the defendant, shortly after the purchase was com-

[1] Wigr. Wills, 4, 6—8, 125, 126; Miller *v.* Travers (1832); Doe *v.* Hiscocks, 1839; Clayton *v.* Ld. Nugent, 1844 (Alderson and Rolfe, BB.).

[2] Woolam *v.* Hearn, 1802 (Sir W. Grant); Shore *v.* Wilson, 1842 (Williams, J.); Stackpole *v.* Arnold, 1814 (Parker, J.); Hunt *v.* Adams, 1809 (Am.) (Sewell, J.).

[3] Set out, supra, § 1132.

[4] See ante, §§ 96, 845.

[5] But perhaps so far as (e.g., in a bill of lading) it is evidence of a *contract*, it cannot be contradicted. See Stratton *v.* Rastall, 1788; Almer *v.* George, 1808: and American authorities collected in Greenleaf on Ev. (15th edit.), § 305, p. 420.

[6] Farrar *v.* Hutchinson, 1839 (Am.); Skaife *v.* Jackson, 1824; Lee *v.* Lanc. and Yorks. Rail. Co., 1871, C. A.; Wallace *v.* Kelsall, 1840; Fuller *v.* Crittenden, 1832 (Am.); à fortiori other modes of payment may be shown, although the bill-head of the account rendered says: "All bills to be paid to —— and receipted by him": Kershaw *v.* Kershaw, 1875 (Am.).

[7] Lockett *v.* Nicklin, 1848. See § 1151, post

pleted, gave him a paper in the following form:—"Bought of A. B., a horse for 7*l.*—A. B.,"—the plaintiff was allowed to prove the warranty by parol evidence, the paper appearing to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, not to contain the terms of the contract itself;[1] where the hirer of a horse had, at the time of hiring, handed the owner a card, on which was written in pencil, "six weeks at two guineas, W. H.," the owner was permitted to prove by parol evidence, not indeed a different time of hiring or a larger rate of payment than those stated in the memorandum, but an additional term, namely, that all accidents occasioned by the shying of the horse should be at the hirer's risk;[2] and on a sale of a chattel under the value of 10*l.*, an auctioneer is not bound by the description of the article contained in an unsigned printed catalogue, but he may show that when the article was put up to auction he publicly stated in the purchaser's hearing that the description was incorrect.[3]

§ 1135. The rule[4] does not moreover prevent parties to a written contract from proving that, either contemporaneously or as a preliminary measure, they entered into a distinct oral agreement on some *collateral* matter.[5] Still less, indeed, does the rule, as will

[1] Allen *v.* Pink, 1838.

[2] Jeffery *v.* Walton, 1816. For other instances, see ante, § 406.

[3] Eden *v.* Blake, 1845. [illegible] examinations of prisoners, [illegible] §§ 893, 894.

[4] Set out in § 1132.

[5] Lindley *v.* Lacey, 1864; Morgan *v.* Griffith, 1871. See post, § 1147; also Brady *v.* Oastler, 1864; Malpas *v.* Lond. & S. W. Rail. Co., 1866. An oral stipulation that an instrument is not to become binding unless and until some stipulation be first fulfilled may always be shown. See Lindley *v.* Lacey, 1864; Wallis *v.* Littell, 1861; Morgan *v.* Griffith, 1871. Where an instrument is not formal it may often be shown that some additional and supplementary agreement was made contemporaneously with the principal one. See supra, § 1134; and Greenleaf on Ev. 15th edit. (1892), § 304 and notes. Thus, in America, even a promissory note has been held not to be such a formal instrument as to prevent its being shown that at the time of its execution there was an agreement to pay "extra interest" beyond that named in it: Rohan *v.* Hanson, 1853 (Am.) When an instrument is a formal one it is often extremely difficult to say what is really "collateral" to it. Obviously, unless *some* restriction be imposed, the rule that parol evidence is not admissible to vary, &c. a written contract may be rendered altogether nugatory. It has been suggested in America that a matter ought not to be considered "collateral" to a formal instrument except where it is evident *from the writing itself* that such writing contains *part only*, and not the whole, of the agreement. See Greenleaf on Ev. 15th edit. (1892), § 284, and note thereto, at p. 384; see, also, ibid. § 89. It is further submitted that, at any rate, evidence of a collateral

presently be shown,[1] exclude evidence of an oral agreement, which constitutes a condition which shows its real nature,[2] or the existence of a condition upon which its performance is to depend.[3] Again, the rule is not infringed by the admission (under proper pleading) of parol evidence, showing that the instrument is altogether *void*, or *never* had any *legal* existence or binding force, either by reason of forgery or fraud, or of the illegality of the subject-matter, or for want of due execution and delivery.[4] For instance, it may be shown by parol evidence that an instrument, apparently executed as a deed, had really been delivered simply as an escrow,[5] or that a document was really meant to be conditional on the happening of an event which had never occurred.[6] *Fraud* by the party relying upon the agreement, practised upon the other party in that which is the subject-matter of the claim, is, moreover, universally fatal to the claim. "The covin," says Ld. Coke, "doth suffocate the right."

§ 1136. This is so, whether the foundation of the claim be a record,[7] a deed, or a writing without seal; for in either case the instrument will be void—or, more correctly, *voidable* at the option of the injured party,[8]—if obtained by fraud, and the fraud may be established by parol evidence.[9] Thus, if a person has been induced by verbal fraudulent statements to enter into a written contract for a purchase, he may, in an action for a deceitful representation,

supplementary contract to a formal contract ought not to be admitted save where it is alleged to have been made at such a time that it could not possibly have been incorporated in the written contract. In any case, an order which is plainly a separate and distinct one from the subject-matter of the original contract is "collateral." See Reid *v.* Battie, 1829; and cases cited, post, § 1147.

[1] Infra, in this §, and note thereto.

[2] E.g., that a bill or mortgage was only to stand as security for certain moneys, or otherwise to show the real nature of a transaction; see Trench *v.* Doran, 1887 (Ir.).

[3] Lindley *v.* Lacey, 1864 (Byles, J.).

[4] Gun *v.* McCarthy, 1884 (Ir.); Collins *v.* Blantern, 1766-7; and cases cited in the notes to S.C. in 1 Smith, L. C.; Paxton *v.* Popham, 1808 (Ld. Ellenborough).

[5] Murray *v.* Ld. Stair, 1823.

[6] Pym *v.* Campbell, 1856; Davis *v.* Jones, 1856. See, also, Wallis *v.* Littell, 1861; Rogers *v.* Hadley, 1863; Gudgen *v.* Besset, 1856. The same doctrine applies to wills, though it must be used with very great caution: Lister *v.* Smith, 1863.

[7] See post, § 1713.

[8] Urquhart *v.* Macpherson, 1878, P. C.; Clarke *v.* Dickson, 1858.

[9] Tait, Ev. 327, 328; Buckler *v.* Millerd, 1689; Filmer *v.* Gott, 1774; Robinson *v.* Ld. Vernon, 1859; Rogers *v.* Hadley, 1863; Taylor *v.* Weld, 1809 (Am.) (Sedgwick, J.); Franchot *v.* Leach, 1826 (Am.); Dorr *v.* Munsell, 1816 (Am.); Morton *v.* Chandler, 1831 (Am.); Com. *v.* Bullard, 1812 (Am.).

prove the fraud by evidence aliundè, though the written contract or the deed of conveyance is silent on the subject to which the fraudulent representations refer.[1] Again, the fraudulent representation of a vendor respecting the article sold, may be given in evidence, if the purchaser has thereby been prevented from discovering a fault which the vendor knew to exist.[2] Moreover, the declarations of a testator are admissible to show his intentions, if the will be impeached on the ground of fraud, circumvention, or forgery;[3] and similar evidence will be received with the view of rebutting the presumption, that an alteration, or interlineation, apparent on the face of the will, was made after its execution.[4] For this last purpose, however, the declarations of the testator must have been made before the writing was executed, though it matters not whether the instrument be, or be not, a holograph will.[5]

§ 1137.[6] Parol evidence may also (under a proper pleading) be given to show that the contract in writing not disclosing these was really made for objects forbidden, either by statute, or by common law;[7] that such writing was obtained by improper means, such as duress;[8] that the party was incapable of contracting by reason of some legal impediment, such as infancy, coverture,[9] idiotcy, insanity, or intoxication;[10] or that the instrument came into the hands of

[1] Dobell *v.* Stephens, 1825; Wright *v.* Crookes, 1840; Hotson *v.* Browne, 1860.

[2] Kain *v.* Old, 1824 (Abbott, C.J.).

[3] Doe *v.* Hardy, 1836; Doe *v.* Allen, 1799.

[4] Doe *v.* Palmer, 1851; In re Duffy, 1871 (Ir.); Dench *v.* Dench, 1877.

[5] Id. See In re Hardy, 1861; Staines *v.* Stewart, 1862; In re Ripley, 1858; Johnson *v.* Lyford, 1868.

[6] Gr. Ev. § 284, in part.

[7] Collins *v.* Blantern, 1766-7; Benyon *v.* Nettlefold, 1850. See, also, Biggs *v.* Lawrence, 1789; Waymell *v.* Reed, 1794; Doe *v.* Ford, 1835; Sinclair *v.* Stevenson, 1824; Norman *v.* Cole, 1800.

[8] 2 Inst. 482, 483; B. N. P. 172; 5 Com. Dig., Plead. 2, W. 18—23. It is difficult to say how far it is competent to show that a written contract, apparently complete, never really became a binding one, because it was not intended by the parties to be so until a condition precedent, which is only shown by oral evidence, had been fulfilled, which has in fact never been completed, or that the signature to it was induced by a contemporaneous oral promise to this effect. In America, the result of the decisions appears to be that such evidence is admissible in cases where the witnesses are credible, distinctly remember the facts, and narrate the details exactly. See Greenleaf on Ev. 15th edit. (1892), § 284, and notes thereto, pp. 381-2. See also ante, note to § 1135.

[9] 2 Inst. 482, 483; B. N. P. 172; 5 Com. Dig., Plead. 2, W. 18—23.

[10] B. N. P. 172; Barrett *v.* Buxton, 1826 (Am.) (Prentiss, J.).

the plaintiff without any absolute and final delivery by the obligor or party charged.[1]

§ 1138. Parol evidence may also be given to show a want or failure of consideration, in the absence of which even an agreement, which is merely in writing, is not binding.[2] When, however, an instrument is under seal the seal is, in the absence of fraud, conclusive evidence of a sufficient consideration,[3] and is strong presumptive evidence that the consideration stated is the true consideration.[4] If no consideration, or a mere nominal consideration, be stated in a deed, the party will be allowed to prove a real substantial consideration by extrinsic evidence;[5] and if such deed is expressed to be made "for divers good considerations," it may be averred and proved by parol that the bargainee gave money for his bargain.[6] The onus, however, of proving the consideration will, in such a case, lie on the party claiming under the deed; for the mere statement in the instrument that it was made for valuable consideration will not suffice to raise a presumption that any substantial consideration was, in fact, given.[7] When, moreover, an instrument *under seal* specifies any particular consideration, such as love and affection, omitting all mention of any other, in general no extrinsic proof of another can be given, because it would contradict the deed.[8] This rule, however, never applies at all to instruments merely written.[9] And it does not even apply to instruments under seal where the object is to establish or negative the existence of fraud.[10]

§ 1139. Parol evidence will sometimes be admitted upon equitable grounds, to contradict or vary a writing, which, by some *mistake in fact*,[11] speaks a different language from what the parties

[1] B. N. P. 172; Clark *v.* Gifford, 1833 (Am.); U. S. *v.* Leffler, 1837 (Am.).

[2] Foster *v.* Jolly, 1835; Solly *v.* Hinde, 1834; Abbott *v.* Hendricks, 1840; ante, § 1023.

[3] Ante, § 86.

[4] Barton *v.* Bank of New South Wales, 1891, P. C.

[5] Leifchild's case, 1865 (Kindersley, V.-C.); Peacock *v.* Monk, 1748.

[6] 2 Ph. Ev. 347; Tull *v.* Parlett, 1829 (Tindal, C.J.).

[7] Kelson *v.* Kelson, 1853 (Wood, V.-C.).

[8] Peacock *v.* Monk, 1748 (Ld. Hardwicke); cited by Alderson, B., in Gale *v.* Williamson, 1841. But see Clifford *v.* Turrell, 1841.

[9] In re Barnstaple Second Annuity Society, 1884.

[10] Filmer *v.* Gott, 1774; cited by Ld. Kenyon in R. *v.* Scammonden, 1789; Gale *v.* Williamson, 1841; Pott *v.* Todhunter, 1845. See 13 E. c. 5.

[11] See Hunt *v.* Rousmanier, 1823 (Am.); Price *v.* Ley, 1863.

intended, and it would consequently be unjust to enforce it according to its expressed terms. In all such cases, however, the party seeking relief undertakes a task of great difficulty, since the court must be clearly convinced by the most satisfactory evidence, first, that the mistake complained of really exists, and next, that it is such a mistake as ought to be corrected.[1] A *plaintiff* may seek this relief either by commencing an action to *reform* the writing, in which it will be necessary (except under very special circumstances[2]) to satisfy the court that the mistake was made on *both* sides[3]—or one to *rescind* the instrument,—in which conclusive proof of error or surprise on the plaintiff's part alone will suffice,[4] but it must appear that the mistake was one of vital importance.[5] Whichever form of relief be sought, if the defendant deny the case set up by the plaintiff, and the latter simply relies on verbal testimony, and has no documentary evidence,—such, for instance, as a rough draft of the agreement, the written instructions for preparing it, or the like,—the plaintiff's position will be well-nigh desperate; though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the court in granting the relief prayed.[6]

§ 1140. A *defendant*, against whom a specific performance of a written agreement is sought, may also insist upon the existence of a mistake in the writing, and establish this by parol, relying on any matter showing it to be inequitable to enforce the contract.[7]

[1] M. of Townsend *v.* Strangroom, 1801; Mortimer *v.* Shortall, 1842 (Sugden, C.); Bold *v.* Hutchinson, 1855; Wright *v.* Goff, 1856; Ashhurst *v.* Mill, 1848; Gillespie *v.* Moon, 1817 (Am.); M'Cormack *v.* M'Cormack, 1876 (Ir.); Welman *v.* Welman, 1880 (Malins, V.-C.).

[2] Lovesy *v.* Smith, 1880 (Denman, J.).

[3] Mortimer *v.* Shortall, 1842 (Ir.) (Sugden, C.); Murray *v.* Parker, 1854; Rooke *v.* Ld. Kensington, 1856; Bentley *v.* Mackay, 1862; Sells *v.* Sells, 1860; Fowler *v.* Fowler, 1859; Elwes *v.* Elwes, 1861; Bradford *v.* Romney, 1862; Gray *v.* Boswell, 1862 (Ir.); Fallon *v.* Robins, 1865 (Ir.). See Bloomer *v.* Spittle, 1872 (Ld. Romilly, M.R.).

[4] Mortimer *v.* Shortall, 1842 (Ir.) (Sugden, C.); Murray *v.* Parker, 1854; Rooke *v.* Ld. Kensington, 1856; Bentley *v.* Mackay, 1862; Sells *v.* Sells, 1860; Fowler *v.* Fowler, 1859; Elwes *v.* Elwes, 1861; Bradford *v.* Romney, 1862; Gray *v.* Boswell, 1862 (Ir.); Fallon *v.* Robins, 1865. See Harris *v.* Pepperell, 1867.

[5] 1 Story, Eq. Jur. § 144, n.

[6] Mortimer *v.* Shortall, 1842 (Ir.) (Sugden, C.); Alexander *v.* Crosbie, 1835; M. of Townsend *v.* Strangroom, 1801; Gillespie *v.* Moon, 1817 (Am.) (Kent, C.); Lovesy *v.* Smith, 1880 (Denman, J.).

[7] 1 Story, Eq. Jur. § 161; 2 id. § 770; M. of Townsend *v.* Strangroom, 1801; Davies *v.* Fitton, 1842 (Ir.) (Sugden, C.); Wood *v.* Scarth,

But here the following artificial distinction is recognised in British courts: parol evidence may be received *against* a plaintiff seeking a specific performance, but it will be inadmissible in his *favour*. In other words, the courts will not receive parol evidence on the part of a plaintiff to rectify a written agreement, of which he seeks a specific execution.[1] In America, Chancellor Kent has rejected this distinction;[2] and Story, J., takes the same view, observing that there is no mutuality or equality in the operation of such a doctrine.[3]

§ 1141.[4] Moreover, the rule against varying or contradicting a written document by parol evidence[5] does not exclude verbal evidence adduced to prove that the written agreement has been *totally* waived or discharged. An agreement by *deed* can, indeed, only be entirely, or even partially, dissolved by an instrument of an equally solemn character; the maxim of law being that unumquodque ligamen dissolvitur eodem ligamine quo et ligatur.[6] Thus to an action on a covenant for payment of money, a parol discharge, without a deed, in satisfaction of all demands is no available defence;[7] and an action by a landlord against his tenant on the latter's covenant to yield up, at the expiration of the term, all erections set up during the tenancy, is not answered by proof of a subsequent agreement (not by deed), that if defendant built a greenhouse on the premises, he should be at liberty to re-

1855; Webster *v.* Cecil, 1861; Manser *v.* Back, 1848 (Wigram, V.-C.); Howard *v.* Wright, 1823 (Leach, V.-C.); Squire *v.* Campbell, 1836 (Ld. Cottenham). See Carpenter *v.* Providence Washington Ins. Co. 1846 (Am.).

[1] Davies *v.* Fitton, 1842 (Ir.) (Sugden, C.); M. of Townsend *v.* Strangroom, 1801; Woollam *v.* Hearne, 1802; Higginson *v.* Clowes, 1808; Clowes *v.* Higginson, 1813; Rich *v.* Jackson, 1794; Clinan *v.* Cooke, 1802 (Ir.); Att.-Gen. *v.* Sitwell, 1835; Squire *v.* Campbell, 1836 (Ld. Cottenham). See, however, M'Cormack *v.* M'Cormack, 1876 (Ir.); Gun *v.* McCarthy, 1884 (Ir.) (Flanagan, J.).

[2] Keisselbrack *v.* Livingstone, 1819 (Am.).

[3] 1 Story, Eq. Jur. § 161, and n. Those who require further information on this subject are referred to 1 Sug. V. & P. (10th edit.) 222—233, 258—266; 1 Story, Eq. Jur. §§ 152—161; Gresl. Ev. 205—209.

[4] Gr. Ev. § 302, in part, as to first five lines.

[5] Set out in § 1132.

[6] 2 Inst. 360; Wing. Max. 68—72; Story, Agen. § 49; Fowell *v.* Forrest, 1669-70; Harris *v.* Goodwyn, 1841; Doe *v.* Gladwin, 1845; Rawlinson *v.* Clarke, 1845.

[7] Rogers *v.* Payne, 1768, recognised in West *v.* Blakeway, 1841; Cordwent *v.* Hunt, 1818. See Spence *v.* Healey, 1853; Mav. of Berwick *v.* Oswald, 1853; The Thames Iron Works Co. *v.* The Roy. Mail St. Packet Co., 1862.

move it.[1] Formerly, indeed, an agreement in discharge of a deed was equally inadmissible whether it was in writing or merely verbal, or whether it was executory or executed; so that if an act was required by deed to be done within a certain time, evidence could not be given to show that the period was extended by some instrument not under seal, and that the act was performed within the time so extended.[2] Perhaps, however, now, in this latter event, the courts would grant relief on equitable grounds;[3] at least, if it could be shown that the license to extend the time was founded on some good consideration.[4]

§ 1142. The doctrine just stated has, however, nothing to do with the general rule that a written document cannot be contradicted or varied by parol evidence.[5] It rests entirely on the solemn nature of deeds. Consequently, in the case of agreements not under seal, to adopt the language of Lord Denman,[6] in the *absence of statutory interference*: "After an agreement has been reduced into writing, it is competent to the parties, 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."

§ 1143. Where, indeed, writing is by statute made necessary to the validity of an agreement, the rule is different. The better opinion is, however, that contracts concerning the sale of land or goods, which fall within the 4th section of the Statute of Frauds, or § 4 of The Sale of Goods Act, 1893,[7] may be *wholly waived* or

[1] West *v.* Blakeway, 1841. But see Cort *v.* Ambergate, &c. Rail. Co., 1851.

[2] Gwynne *v.* Davy, 1840 (Tindal, C.J.); Littler *v.* Holland, 1790. See Nash *v.* Armstrong, 1861. See, also, Williams *v.* Stern, 1879, C. A., questioning Albert *v.* The Grosvenor Invest. Co., 1867.

[3] Gwynne *v.* Davy, 1840 (Tindal, C.J.).

[4] See Williams *v.* Stern, 1879, C. A.

[5] Set out in § 1132.

[6] In Goss *v.* Nugent, 1833. By Scotch law no written obligation whatever can be extinguished or renounced, without either the creditor's oath, or a writing signed by him. Tait, Ev. 325 (S.). Neither can a written agreement be afterwards waived or varied by mere words; though a subsequent parol agreement, accompanied or followed by part performance, will suffice for that purpose: Bargaddie Coal Co. *v.* Wark, 1859, H. L.

[7] 56 & 57 V. c. 71.

abandoned by a *subsequent oral agreement*, so as to prevent either party from recovering on the original written contract; for the Act, without distinctly stating that the contracts in question must be in writing, merely says that, unless they are so, no action shall be brought upon them.[1]

§ 1143A. The result is that no general rule can safely be laid down as to the validity of the oral dissolution of a statutory instrument; but in each case, the special language of the Act requiring the writing must be duly considered; while in several cases (as, for instance, in that of a will) it is clear that a verbal abandonment will not suffice.[2]

§ 1144. But, whatever may be the effect of an oral dissolution of the *whole* of a statutory contract, *no verbal agreement to abandon it in part, or to add to, or modify, its terms, can be received.* To allow such contracts to be proved partly by writing, and partly by oral testimony, would let in all the mischiefs which it was the object of the Legislature to exclude; consequently, it matters not what term of the written contract is sought to be varied by parol, and no distinction can be drawn between the material and immaterial parts of the contract; but everything which originally formed part of the agreement must be deemed to be material.[3]

§ 1145. Accordingly, if a written contract for the sale, either of goods above the value of 10*l.*, or of lands, state a time for the delivery of the goods, or for the completion of the purchase, no verbal agreement to substitute another day for the one originally agreed upon will be valid,[4] but the original contract may still be enforced in its entirety;[5] a vendor who has contracted in writing to sell to a purchaser certain lots of land, and to make out a good title to them, is not at liberty to show a verbal waiver by the pur-

[1] Goss *v.* Ld. Nugent, 1833 (Ld. Denman); Price *v.* Dyer, 1810 (Sir W. Grant). These dicta go far towards overruling Lord Hardwicke's contrary opinion in Buckhouse *v.* Crossby, 1737; and in Bell *v.* Howard, 1741.

[2] Ante, § 1063.

[3] Marshall *v.* Lynn, 1840 (Parke, B.); Emmet *v.* Dewhirst, 1852; Moore *v.* Campbell, 1854; Sanderson *v.* Graves, 1875.

[4] Stowell *v.* Robinson, 1837; Marshall *v.* Lynn, 1840; Stead *v.* Dawber, 1839; Tyers *v.* Rosedale and Ferryhill Iron Co., 1875. These cases overrule Cuff *v.* Penn, 1813; Warren *v.* Stagg, 1787, cited in Littler *v.* Holland, 1790; and Thresh *v.* Rake, 1794. See Ogle *v.* Ld. Vane, 1868.

[5] Noble *v.* Ward, 1867. See, also, Leather Cloth Co. *v.* Hieronimus, 1875; Hickman *v.* Haynes, 1875; Plevins *v.* Downing, 1876.

chaser of his right to a good title as to one lot (since to allow this would be to substitute a partly oral contract for the one which the Statute of Frauds required to be in writing);[1] a contract by a master to pay his clerk a *yearly* salary (which is necessarily in writing, being one not to be performed within a year from its date) cannot be varied by parol evidence to show either a contemporaneous, or a subsequent, verbal agreement that the salary should be paid quarterly, or to prove the fact that quarterly payments had usually been made;[2] and where an entire written agreement consists of divers particulars, some of which are within, and others without, the Statute of Frauds, evidence cannot be given of a verbal agreement to vary the latter part even in some trifling particular (as, for instance, to have one valuer instead of two), though that part of the contract might, standing alone, have been good without any writing.[3]

§ 1146. In applying the doctrine that a written instrument cannot be contradicted or varied by parol *to testamentary instruments*, a distinction must be noted between the revocation of a will, and the ademption, or rather, the payment by anticipation, of a legacy. For, although a will can be neither wholly nor partly revoked or abandoned by words, parol evidence is admissible to establish either a total or a partial ademption of a legacy originally contained therein. By "ademption" the law means, that the subject-matter of the legacy has been aliened by the testator in his lifetime.[4] Thus, where a testator bequeathed 3000*l.* to his daughter for her separate use for life, with remainder to her children, and the residue of his property to his son, in a suit to have the legacy invested and secured, it was held that it might be shown by extrinsic parol evidence that, after the date of the will, the testator had, at his daughter's request, paid her husband 500*l.*, and then declared that this sum was to be considered in part satisfaction of the legacy, expressing a determination not to alter his will, having been advised by his solicitor that it was unnecessary to do so.[5] The evidence here admitted did not in any way revoke or alter the

[1] Goss *v.* Ld. Nugent, 1833.
[2] Giraud *v.* Richmond, 1846; Evans *v.* Roe, 1872.
[3] Harvey *v.* Grabham, 1836.
[4] Harrison *v.* Jackson, 1877 (Jessel, M.R.)
[5] Kirk *v.* Eddowes, 1844 (Wigram, V.-C.); Ferris *v.* Goodburn, 1858. See Nevin *v.* Drysdale, 1867.

will, but simply proved a transaction whereby the daughter had in part received her legacy by anticipation; while the testator's declarations, contemporaneously with the advance, were considered as part of that transaction.

§ 1147. The rule excluding parol evidence to vary or contradict a written document,[1] moreover, is not infringed by proof of any *collateral* parol agreement, which does not interfere with the terms of the written contract, though it may relate to the same subject-matter.[2] For instance, where parties to a charter-party afterwards agreed by parol to use the ship for a period which was to elapse before the charter-party attached, it was held that this latter contract might be enforced by action.[3] The fact of a written demise of an unfinished house having been signed will not preclude the tenant from proving that, subsequently to the agreement for the demise, but at the time when the parties signed it, the landlord verbally agreed with him to put the premises into a habitable state.[4] Where parties have agreed for the lease of a house to be built upon land at a cost of 400*l.*, a collateral agreement that if their cost exceeded 400*l.*, the rent should be proportionate to the expenditure, is admissible.[5] Letters which have passed during negotiations which have terminated in a written agreement, are admissible to support a collateral verbal agreement set up by one of the parties;[6] and if money be received, under circumstances raising an implied promise to pay it to another, or under an express promise so to do, and a deed be subsequently entered into between the parties in order to ascertain the amount to be paid, an action of simple contract can apparently be afterwards, nevertheless, sustained.[7] If, however, a debt be secured by deed, the claim to payment of it still arises on the deed, even though there has been a subsequent statement of an account respecting it, and the striking of a balance under those circumstances creates no new liability.[8]

§ 1148.[9] Next, the rule forbidding the variation or contradiction

[1] Set out in § 1132.
[2] See ante, § 1135.
[3] White *v.* Parkin, 1810. See Seago *v.* Deane, 1828; Fletcher *v.* Gillespie, 1826; Foster *v.* Allanson, 1788.
[4] Mann *v.* Nunn, 1874; Angell *v.* Duke, 1875.
[5] Williams *v.* Jones, 1887.
[6] Pearson *v.* Pearson, 1884, C. A.
[7] Edwards *v.* Bates, 1844 (Cresswell, J.).
[8] Middleditch *v.* Ellis, 1848.
[9] Gr. Ev. § 283, in part.

of written documents by parol evidence does not restrict the court to the perusal of a single instrument or paper; for, while the controversy is between the original parties, or their representatives, all *contemporaneous writings* relating to the same subject-matter, are admissible in evidence, provided only that they be of equal solemnity with the principal document, *and that no oral testimony be required for the purpose of connecting them therewith.*[1]

§ 1149.[2] The rule excluding parol evidence to vary or contradict written agreements is, moreover, *applied only in suits between the parties* to the instrument, and their representatives. These latter are to blame if the writing contains what was not intended, or omits what it should have contained. But third persons are not prejudiced by things recited in writing, contrary to the truth, through the ignorance, carelessness, or fraud of the parties, or thereby precluded from proving the truth, however contradictory it may be to the written statement.[3] Thus, in settlement cases, where the validity of the settlement depended upon the value of an estate, evidence of a greater sum having been paid for such estate than recited in the purchase deed was admissible;[4] in similar cases, parol evidence has been received to show that lands, described in a deed of conveyance as in one parish, were in fact situated in another;[5] or to show that, at the time of entering into a contract of service in a particular employment, a verbal agreement was made to pay a sum of money as a premium for teaching the pauper the trade, and that, as this amounted to an apprenticeship, the whole transaction was void for want of a stamp, and no settlement was gained under it;[6] or to show, where an unstamped assignment of a parish apprentice stated a consideration which would have (if true) made a stamp needful, that the real circumstances were such that the instrument did not require a stamp.[7]

[1] Leeds *v.* Lancashire, 1809; Hartley *v.* Wilkinson, 1815; Stone *v.* Metcalf, 1815; Bowerbank *v.* Monteiro, 1813 (Gibbs, J.); Gale *v.* Williamson, 1841; Brown *v.* Langley, 1842; Peek *v.* N. Staffords. Rail. Co., 1858; Hunt *v.* Livermore, 1827 (Am.); Davlin *v.* Hill, 1834 (Am.); Couch *v.* Meeker, 1817 (Am.); Lee *v.* Dick, 1836 (Am.); Bell *v.* Bruen, 1843 (Am.); ante, § 1026.

[2] Gr. Ev. § 279, as to first nine lines.

[3] R. *v.* Cheadle, 1832.

[4] R. *v.* Scammonden, 1789; R. *v.* Olney, 1813; R. *v.* Cheadle, 1832.

[5] R. *v.* Wickham, 1835.

[6] R. *v.* Laindon, 1799.

[7] R. *v.* Llangunnor, 1831.

§ 1150. Some of the cases cited in the last paragraph have been said to have been determined, not only on the ground that the contending parties were strangers to the deeds, but on the principle that, though parol evidence is inadmissible to contradict a written agreement, it may be offered to ascertain an independent collateral fact explanatory of the instrument.[1] However this may be, it certainly is also established that the rule will not be infringed by adducing extrinsic evidence even to contradict a deed or other writing, provided the contradiction be confined to the *recitals* of *formal matter*, for these are not matters of agreement at all, and may well be presumed not to have been stated with careful precision.[2] Accordingly, parol evidence has, on several occasions, been admitted, to contradict the date which a deed, order, or other instrument purports, or is recited to bear, and to prove that its real date was different.[3]

§ 1151. Having now pointed out several classes of cases to which the rule rejecting parol evidence in contradiction of a written document[4] does not extend, we may usefully advert shortly to some of the leading cases in which such rule[4] has been applied.[5] Its reason and policy, as well as its nature and extent, will both be best thus seen. For example,[6] where a policy of insurance was effected on goods "in ship or ships from Surinam to London," parol evidence is inadmissible to show, that a particular ship, which has been lost, was verbally excepted at the time of the contract;[7] where a policy or shipping instrument contains express statements, descriptions, or provisions, parol evidence in direct contradiction to them is not admissible;[8] where an instrument purports to be an absolute engagement to pay on a specified day, parol evidence of a contemporaneous oral agreement, that payment should be either hastened or postponed,[9] or that such payment should depend upon

[1] R. *v.* Stoke-upon-Trent, 1843 (Williams, J.); Sumers *v.* Moorhouse, 1884.

[2] 3 St. Ev. 787, 788; 2 Poth. Obl. 181, 182.

[3] Hall *v.* Cazenove, 1804. See Steele *v.* Mart, 1825; Cooper *v.* Robinson, 1842; R. *v.* Flintshire, 1846 (Williams, J.); Reffell *v.* Reffell, 1866.

[4] Set out in § 1132.

[5] See Fawkes *v.* Lamb, 1862.

[6] Gr. Ev. § 281, in part.

[7] Weston *v.* Emes, 1808.

[8] Kaines *v.* Knightly, 1682; Leslie *v.* De la Torre, 1795.

[9] Hoare *v.* Graham, 1811; Spartali *v.* Benecke, 1850, as explained by Williams, J., in Field *v.* Leleau, 1861; Besant *v.* Cross, 1851; Han-

a contingency,[1] or that it should be made out of a particular fund,[2] must be rejected; and where goods are sold under a written contract, silent as to the time, both for their removal and of that for payment, parol evidence is inadmissible to prove, either that the goods were to be removed immediately,[3] or were sold on a credit of six months.[4]

§ 1152. Again, where a written agreement of partnership is unlimited as to the time of commencement, parol evidence, that it was at the same time verbally agreed that the partnership should not commence till a future day, is inadmissible;[5] where there is a written memorandum of lease at a certain rent, parol evidence of a contemporaneous verbal agreement to also pay the ground-rent to the ground-landlord,[6] or by the landlord where the lease contained covenants as to title, to discharge an incumbrance not created by himself,[7] must be rejected; where a ship is particularly described in a written contract of sale, parol evidence of a further descriptive representation, made prior to the sale, is inadmissible except in support of a charge of fraud;[8] evidence of a promise by a lessee to work a certain quantity of the subject of a mining lease is inadmissible;[9] evidence that the grantee's name in a deed is a mistake is also inadmissible;[10] and where a deed conveyed the messuage and land called Gotton farm, consisting of particulars specified in a schedule, and delineated in a map drawn thereon, evidence that a

son *v.* Stetson, 1827 (Am.); Spring *v.* Lovett, 1831 (Am.); Sayward *v.* Stevens, 1854 (Am.); and other American cases cited Greenleaf on Ev., 15th edit., 1892, note to § 281, at p. 377.

[1] Abrey *v.* Crux, 1869; M'Dougall *v.* Field, 1872 (Ir.); Rawson *v.* Walker, 1816; Adams *v.* Wordley, 1836; Foster *v.* Jolly, 1835; Free *v.* Hawkins, 1817; Woodbridge *v.* Spooner, 1819; Stott *v.* Fairlamb, 1883; Moseley *v.* Hanford, 1830; Erwin *v.* Saunders, 1823 (Am.); Hunt *v.* Adams, 1811 (Am.). See Salmon *v.* Webb, 1852, H. L.

[2] Campbell *v.* Hodgson, 1819.

[3] Greaves *v.* Ashlin, 1813 (Ld. Ellenborough). See, also, Harnor *v.* Groves, 1855.

[4] Ford *v.* Yates, 1841. There it was erroneously assumed, that a memorandum, which really contained the name of only one of the parties, was sufficient to satisfy the Statute of Frauds. See Lockett *v.* Nicklin, 1848, cited ante, § 1134.

[5] Dix *v.* Otis, 1827 (Am.).

[6] Preston *v.* Merceau, 1775. See The Isabella, 1799; White *v.* Wilson, 1800; Rich *v.* Jackson, 1794; Brigham *v.* Rogers, 1822 (Am.).

[7] Howe *v.* Walker, 1855 (Am.).

[8] Pickering *v.* Dowson, 1813. See, also, Stucley *v.* Baily, 1862; Powell *v.* Edmunds, 1810; Ponder *v.* Fobes, 1838 (Am.); Wright *v.* Crookes, 1840.

[9] Lyn *v.* Miller, 1855 (Am.); and other American cases cited in Greenleaf on Ev., 15th edit. (1892), note to § 281, at p. 379.

[10] Crawford *v.* Spencer, 1851 (Am.).

close, not included in the map and schedule, had always been occupied and treated as part of Gotton farm, was rejected.[1]

§ 1153. Further, on a sale (prior to the Apportionment Act, 1870[2]) of land let for years, a contemporaneous parol agreement, that the current quarter's rent should be apportioned between vendor and p[illegible], was inadmissible.[3] It was, moreover, till recently, supposed that when a promissory note was in its terms joint, evidence could in no case be given that one of the makers was merely a surety, and that the payee had given time to the principal;[4] but this doctrine has been held inapplicable to a case where a money-lender has made advances on the security of a joint and several note, being well aware at the time that one of its makers was a surety.[5] In such a case the surety, notwithstanding the form of the note, may now set up as a defence that when the note was made he was known by the lender to be a surety, and that, without his consent, the principal has had time given to him by the lender.[6] It appears, however, still to be law that in general if a party sign a bill of exchange, a charter-party,[7] or indeed, any written contract, in his own name, and there is nothing in the instrument to show that he intends *only* to sign on behalf of a named principal,[8] he cannot avoid his personal liability by parol evidence that he merely signed as agent, and that the other party knew this.[9] If, however, it is sought on the one hand to charge with liability,[10] or on the other to give the benefit of the contract

[1] Barton *v.* Dawes, 1850; Llewellyn *v.* Ld. Jersey, 1843. See post, §§ 1224, 1225.

[2] 33 & 34 V. c. 35.

[3] Flinn *v.* Calow, 1840.

[4] Abbott *v.* Hendricks, 1840 (Tindal, C.J.); Manley *v.* Boycot, 1853; Strong *v.* Foster, 1855. See Davies *v.* Stainbank, 1855; Riley *v.* Gerrish, 1851 (Am.); and Myrick *v.* Dame, 1852.

[5] Greenough *v.* M'Clelland, 1861; Mutual Loan Fund Assoc. *v.* Sudlow, 1858; Pooley *v.* Harradine, 1857; Taylor *v.* Burgess, 1859; Lawrence *v.* Walmsley, 1862; Bristow *v.* Brown, 1862 (Ir.); Bailey *v.* Edwards, 1865; Overend, Gurney & Co. *v.* Oriental, &c. Corp., 1874, H. L.

[6] Id.

[7] Hough *v.* Manzanos, 1879.

[8] Gadd *v.* Houghton, 1877, C. A.

[9] Higgins *v.* Senior, 1841; Roy. Ex. Ass. Co. *v.* Moore, 1863; Sowerby *v.* Butcher, 1834; Magee *v.* Atkinson, 1837; Jones *v.* Littledale, 1837; Stackpole *v.* Arnold, 1814 (Am.); Hunt *v.* Adams, 1811 (Am.); Shankland *v.* City of Washington, 1831 (Am.); Lefevre *v.* Lloyd, 1814. But see Holding *v.* Elliott, 1860, cited ante, § 804. See, also, Williamson *v.* Barton, 1862.

[10] Paterson *v.* Gandasequi, 1812; cited and confirmed in Higgins *v.* Senior, 1841 (Parke, B.); Calder *v.* Dobell, 1871; Young *v.* Schuler, 1883, C. A.

to,[1] an unnamed principal, such evidence will be received; and this, too, whether the Statute of Frauds does or does not require the agreement to be in writing; for, in the cases first cited the parol evidence would clearly contradict the written agreement, in these we are now considering it would have no such effect, since without denying the agreement to be binding on the party whom it purported to bind, it would show that another party, namely the principal, was also bound, on the well-known doctrine that the act of an authorised agent is, in law, the act of the principal.[2]

§ 1154. Still less is the rule excluding parol evidence to contradict or vary a written document violated by it being held (as it is) that a person who describes himself in a written contract as agent of an unnamed principal, may be shown by the party with whom he contracted to be the real principal.[3] He may even in an action by himself against the other contracting party, repudiate the character of agent and adopt that of principal; and on furnishing proof that he entered into the agreement on his own behalf, will be entitled to recover.[4] Where, however, an agent, employed to enter into a charter-party, described himself in the instrument as the owner of the ship, in an action by the principal on the charter-party, it was held that parol evidence that the agent acted merely as agent could not be given, since it would directly contradict the written document.[5]

§ 1155. So strict is the rule that parol evidence cannot be received to vary or contradict a written document that even the subsequent admission of a party as to the true intent and construction of the title-deed under which he claims, cannot be received in contradiction of the language therein contained.[6] Thus, the plain language of a deed purporting to convey a messuage in the occupation of A., *with the appurtenances*, cannot be contradicted either by the written conditions of sale excepting the garden, or by the declarations of the grantee that he had not purchased it.[7]

§ 1156. Still less will any statements made by the writer of an

[1] Garrett *v.* Handley, 1825; Bateman *v.* Phillips, 1812; both cited and confirmed in Higgins *v.* Senior, 1841, as reported 8 M. & W. 844 (Parke, B.).

[2] Higgins *v.* Senior, 1841 (Parke, B.).

[3] Carr *v.* Jackson, 1852.

[4] Schmeltz *v.* Avery, 1851.

[5] Humble *v.* Hunter, 1848.

[6] Pain *v.* M'Intier, 1804 (Am.). See, also, Townsend *v.* Weld, 1811 (Am.).

[7] Doe *v.* Webster, 1840.

instrument be receivable in evidence with the view of varying its terms. Thus, where a testator devised to his eldest son his residence with the *buildings to the same adjoining*, and left to his second son all his other real property, evidence of declarations made by him, while giving instructions for his will, showing that he intended some other cottages which adjoined his residence when such will was made to pass to such second son, was rejected.[1] Where, too, in a will, a complete *blank* is left for the description of the legatee or devisee,[2] or for the amount of the legacy, or for the description of the estate or thing devised,[3] no parol evidence, however strong, will be allowed to fill it up as intended by the testator.

§ 1157. Neither[4] under a devise by a testator of all his freehold and real estate "in the county of Limerick, and in the city of Limerick," he having no real estates in the *county* of Limerick, but only possessing landed property consisting of estates in the county of Clare, which were not mentioned in the will, and a small estate in the *city* of Limerick, which was inadequate to meet the testamentary charges, was the devisee allowed to show by parol evidence, that the estates in the county of Clare were inserted in the devise to him in the first draft of the will, which was sent to a conveyancer to make certain alterations not affecting those estates; that such conveyancer by mistake[5] erased the words "county of Clare;" and that the testator, after keeping the will by him for some time, executed it without adverting to the alteration as to that county. Tindal, L. C. J., in pronouncing the joint opinion of himself, Lds. Lyndhurst, and Brougham, L. C.,[6] said "The plaintiff contends that he has a right to prove that the testator intended to pass, not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in place of, or in addition to, that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of

[1] Doe *v.* Holtom, 1832.
[2] Hunt *v.* Hort, 1791; Miller *v.* Travers, 1832 (Tindal, C.J.).
[3] Miller *v.* Travers, 1832 (Tindal, C.J.); Taylor *v.* Richardson, 1853.
[4] Miller *v.* Travers, 1832. See, also, In re The Clergy Society, 1856.
[5] See, also, Francis *v.* Dichfield, 1742 (Ld. Hardwicke).
[6] Ld. Lyndhurst, C.B., and Tindal, C.J., assisted the Ld. C. in this case.

the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted." [1]

§ 1158. Extrinsic parol evidence, contradicting, varying, adding to, or subtracting from, the contents of a valid written instrument, is thus inadmissible. This, however, is chiefly because the parties must be presumed to have committed to writing all which they deemed necessary to give full expression to their meaning; and secondly, because of the mischiefs which would result, if verbal testimony were in such cases received. It is, however, also a principle that, *parol evidence may in all cases of doubt be adduced, to explain the written instrument;* or, in other words, to enable the court to discover the meaning of the terms employed, and to apply them to the facts.[2] Such a "doubt" as is here meant may arise from one or both of the two following causes; either the *language* of the instrument may be *unintelligible* to the court, or, at least, be *susceptible of two or more meanings;* or the *persons or things* mentioned *may require to be identified.*[3] The rule, consequently, lets in evidence of two descriptions.

§ 1159.[4] First, if the characters, in which the instrument is written, are in short-hand,[5]—or are otherwise difficult to be deciphered,—or if the language, whether as being foreign, obsolete, technical, local, or provincial, is either not understood by the court, or is capable of bearing two or more interpretations,—the testimony of persons skilled in deciphering writings, or who understand the language in which the instrument is written, or the ancient, technical, local, or provincial meaning of the terms

[1] Miller *v.* Travers, 1832.
[2] Shore *v.* Wilson, 1842, H. L. (Parke, B.).
[3] Shore *v.* Wilson, 1842, H. L. (Parke, B., and Tindal, C.J.).
[4] Gr. Ev. § 280, in part.
[5] See Kell *v.* Charmer, 1856, cited post, § 1196.

employed, is admissible, to interpret the characters, or to translate the instrument, or to testify to the proper meaning of particular expressions.[1] In several cases, wills, written in a scarcely legible hand, have been interpreted by Courts of Equity, with the assistance of persons skilled in writing.[2] The practice of proving translations of foreign documents is so notorious as to require no authority to support it.

§ 1160. The remainder of the rule is established beyond dispute by an absolute crowd of decisions. The testimony resorted to under the second branch of this rule consists of evidence of *usage*,[3]—that is, witnesses conversant with the business, trade, or locality to which the document relates, are called to testify that, according to the recognised practice and usage of such business, trade, or locality, certain expressions contained in the writing have in similar documents a particular conventional meaning,—and the jury are asked to presume that the parties, who employed these expressions, used them, in the conventional sense, as explained by the witnesses.[4]

§ 1161. Evidence of *usage* to explain the meaning of particular words in a written instrument may either go to show that the words employed are purely local or technical;—that is, words which are not of universal use, but familiarly known and employed, either in a particular district, or in a particular science or trade, or by a particular class of persons;—or to show that such words have two meanings, the one common and universal, the other technical, peculiar or local. In either case, it will be admissible to define and explain the meaning of the language employed. Thus, where the founder of a charity in the early part of the eighteenth century had, in the deed of grant, described the objects of her munificence as "Godly preachers of Christ's Holy Gospel," on its becoming long afterwards necessary to determine what persons were entitled

[1] Shore *v.* Wilson, 1842, H. L. (Parke, B., and Tindal, C. J.); Wigr. Wills, 61.

[2] Goblet *v.* Beechey, 1829; Masters *v.* Masters, 1718; Norman *v.* Morrell, 1799.

[3] As will presently be seen (post, §§ 1204, 1205), the word "usage" is frequently used by lawyers to denote a species of evidence, often admitted for the purpose of explaining ancient ambiguous grants, and consisting in the proof of the contemporaneous acts of the grantors or grantees, in relation to the property conveyed.

[4] See ante, § 181.

to this charity, extrinsic evidence was admitted to show, that at the time when the charity was founded a religious sect existed, who applied this particular phraseology (which might seem at first sight of a far wider interpretation), to Protestant Trinitarian Dissenters, of which sect the founder was a member.[1] Where, however, words have by usage two meanings, in addition to giving evidence of this it will also be necessary to prove such additional circumstances, as will raise a presumption that the parties intended to use the words in what logicians call their second intention, unless this can be inferred from reading the instrument itself.

§ 1162. In accordance with the principle just stated, various words in written documents which primâ facie present no ambiguity, have been interpreted by extrinsic evidence of usage; and their peculiar meaning, when found in connexion with the subject-matter of the transaction, has been fixed, by parol testimony of the sense in which they were *usually* received, when employed in cases similar to that under investigation.[2]

[1] Shore *v.* Wilson, 1842, H. L. (Ld. Cottenham). See, also, Drummond *v.* Att.-Gen., 1849, H. L.; and 7 & 8 V. c. 45, noticed ante, § 75.

[2] Some of the principal expressions which have been interpreted in this way, stated in alphabetical order, are the following:—"All faults" (Whitney *v.* Boardman, 1875 (Am.)); "Arrived in dock" in a charter-party (The Steamship Co. Norden *v.* Dempsey, 1876); "Barrel" (Miller *v.* Stevens, 1868 (Am.)); "Best oil" in a contract (Lucas *v.* Bristow, 1858); "Corn" (Mason *v.* Skurray, 1780; Moody *v.* Surridge, 1798; Scott *v.* Bourdillion, 1806); "Cotton in bales" (Taylor *v.* Briggs, 1827; Morrisson *v.* Perrin, 1857); "Current funds" (Thorington *v.* Smith, 1868 (Am.)); "Crop of flax" (Goodrich *v.* Stevens, 1871 (Am.)); "Days," in a bill of lading, as meaning working days (Cochran *v.* Retberg, 1800); "Duly honoured," as applied to a bill of exchange (Lucas *v.* Groning, 1816); "Expected to arrive about November next" is a phrase which in a bought note is a mere description, and creates no contract as to time (Bold *v.* Rayner, 1836); "F.o.b." (Silberman *v.* Clark, 1884 (Am.)); "Freight" (Peisch *v.* Dixon, 1815 (Am.); Gibbon *v.* Young, 1818; Lewis *v.* Marshall, 1844); "Fur" (Astor *v.* Union Insco. Co., 1827 (Am.)); "Inhabitant" (R. *v.* Mashiter, 1837; R. *v.* Davie, 1837); "In turn to deliver" in a charter-party (Robertson *v.* Jackson, 1845; Leidemann *v.* Schultz, 1853); "Level," as understood by miners (Clayton *v.* Gregson, 1836); "Months," in a charter-party, as meaning calendar months (Jolly *v.* Young, 1800, recognised Simpson *v.* Margitson, 1847); "Payable in trade" (Dudley *v.* Vose, 1873 (Am.)); "Pig iron" (Mackenzie *v.* Dunlop, 1856, H. L. (Ld. Cranworth, C.)); "Regular turns of loading" (Leidemann *v.* Schultz, 1853); "Salt" (Journu *v.* Bourdieu, 1787); "Spitting of blood," as a term in a policy of insurance (Singleton *v.* St. Louis, &c., 1877 (Am.)); "Street," as used in the Public Health Act (Elliott *v.* South Devon R. C. 1848); "Ten pockets of Kent hops at five pounds," as meaning in the hop trade at five pounds per cwt. (Spicer *v.* Cooper, 1841); "Thousand," as locally ap-

§ 1163. By an extension of this same principle of construction, the expression "in the month of October" has been allowed to be shown by parol evidence to be the usage of merchants to fix the exact part of that month for the sailing of a vessel;[1] the words warranted "to depart with convoy," by the same usage to show at what place a ship usually took up convoy for a voyage such as the one contemplated;[2] the responsibility of an underwriter for "general average" under an ordinary policy of insurance on a ship and cargo, may be so limited by a custom of trade as not to extend to jettison of goods which have been stowed on deck;[3] "weekly accounts" in a building contract, by the usage of trade, is a technical signification, meaning accounts of day-work only, exclusive of work which is capable of being measured;[4] where agents have purported to sign "by telegraphic authority as agents," evidence has been admitted to show that by mercantile usage under such words the agents are not responsible for a term in the contract arising from a mistake in the transmission of the message;[5] a London packer, who acknowledges the receipt of goods "on account of the vendor for the vendee," may prove that by usage, when packers signed receipts in this form, it is their duty not to part with the goods without the vendor's further orders;[6] and evidence of usage may similarly be admitted to show that where a merchant has sent written instructions to his del credere agent in London, to sell "*on his account*," such agent is by the custom of the London corn trade, warranted in selling in his own name;[7] and by custom brokers who do not disclose their principal,[8] or who sign as "agents to merchants," but do not state within a certain time for whom they are agents,[9] may be liable as principals.

plied to rabbits on a warren (Smith *v.* Wilson, 1832; recognised (Williams, J.) Shaw *v.* Wilson, 1842); "Weeks," as meaning in a theatrical contract only weeks during the theatrical season (Grant *v.* Maddox, 1846; and see, also, Myers *v.* Sarl, 1860). In Symonds *v.* Lloyd, 1859, the rule seems to have been strained to its utmost extent.

[1] Chaurand *v.* Angerstein, 1791. See, also, Robertson *v.* Jackson, 1845; and U. S. *v.* Breed, 1832 (Am.).

[2] Lethulier's case, 1692; recognised by Williams, J., in Shore *v.* Wilson, 1842.

[3] Miller *v.* Tetherington, 1861. See Kidston *v.* The Empire Marine Ins. Co., 1866.

[4] Myers *v.* Sarl, 1860.

[5] Lilly & Co. *v.* Smiles, 1892.

[6] Bowman *v.* Horsey, 1837 (Ld. Abinger).

[7] Johnston *v.* Usborne, 1841.

[8] Fleet *v.* Murton, 1871.

[9] Hutchinson *v.* Tatham, 1873.

§ 1164. The reports contain, again, many cases, where the language of *policies* has been explained by evidence of the understood practice of making voyages in particular branches of trade.[1] In such cases it is unnecessary for the assured or his broker to communicate the usage to the underwriter, for, as Lord Mansfield observed, "every underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it, he ought to inform himself."[2] Accordingly, though, under the words "at and from," a policy would appear at first sight to attach upon the ship's first mooring in a harbour on the coast, yet these expressions, in a Newfoundland policy, were allowed to be explained by evidence that by usage they in that trade mean that the risk is not to commence till the expiration of the fishing (technically called "banking"), or of an intermediate voyage.[3]

§ 1165. But evidence of *usage*, though admissible to explain what is doubtful, is *not admissible to contradict or vary* what is plain.[4] If the words employed in a written instrument have a known legal meaning, parol evidence that the parties intended to use them in some different, though popular, sense, will be rejected; unless such words, if interpreted according to their strict legal acceptation, be wholly insensible with reference either to the context or to the extrinsic facts.[5] Thus, where a word denoting weight, measure, or number, has had a definite meaning attached to it by the Legislature, any party using that word in a written contract, or a will, will be conclusively presumed to have used it in such sense, unless the contrary clearly appears from some part of the writing itself.[6] Thus parol evidence of custom of the country is not admissible to show that the words "Lady Day" or "Michael-

[1] See Trueman *v.* Loder, 1840; and Milward *v.* Hibbert, 1842.

[2] Noble *v.* Kennaway, 1780; cases cited in following note; Da Costa *v.* Edmunds, 1815 (Ld. Ellenborough).

[3] Vallance *v.* Dewar, 1808 (Ld. Ellenborough); Ougier *v.* Jennings, 1800 (Ld. Eldon); Kingston *v.* Knibbs, 1809 (Ld. Ellenborough).

[4] Blackett *v.* Roy. Ex. Ass. Co., 1832 (Ld. Lyndhurst); Crofts *v.* Marshall, 1836 (Ld. Denman). See, also, Phillips *v.* Briard, 1856; Abbott *v.* Bates, 1876.

[5] Wigr. Wills, 11, 12, cited ante, § 1131, n.

[6] Smith *v.* Wilson, 1832 (Ld. Tenterden, and Parke, J.); O'Donnell *v.* O'Donnell, 1882 (Ir.); Hockin *v.* Cooke, 1791; Att.-Gen. *v.* Cart Plate Glass Co., 1792; Noble *v.* Durell, 1789; Sleght *v.* Rhinelander, 1806 (Am.); Frith *v.* Barker, 1807 (Am.); Stoever *v.* Whitman, 1814 (Am.); Henry *v.* Risk, 1788 (Am.).

mas" in *a lease* (made since the Act of Parliament for altering the style) do not respectively mean the 25th of March and the 29th of September, but relate to the old style.[1] Words referring to a particular relation (such as "child"[2] or "grandson"[3]), will, where there is such an one, import the *legitimate* relation of that name, and parol evidence may not show that an *illegitimate* one was meant. But such evidence is receivable if there be no such legitimate relation,[4] or if the context show that the word is used to include a relation who does not really fill that exact relationship.[4]

§ 1166.[5] In accordance with the above principle, parol evidence has been rejected when offered to show that on a warranty of "prime singed bacon," it is the practice in the trade to receive bacon slightly tainted as "prime" singed;[6] that upon a policy on a ship, her tackle, apparel, boats, &c., underwriters, by usage, never pay for loss of boats slung upon the quarter, outside of the ship;[7] that in a memorandum of excepted articles in a fire policy, "glass ware in casks," according to the understanding of insurers and insured, only means such ware in open casks;[8] that in a bill of lading containing the usual clause, "the dangers of the sea only excepted," shipowners, by the custom of the trade, are only liable for damages occasioned by their own neglect, provided they saw the merchandise properly secured and stowed;[9] that by the custom of a particular port where merchandise is to be delivered and "fourteen days to be allowed for its delivery from the time of the ship's being ready to discharge," this is a stipulation for the benefit of the buyer, but not of the seller;[10] or that on a charter-party containing terms clearly defining who is to bear the expense of delivery, there is a custom regulating the subject.[11]

[1] Doe *v.* Lea, 1809. In some cases of *parol* demises, such evidence has indeed been received: Doe *v.* Benson, 1821; Furley *v.* Wood, 1794 (Ld. Kenyon); but whether the distinction between a letting by deed, and a letting by parol, would now be sustained, may be seriously doubted.

[2] Ellis *v.* Houstoun, 1878.

[3] Doe *v.* Taylor, 1849 (Am.).

[4] Bowers *v.* Bowers, 1850 (Am.); Re Cahn, 1877 (Am.).

[5] Gr. Ev. § 292, in part.

[6] Yates *v.* Pym, 1816. See, also, Macolmson *v.* Morton, 1847 (Ir.).

[7] Blackett *v.* Roy. Ex. Ass. Co., 1832. See Hall *v.* Janson, 1855. But see, also, Miller *v.* Tetherington, 1862; and Myers *v.* Sarl, 1861, both cited ante, § 1162.

[8] Bend *v.* Georgia Ins. Co., 1842 (Am.).

[9] The Schooner Reeside, 1837 (Am.).

[10] Sotilichos *v.* Kemp, 1848.

[11] The Nifa, 1892. And see also Scrutter *v.* Childs, 1877; Hayton *v.* Irwin, 1879, C. A.; Lishman *v.* Christie, 1887, C. A.

§ 1167. On the same principle, evidence that by the custom of the trade, "bills" meant "approved bills," and that the vendor could reject any bill of which he did not approve, was rejected where there had been a sale of goods through a London broker under a written contract stipulating that payment should be made "by bills."[1]

§ 1168. On the other hand, parol evidence of usage or custom is[2] certainly sometimes admissible "*to annex incidents to contracts*," —that is, to show what things are customarily treated as incidental and accessorial to the principal thing, which is the subject of the contract, or to which the instrument relates. For instance, when a bill of exchange or promissory note, payable either at a fixed time or on demand (not being one payable in England upon demand[3]) is silent as to any days of grace, in Great Britain three days, called "days of grace" are (subject to provisions as to holidays) added to the time of payment as fixed by the bill,[4] and where a bill is payable elsewhere than in England parol evidence of the known and established usage of the country or place is admissible to show on what day the grace expired.[5] Parol evidence is, more-

[1] Hodgson *v.* Davies, 1810 (Lord Ellenborough). The learned judge, however, in a subsequent stage of the case, admitted evidence of a usage of trade, which reserved to vendors, selling through brokers in the manner above stated, the power of annulling the contract within a reasonable time after the name of the purchaser had been communicated to them, but serious doubts have been entertained whether he was right in so doing; and whether the custom, thus allowed to be proved, was so incidental to the contract, as, in the absence of express words, to be incorporated in it. See Trueman *v.* Loder, 1840.

[2] Gr. Ev. § 294, as to four lines.

[3] Which is not entitled to any days of grace. See 45 & 46 V. c. 61, §§ 10—14.

[4] See "The Bills of Exchange Act, 1882" (45 & 46 V. c. 61), § 14.

[5] In Renner *v.* Bank of Columbia, 1824 (Am.), the decisions on this point are reviewed by Thompson, J. Chitty on Bills, 374—376, contains the following table, on the entire accuracy of which too much reliance should not, however, be placed, as to the days of grace allowed in various places:—

Altona—12 days, Sundays and holidays included, and bills falling due on a Sunday or holiday must be paid, or in default thereof protested, on the day previous: *America*—3 days: *Amsterdam*—None, abolished since the Code Napoleon: *Antwerp*—None, abolished by the Code Napoleon: *Berlin*—3 days, when bills do not fall due on a Sunday or holiday, in which case they must be paid or protested the day previous: *Brazil*—15 days, Rio de Janeiro, Bahia, including Sundays, &c., as in the last case: *England, Scotland, Wales, and Ireland*—3 days, subject to 45 & 46 V. c. 61, §§ 10 and 14: *France*—None, abolished by the Code Napoleon, livre i. tit. 8, § 5, pl. 135; 1 Pardess. 189; ten days were formerly allowed (Poth. pl. 14, 15): *Frankfort-on-the-Maine*—4 days, except on bills drawn at sight, Sundays and holidays not included: *Genoa*—None, abolished by the Code Napoleon: *Hamburgh*—Same as Altona:

over, admissible to prove that by local custom in particular trades, general contracts of hiring and service are defeasible on giving a month's notice on either side;[1] or that persons employed have certain holidays in the year, and the Sundays to themselves;[2] or that on the death of a tenant for life a heriot is due, and this, though no mention of it is made in the lease,[3] or that a lessee by deed is entitled to an away-going crop—though no such right be reserved in the deed;[4] or that a publican, holding premises under a written agreement, reserving a weekly rent, but otherwise silent as to the period of the tenancy, is considered to have a yearly tenure, though the rent be payable weekly,[5] when he pays in advance the yearly victualler's licence.

§ 1169. Parol evidence is also admissible to show that by usages of particular trades all sales of certain goods are by sample, although this term be not expressed in the bought and sold notes;[6]

Ireland—3 days: *Leghorn*—None: *Lisbon and Oporto*—15 days on local, and 6 on foreign bills; but if not previously accepted, must be paid on the days they fall due: *Naples*—None, abolished by the Code Napoleon: *Palermo*—None: *Petersburgh*—Bills drawn *after date* are entitled to 10 days' grace, those drawn *at* sight to only 3 days, and those at any number of days *after* sight, none whatever; but bills received and presented after they are due are nevertheless entitled to 10 days' grace. In these days of grace are included Sundays and holidays, also the day when the bill falls due, on which days they cannot be protested for non-payment, but on the morning of the last day of grace payment must be demanded, and if not complied with, the bill must be protested before sunset: *Rio de Janeiro, Bahia, and other parts of Brazil*—Days of grace on foreign bills are 15, including holidays and Sundays, and if due on any such day, must be paid, or in default thereof protested, on the previous day: *Rotterdam*—None, abolished by the Code Napoleon: *Scotland*—3 days: *Spain*—Vary in different parts of Spain, generally 14 days on foreign, and 8 on inland bills; at Cadiz only 6 days' grace. When bills are drawn at a certain date, fixed or precise, no days of grace are allowed. Bills drawn at sight are not entitled to any days of grace; nor any bills, unless accepted prior to maturity: *Trieste*—3 days on bills drawn after date, or any term after sight not less than 7 days, or payable on a particular day; but bills presented after maturity must be paid within 24 hours. Sundays and holidays are included in the days of grace, and if the last day of grace fall on such a day, payment must be made, or the bill protested, on the first following open day: *Venice*—6 days, in which Sundays, holidays, and the days when the bank is shut, are not included: *Vienna*—Same as Trieste: *Wales*—3 days.

[1] Parker *v.* Ibbetson, 1858.
[2] R. *v.* Stoke-upon-Trent, 1843.
[3] White *v.* Sayer, 1622.
[4] Wigglesworth *v.* Dallison, 1778-79; Senior *v.* Armytage, 1816; explained (Parke, B.) in Hutton *v.* Warren, 1836, as reported 1 M. & W. 476; Hutton *v.* Warren, 1836. See In re Estate of M. of Waterford, 1871 (Ir.).
[5] Lundy *v.* Reilly, 1858 (Ir.).
[6] Syers *v.* Jonas, 1848; O'Neill *v.* Bell, 1866 (Ir.). See, also, Brown *v.* Byrne, 1854; Cuthbert *v.* Cumming, 1855; Lucas *v.* Bristow, 1858.

or (where it is not inconsistent with the contract itself [1]) that in the City every buying broker, who does not, at the date of the bargain, name his principal, renders himself liable to be treated by the vendor as the purchaser; [2] or that a person who contracts expressly as agent is personally liable, if he does not disclose the name of his principal within a reasonable time; [3] or that, even where there has been a written contract for the sale of mining shares upon the terms that they shall be *paid for* "half in two, and half in four months," which was silent as to the time of *delivery*, the vendor is, by the usage of brokers, not bound to deliver them without contemporaneous payment.[4] Similarly, where a horse is sold at a repository (even by private contract) with a written warranty of soundness, in an action for breach of warranty against him, the vendor may show that, by a printed regulation hung up in the repository, warranties only remain in force till twelve o'clock on the day after the sale, that the plaintiff was aware of this regulation, and yet that he made no complaint within the specified time.[5] Moreover, a custom that all steamships having a general cargo, coming into a certain port, shall discharge their goods on the quay, may be annexed even to a bill of lading of goods which says that the goods are to be discharged in good order from the ship's tackles; [6] nor is a custom that all goods may, unless demanded within twenty-four hours of a ship's arrival, be landed on the quay, inconsistent with one which provides that goods are to be delivered by a person appointed by the ship's agents, the delivery to be according to the custom of the port.[7]

§ 1170. The rule of annexing incidents by parol, which has time out of mind been adopted in explanation of mercantile proceedings, is now generally applied to all contracts respecting any transaction wherein known usages have prevailed. It rests on the presumption that the parties did not intend to express in writing the whole of

[1] Barrow *v.* Dyster, 1884.
[2] Dale *v.* Humfrey, 1858; Imperial Bk. *v.* Lond. & St. Katherine's Dock Co., 1877 (Jessel, M.R.); Fleet *v.* Murton, 1872. See Southwell *v.* Bowditch, 1876, C. A.
[3] Pike *v.* Ongley, 1887, C. A.; Hutchinson *v.* Tatham, 1873.
[4] Field *v.* Lelean, 1861; overruling Spartali *v.* Benecke, 1850. See Godts *v.* Rose, 1855.
[5] Bywater *v.* Richardson, 1834. See Smart *v.* Hyde, 1841; and Foster *v.* Mentor Life Assur. Co., 1854.
[6] Marzetti *v.* Smith, 1883, C. A.
[7] Aste *v.* Stumore, 1884, C. A.

the agreement by which they were to be bound, but to make their contract with reference to the established usages and customs relating to the subject-matter.[1] Here, however, it must be borne in mind, that "incidents" are frequently "annexed" to contracts, and conditions implied, not only by the usage or custom of trade, which is always a matter of evidence, but also by the law-merchant (which is judicially noticed without proof[2]), by the common law,[3] and, occasionally, by statute. This whole doctrine of legal implication is, however, abstruse, and the soundest lawyers are often at fault in applying it. On some constantly occurring matters the law has, however, been settled by decisions.[4]

§ 1171. For instance, it now is an undoubted principle of *marine insurance* that a warranty of seaworthiness[5] at the commencement of the risk is, in the absence of express stipulation, implied,[6] in every voyage-policy, whether on a ship, on goods, on freight, or on salvage.[7] In other words, the law annexes to every marine policy, as a necessary incident thereto, the condition that the ship should be seaworthy either at the commencement of the voyage, or in port when preparing for it, or (if the insurance is on a vessel already at sea), that she was seaworthy when the voyage commenced. Other conditions which are equally implied in a policy of marine insurance are conditions not to deviate unnecessarily from the usual course of the voyage, except in order to save life,[8] to commence it in a reasonable time, and to disclose all material circumstances.[9] The non-performance of any of these conditions, whether fraudulent or not,[10] avoids the policy. On the other hand, English law implies no warranty in a policy of marine insurance that the lighters employed at the port of discharge to land the cargo shall be sea-

[1] Hutton *v.* Warren, 1836 (Parke, B.); Gibson *v.* Small, 1853 (id.), H. L.

[2] Ante, § 5.

[3] Gibson *v.* Small, 1853 (Parke, B.), H. L.

[4] See post, note to § 1177A.

[5] This is a relative term, depending on the nature of the ship, as well as of the voyage insured; and in an action on a policy, parol evidence as to these facts is admissible to show the amount of seaworthiness implied: Burges *v.* Wickham, 1864; Clapham *v.* Langton, 1865. See, also, Bouillon *v.* Lupton, 1863; Daniels *v.* Harris, 1874; and Thin *v.* Richards, 1892, C. A.

[6] See Quebec Marine Ins. Co. *v.* Commer. Bk. of Canada, 1870.

[7] Knill *v.* Hooper, 1857.

[8] Scaramanga *v.* Stamp, 1880, C. A.

[9] See Proudfoot *v.* Montefiore, 1867.

[10] Gibson *v.* Small, 1853, H. L. See, also, Biccard *v.* Shepherd, 1861, P. C.

worthy;[1] none that the vessel shall continue seaworthy after the voyage has commenced; none that an originally competent crew shall continue so; none that the vessel shall be navigated with due care and skill during the voyage; none, where the voyage has originally commenced, that pilots shall be taken on board at proper places, unless, perhaps, where required by Act of Parliament; none on an insurance for one voyage out and home, that the ship shall be seaworthy on the return voyage; although these conditions are by law or custom imposed in America.[2] In the case of a time-policy, the law does not imply, as necessarily incident to the policy, any warranty or condition that the ship should be seaworthy either at the date of the insurance,[3] or at the commencement of the voyage during which the policy attaches,[4] and this, too, as it would appear, even where the ship is outward-bound, and starts from a British port where the owner resides.[5] In a voyage-policy on goods, again, no warranty that the goods are seaworthy for such voyage can be implied.[6]

§ 1172. The law, moreover, annexes to, or implies in, every contract by a common carrier, or by a shipowner,[7] whether a common carrier or not, for the carriage for hire, whether by land[8] or by water,[9] of *goods* (which term includes live animals[10]) an insurance on his part that he will,—unless prevented either by "the act of God or by the public enemies of the Crown," the "proper vice" of the animal, or the inherent quality of the article,[11]—safely deliver at its destination the property entrusted to him. Consequently, the carrier of goods by land impliedly warrants that his carriage is roadworthy, and the shipowner that his ship is seaworthy.[12] These

[1] Lane *v.* Nixon, 1866.
[2] Gibson *v.* Small, 1853 (Parke, B.), H. L. See, also, Biccard *v.* Shepherd, 1861, P. C.
[3] Gibson *v.* Small, 1853, H. L.
[4] Gibson *v.* Small, 1853 (Parke, B., and Ld. Campbell), H. L.; Jenkins *v.* Heycock, 1853, P. C.; Michael *v.* Tredwin, 1856; Dudgeon *v.* Pembroke, 1877, H. L.
[5] Thompson *v.* Hopper, 1856 (Erle, J., diss.); Fawcus *v.* Sarsfield, 1856 (id.).
[6] Koebel *v.* Saunders, 1864.
[7] Nugent *v.* Smith, 1876.
[8] Riley *v.* Horne, 1828.
[9] Lyon *v.* Mells, 1802; Liver Alkali Co. *v.* Johnson, 1874.
[10] McManus *v.* Lanc. & Yorks. Rail. Co., 1859; Nugent *v.* Smith, 1876; Tattershall *v.* Nat. Steamship Co., 1884.
[11] Kendall *v.* Lond. & S. W. Rail. Co., 1872; Blower *v.* Gt. W. Rail. Co., 1872; Nugent *v.* Smith, 1876, C. A.
[12] Kopitoff *v.* Wilson, 1876; Cohn *v.* Davidson, 1877; Steel *v.* State Line Steamship Co., 1877, H. L. See, also, Tattershall *v.* Nat. Steamship Co., 1884; and ante, § 187.

rules do not extend to forwarding agents (as distinguished from common carriers), who have made special contracts with their employers.[1] Neither do they apply to the carriers of *passengers*, who do not impliedly warrant either the roadworthiness of their vehicles, or the seaworthiness of their vessels, so as to render themselves liable for injuries caused by mere *latent* defects,[2] although bound to exercise the utmost care and skill in the conduct of their business,[3] and responsible for every accident occasioned by negligence, however slight.[4]

§ 1173. It is, however, a general proposition, that any person who, for a valuable consideration, engages with another to allow him the *personal* use for a specified purpose of a particular article, impliedly contracts that the article is reasonably fit for that purpose. Thus, notwithstanding that he has been guilty of no personal negligence, and has employed a competent builder, a man who admits persons on payment of money to seats in a building to view a public exhibition, impliedly undertakes that the building is fit for their reception; and if it falls, in consequence of careless or improper construction, he is liable.[5] The distinction between a letting for *personal* use, and one for the use of goods, must be noted, for the obligation thus imposed (like similar obligations on carriers) does not apply in the latter case. For instance, it is inapplicable where *goods* (e.g., a carriage), taken charge of for reward, are placed in a building, which, without any want of reasonable care on the bailee's part (as e.g., where it has just before been built by a competent builder), falls down through some defect in construction.[6]

§ 1174. Certain implied contracts, as incident thereto, are also, in the absence of express stipulation, annexed by the law to all contracts for the *sale* of *estates*,[7] whether freehold or leasehold. These are on the part of the vendor to the effect that he will make

[1] Scaife *v.* Farrant, 1875.

[2] Readhead *v.* Midl. Rail. Co., 1869; Buxton *v.* North East. Rail. Co., 1869; Ingalls *v.* Bills, 1845 (Am.).

[3] This doctrine was applied to a job-master who had let out a carriage which broke down, in Hyman *v.* Nye, 1881.

[4] See John *v.* Bacon, 1870; Simpson *v.* Lond. Gen. Omnibus Co., 1873.

[5] Francis *v.* Cockrell, 1870.

[6] Searle *v.* Laverick, 1874.

[7] See "The Conveyancing and Law of Property Act, 1881" (44 & 45 V. c. 41), §§ 3, 7.

out a good title,[1] and on the part of the purchaser to the effect that the damages to which he shall be entitled, if the title prove defective, shall be limited to the expenses actually incurred in the investigation, and shall be merely nominal for the loss of the bargain.[2] If, indeed, it turn out that the vendor has been guilty of any fraudulent misrepresentation or concealment, or that he has contracted to sell an estate in which he has no reasonable ground for believing that he has any interest whatever,[3] or if, though able to furnish a marketable title, he has simply declined to do so, or to take the steps necessary for giving possession,[4] the case will fall within the general rule of law, that where a person makes a contract and afterwards breaks it, he must pay the whole damage sustained by the party with whom he contracts.[5] The same result, too, would follow, should the question arise on an executed contract, and the indenture contain a covenant for quiet enjoyment.[6]

§ 1175. Certain implied undertakings and conditions are also annexed by the law to every lease or agreement to lease property. Thus, on the lessor's part every written agreement to grant a lease implies an undertaking that the lessor has title to grant a valid lease:[7] on every *demise*, whether by deed or parol, the law implies conditions that the lessor will give possession of the premises to the lessee;[8] and that, provided his own interest in them continues,[9] the lessee shall have quiet enjoyment of them,[10] including an inalienable

[1] Souter *v.* Drake, 1834; Doe *v.* Stanion, 1836 (Parke, B.); Hall *v.* Betty, 1842; Worthington *v.* Warrington, 1848. These cases overrule George *v.* Pritchard, 1826. See Kintrea *v.* Perston, 1856.

[2] Flureau *v.* Thornhill, 1775-6; Walker *v.* Moore, 1829; Robinson *v.* Harman, 1848 (Parke, B.); Bain *v.* Fothergill, 1874, H. L.; Worthington *v.* Warrington, 1849; Pounsett *v.* Fuller, 1856; Sikes *v.* Wild, 1861.

[3] Hopkins *v.* Grazebrook, 1826; Robinson *v.* Harman, 1848. See Sikes *v.* Wild, 1861.

[4] Engell *v.* Fitch, 1869. See Godwin *v.* Francis, 1870.

[5] Ld. Chelmsford's opinion in Bain *v.* Fothergill, 1874, H. L., was that even if a man contracts for the sale of real estate, knowing that he has no title, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses incurred by an action for breach of contract; he can only obtain other damages by an action for deceit. Sed qu.

[6] Lock *v.* Furze, 1866.

[7] Stranks *v.* St. John, 1867.

[8] Coe *v.* Clay, 1829; Jinks *v.* Edwards, 1856; Drury *v.* Macnamara, 1855.

[9] Penfold *v.* Abbott, 1863; Adams *v.* Gibney, 1830.

[10] Bandy *v.* Cartwright, 1853; Hall *v.* City of Lond. Brewery Co., 1862. See Howard *v.* Maitland, 1883, as to what constitutes a breach of a covenant for quiet enjoyment.

right to kill and take ground game thereon,[1] and shall not be evicted during the term.[2] On the lessee's part every demise, containing no express provision with respect to delivering up the premises, implies a contract not only to go out of them at the termination of the tenancy, but to restore the absolute possession to the landlord.[3] A demise by parol, however, implies no undertaking for good title;[4] nor does a lease legally imply any warranty that the subject-matter thereof,—whether house or land,—shall, either at the commencement, or during the continuance, of the term, be in a proper state for habitation or cultivation, or, in other respects, reasonably fit for the purpose for which it is taken.[5] Neither does the law imply, from the relation of landlord and tenant, either any obligation on the part of the landlord to do substantial repairs on notice;[6] or a condition—even where the landlord is bound by special agreement to keep the premises in repair during the tenancy,—that the tenant may quit if the repairs be not done.[7]

§ 1176. The letting, however, a *ready furnished* house (contrary to the rule in other cases) implies a warranty that the premises are in a reasonably habitable state. Therefore, if the furniture be insufficient, or defective, or the beds badly infested with vermin, or the drains out of order, or the house infected with contagion, the

[1] 43 & 44 V. c. 47 ("The Ground Game Act, 1880"), §§ 1, 3.

[2] Parke, B., in Sutton *v.* Temple, 1843; and in Hart *v.* Windsor, 1843.

[3] Henderson *v.* Squire, 1869.

[4] Bandy *v.* Cartwright, 1853; overruling contrary dic[illegible]y Parke, B., in De Medina *v.* Norman, 1842; and Sutton *v.* Temple, 1843. With respect to Ireland, § 41 of 23 & 24 V. c. 154, Ir., enacts that every lease, made since 1st January, 1861, shall, unless otherwise expressly provided thereby (see Leonard *v.* Taylor, 1874 (Ir.)), imply an agreement by the landlord that he has a good title, and that the tenant shall have quiet enjoyment. § 42 also enacts, that every such lease shall, unless otherwise expressly provided thereby, imply an agreement by the tenant to pay the rent, and all taxes and impositions payable by the tenant, and to keep the premises in good and substantial repair, and to deliver them up in such repair on the determination of the lease, accidents by fire without the tenant's default excepted.

[5] Sutton *v.* Temple, 1843; Hart *v.* Windsor, 1843; Murray *v.* Mace, 1874 (Ir.); Manchester Bonded Warehouse Co. *v.* Carr, 1880. These cases overrule Edwards *v.* Etherington, 1825; Collins *v.* Barrow, 1831; Salisbury *v.* Marshall, 1829. In Erskine *v.* Adeane, 1873, Ld. Romilly held "that every landlord warranted his tenant that he would not keep noxious things (such as yew trees) near the tenant's estate," but this ruling was reversed in C. A., 1873.

[6] Gott *v.* Gandy, 1853.

[7] Surplice *v.* Farnsworth, 1844.

tenant may quit without notice, unless,[1] perhaps, in the event of his having had an opportunity of inspecting the premises by himself or his agent before entering on the occupation.

§ 1177. The law of England, moreover, now, like the Roman,[2] the French,[3] the Scotch,[4] and, in part, the American law,[5]—on the sale or letting of a specific ascertained chattel annexes, as incident to the contract, an implied warranty of *title* and against incumbrances.[6] Even before this was expressly enacted, a warranty might have been inferred either from the usage of trade, from the vendor's declarations, or from his conduct being such as to lead to the conclusion that he sold the property as "his own," or from the fact of the articles being bought in a shop professedly carried on for the sale of goods.[7] The rule, such as it was, had in truth already been nearly eaten up by the exceptions.[8] Moreover, on *executory* contracts of purchase and sale, where the subject is *unascertained*, and is afterwards to be conveyed, even the old law probably implied that both parties meant that a good title to that subject should be transferred, in the same manner as, under similar circumstances, it would imply that a merchantable article was to be supplied; for unless goods, which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept goods if he discovered a defect in their title before delivery; since, if he did accept, and the goods were recovered from him, he would not be bound to pay for them, or having paid, he would be entitled to recover back the price, as on a consideration which had failed.[9]

§ 1177A. By statute, the custom of trade may annex an implied

[1] Smith *v.* Marrable, 1843; commented on by Ld. Abinger, in Sutton *v.* Temple, 1843; and approved in Wilson *v.* Finch Hatton, 1877.

[2] See Domat, bk. 1, tit. 2, § 2, art. 3.

[3] Code Civil, c. 4, § 1, art. 1603.

[4] Bell on Sale, 94.

[5] Defreeze *v.* Trumper, 1806 (Am.); Rew *v.* Barber, 1824 (Am.).

[6] See "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), § 12. As to the old law under which there was no implied warranty, see Morley *v.* Attenborough, 1849 (Parke, B.); Ormrod *v.* Huth, 1845 (Tindal, C.J.); Hall *v.* Conder, 1857; Chapman *v.* Speller, 1850; Bagueley *v.* Hawley, 1867.

[7] Morley *v.* Attenborough, 1849 (Parke, B.); Eicholz *v.* Bannister, 1864.

[8] Sims *v.* Marryat, 1851 (Ld. Campbell); Eicholz *v.* Bannister, 1864 (Erle, C.J., and Byles, J.).

[9] Morley *v.* Attenborough, 1849 (Parke, B.). It is still undecided whether, on the sale of a *copyright*, the law would imply a warranty of title. See Sims *v.* Marryat, 1851.

warranty or condition *as to quality or fitness for a particular purpose* to a sale of goods.[1]

§ 1178. If the buyer of goods expressly, or by implication, make known to the seller the particular purpose for which they are required, so as to show that he relies on the seller's skill and judgment, and the goods are of a description which it is the seller's business to supply, there is (except in the case of patent goods, or goods sold under a trade name) by statute an implied condition that the goods shall be reasonably fit for the purpose for which they are bought.[2] Where, too, goods are bought by description from a seller who deals in goods of that description (whether a manufacturer of them or not), there is an implied condition that the goods shall be of merchantable quality, provided that if the buyer has examined the goods, there is no warranty as regards defects which the examination ought to have revealed.[3] Subject to the above enactment, where on a sale the purchaser has been afforded an opportunity of inspecting either the bulk or the sample, the maxim *caveat emptor* generally applies, and the law does not imply any warranty,[4] either as to merchantable quality,[5] or value,[6] or fitness for the purpose for which such goods were bought,[7] unless the defect be of such a nature as not to be readily discoverable by the inspection of the bulk or the sample.[8] This doctrine even extends to the sale of food for the use of man,[9] unless the vendor be a butcher, baker, vintner, or common victualler, in which case he will perhaps be presumed to have warranted that the provisions supplied by him were sound and wholesome.[10] Even a sale *in a market* of a herd of

[1] See "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), § 14, subs. 3.

[2] Id., subs. 1.

[3] Id., subs. 2. As to the former law, see Wieler *v.* Schilizzi, 1856; Bigge *v.* Parkinson, 1862; Beer *v.* Walker, 1877.

[4] See 56 & 57 V. c. 71 ("The Sale of Goods Act, 1893"), § 14.

[5] Independently, however, of the law of implied warranty, a party is not bound to accept and pay for chattels, unless they really answer the *description* of the articles which the vendor professed to sell, and the purchaser intended to buy: Gompertz *v.* Bartlett, 1853; Nichol *v.* Godts, 1854; Young *v.* Cole, 1837; Hall *v.* Conder, 1857; Josling *v.* Kingsford, 1863.

[6] Kirkpatrick *v.* Gowan, 1875 (Ir.). See Smith *v.* Hughes, 1871.

[7] Parkinson *v.* Lee, 1802; recognised (Parke, B.) in Sutton *v.* Temple, 1843; and explained (Tindal, C.J.) in Shepherd *v.* Pybus, 1842.

[8] Mody *v.* Gregson, 1868.

[9] Burnby *v.* Bollett, 1847; Le Neuville *v.* Nourse, 1813; Emmerton *v.* Matthews, 1862.

[10] Burnby *v.* Bollett, 1847 (Parke, B.).

animals, which the vendor has reason to believe were diseased (although by thus publicly exposing the animals for sale, his conduct might have been morally, or even statutably,[1] culpable), does not render him liable to an action by a purchaser for false representation where such animals are sold under an express condition that they are to be "taken with all faults," and without any warranty.[2]

§ 1179. No warranty is generally implied by the law from the execution by a manufacturer of a specific order for a *known and ascertained* chattel ordered by the buyer, that the article supplied shall be fit for the special purpose to which it is intended to be applied.[3] But such a warranty *is* implied by law where it may fairly be inferred that the purchaser, instead of depending on his own judgment, relied on the skill and knowledge of the vendor,[4] and no exception will be recognised in the case of latent undiscoverable defects.[5] This doctrine specially applies to cases where the articles are supplied directly by the manufacturer;[6] and sometimes extends to natural products as well as to manufactured articles, so that in a case where a seed-dealer had sold some rape, knowing that the purchaser required it for seed, the contract was held to contain an implied warranty that the rape was good growing seed, fit for germination.[7]

§ 1179A. Moreover, on a sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, in the absence of any usage, in the particular trade or as regards the particular goods, to supply goods of other makers, there is an implied contract that the goods supplied shall be of the manufacturer's own make.[8]

§ 1180. The vendor of any article with a trade mark or description upon it, is also, by the Merchandise Marks Act, 1887, presumed to have contracted that the mark is genuine and the

[1] See 57 & 58 V. c. 57 ("The Diseases of Animals Act, 1894"), § 52.

[2] Ward *v.* Hobbs, 1878, H. L.

[3] Chanter *v.* Hopkins, 1838; Ollivant *v.* Bayley, 1843; recognised Parsons *v.* Sexton, 1847; Prideaux *v.* Bunnett, 1857; Hall *v.* Conder, 1857.

[4] See "The Sale of Goods Act, 1893" (56 & 57 V. c. 71, § 14 (3)). Bigge *v.* Parkinson, 1862; Brown *v.* Edgington, 1841; recognised in Sutton *v.* Temple, 1849; Mallan *v.* Radloff, 1864.

[5] Randall *v.* Newson, 1877, C. A.

[6] Shepherd *v.* Pybus, 1842; Sutton *v.* Temple, 1849 (Parke, B.).

[7] Shiels *v.* Cannon, 1865 (Ir.); Jones *v.* Just, 1868.

[8] Johnson *v.* Raylton, 1881 (Bramwell, L.J., diss.), C. A.

description true, "unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee."[1]

§ 1181. After much discussion, it is now determined, however, that the law implies no warranty on a contract for the sale of a patent, either that the vendor was the true and first inventor within the Statute of James, or that the invention was either useful or new.[2]

§ 1182. The common law, too (as distinguished from the Employers' Liability Act), does not imply, from the ordinary relation of *master* and *domestic* or *menial servant*, any contract on the master's part to protect his servant against injury arising, either from the negligence of another servant, or from the defective condition of the master's property, unless it can be shown, either that the personal negligence or other misconduct of the master caused, or at least materially contributed to, the accident,[3] or that the master knew of the danger while the servant did not.[4] This doctrine is still applicable to the masters of domestic or menial servants. But the liability of most employers, other than those of domestic or menial servants, for personal injuries suffered by workmen in their service, has been altered by the Employers' Liability Act.[5] The first three sections of that statute are the most important, but are too long to insert in this work. It should, however, be noted, 1st, that the Act does not apply, either to domestic servants or to seamen; 2nd, that "employer," as used in it, "includes a body of persons corporate or unincorporate;" and, 3rd, that the expression "workman," includes a railway servant, and any person of any age, who,—being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or *otherwise engaged in manual labour*,—has entered into or works under a contract with an employer, whether such contract be express or implied, oral or in writing, and be a contract of service, or a con-

[1] 50 & 51 V. c. 28, § 17.
[2] Hall *v.* Conder, 1857; Smith *v.* Neale, 1857; Notor *v.* Brooks, 1861; Trotman *v.* Wood, 1864.
[3] Priestley *v.* Fowler, 1837; Seymour *v.* Maddox, 1851.
[4] Griffith *v.* London, &c. Docks Co., 1884, C. A.
[5] 43 & 44 V. c. 42, continued till 31st Dec. 1895, by 57 & 58 V. c. 48 ("The Expiring Laws Continuance Act, 1894").

tract personally to execute any work or labour.[1] In consequence of this last definition, the Act does not apply to an omnibus conductor,[2] the driver of a tramcar,[3] nor to a grocer's assistant.[4]

§ 1182A. The law, again, as regards seamen and sea apprentices, is governed by "The Merchant Shipping Act, 1894,"[5] which enacts that, "(1) In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same: (2) Nothing in this section (*a*) shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state, where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable; or (*b*) shall apply to any ship employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession." The above section apparently makes the burthen of proof of unseaworthiness rest on the shipowner, and obliges him to show that he has used "all reasonable means to insure the seaworthiness of the ship."

§ 1183. To return to the subject of warranties annexed by the law to certain contracts. The law implies a warranty by every artisan, artist, or presumably skilled labourer who enters into an engagement with an employer to work as such, that he possesses skill reasonably competent to the task he undertakes; as in the case of, e.g., an apothecary, a surveyor, a watchmaker, a cook, an auctioneer,[6] or a solicitor, employed for reward. No express

[1] See 38 & 39 V. c. 90 ("The Employers and Workmen Act, 1875"), § 10; and 43 & 44 V. c. 42 ("The Employers' Liability Act, 1880"), § 8.

[2] Morgan *v.* Lond. Gen. Omnibus Co., 1884, C. A.

[3] Cook *v.* North Metropolitan Tramways Co., 1887.

[4] Bound *v.* Lawrence, 1892, C. A.

[5] 57 & 58 V. c. 60, § 458.

[6] Kavanagh *v.* Cuthbert, 1874-5, (Ir.).

promise or representation is necessary, for the public profession of an art is in itself a representation and undertaking to all the world that the professor possesses the requisite ability and knowledge.[1] If, therefore, the party employed proves incompetent, he may, though engaged for a term, be immediately discharged,[2] and his employer may also proceed against him for any loss occasioned by his ignorance or incapacity.[3]

§ 1184. The law, too, annexes as an incident to every contract to perform personal services,—as, for instance, to a covenant by an apprentice to serve his master for a certain period,—however absolute and unconditional may be the terms employed, a condition that the contractor shall be excused from the performance of his contract in the event of his becoming disabled by the act of God, as by death or permanent illness, from doing what he has undertaken to do.[4] Thus, unless there be an express stipulation to the contrary, the death of the master terminates the service of a farm-bailiff.[5] Consequently, inability from illness to perform it, discharges an undertaking by an author to write a book, by an artist to paint a picture within a certain time, or by a musician to play at a concert.[6]

§ 1185. Again, the law implies a warranty by a man who makes a contract as agent for another that he has authority to bind his principal. Therefore, if the agent turn out to have really no such authority as he has assumed to possess, or if he has made any misrepresentation in point of fact, as distinguished from a mere mistake in point of law,[7] he may be sued for the damages necessarily occasioned by this breach of warranty, though he may have acted bonâ fide.[8] Two directors of a company who had informed its bankers that "the manager" had authority to draw cheques upon the company's account, were, on this principle, held,

[1] Harmer *v.* Cornelius, 1858 (Willes, J.).
[2] Id.
[3] Jenkins *v.* Betham, 1854.
[4] Boast *v.* Firth, 1868.
[5] Farrow *v.* Wilson, 1869.
[6] Robinson *v.* Davison, 1871.
[7] Beattie *v.* Ld. Ebury, 1872, C. A. (Mellish, L.J.); Rashdall *v.* Ford, 1866; Holman *v.* Pullin, 1884 (Williams, J.).
[8] West London Com. Bk. *v.* Kitson, 1884, C. A.; Collen *v.* Wright, 1857; Richardson *v.* Williamson, 1871; Weeks *v.* Propert, 1873; Randell *v.* Trimen, 1856; Simons *v.* Patchett, 1857. See Worthington *v.* Sudlow, 1862; Maxwell *v.* Parnell, 1866-67 (Ir.).

when it appeared that there in fact was no such authority, to be themselves personally liable for advances made on cheques so drawn.[1]

§ 1186. So, too, the law implies from the deposit of goods as security for the repayment of a loan on a certain day, a power on the pawnee's part to sell the goods in default of payment at the period stipulated.[2] This doctrine, however, does not apply where a man holds another person's goods on a simple *lien*. A *lien*, unlike a *pledge*, gives only a right of retention;[3] and if goods the subject of a lien be sold (even to meet current expenses) the lien,—except in the case of an innkeeper who now enjoys to a limited extent a statutable right of sale,[4]—is thereby destroyed.[5]

§ 1187. Wherever it is sought to receive evidence of custom to annex an incident to a written contract, however, such evidence must not be *repugnant to or inconsistent with* the contract. Otherwise it would not go to interpret and explain, but to contradict, what is written.[6] To create an inconsistency between the written agreement and the custom, it is not necessary that the former should *in express terms* exclude the latter; but if it can clearly be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by the custom, no evidence respecting it can be received.[7] For instance, where a lease contains express stipulations as to ploughing, sowing, and manuring on leaving, and as to the payments the lessee is to then receive, evidence as to what, by the custom of the country, are the rights of the parties as to sowing, ploughing, and manuring on quitting, and as to the payments to which the lessee would usually be entitled, could not be received, because the principle, "*expressum facit cessare tacitum*" applies, and the language of the lease is deemed to exhaustively contain the stipulations of the parties on these subjects.[8]

[1] Cherry *v.* Colonial Bk. of Australasia, 1869, P. C. See Beattie *v.* Ld. Ebury, 1875, H. L.

[2] Pigot *v.* Cubley, 1864; Johnson *v.* Stear, 1863; Pothonier *v.* Dawson, 1816 (Gibbs, C.J.).

[3] See Donald *v.* Suckling, 1866; Halliday *v.* Holgate, 1868.

[4] 41 & 42 V. c. 38 ("The Innkeepers Act, 1878").

[5] Mulliner *v.* Florence, 1878, C. A.

[6] Holding *v.* Pigott, 1831; Clarke *v.* Roystone, 1845; Yates *v.* Pym, 1816; Trueman *v.* Loder, 1840; Muncey *v.* Dennis, 1856; Suse *v.* Pompe, 1860. See Buckle *v.* Knoop, 1867.

[7] Hutton *v.* Warren, 1836 (Parke, B.). See Clarke *v.* Roystone, 1845.

[8] Hutton *v.* Warren, 1836; Webb *v.* Plummer, 1819.

§ 1188. To constitute a custom or usage of trade or business, admissible in evidence to explain the terms of a written instrument, it, unlike a common law custom, need not have existed from time *immemorial*, or even have been established for a considerable period, nor be *uniform*, or capable of being defined with precision and accuracy.[1] Thus, "the custom of the country" with reference to good husbandry, means no more than that the tenant should conform to the existing prevalent usage of the country where the lands lie.[2] The general usage of trade may, too, be imported into a contract, though proof has been given of exceptions to such usage.[3] Parties connected with a trade will also be presumed to have contracted with a reference to all usages which since its existence have prevailed in such trade, although that particular branch of it has been only established for a year or two.[4] It is, however, the *fact* of a general usage or practice prevailing in the particular trade or business, and not the mere opinion of the witnesses, which is admissible in evidence: and unless the witnesses can state instances of the usage as having occurred within their own knowledge, their testimony will seldom be entitled to much weight.[5]

§ 1189. Whenever evidence of usage is adduced, whether in order to explain the technical language of an instrument, or to annex incidents to it, the party against whom it is offered is always at liberty to prove,—either first, the non-existence of the usage,—or secondly, its illegality or unreasonableness,—or thirdly, that, in fact, it formed no part of the agreement between the parties.[6] Indeed, "a party may properly . . . anticipate objections, and introduce evidence of this sort, which, if he delayed to produce at that moment, would afterwards be shut out."[7]

[1] Juggomohun *v.* Manickchund, 1859, P. C. (Sir J. Coleridge).

[2] Legh *v.* Hewitt, 1803 (Ld. Ellenborough); Dalby *v.* Hirst, 1819. See ante, § 318.

[3] Vallance *v.* Dewar, 1808 (Ld. Ellenborough).

[4] Noble *v.* Kennoway, 1780 (Ld. Mansfield); Robertson *v.* Jackson, 1845.

[5] Lewis *v.* Marshall, 1844 (Tindal, C.J.). Formerly, in America, a custom could not be established by merely the evidence of a single witness; but it is now settled in that country that the fact that there is only a single witness to an alleged contract goes only to his credibility with the jury, and not to his competency in point of law: Jones *v.* Hoey, 1880 (Am.); Robinson *v.* U. S., 1871 (Am.); Vail *v.* Rice, 1851 (Am.); Greenleaf, 15th edit., 1892, p. 355.

[6] Bourne *v.* Gatliffe, 1841 (Alderson, B.). See, also, Bottomley *v.* Forbes, 1838 (Tindal, C.J.); Fawkes *v.* Lamb, 1862.

[7] Bourne *v.* Gatcliffe, 1844 (Ld. Brougham), H. L.

§ 1190. Much injustice is, it is feared, occasioned by a lax habit of admitting evidence of usage, which, though ostensibly received for the purpose of explaining a written contract or other instrument, has too often the effect of putting a construction upon it never contemplated by the parties themselves, and utterly at variance with their real intentions. In this view some of the highest legal authorities both in England and America concur. The judges of the old Court of Exchequer once so said,[1] and the same opinion was expressed more than once by the old Court of Queen's Bench.[2]

§ 1191. Moreover, the expediency of the rule itself was questioned in a judgment of Lord Denman in the last-named court.[3]

§ 1192. In America, the late Story, J., too, expressed similar views.[4]

§ 1193. Not only, however, is evidence of usage, strictly so called, admissible under the rule laid down[5] and discussed[6] above, but it further almost seems that where a written agreement is expressed in short and incomplete terms, or contains words of indeterminate signification, witnesses, present at the time of its being made, may be called to explain that which is per se unintelligible; such explanation not being inconsistent with the written terms.[7] Even conversations between the parties when the contract was being made, have, on one or two occasions, been received, in proof of the sense which they attached to the ambiguous expressions.[8] The principle of these cases is, however, not very clear, and no great weight should be attached to them.[9]

§ 1194. Some time ago[10] it was pointed out that evidence in explanation of written instruments might be received, first, if such instrument was doubtful, or, secondly, where the person or things to which it relates require identification. The first branch of this

[1] See Hutton *v.* Warren, 1836. See, also, Anderson *v.* Pitcher, 1800 (Ld. Eldon).

[2] Johnston *v.* Usborne, 1840; Trueman *v.* Loder, 1840.

[3] Trueman *v.* Loder, 1840.

[4] The Schooner Reeside, 1837 (Am.).

[5] Supra, § 1168.

[6] Supra, §§ 1168—89.

[7] Sweet *v.* Lee, 1841; as, for instance, to show who are meant by "S. and others" in an agreement: Herring *v.* Boston Iron Co., 1854 (Am.).

[8] Birch *v.* Dopeyster, 1816 (Gibbs, C. J.); Gray *v.* Harper, 1841 (Am.); Selden *v.* Williams, 1839 (Am.).

[9] See Smith *v.* Jeffryes, 1846.

[10] § 1158.

rule has now been fully dealt with. Passing to the second, it may be said broadly that *extrinsic evidence* of every *material fact*, which will enable the court to ascertain the *nature and qualities* of an instrument, must always be received.[1] To discover the intention of the writer of an instrument, as evidenced by the words he has used, is always the object; and the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter.[2] With this view, extrinsic evidence of all the circumstances surrounding the author of the instrument is admissible.[3] In the simplest case that can be put, namely, that of an instrument appearing on its face to be perfectly intelligible, inquiry must be made for a subject-matter to satisfy the description. If an estate be conveyed as "Blackacre," parol evidence must be admitted to show what property is known by that name;[4] and if a testator devise a house or a farm described as purchased of A., or in the occupation of B., or called "Cleeve Court," it must be shown by extrinsic evidence what house or farm was purchased of A., or was in B.'s occupation, or was called "Cleeve Court," before it can be shown what is devised.[5]

§ 1195. To put an instance somewhat more complex; if the terms be vague and general, or have divers meanings, parol evidence will always be admissible of any *extrinsic circumstances* tending to show what person or persons,[6] or what things, were intended by the party, or to ascertain his meaning in any other respect. Thus, a court which has to determine whether a bequest of *stock* is specific or pecuniary, will not only look to the context

[1] Grahame *v.* Grahame, 1887 (Ir.). Accordingly, parol evidence may be admitted to show that a mortgage was only intended to stand as security for certain moneys. See Trench *v.* Doran, 1887 (Ir.); Doe *v.* Hiscocks, 1839 (Ld. Abinger); Shore *v.* Wilson, 1842 (Parke, B.), H. L.; Wigr. Wills, 65; Doe *v.* Martin, 1833 (Parke, J.); R. *v.* Wooldale, 1844 (Colcridge, J.). See Macdonald *v.* Longbottom, 1860; Mumford *v.* Gething, 1859; Chambers *v.* Kelly, 1873 (Ir.); McCollin *v.* Gilpin, 1881.

[2] Shore *v.* Wilson, 1842 (Parke, B.), H. L.; Doe *v.* Martin, 1833 (id.); Guy *v.* Sharp, 1833 (Ld. Brougham); Wigr. Wills, 88.

[3] Sweet *v.* Lee, 1841 (Tindal, C.J.); Att.-Gen. *v.* Drummond, 1842 (Sugden, C.); Drummond *v.* Att.-Gen., 1849 (Ir.) (Ld. Brougham), H. L.; Att.-Gen. *v.* Earl of Powis, 1853 (Wood, V.-C.); King's Coll. Hospital *v.* Wheildon, 1854; Blundell *v.* Gladstone, 1843; Simpson *v.* Margitson, 1847 (Ld. Denman); Roden *v.* London Small Arms Co., 1877.

[4] Ricketts *v.* Turquand, 1848, H. L.

[5] Sanford *v.* Raikes, 1816 (Sir W. Grant); Clayton *v.* Ld. Nugent, 1844 (Rolfe, B.); Castle *v.* Fox, 1871.

[6] See Grant *v.* Grant, 1870.

of the will, and the terms of the gift, as compared with those of the other bequests, but will receive evidence of the state of the testator's funded property.[1] Again, where an assignment by deed stated that the particulars were set forth in an inventory annexed, the fact of no inventory being found does not invalidate the deed, but extrinsic evidence is admissible to identify the chattels;[2] where a will directs that all moneys advanced to his children, "as will appear in a statement in my handwriting," should be brought into hotchpot, not only is extrinsic evidence of the nature and amount of the advances admissible, but so is even an unattested document, drawn up by the testator after the date of the will, with the apparent view of furnishing a guide to his trustees;[3] and parol evidence is even admissible to identify an imperfectly executed testamentary paper, if the object be to incorporate that document with a duly-attested codicil, which refers in general terms to the testator's "last will."[4]

§ 1196. A codicil of the distinguished sculptor, Nollekens, occasioned a dispute arising from this doctrine.[5] "In case of my death all the marble in the yard, the tools in the shop, bankers, *mod* tools for carving," &c., "shall be the property of Alex. Goblet." The legatee contended that "mod" meant "models;" the executor urged that either it was an abbreviation for "moulds," or that it should be read in connexion with the words which immediately followed it, and meant "modelling tools for carving." On the one hand the legatee was proved to have been in the testator's service for thirty years, and highly esteemed by him as one of his best workmen; while statuaries proved that no such tools were known as modelling tools for carving, but that "mod" would be understood by any sculptor as a simple abbreviation of the word models. On the other hand, the executor showed that the testator's models were rare and curious works of art, which had sold for a large sum, but that all the other articles mentioned in

[1] Att.-Gen. *v.* Grote, 1827 (Ld. Eldon); Boys *v.* Williams, 1831 (Ld. Brougham); Horwood *v.* Griffith, 1854.

[2] England *v.* Downs, 1840. But see now "The Bills of Sale Act, 1882" (45 & 46 V. c. 43), § 4.

[3] Whateley *v.* Spooner, 1857. But see Smith *v.* Conder, 1878 (Hall, V.-C.).

[4] Allen *v.* Maddock, 1858, P. C.; In re Almosnino, 1860; ante, § 1061.

[5] Goblet *v.* Beechey, 1829.

the codicil were of trifling value; and he further shewed that the testator had a great number of moulds in his possession, which were not specifically disposed of by the will. On this evidence "mod" was decided by a V.-C. to mean "models."[1] In another case, a testator bequeathed to his two children the several sums of "i.x.x." and "o.x.x." These marks were allowed to be explained by extrinsic evidence, that the deceased had, in his business of a jeweller, used them respectively as denoting 100*l.* and 200*l.*[2]

§ 1197. Again, it is obvious, that unless it were first made acquainted with the circumstances surrounding a testator, a court could not with safety undertake to construe his will.[3] Thus, in many testamentary dispositions, one construction would be given to particular words, if children were living at the time the will was executed; and another construction, if no child was alive at that period. If a man were to make an ambiguous settlement for his children, it might be impossible to solve the doubt, until evidence had been adduced respecting the state of the settlor's family, and the circumstances in which he was placed in relation to the property dealt with.[4] Parol evidence will, too, always be admissible to shew what passed as parcel thereof on a conveyance or devise of an estate, a house, a mill, a factory, or a farm, eo nomine, by proof of the situation and limits of the property, the manner in which it was acquired, or occupied, and the like.[5] Parol evidence of the circumstances under which it was given, and to explain the ambiguity, will also be received if the language of a guarantee leaves it doubtful whether the consideration mentioned therein be a *past* or *present* consideration, and, consequently, whether the instrument be invalid or valid,[6] unless, indeed, the court, without

[1] The case was ultimately decided not to turn upon the admissibility of this evidence, but on the ground that the models had been distinctly bequeathed by the will to another party, and that the meaning of the codicil was involved in too much obscurity to justify its operating as a revocation of the prior bequest: Goblet *v.* Beechey, 1831.

[2] Kell *v.* Charmer, 1856.

[3] Sugden, C., in Att.-Gen. *v.* Drummond, 1842 (Ir.).

[4] Id.

[5] Doe *v.* Martin, 1833 (Parke, J.); Doe *v.* Burt, 1787 (Buller, J.); Castle *v.* Fox, 1871; Webb *v.* Byng, 1855; Doe *v.* Ld. Jersey, 1825, H. L.; Okeden *v.* Clifden, 1826; Ropps *v.* Barker, 1826 (Am.); Farrar *v.* Stackpole, 1829 (Am.).

[6] Goldshede *v.* Swan, 1847, and cases there cited; Edwards *v.* Jevons, 1849; Colbourn *v.* Dawson, 1851; Bainbridge *v.* Wade, 1850; Hoad *v.* Grace, 1862; Wood *v.* Priestner, 1866; Hellield *v.* Meadows, 1869.

the aid of any extrinsic proof, in the first instance adopt that construction which supports the validity of the instrument, and casts upon the party objecting to the guarantee the burthen of producing evidence to show that it was void.[1]

§ 1198. It often happens that, in consequence of the surrounding circumstances being proved, the courts give an instrument, thus relatively considered, a very different interpretation from that which it would have received, had it been considered in the abstract. The effect of proof of surrounding circumstances is, however, not to vary the language employed, but merely to explain the sense in which the writer understood it. For example, a contract or other instrument, susceptible of both meanings, but which primâ facie seems to have created a joint-tenancy, may be construed as having simply established a tenancy in common, if it can be shown, not indeed by parol testimony of intention, but by evidence of the acts and dealings of the parties, and of the surrounding circumstances, that the latter construction is that which the instrument must have been originally intended to bear;[2] verbal evidence that a cellar under the yard was at the time of the lease in the occupation of a third party may be admitted to show that a lease which included a yard described by the metes and bounds, could not have been intended to pass such cellar;[3] a devise of all testator's "lands in the parish of Doynton" passed a farm, which subsequently turned out to be partly in another parish, but which was at the date of the will generally reputed to be wholly in Doynton;[4] and though the estate at Chelsea of a cognisor of a fine levied for twenty acres of land and twelve messuages in Chelsea, was under twenty acres, verbal evidence that he had nineteen houses on it was admitted; while since read in connexion with these facts, the fine was ambiguous, further verbal evidence was allowed to show that a particular part of the property was intended to be included in the fine.[5]

[1] Steele *v.* Howe, 1849; Broom *v.* Batchelor, 1856. See Maro *v.* Charles, 1856; and, also, 19 & 20 V. c. 97 ("The Mercantile Law Amendment Act, 1856"), § 3, cited ante, § 1030.

[2] Harrison *v.* Barton, 1861 (Wood, V.-C.).

[3] 2 Poth. Obl. 185; Doe *v.* Burt, 1787.

[4] Anstee *v.* Nelms, 1853.

[5] Doe *v.* Wilford, 1824; Denn *v.* Wilford, 1826.

§ 1199. The same principle was applied where an estate was devised to Mary Beynon's three daughters, Mary, Elizabeth, and Ann. At the date of the will, Mary Beynon had two legitimate daughters, namely, Mary and Ann, and an illegitimate daughter, named Elizabeth. To rebut the claim of the illegitimate daughter Elizabeth, extrinsic evidence was admitted showing that Mary Beynon had formerly had a legitimate daughter named Elizabeth, who had been born in the order stated in the will; that, though this daughter had died several years before the date of the will, her death was unknown to the testator, who had also been studiously kept in ignorance of the birth of the natural child; and under these circumstances a jury were held to have rightly decided that the illegitimate Elizabeth was not entitled.[1]

§ 1200. Again, where an order of removal has been quashed generally by Sessions, on the trial of an appeal against a subsequent order of removal, the removing parish may show by parol evidence the state of things when the first order was quashed, and that the Sessions, in quashing it, intended to pronounce no decision on the merits of the settlement.[2] Primâ facie, indeed, an order of Sessions quashing an order of removal is evidence that the pauper was not settled in the appellant parish.[3] But the respondents may prove the particular ground on which the decision rested.[2]

§ 1201. Moreover, although evidence of all the circumstances surrounding the author of a written instrument, will be received to ascertain his intentions, yet those intentions must ultimately be determined by the *language* of the instrument, as explained by the extrinsic evidence; and no proof (however conclusive), can be admitted, with a view of setting up an intention inconsistent with the known meaning of the writing itself.[4] The duty of the court in all cases is to ascertain, not what the parties may have really intended, as contradistinguished from what their words express; but simply, what is the meaning of the words they have used.[5]

[1] Doe *v.* Beynon, 1840; Phillips *v.* Barker, 1854. See, also, supra, § 1165.

[2] R. *v.* Wick St. Lawrence, 1833; R. *v.* Wheelock, 1826; R. *v.* Perranzabuloe, 1844 (Patteson, J.); R. *v.* Flintshire, 1844.

[3] R. *v.* Wick St. Lawrence, 1833 (Parke, J.); R. *v.* Yeoveley, 1838 (Ld. Denman).

[4] Newenham *v.* Smith, 1859 (Ir.) (Pigot, C.B.).

[5] Doe *v.* Gwillim, 1833 (Parke, J.); Doe *v.* Martin, 1833 (id.); Shore *v.*

The duty is merely that of interpretation; that is, to find out the true sense of the written words, *as the parties used them;* and of construction, that is, when the true sense is ascertained, *to subject the instrument to the established rules of law.*[1]

§ 1202. Therefore, in no case is it permitted to explain the language of a written instrument by evidence of the private views, the secret intentions, the known principles, or even the express parol declarations of the writer, except[2] where the description in the document would equally apply to any one of two or more subjects,[3] or where the object is to rebut an equity.[4] In all cases alike, the court must expound the instrument in strict accordance with the language employed; and if the primary meaning of this language be unambiguous, both with reference to the context, and to the circumstances in which the parties to the instrument were placed at the time of making it, such primary meaning must be taken conclusively to be that in which the parties used the language, and no extrinsic evidence can be received to show that in fact they used it in any other sense, or had any other intention.[5]

§ 1203. For instance,[6] parol evidence to show what persons a testator meant to include or exclude in employing the words "relations," has repeatedly been rejected;[7] neither can it be received to show what articles he intended to give by the word "plate,"[8] or what property he thought he devised by the expression "lands out of settlement,"[9] and the like.[10] In

Wilson, 1842 (Coleridge, J., Parke, B., Tindal, C.J.), H. L.; Beaumont *v.* Field, 1818 (Abbott, C.J.); Richardson *v.* Watson, 1833 (Parke, J.); Rickman *v.* Carstairs, 1833 (Ld. Denman).

[1] See Leiber's Legal and Polit. Hermeneutics, c. 1, § 8, and c. 3, §§ 2, 3; Doct. & Stu. 39, c. 24.

[2] As to these exceptions, see further, post, §§ 1206, 1227.

[3] Shore *v.* Wilson, 1842 (Parke, B.) H. L.

[4] See post, §§ 1227—1230.

[5] Shore *v.* Wilson, 1842 (Coleridge, J., Parke, B., Tindal, C.J.), H. L. Re Peel, 1870, appears to unprofessional men a reduction of this rule to an absurdity.

[6] For other instances, see ante, §§ 1155, 1156.

[7] Goodinge *v.* Goodinge, 1749; Edge *v.* Salisbury, 1749; Green *v.* Howard, 1779. See Sullivan *v.* Sullivan, 1870 (Ir.), where the words were "my dearly beloved."

[8] Nicholls *v.* Osborn, 1727; Kelly *v.* Powlet, 1763.

[9] Strode *v.* Russel, 1708.

[10] See other instances collected in Wigr. Wills, 99—105. See, also, Doe *v.* Hubbard, 1850; Horwood *v.* Griffith, 1854; Hicks *v.* Sallitt, 1854; Millard *v.* Bailey, 1866 (Wood, V.-C.). In Knight *v.* Knight, 1861, Stuart, V.-C., appears to have utterly ignored this rule, holding that extrinsic evidence was admissible to show that, under the words "ready money," a testator meant that shares in an insurance company should pass. Sed qu.

all these cases, as the legal signification of the language used was plain, it matters not what the testator intended; the sole question being, non quod voluit, sed quod dixit.[1] If this were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of a particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to benefit under it, might be set up to contradict or vary its plain language.[2]

§ 1203A. Declarations of intention may, however, be received in evidence when the question does not turn on the *meaning* of the language employed; consequently, if a will be lost, evidence of the testator's declarations of intention will be admissible in proof of its contents;[3] and if a question arise with regard to the constituent parts of an existing will, similar statements, whether oral or written, and whether made before or after it was signed, may be given in evidence to show what was or was not a part of the instrument at the time of its execution.[4]

§ 1204. The general rule has, moreover, been somewhat relaxed in order to facilitate the interpretation of *ancient* writings. For if an instrument be old, and its meaning doubtful, the *acts* of the author (which are only modes of expressing intention more weighty than words) may be given in evidence in aid of its construction. Tindal, L. C. J., once expressly declared, that to ascertain the sense of an old charity grant, evidence of "the early and contemporaneous application of the funds of the charity itself by the original trustees under the deed," is certainly admissible.[5] Proof of the application of the funds of an ancient charity by the original founder, and first trustee, is, indeed, strong evidence of intention,

[1] Shore *v.* Wilson, 1842 (Parke, B.) H. L.
[2] Id. (Tindal, C.J.).
[3] Sugden *v.* Ld. St. Leonards, 1876.
[4] Gould *v.* Lakes, 1880; Re Ball, 1890 (Ir.); Sugden *v.* Ld. St. Leonards, 1876.
[5] Shore *v.* Wilson, 1842, H. L. See, also, Att.-Gen. *v.* Sidney Sussex Coll., 1869, C. A.; Att.-Gen. *v.* Mayor of Bristol, 1820 (Ld. Eldon). See 7 & 8 V. c. 45 ("The Nonconformist Chapels Act, 1844"), § 2, cited ante, § 75.

and may be so regarded by the court in construing an old grant;[1] and, while evidence of the declarations of the founder of an ancient charity, either against, or in favour of, his grant, cannot be received, evidence may be given of *acts* of the founder in relation to the charity.[2] Lord St. Leonards, too, once observed, "Tell me what you have done under such a deed, and I will tell you what that deed means."[3]

§ 1205. Charities, however, possess no peculiarity which warrants the adoption of a special rule of evidence with respect to them. Consequently, *all* ancient instruments of every description may, *when they contain ambiguous language*, but in that event alone, be interpreted by what is called contemporaneous and continuous usage under them, or, in other words, by evidence of the mode in which property dealt with by them has been held and enjoyed.[4] For instance, the contemporaneous acts of occupiers of land have been admitted in evidence to explain the meaning of an ambiguous award under an old enclosure Act;[5] evidence that the tenants had for a long series of years enjoyed the land itself has been received on a question as to whether the soil, or merely the herbage, passed under the term "pastura" contained in an ancient admission as entered on the court-rolls of a manor;[6] the by-laws of a corporation may be taken as an exposition of their charter;[7] and evidence of contemporaneous, or even of constant modern,[8] usage will be admissible, for the purpose of ascertaining the meaning and effect of an ancient grant or charter from the Crown,[9] or of any private

[1] Att.-Gen. *v.* Brazenose College, 1834, H. L.

[2] Drummond *v.* Att.-Gen., 1848, H. L.

[3] Att.-Gen. *v.* Drummond, 1842 (Ir.).

[4] Weld *v.* Hornby, 1806 (Ld. Ellenborough); Waterpark *v.* Fennell, 1859, H. L.; Donegall *v.* Templemore, 1858 (Ir.); D. of Devonshire *v.* Neill, 1877 (Ir.) (Palles, C.B.); Att.-Gen. *v.* Parker, 1747 (Ld. Hardwicke); R. *v.* Dulwich College, 1851; Att.-Gen. *v.* Murdoch, 1852. In Att.-Gen. *v.* St. Cross Hospital, 1853, Sir J. Romilly, M.R., held that no presumption could be made against the clear ostensible purpose of the foundation, though it were supported by a usage of 150 years. See Att.-Gen. *v.* Clapham, 1854.

[5] Wadley *v.* Baylis, 1814; recognised (Cresswell, J.) in Doe *v.* Beviss, 1849; Att.-Gen. *v.* Boston, 1847.

[6] Doe *v.* Beviss, 1849; Stammers *v.* Dixon, 1806.

[7] Davis *v.* Waddington, 1844 (Tindal, C.J.).

[8] Chad *v.* Tilsed, 1821; Doe *v.* Beviss, 1849; D. of Beaufort *v.* May. of Swansea, 1849; Master Pilots, &c. of Newcastle *v.* Bradley, 1851; Shephard *v.* Payne, 1863, C. A.

[9] May. of London *v.* Long, 1807 (Ld. Ellenborough); R. *v.* Varlo, 1775; Blankley *v.* Winstanley, 1789;

deed, or other instrument, of remote antiquity.[1] Even when an old statute is ambiguous, the maxim, optimus interpres rerum usus, will apply.[2]

§ 1206. As before mentioned,[3] moreover, the *declarations* of the writer of an instrument will *be receivable in evidence* in two cases. One of these arises *where extrinsic evidence has shown that a description in the instrument is alike applicable, with legal certainty, to two or more persons or things.*

§ 1207. To use the words of Lord Abinger, "there is *but one case*,[4] in which . . . . this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things,[5] or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls 'an equivocation,' that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity;[6] for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to

Bradley *v.* Pilots of Newcastle, 1853; Jenkins *v.* Harvey, 1835; Bruno *v.* Thompson, 1843.

[1] Withnell *v.* Gartham, 1795 (Ld. Kenyon); Weld *v.* Hornby, 1806 (Ld. Ellenborough); Duke of Beaufort *v.* May. of Swansea, 1849; Sadlier *v.* Biggs, 1853, H. L.; Waterpark *v.* Fennell, 1859, H. L.

[2] R. *v.* Scott, 1790 (Ld. Kenyon); Sheppard *v.* Gosnold, 1673; R. *v.* Abp. of Canterbury, 1848 (Coleridge and Patteson, JJ.); Montrose Peer., 1853, H. L.

[3] Ante, § 1202. See, also, Charter *v.* Charter, 1874, H. L.

[4] As to rebutting an equity, see, however, §§ 1227—1230.

[5] See Harman *v.* Garner, 1866.

[6] See Douglas *v.* Follows, 1853 (Wood, V.-C.).

appear by the writing, explained by circumstances, there is no will."[1]

§ 1208. The rule thus laid down has been followed in various cases. Thus, on the one hand, where there is a devise to a relative described as being of a certain degree of relationship, if there exist a legitimate relation of this degree of relationship, parol evidence is not admissible to show that an *illegitimate* relation whose reputed relationship is of the same degree, was the person really intended.[2] Further, on a gift by will to "my niece, E. W." if neither the testator nor his wife possess a niece, though it may be shown that a niece or grandniece of the wife was meant—and such a person can claim the gift as a "niece"[3]—extrinsic evidence is not admissible to show that another but illegitimate grandniece was meant.[4] Again, on a gift to the "children" of a donee who has two families, all his children will take, and extrinsic evidence cannot be received to show that only the children of one family were meant, for the word "children" is not ambiguous.[5] On the other hand, where a testator devised one house "to George Gord, the son of George Gord," another "to George Gord, the son of John Gord," and a third after the expiration of certain life estates, "to George Gord, the son of Gord," evidence of his declarations was admitted to show, that the person meant to be designated by the last description was George the son of *George* Gord;[6] where a devise is expressed to be in favour of a person who is named and described, but there are two persons, each of whom possesses the name and description, parol evidence of the testator's intention or declarations is admissible to resolve this latent ambiguity.[7]

§ 1209. Where declarations of intention are receivable in evidence, their admissibility appears not to depend upon the *time* when they were made. Certainly, *contemporaneous* declarations will, cæteris paribus, be entitled to greater weight than those made

[1] Doe *v.* Hiscocks, 1839.

[2] See Dorin *v.* Dorin, 1875, H. L.; In re Taylor, 1887; Wells *v.* Wells, 1874; In re Brown, 1889.

[3] In re Fish, Ingham *v.* Rayner, 1894.

[4] Sherratt *v.* Montford, 1873.

[5] Andrews *v.* Andrews, 1884-85 (Ir.); Dorin *v.* Dorin, 1875, supra.

[6] Doe *v.* Needs, 1836; Doe *v.* Morgan, 1832.

[7] Doe *v.* Allen, 1840; Fleming *v.* Fleming, 1862; Jones *v.* Newman, 1750-51; explained in Doe *v.* Hiscocks, 1839; Phelan *v.* Slattery, 1887 (Ir.); Bennett *v.* Marshall, 1856; Re O'Reilly, 1874. See Webber *v.* Corbett, 1874.

before or after the execution; but in point of law no distinction can be drawn between them,[1] unless the subsequent declarations, instead of relating to what the declarant had done, or had intended to do, by an instrument, were simply to refer to what he intended to do, or wished to be done, at the time of speaking.[2] Neither will the *admissibility* of declarations rest on the manner in which they were made, or on the occasions which called them forth. Whether they consist of statements gravely made to interested parties, or of instructions to professional men, or of light conversations, or of angry answers to impertinent inquiries by strangers, they will be alike received in evidence, though the *credit* due to them will of course vary materially according to the time and circumstances.[3] They may of course consist of letters; for example, letters in which a deceased insured expressed an intention of going to a certain place where a dead body, the identity of which is questioned, has been found.[4]

§ 1210. Moreover, though declarations of intention are inadmissible, except for the purpose of explaining a latent ambiguity in the instrument, mere *collateral statements* made by the author of the instrument respecting the persons or things mentioned therein are not excluded. For instance, where a testator has habitually called certain persons or things by *peculiar names*, by which they were not commonly known, these names occurring in his will, could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language,[5] and the habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will.[6] Accordingly, under a devise in trust for "the second son of *Edmond* Weld, of Lulworth, Esq.," parol evidence was admitted to show that the testator had on several occasions, even after correction, called the possessor of Lulworth "Edmond,"[7] though his real name was "Joseph."

[1] Doe *v.* Allen, 1840 (Ld. Denman), as to *subsequent* declarations; Doe *v.* Hiscocks, 1839 (Ld. Abinger), as to *previous* declarations. See, contrà, Thomas *v.* Thomas, 1796; Strode *v.* Russell, 1708.

[2] Whitaker *v.* Tatham, 1831.

[3] Trimmer *v.* Bayne, 1802 (Ld. Eldon).

[4] Mutual Life, &c. *v.* Hillman, 1892 (Am.).

[5] As to which, see supra, § 1196.

[6] Doe *v.* Hiscocks, 1839 (Ld. Abinger). See, also, Doe *v.* Hubbard, 1850 (Erle, J.).

[7] Ld. Camoys *v.* Blundell, 1848,

§ 1211. Again,[1] where a testatrix of great age bequeathed "to Mrs. and Miss Bowden, of Hammersmith, widow and daughter of the late Rev. Mr. Bowden, 200*l.* each," evidence was received (and acted upon) that no "Mrs. Bowden" answering the description in the bequest, had for years lived at Hammersmith; that the testatrix had, years before, been intimately acquainted with Bowdens; that a certain Mrs. Washbourne was the daughter of a Rev. Mr. Bowden; and that testatrix had been in the habit of calling her by her maiden name of Bowden, and often, after being reminded of the mistake, acknowledged that she had confounded the two names. Similarly, under a bequest to "Mrs. G.," parol evidence was admitted to show that the testator had been in the habit of calling a Mrs. Gregg, "Mrs. G.;"[2] while (and perhaps this case[3] carries this doctrine to its extreme limit) under a gift of a legacy to Catherine Earnley, proof was received (and acted upon) that no such person as Catherine Earnley was known, and that the testator usually called one *Gertrude* Yardley "Gatty," which might easily have been mistaken by the scrivener who drew the will for "Katy."

§ 1212. This rule, by which the admissibility of declarations of intention is governed, largely turns upon the distinction between a *patent* and a *latent* ambiguity, and will be better understood by reference to cases where evidence of such declarations has been rejected. Says Lord Bacon, "There be two sorts of ambiguities of words, the one is ambiguitas patens, and the other latens. Patens is that which appears to be ambiguous upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. Ambiguitas patens is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with

H. L. See, also, Mostyn *v.* Mostyn, 1854, H. L.

[1] Lee *v.* Pain, 1844. See, also, R. *v.* Wooldale, 1845.

[2] Abbott *v.* Massie, 1796; explained (Rolfe, B.) in Clayton *v.* Ld. Nugent, 1844. See, also, In the goods of François de Rosaz, 1877.

[3] Beaumont *v.* Fell, 1723. Declarations of the testator were here admitted, but the propriety of receiving such evidence has been strongly questioned (Ld. Abinger) in Doe *v.* Hiscocks, 1839, and, as an authority of that, the case may be considered overruled.

matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore, if a man give land to J. D. and J. S. et hæredibus, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was (that) the inheritance should be limited." "But if it be ambiguitas latens, then otherwise it is; as if I grant my manor of S. to J. F., and his heirs, here appeareth no ambiguity at all. But if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them it was, that the party intended should pass."[1] He also remarks: "Ambiguitas verborum latens, verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur."[2]

§ 1213. So far as patent ambiguities are concerned, Lord Bacon's exposition of the law is sufficiently precise; and there can be no doubt that when the ambiguity is *patent*, all declarations of the writer's intention will be uniformly excluded. For example, if a testator, after leaving specific legacies to his several children, were to bequeath the residue to his child, not specifying which, the will would, so far as regarded the residuary bequest, be inoperative and void; and on the same principle, where a testator purported to leave his property to persons designated by letters of the alphabet, his will stating at its end that the key to the initials was in his writing-desk on a card, it was held that (no card of as old a date as the will being found) a card which would have furnished a key, but was dated many years after the execution of the will, could only be regarded as a declaration of the testator, and that the case being one of patent ambiguity, this species of evidence could not be legally admitted.[3]

§ 1214. The law as to latent ambiguities is not so easily intelligible. To begin with, it must not be supposed that, because no ambiguity arises on the face of the instrument, *any* doubt which is occasioned by extrinsic evidence may be cleared up by having

[1] See Bacon's Law Tracts, 99, 100.
[2] Bacon's Maxims, Reg. 23.
[3] Clayton *v.* Ld. Nugent, 1844. See Kell *v.* Charmer, 1856, cited ante, § 1196; and see, also, Whateley *v.* Spooner, 1857, cited ante, § 1195.

recourse to the declarations of the writer's intention. In many instances of strictly *latent* ambiguities evidence of declarations of intention would be inadmissible. Thus, a will, apparently plain and intelligible, may, when an inquiry is instituted respecting the persons or things to which it relates, turn out to be "*uncertain;*" that is, not to describe persons or things to which it refers with *legal certainty*. For example, suppose a bequest to the *four* children of A., and it appears that A. had *six* children, two by a first marriage, and the remainder by a second. Evidence of the circumstances of the family, and of the respective ages of the children, would no doubt be admissible, with the view of identifying the particular legatees alluded to in the will, but proof of the testator's declarations of intention could not be received, so that the gift would be bad for uncertainty.[1]

§ 1215. In the second place, a legatee may be so described in a will, that *while part of the description answers to one claimant, the remainder may apply to another.* Formerly the law attached somewhat greater weight to the *name* than to the *description* of the legatee, so that if there were nothing in the rest of the will, or in admissible evidence, to show who was meant, the person rightly named was allowed to take in preference to him who was only rightly described.[2] This doctrine seems to have been first promulgated by Lord Bacon,[3] who embodied it in the maxim, "Veritas nominis tollit errorem demonstrationis." Thus, where a man had, in the lifetime of his wife, Mary, gone through the marriage ceremony with a reputed second wife, Caroline, with whom he had continued to reside up to the date of his decease, and by a will made shortly before his death devised certain property to "his dear wife Caroline," on the question whether the will designated the lawful wife who was wrongly, or the unlawful wife who was rightly, named, the court held Caroline to be entitled.[4] The doctrine has, however, been very roughly handled

[1] Doe *v.* Hiscocks, 1839 (Ld. Abinger), questioning Hampshire *v.* Peirce, 1750; Andrews *v.* Andrews, 1884-85 (Ir.), supra, § 1208.

[2] Ld. Camoys *v.* Blundell, 1848, H. L. (Parke, B., pronouncing the opinion of the judges). But see Drake *v.* Drake, 1860, H. L.; and Farrer *v.* St. Catherine's Coll., 1873 (Ld. Selborne, C.).

[3] Ld. Camoys *v.* Blundell, 1848 (Ld. Brougham), H. L.

[4] Doe *v.* Rouse, 1848; Adams *v.* Jones, 1852 (Turner, V.-C.); Dilley *v.* Matthews, 1863 (Wood, V.-C.).

by Lord Chancellor Campbell in the House of Lords;[1] and if it cannot at present be safely regarded as exploded,[2] still less, on the other hand, can it be recognised as an inflexible rule.[3] In all such cases the context and the surrounding facts will be looked at closely, and the court will place itself, as nearly as may be, in the situation of the testator at the time of executing the instrument. If it can then *clearly* ascertain from the language of the will[4] which of two claimants was intended by the testator, it will award the legacy to the one so meant to be benefited,[5] though the supposed maxim may chance to be contravened.[6]

§ 1216. A striking illustration of this last principle is afforded by a case[7] where a testator devised an estate to his nephew for life, with remainder over to "*Elizabeth Abbott*, a *natural daughter* of Elizabeth Abbott, of Gillingham, single woman, who had formerly lived in his service," and it appeared that, at the date of the will, Elizabeth Abbott, the mother, was the wife of John Caddy, and had had only two children, namely, a *natural son* named John, born before his mother's marriage, shortly after she had left the testator's service, and of whom testator's nephew was the putative father, the other named Margaret, who was born four years subsequently to her leaving the service, and was a *legitimate daughter* by Caddy, and it further appeared that the testator had wished his nephew to marry his servant, that he was aware she had had a natural child, and that he had treated her kindly since its birth and up to the date of the will; but no proof was given that he knew whether the natural child was a boy or a girl. It was held that the testator meant to provide for his nephew's natural child

[1] Drake *v.* Drake, 1860, H. L.

[2] See In re Plunkett's estate, 1861 (Ir.); Colclough *v.* Smyth, 1860 (Ir.); Garner *v.* Garner, 1860; Gillett *v.* Gane, 1870.

[3] Ld. Camoys *v.* Blundell, 1848, H. L.; Thomson *v.* Hempenstall, 1849 (Dr. Lushington).

[4] Re Brake, 1881.

[5] Garland *v.* Beverley, 1878; In re Lyon's Trusts, 1879 (Hall, V.-C.).

[6] Doe *v.* Huthwaite, 1820; explained (Ld. Abinger) in Doe *v.* Hiscocks, 1839; Ld. Camoys *v.* Blundell, 1848, H. L.; Healy *v.* Healy, 1875 (Ir.); Charter *v.* Charter, 1874, H. L.; In re Wolverton Mortgaged Estates, 1877 (Malins, V.-C.); In re Nunn's Will, 1875; In re Blayney's Trusts, 1875 (Ir.), where the doctrine was carried to its limit (Sullivan, M.R.); Bernasconi *v.* Atkinson, 1853; In re Bridget Feltham, 1855; Hodgson *v.* Clarke, 1860; Re Gregory's Settlement and Wills, 1865; Re Noble's Trusts, 1871 (Ir.); Re Feltham's Trusts, 1855; Re Kilvert's Trusts, 1871; Dooley *v.* Mahon, 1877 (Ir.).

[7] Ryall *v.* Hannam, 1847. See, also, Douglas *v.* Fellows, 1853.

by his servant, Elizabeth Abbott, and that the mistake of the name and sex was not sufficient to defeat the devise.

§ 1217. In cases of this nature, however, the court cannot, it must be recollected, receive any *declarations* of the testator as to what he intended to do[1] by his will. Thus, in a leading case, a testator devised lands to his son, John Hiscocks, for life; and after his decease, to his grandson, "*John*, the *eldest* son of the said John Hiscocks," it appearing that the testator's son had been twice married, and that by his first wife had had Simon, but that John was the eldest son of the second marriage; it was held, that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible for the purpose of showing which of these two grandsons was intended.[2] So, again, in the case cited below, upon the question whether a great-great-niece could take under the description of a "niece," evidence was offered that the testator had had a niece named Elizabeth Stringer, to whom by a former will he had left a legacy; that this niece (who was grandmother to Elizabeth Stringer, the claimant) died in 1848; that, in 1850, the testator made a codicil, without allusion to the lapsed legacy; that in 1852 he instructed his solicitor to prepare a second (and inconsistent) codicil, on which occasion he again made no reference to Elizabeth Stringer's legacy; that his solicitor, having recommended that, in lieu of two inconsistent codicils, a new will should be made, and being ignorant of the death of Elizabeth Stringer, the niece, copied into the second will the bequest in her favour as it stood in the first will; and that the testator's memory was impaired by age, and his attention was not in any way directed to the legacy in question, which, beyond reasonable doubt, having thus been inserted by the solicitor through ignorance, was allowed to remain by the testator through forgetfulness. Assuming this evidence to be admissible, the claimant was *clearly* not the object of the testator's bounty. Such evidence, however, was rejected, first, by the Master of the Rolls,[3] and next,

[1] Doe *v.* Hiscocks, 1839, where Ld. Abinger questions and overrules the contrary dicta of Ld. Kenyon and Lawrence, J., in Thomas *v.* Thomas, 1796.

[2] See, also, Drake *v.* Drake, 1860, H. L.; Douglas *v.* Fellows, 1853; Bernasconi *v.* Atkinson, 1853; Farrer *v.* St. Catherine's Coll., 1873 (Ld. Selborne, C.).

[3] Stringer *v.* Gardiner, 1859.

by the full Court of Appeal,[1] as not being admissible to guide the court in the construction of the will, and Elizabeth Stringer, the claimant, was consequently held entitled to the property although she was a great-great-niece, not a "niece," and although her proper name was not "Elizabeth Stringer" but Elizabeth Jane Stringer.

§ 1218-19. In the third place,[2] the description may *not accurately specify* even one person or thing; that is, the description of the subject intended may be true in part, but not true in every particular. Here, though parol evidence of the author's declarations cannot be received, the instrument will not in consequence of the inaccuracy be regarded as inoperative. If, after rejecting so much of the description as is false, the remainder will enable the court to ascertain with legal certainty the subject matter to which the instrument really applies, it will be allowed to take effect.[3] The rule of the civil law, "falsa demonstratio non nocet, cum de corpore constat," is followed in such cases.

§ 1220. The rule, which rejects erroneous descriptions, which are not substantially important, can, however, only be applied where enough remains to show the intent plainly. It is[4] "clearly settled, that when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if the premises be described in general terms, and a particular description be added, the latter controls the former." It matters not which part of the description is placed first, and which last, in the sentence; since "it is vain to imagine one part before another; for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives vitam et modum to the sentence."[5]

§ 1221.[6] Examples of the rule "falsa demonstratio non nocet," are furnished by its having been held that, under a lease of "all that part of Blenheim park, situate in the county of Oxford, and

[1] Stringer *v.* Gardiner, 1860.
[2] For the two first cases, see supra, §§ 1214, 1215 et seq.
[3] See Ford *v.* Batley, 1854; Coltman *v.* Gregory, 1871.
[4] Doe *v.* Galloway, 1833 (Parke, J.). See, also, Doe *v.* Hubbard, 1850; Doe *v.* Carpenter, 1850.
[5] Stukeley *v.* Butler, 1615.
[6] Gr. Ev. § 301, in part.

now in the occupation of one S., lying" within certain specified abuttals, "with all the houses thereto belonging, and which are now in the occupation of the said S.," a house lying within the abuttals, though not in the occupation of S., would pass;[1] that by a devise of "all that my farm called Trogue's farm, now in the occupation of C.," the whole farm passed, though it was not all in C.'s occupation;[2] that a devise of all the testator's *freehold* houses in Aldersgate-street, when in fact he had only leasehold houses there, was, in substance and effect, a devise of his houses in that street, the word freehold being rejected as surplusage;[3] that if a landlord, having but one house in a street, describe it in a lease by a wrong number, and then let a tenant into possession under it, he cannot afterwards rely on the error, and contend that no interest passed; for the number is rejected as an immaterial part of the description;[4] that where land was described in a patent as lying in the county of M., and further described by reference to natural monuments, on its appearing that the land described by the monuments was in the county of H., and not of M., that part of the description which related to the county must be rejected, since, said the court, the entire description in the patent being taken, and the identity of the land ascertained, by a reasonable construction of the language used, and a repugnant description, which, by the other descriptions in the patent, clearly appeared to have been made through mistake, not making the patent void. If, however, land granted be so inaccurately described as to render its identity wholly uncertain, the grant is void.[5] But where lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to the one description, and not to the other, the description of the lands,

[1] Doe *v.* Galloway, 1833; Dyne *v.* Nutley, 1853.

[2] Goodtitle *v.* Southern, 1813; recognised in Miller *v.* Travers, 1832; and in Slingsby *v.* Grainger, 1859, (Ld. Cranworth) H. L. See, also, Hardwick *v.* Hardwick, 1873 (Ld. Selborne, C.); Barber *v.* Wood, 1877 (Hall, V.-C.); Norreys *v.* Franks, 1874 (Ir.); Keogh *v.* Keogh, 1874 (Ir.); Harrison *v.* Hyde, 1859; Stanley *v.* Stanley, 1862; West *v.* Lawday, 1865, H. L.; White *v.* Birch, 1867 (Malins, V.-C.); In re Whatman, 1805; Travers *v.* Blundell, 1877, C. A.

[3] Day *v.* Trig, 1715, cited with approbation (Tindal, C.J.) in Miller *v.* Travers, 1832; Doe *v.* Cranstoun, 1840 (Parke, B.).

[4] Hutchins *v.* Scott, 1837 (Ld. Abinger). See Hitchin *v.* Groom, 1848.

[5] Boardman *v.* Reed and Ford's Lessees, 1832 (Am.) (McLean, J.).

owned by him, will be taken to be the true one, and the other will be rejected as falsa demonstratio.[1]

§ 1222. Two cases[2] may be cited in which the rule which rejects erroneous description, and admits parol evidence for the purpose of showing how the mistake arose, was carried to its extreme bounds. In each a testator had devised to certain legatees a sum which he described as part of a specified stock, of which, at the date of the will, and thence up to the time of his death, he had none, though he had had some such stock some years before, and had sold it out, and invested the produce in other securities of somewhat similar name. Proof of these facts was admitted, not, indeed, "to prove that there was a mistake, for that was clear, but to show how it arose;" and (as pointed out in the later case) not, as it has been erroneously supposed,[3] for the purpose of showing that the testator, when he used the erroneous description of the first stock, meant to bequeath the second stock, which he had purchased with the produce of the first, with the result, not of substituting another specific subject in the place of a specific legacy which the will purported to bequeath;—not of substituting the second stock, which the testator had, and did not purport to give, for the first stock which he had not, and did purport to give; but simply of rendering legacies, which were primâ facie specific, payable out of the general personal estate.[4] In other words, a good legacy is not adeemed by being made payable out of a fund which is not the subject of the will.

§ 1223. In connexion with the rule as to "falsa demonstratio," &c., a somewhat arbitrary rule of equitable construction, with reference to the interpretation of wills, may be noticed. This is,

[1] Loomis *v.* Jackson, 1822 (Am.); Lush *v.* Druse, 1830 (Am.); Jackson *v.* Marsh, 1826 (Am.); Worthington *v.* Hylyer, 1808 (Am.); Blague *v.* Gold, 1635; Swift *v.* Eyres, 1636. The object in such cases is, to interpret the instrument by ascertaining the intent of the parties; and the rule to find the intent is, to give most effect to those things about which men are least liable to mistake: Davis *v.* Rainsford, 1821 (Am.); McIver *v.* Walker, 1815 (Am.).

[2] Selwood *v.* Mildmay, 1797; Lindgren *v.* Lindgren, 1846.

[3] In Miller *v.* Travers, 1832; Doe *v.* Hiscocks, 1839.

[4] Lindgren *v.* Lindgren, 1846. See, also, Quennell *v.* Turner, 1851; Tann *v.* Tann, 1863 (Romilly, M. R.); and Hart *v.* Tulk, 1852, where the Lords Justices, to set right what they thought was an obvious clerical error, held that the words, "fourth schedule," in a will, should be read as if they were "fifth schedule."

that if legacies be given to any specified number of children, as, for instance, 500*l.* apiece to the *three* children of A., and it turn out that at the date of the will A. had any larger number of children, the court will reject the number mentioned in the will, upon the presumption of mistake, and will award a legacy of 500*l.* to each of A.'s children.[1]

§ 1224. False statements, introduced into an instrument by way of affirmation only, may, as we have seen, be rejected, provided the remaining description be sufficient to identify the person or thing intended. But they cannot be disregarded, if they have been used by way of *exception* or *limitation;* because, in this latter case, it is obvious that they were intended to have a *material* operation.[2] Moreover, if there be one subject-matter as to which all the demonstrations in a written instrument are true, and another as to which part are true and part false, the instrument shall be intended to contain words to pass only that subject-matter, as to which all the circumstances are true.[3] Such is the correct meaning of the maxim enunciated by Lord Bacon, "Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram."[4] For example, on a devise of "all my messuages situate at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk;" it appearing that the testator had bought of the Duke four houses very near Snig Hill, and two at some considerable distance from it, and in a place bearing a different name; the court held that the four houses only passed by the devise, though all the six had been purchased by one conveyance, and the testator had redeemed the land tax upon all by one contract;[5] and under a bill of sale assigning "all the household goods of every description at No. 2, Meadow Place, more particularly set forth in an inventory of even

[1] Daniell *v.* Daniell, 1840; McKechnie *v.* Vaughan, 1873 (James, L.J.); Morrison *v.* Martin, 1846; Lee *v.* Pain, 1844; Scott *v.* Fenoulhett, 1784; Yeats *v.* Yeats, 1852. See Wrightson *v.* Calvert, 1860; Newman *v.* Piercey, 1876.

[2] Taylor *v.* Parry, 1840 (Manie, J.).

[3] Doe *v.* Bower, 1832 (Parke, J.); Ex parte Kirk, In re Bennett, 1877, C. A.

[4] Morrell *v.* Fisher, 1849 (Ir.) (Alderson, B.). See, also, Boyle *v.* Mulholland, 1860; Horner *v.* Horner, 1877 (Fry, J.).

[5] Doe *v.* Bower, 1832; Homer *v.* Homer, 1878, C. A.; Pogson *v.* Thomas, 1840; Doe *v.* Ashley, 1847; Webber *v.* Stanley, 1864; Smith and Goddard *v.* Ridgway, 1866, Ex. Ch.; Pedley *v.* Dodds, 1866.

date herewith," no goods will pass except those specified in the inventory.[1]

§ 1225. On the same principle, too, where a testator devised to A. his *freehold* messuage, farms, lands, and hereditaments, in the county of B., and it appeared that he had a farm in that county, consisting of a messuage and 116 acres, the greater part of which was freehold, but a small portion was leasehold for a long term of years at a pepper-corn rent, it was held that as the devise correctly described the freehold, the leasehold part was not included therein, though this part was interspersed with, and undistinguishable from, the freehold, and the whole farm had always been treated as freehold by the testator.[2] This rule of construction will (it is said) be enforced with greater strictness, where an interpretation is to be put upon a devise of real estate, than in other cases; it being an established doctrine of construction, that an heir-at-law shall not be disinherited except by express words.[3]

§ 1226. From what precedes, the following rules may be collected. First, where in a written instrument the description of the person or thing intended *is applicable with legal certainty to each of several subjects*, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author.[4] Secondly, if the description of the person or thing be *partly applicable* and *partly inapplicable to each of several subjects*, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible.[5] Thirdly, if the description be partly correct and partly incorrect, and the correct part be sufficient of itself to enable the court to identify the subject intended, while the incorrect part is *inapplicable to any subject*, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by

[1] Wood *v.* Rowcliffe, 1851; Morrell *v.* Fisher, 1849; Barton *v.* Dawes, 1850.

[2] Stone *v.* Greening, 1843; Hall *v.* Fisher, 1844; Quennell *v.* Turner, 1851; Evans *v.* Angell, 1858. See, also, Gilliat *v.* Gilliat, 1860; Mathews *v.* Mathews, 1867.

[3] Doe *v.* Bower, 1832 (Parke, J.).

[4] Wigr. Wills, 160.

[5] Doe *v.* Hiscocks, 1839.

rejecting the erroneous statement.[1] Fourthly, if the description be *wholly inapplicable* to the subject intended, or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe.[2] Fifthly, if the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to, in order to show that in some secondary sense of the words, and in one in which the author meant to use them, the instrument may have a full effect.[3]

§ 1227.[4] It only remains to notice a class of cases to which allusion has before been made[5]—namely, cases in which such evidence is offered to rebut an equity[6]—when parol declarations of intention, in common with other extrinsic evidence, are allowed to affect the operation of a writing, though the writing is on its face free from ambiguity. Where the principles of Equity raise a presumption against the apparent intention of a written instrument, such presumption may be repelled by extrinsic evidence, whether of declarations, or of collateral facts, showing the intention to be otherwise.[7] The simplest instance of this is when two legacies are left to the same person by different testamentary instruments. Contrary to the general rule,[8] these are, primâ facie, presumed not to have been intended as cumulative, if the sums and the expressed motives of both exactly correspond.[9] But to rebut this presumption parol evidence of every kind will be received. The effect, indeed, of such evidence is not to show that the testator did not mean what he said, but, on the contrary, to prove that he did mean what he has expressed.[10] Extrinsic evidence is also admissible to repel the primâ facie presumption against double portions,[11] which

[1] Wigr. Wills, 67—70.
[2] Id. 133.
[3] Doe *v.* Hiscocks, 1839 (Ld. Abinger); Wigr. Wills, 11, cited ante, § 1131, *n.*
[4] Gr. Ev. § 296, in part.
[5] Supra, § 1202.
[6] See Buckley *v.* Littlebury, 1711; Francis *v.* Dichfield, 1742.
[7] Hall *v.* Hill, 1841 (Ir.) (Sugden, C.); Hurst *v.* Beach, 1819; Trimmer *v.* Bayne, 1802 (Ld. Eldon).
[8] See Russell *v.* Dickson, 1853, H. L.; Breeman *v.* Moran, 1857 (Ir.); Wilson *v.* O'Leary, 1872, H. L.; Hubbard *v.* Alexander, 1876.
[9] Tatham *v.* Drummond, 1864 (Wood, V.-C.); Tuckey *v.* Henderson, 1863.
[10] Hurst *v.* Beach, 1821 (Leach, V.-C.); recognised in Hall *v.* Hill, 1841 (Ir.) (Sugden, C.); and by C. A. in Re Tussaud's Estate, 1878.
[11] See Montague *v.* Montague, 1852; In re Lawes, 1882. This presumption is not recognised in Scotland: Kippen *v.* Darley, 1858, H. L.

is raised when a father makes a provision for his daughter by settlement on her marriage, and afterwards provides for her by his will;[1] or to rebut the presumption that a portionment[2] of a legatee by a parent or person in loco parentis[3] was intended to operate as an ademption (though only pro tanto)[4] of the legacy.[5]

§ 1228. So, again, to rebut the somewhat forced equitable presumption, that a debt due from a testator is intended to be satisfied by a legacy of a greater or equal amount bequeathed by him to his creditor,[6] the courts have for a long period eagerly caught at any trifling circumstance, whether arising out of the language of the will,[7] or brought under their notice by extrinsic evidence,[8] which will afford an excuse for evading a rule of such questionable policy.[9] The presumption of a resulting trust in favour of the person who paid the purchase money, which arises where a man purchases property in the name of a stranger, affords another illustration.[10] For the stranger may give parol evidence to show that the purchase was really intended for his benefit—in other words, he may rebut the presumption, and support the instrument.[11]

§ 1229. In all these cases, when parol evidence has been *first* admitted to show that the presumption drawn by the law is not in accordance with the real intention of the author of the instrument,

[1] Weall *v.* Rice, 1831; Ld. Glengall *v.* Barnard, 1836; Hall *v.* Hill, 1841 (Ir.) (Sugden, C.), explaining and limiting the two former cases. See Lady E. Thynne *v.* Ld. Glengall, 1848, H. L.; Chichester *v.* Coventry, 1867, H. L.; Re Tussaud's Estate, 1878, C. A.; Nevin *v.* Drysdale, 1867 (Wood, V.-C.); Dawson *v.* Dawson, 1867 (id.); Russell *v.* St. Aubyn, 1876; Bennett *v.* Houldsworth, 1877 (Bacon, V.-C.); Edgeworth *v.* Johnston, 1877 (Ir.); Curtis *v.* Mackenzie, 1877 (Jessel, M.R.).

[2] This need not be by deed, or in consideration of marriage: Leighton *v.* Leighton, 1874.

[3] See Palmer *v.* Newell, 1855; Campbell *v.* Campbell, 1866.

[4] Pym *v.* Lockyer, 1840 (Ld. Cottenham); recognised in Suisse *v.* Lowther, 1843 (Wigram, V.-C.). See Montefiore *v.* Guedalla, 1860; Fowkes *v.* Pascoe, 1875; Ravenscroft *v.* Jones, 1864; Watson *v.* Watson, 1864; In re Peacock's Estate, 1872.

[5] Trimmer *v.* Bayne, 1802 (Ld. Eldon); Hall *v.* Hill, 1841 (Ir.); Cooper *v.* Macdonald, 1873 (Ld. Selborne, C.); Curtin *v.* Evans, 1872; Kirk *v.* Eddowes, 1844 (Wigram, V.-C.); Hopwood *v.* Hopwood, 1860, H. L.; Schofield *v.* Heap, 1859; Beckton *v.* Barton, 1859; Phillips *v.* Phillips, 1864. See ante, § 1146.

[6] Brown *v.* Dawson, 1705; Fowler *v.* Fowler, 1735; Atkinson *v.* Littlewood, 1874.

[7] Rowe *v.* Rowe, 1848; Matthews *v.* Matthews, 1755; Bartlett *v.* Gillard, 1826.

[8] Wallace *v.* Pomfret, 1805.

[9] See Edmunds *v.* Low, 1857.

[10] Ante, § 1017.

[11] Hall *v.* Hill, 1841 (Ir.) (Sugden, C.). See, also, Sidmouth *v.* Sidmouth, 1840; Williams *v.* Williams, 1863; Nicholson *v.* Mulligan, 1868.

counter evidence will be received to *fortify* the presumption. The evidence on either side is admissible, not for the purpose of proving, in the first instance, with what intent the writing was made, but simply with the view of ascertaining whether the presumption, which the law has raised, is well or ill founded.[1] But, in the absence of evidence to countervail the presumption, no parol evidence in support of it can be adduced. In the first place, such evidence would be unnecessary; and next, its effect, if it had any, would be to contradict the language of the instrument.[2] If, therefore, the circumstances are on the face of the instrument such as to rebut the presumption drawn by the law, or if the court does not raise any presumption at all, parol evidence to fortify the presumption in the one case, or to create it in the other, will be alike inadmissible; because, in either event, the effect of the evidence would be to contradict the apparent meaning of the writing.[3]

§ 1230. A good illustration of this distinction is afforded by a case[4] where a father, upon the marriage of his daughter, had given a bond to the husband to secure the payment of 800*l.*, part to be paid during his life, and the residue at his decease, and subsequently by his will bequeathed to his daughter a legacy for 800*l.* Parol evidence of the testator's declaration that the legacy was intended as a satisfaction of the debt, was tendered, and, if admissible, was conclusive;[5] but it was decided, that though the debt was to be regarded in the light of a portion,[6] yet that as it was due to the daughter's husband, while the legacy was left to the daughter herself, the ordinary presumption against double portions was rebutted by the language of the instruments, or, rather, could not, under the circumstances, be raised, and that the declaration must, consequently, be rejected. The evidence would have been equally inadmissible in the first instance, on the ground of its inutility, if the ordinary presumption had arisen. But, in this event, had the opponent offered parol evidence to show that

[1] Kirk *v.* Eddowes, 1844; Hall *v.* Hill, 1841 (Ir.); Ferris *v.* Goodburn, 1858.

[2] Id.

[3] Palmer *v.* Newell, 1855.

[4] Hall *v.* Hill, 1841 (Ir.), in which the judgment (Sugden, C.) contains an elaborate discussion of all the important authorities on the subject. The cases of Wallace *v.* Pomfret, 1805; Coote *v.* Boyd, 1789; Weall *v.* Rice, 1831; Booker *v.* Allen, 1831; and Lloyd *v.* Harvey, 1832, are here much shaken, if not overruled.

[5] Hall *v.* Hill, 1841 (Ir.), as reported 1 Dru. & War. 112.

[6] Id. 108, 109.

the testator intended that the debt should not be satisfied by the legacy, the evidence rejected might then have been received with overwhelming effect, to corroborate and establish the presumption of law.

§ 1231. To clearly understand this subject, it is essential to distinguish between mere *legal presumptions* and *rules of construction*. For *presumptions* may be rebutted, and being rebuttable may also be supported by parol testimony. But no evidence can be received on either side, if the court can, *by construction*, arrive at a conclusion respecting the meaning of the instrument.[1] Important as this distinction is, it is by no means easy on all occasions to observe it. The difficulty is increased by the loose manner in which the word "presumption" has occasionally been used. For instead of its being confined to its strict sense, as meaning an inference raised by the courts independently of, or against, the words of an instrument, it is often employed as denoting an inference in favour of a given construction of particular language.[2] Thus Lord Thurlow once remarked:[3]—"Where the *presumption* arises from the construction of words, simply quâ words, no evidence can be admitted,"—evidently using the word presumption as tantamount to a rule of law. Among other rules of construction,[4] occasionally miscalled legal presumptions, is the one (now clearly established) which awards to a stranger legatee as many legacies as are bequeathed to him by separate instruments, unless the instruments themselves contain *intrinsic* evidence that the legacies were not intended to be cumulative, or unless the double coincidence of the same amounts and the same expressed motives appearing in each instrument, induces the court to presume that repetition, and not accumulation, was intended.[5] Extrinsic evidence cannot be received to impugn this rule of construction, since to admit it would be to construe a writing by parol evidence.[6]

[1] Lee *v.* Pain, 1845 (Wigram, V.-C.); Hall *v.* Hill, 1841 (Ir.) (Sugden, C.); Barrs *v.* Fewkes, 1865 (Wood, V.-C.).

[2] Lee *v.* Pain, 1845 (Wigram, V.-C.).

[3] Coote *v.* Boyd, 1789.

[4] For other rules of construction relating to wills, see 7 W. 4 & 1 V. c. 26 ("The Wills Act, 1837"), §§ 24 (rendered applicable to the estates of married women by § 4 of "The Married Women's Property Act, 1893," being 56 & 57 V. c. 63) to 33; Re George's Estate, King *v.* George, 1877, C. A.; Everett *v.* Everett, 1877, C. A.; In re Ord, 1878.

[5] Hurst *v.* Beach, 1821; Suisse *v.* Lowther, 1843; Lee *v.* Pain, 1845; Kirk *v.* Eddowes, 1844; Roch *v.* Callen, 1847.

[6] Id.

AMERICAN NOTES.

Parol Evidence Rule. — As has been said, *supra*, the rules of evidence are principally those of exclusion; — the fundamental idea being that all relevant evidence is competent.

A peculiarly sweeping rule of exclusion — which, indeed, from its vagueness and comprehensivenses should, perhaps, rather be considered a principle than a rule — is that which, in any suit between the parties or those identified with them in legal interest, excludes parol evidence which varies, contradicts or controls the ascertained purport of any formal solemn instrument to which the parties may have reduced their agreement or understanding.

Each portion of this definition is important. The rule applies only (1) Between the parties. (2) To exclude parol evidence. (3) When the effect is to vary, contradict or control. (4) When the purport of the instrument has been ascertained. (5) And provided it affirmatively appears that the parties have intended to have the instrument embody their agreement and understanding.

(1) Applies only between Parties and Privies. — A stranger to a written agreement cannot insist upon the writing as the final embodiment of the intention or agreement of the parties. Dempsey *v.* Kipp, 61 N. Y. 462 (1875); Fonda *v.* Burton, 63 Vt. 355 (1891); Selsers Estate, 141 Pa. St. 529 (1891); Hussman *v.* Wilke, 50 Cal. 250 (1875); Hughes *v.* Sandal, 25 Tex. 162 (1860); Blake *v.* Hall, 19 La. Ann. 49 (1867); Quilliard *v.* Chaffee, 92 N. Y. 529 (1883); National Car &c. Builder *v.* Cyclone &c. Co., 49 Minn. 125 (1892); Kellogg *v.* Tompson, 142 Mass. 76 (1886). "The written agreements are conclusive upon no one but the parties to them." Fonda *v.* Burton, 63 Vt. 355 (1891); Minneapolis &c. R. R. *v.* Home Ins. Co., 55 Minn. 236 (1893); Clapp *v.* Banking Co., 50 Oh. St. 528 (1893); Williams *v.* Fisher, 28 N. Y. Supp. 739 (1894); Emmett *v.* Penoyer, 76 Hun, 551 (1894). It is clear that where a party is bound, those identified with him in legal interest are also bound. First Nat. Bk. *v.* Dunn, 55 N. J. Law, 404 (1893).

"So as to rights which originate in the relation established by the written contract, or are founded upon it, the rule against varying it by parol applies." Minneapolis &c. R. R. *v.* Home Ins. Co., 55 Minn. 236 (1893).

The same is true as between one of the parties to the written agreement and a stranger. The rule does not apply. Forbush *v.* Goodwin, 25 N. H. 425 (1552).

Consequently the rule does not apply to a criminal prosecution against one of the parties. People *v.* Barringer, 76 Hun, 330 (1894).

(2) Parol Evidence. — Where a contract is in writing, as for

example a receipt for stock, "parol evidence" is equivalent to oral. Fay *v.* Gray, 124 Mass. 500 (1878).

The rule is the same in equity as at law.

"These writings, there being no allegation or proof of fraud or mistake in their execution, or of any subsequent waiver or modification of the contract they import, are the sole memorial and expositor of the contract, and parol evidence is as inadmissible in equity, as at law, to vary, contradict, or explain them." Winston *v.* Browning, 61 Ala. 80 (1878); Kelley *v.* Saltmarsh, 146 Mass. 585 (1888); Grand Tower &c. R.R. *v.* Walton, 150 Ill. 428 (1894). And it is not necessary to say that a parol contract contemporaneous with the written but on a different subject matter is not affected by the rule under consideration. Clator *v.* Otto, 38 W. Va. 89 (1893).

(3). "Vary, Contradict, or Control." — The principle is stated in Serviss *v.* Stockstill, 30 Oh. St. 418 (1876). "The contract of the parties was in writing, and could not be thus varied by parol evidence." Trammell *v.* Pilgrim, 20 Tex. 158 (1857); Bonsack Machine Co. *v.* Woodrum, 88 Va. 512 (1891); Williams *v.* Waters, 36 Ga. 454 (1867); Coapstick *v.* Bosworth, 121 Ind. 6 (1889); Lee *v.* Fowler, 19 S. C. 607 (1883); Herbst *v.* Lowe, 65 Wisc. 316 (1886); Ohlert *v.* Alderson, 86 Wis. 433 (1893); Bank of Upper Canada *v.* Boulton, 7 Q. B. U. C. 235 (1850); La Roche *v.* O'Hagan, 1 Ont. Rep. 300 (1882); Crane *v.* Elizabeth Library Association, 29 N. J. Law, 302 (1861); Bladen *v.* Wells, 30 Md. 577 (1869); Selden *v.* Myers, notes, 20 How. 506 (1857); St. Vrain Stone Co. *v.* Denver etc. R.R., 18 Col. 211 (1893); Union Stove Wks. *v.* Arnoux, 28 N. Y. Supp. 23 (1894).

Where a pledgee of a certificate stock in a corporation gave a receipt to the pledgor embodying an agreement to sell on "one day's notice" parol evidence of a contemporaneous agreement that the pledgee might use the stock is inadmissible. "Its only tendency was to show that the contract made when the stock was pledged was different from that set forth in writing at the time." Fay *v.* Gray, 124 Mass. 500 (1878).

Evidence of preliminary negotiations or conversations is equally incompetent with other evidence in the line of explanation or interpretation. "The rule that parol evidence is inadmissible to add to or vary the terms of a written contract, precludes evidence of the negotiation which preceded or conversations which accompanied the making of it in relation to the subject-matter thereof, unless necessary to explain ambiguous provisions, the meaning of which cannot be ascertained with certainty by an inspection of the written instrument." Corse *v.* Peck, 102 N. Y. 513 (1886); Rogers *v.* Straub, 75 Hun, 264 (1894); Dwelling &c. Ins. Co. *v.* Shaner, 52 Ill. App. 326 (1893); Dixon-Woods Co. *v.* Phillips Glass Co. 169

Pa. St. 167 (1895); Bignall &c. Co. *v.* Pierce &c. Co. 59 Mo. App. 673 (1894).

"All anterior and contemporaneous stipulations and representations are merged in the written instrument." Gooch *v.* Conner, 8 Mo. 391 (1844); Quinn *v.* Moss, (Neb.) 63 N. W. 931 (1895); Parkhurst *v.* Van Cortlandt, 1 Johns., Ch. 273 (1814); Mattison *v.* Chicago &c. R. R., 42 Neb. 545 (1894); Corse *v.* Peck, 102 N. Y. 513 (1886); Custeau *v.* St. Louis &c. Co. 88 Wis. 311 (1894); Chaplin *v.* Baker, 124 Ind. 385 (1890); Clarke *v.* Kelsey, 41 Neb. 766 (1894); Gilpins *v.* Consequa, Peters C. Ct. 85 (1813); Bladen *v.* Wells, 30 Md. 577 (1869); Whitehead *v* Jessup, 2 Col. App. 76 (1892); Empire State Phosphate Co. *v.* Heller, 61 Fed. Rep. 280 (1894); Averill *v.* Sawyer, 62 Conn. 560 (1893). So of conversations held before the written contract was made, or during its preparation. Bedford *v.* Flowers, 11 Humph. 242 (1850); Ellmaker *v.* Franklin Ins. Co., 5 Barr. (Pa.) 183 (1847); Rowell *v.* Newton, Q. B. 10 Low. Can. 437 (1860); Gilpin *v.* Greene, 7 Q. B. U. C. 587 (1850); Groome *v* Odgen City, 10 Utah, 54 (1894). So 'correspondence preliminary to a contract cannot be put in evidence in an action thereon if the contract covers the same ground as the correspondence and is complete in itself." Wonderly *v.* Holmes Lumber Co., 56 Mich. 412 (1885).

So where previous conversations have "been reduced to a written contract, that contract, in the absence of fraud, is the best proof of their agreement, and it cannot be varied or contradicted by parol evidence." Bell *v.* Woodman, 60 Me. 465 (1872). "The uni- decisions of this Court have been, that all oral negotiations between the parties to a written contract, which either preceded or accompanied the execution of the instrument, are to be regarded as merged in it, and that the writing is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves." Freeman *v.* Bass, 34 Ga. 355, 367 (1866).

But it is only because the previous negotiations are inconsistent with, and not because they are prior to, the written agreement that they are rejected. Where such inconsistency does not exist, the rule does not apply. For example, a written option for the purchase of certain property does not exclude parol evidence of a previous contract of agency for the sale of the same property on commission. "The principle that oral evidence cannot be received to vary, alter, or contradict the terms of a written contract is so elementary and well settled that it scarcely requires statement. It is a salutary rule, and one that has, we believe, been consistently adhered to by this court. But the rule itself suggests its limitations. It is the evidence which tends to establish an inconsistent obligation from that which is expressed in the writing which is rejected. Where, therefore, it is shown that there was an original

verbal contract, and a part of it only has been reduced to writing, the rule does not apply as to the part not reduced to writing." Riemer *v.* Rice, 88 Wis. 16 (1894).

Negotiable Instruments. — A certain stringency in applying the parol evidence rule is observable in the case of negotiable instruments, — a result probably affected to a certain indeterminate degree by the substantive rules of the law merchant. Dow *v.* Tuttle, 4 Mass. 414 (1808); Dobbins *v.* Blanchard, 94 Ga. 500 (1894); Hutchinson *v.* Hutchinson, (Mich.) 61 N. W. 60 (1894); Waddle *v.* Owen, 43 Neb. 489 (1895). Thus it cannot be shown that a promissory note was delivered as a gift. Atkinson *v.* Blair, 38 Ia. 156 (1874); Or that an indorsee, at the time of an indorsement to him, verbally agreed to look for payment only to the maker and not rely on the endorser. Chamberlin *v.* Ball, 5 Low. Can. Jur. 88 (1860).

It cannot be shown by oral testimony that a promissory note to pay a certain sum "with interest from date at the rate of eight per cent per annum" five years from date was intended to mean the annual payment of interest. Koehring *v.* Muemminghoff, 61 Mo. 403 (1875). But it has been held that one who receives the promissory notes of a corporation may be shown to have waived the personal liability of the stockholders by a verbal agreement made at the time of accepting the notes. Bush *v.* Robinson, 95 Ky. 492 (1894).

(4). "Ascertained Purport." It is essential to the application of the rule that it be ascertained that the instrument in question represents the then present intention or agreement of the party or parties and what that intention or agreement is.

In an action on a fire insurance policy, the language of the policy cannot be controlled by what the applicant for insurance told the agents of the insurance company he desired to insure. "When a contract is reduced to writing and is couched in plain and unambiguous language, Courts must look to it alone to find the intention and meaning of the parties, and parol proof is inadmissible." Hough *v.* People's Fire Ins. Co., 36 Md. 398, 426 (1872). "The general rule that parol evidence will not be received to add to or alter the terms of a contract in writing, applies to leases as well as other instruments in writing. Except where fraud or illegality has been set up, parol evidence of an agreement not expressed in the writing, is competent only where the writing contains only a part of the contract, or the evidence is admitted to apply the written contract to its subject matter, or to establish a parol contemporaneous agreement between the parties, with respect to the manner in which the rent reserved should be paid, which both parties have acted upon and carried into execution, and, therefore, have given the agreement the force and effect of an accord executed." Naumberg *v.* Young, 44 N. J. L. 331 (1882).

INTERPRETATION AND EXPLANATION. — It follows that parol evidence which puts the court in the position of the party or parties is competent both in connection with the court's duty of construction and also for the purposes of applying the rule under consideration. "It often happens that the contract is not 'plainly and intelligibly stated' in the writing. In such cases parol evidence is admissible, not to contradict or vary, but to explain; provided the explanation does not result in making a new contract. And, although this explanatory evidence generally consists of the facts and circumstances surrounding the parties at the time, yet even their language used in the negotiation may be proven to explain doubtful phrascology in the written contract." G., C., & S. F. R'y. Co. *v.* Jones, 63 Tex. 524 (1885). "While parol evidence cannot be admitted to vary, alter, or qualify a written instrument, yet it is clearly admissible to show the circumstances surrounding the parties at the time of the execution of an instrument, in order that the Court may put itself in the place of the contracting parties, and thus see how the terms of the instrument affect the property or subject-matter of the contract." Railway Co. *v.* Beeler, 90 Tenn. 548 (1891); Wolfe *v.* Dyer, 95 Mo. 545 (1888); Baker *v.* Hall, 158 Mass. 361 (1893); McHugh *v.* Gallagher, 1 Tex. Civ. App. 196 (1892).

Prior negotiations may be used to assist in the work of explanation as to the meaning of terms used. Rogers *v.* Straub, 75 Hun, 264 (1894).

"In every case the words used must be translated into things and facts by parol evidence." Doherty *v.* Hill, 144 Mass. 465 (1887); Durr *v.* Chase, 161 Mass. 40 (1894); Weber *v.* Illing, 66 Wis. 79 (1886); Sneider *v.* Patterson, 38 Neb. 680 (1894); Hinnemann *v.* Rosenback, 39 N. Y. 98 (1868); Solary *v.* Webster, 35 Fla. 363 (1895); Camp *v.* Simmons, 62 Ga. 73 (1878); Kiser *v.* Carrollton Dry Goods Co. (Ga.), 22 S. E. 303 (1895); Charter Oak Life Ins. Co. *v.* Gisborne, 5 Utah, 319 (1887); Kentucky &c. Bridge Co. *v.* Hall, 125 Ind. 220 (1890); Lassing *v.* James, 107 Cal. 348 (1895); Sullivan *v.* Collins (Colo.) 39 Pac. 334 (1895); Reinhart *v.* Oconto Co., 69 Wis. 352 (1887); Fire Ins. Co. *v.* Wickham, 141 U. S. 564 (1891); Colton &c. Co. *v.* Swartz, 99 Cal. 278 (1893); Miller *v.* Palmer, 3 Q. B. U. C. o. s. 425 (1834); Gress Lumber Co. *v.* Coody, 94 Ga. 519 (1894); Vanderlin *v.* Hovis, 152 Pa. St. 11 (1892); Bagley &c. Co. *v.* Saranac &c. Co. 135 N. Y. 627 (1892); Martin *v.* Brown, 91 Ia. 574 (1894). So to determine whether a set of figures, where the final one is overwritten and blurred is "25" or "26," parol evidence is competent. Goldsmith *v.* Pickard, 27 Ala. 142 (1855). So identity between two obligations may be established by parol. Kelly *v.* Leachman (Idaho), 34 Pac. 813 (1893).

An instrument may be so plain and explicit as to leave nothing

"for parol evidence to explain." Whitehead *v.* Park, 53 Ga. 575 (1875); Millsaps *v.* Merchant's &c. Bank, 69 Miss. 918 (1892); Gulf &c. R. R. *v.* Jones, 82 Tex. 156 (1891); Bonsack Machine Co. *v.* Woodrum, 88 Va. 512 (1891); Holston &c. Co. *v.* Campbell, 89 Va. 396 (1892); Muldoon *v.* Deline, 135 N. Y. 150 (1892); Henry McShane Co. *v.* Padian, 142 N. Y. 207 (1894); Baugh *v.* White, 161 Pa. St. 632 (1894); Falke *v* Fassett, 4 Col. App. 171 (1893).

When the court is put into possession of all information necessary to place it in the position of the parties, the parol evidence rule continues to apply. The court is still bound by the language which the parties have employed. It does not receive evidence for the purpose of creating a different writing from what the parties have made, but simply to ascertain precisely what the writing does, in fact, say.

"Is the testimony offered necessary to understand or apply the language of the written contract, or does it seek to establish one at variance with what is written? If the former, it is permissible; if the latter, it is not." Bigelow *v.* Wilson, 77 Ia. 603 (1889); Robinson *v.* Hyers, 35 Fla. 544 (1895).

Thus a written contract cannot be modified by evidence of what the parties, or one of them, intended. County of Johnson *v.* Wood, 84 Mo. 489 (1884); Jones *v.* Swearingen, 42 S. C. 58, 66 (1894).

But the rule applies where the contract is not contained in any single instrument, but is found in a correspondence between the parties. Northwestern Fuel Co. *v.* Bruns. 1 N. Dak. 157 (1890).

5. Deliberate Embodiment of Agreement. — "It is a rule too firmly established in the law of evidence to need a reference to authority in its support, that parol evidence will not be heard to contradict, add to, take from or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound." Ray *v.* Blackwell, 94 N. C. 10 (1886).

"There must exist a writing, containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions.

This rule of evidence has no application where the writing, on its face, is incomplete, in that it does not purport to contain the whole agreement, or because, lacking some of the essentials, it falls short of being a contract. If it contains such language as imports a complete legal obligation, it is to be presumed that the parties have introduced into it every material item and term, and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed." Beyerstedt *v.* Winona Mill Co., 49 Minn. 1, 10 (1892).

Consequently the rule does not apply "where the original contract was verbal and entire and a part only reduced to writing." Chapin *v.* Dobson, 78 N. Y. 74 (1879); Hope *v.* Balen, 58 N. Y. 380 (1874); Pacific Iron Works *v.* Newhall, 34 Conn. 67 (1867); Randall *v.* Turner, 17 Oh. St. 262 (1867); Perry *v.* Hill, 68 N. C. 417 (1873); Cole *v.* Howe, 50 Vt. 35 (1877); Moss *v.* Green, 41 Mo. 389 (1867); Thomas *v.* Hammond, 47 Tex. 42 (1877); Burton *v.* Morrow, 133 Ind. 221 (1892); Staples *v.* Edwards &c. Co. 56 Minn. 16 (1893); Miller *v.* Goodrich &c. Co., 53 Mo. App. 430 (1893); Emmett *v.* Penoyer, 76 Hun, 551 (1894); Van Kirk *v.* Scott, 54 Ill. App. 681 (1894); Chamberlain *v.* Smith, 21 Q. B. U. C. 103 (1861). "Where parties reduce their agreement to writing they can not be allowed to vary its terms by parol: but where it is evident that the agreement is not reduced to writing, but only a part of it, and where that part reduced to writing is merely a partial execution of a part of an entire agreement between the parties, the whole agreement may be proven." Bradshaw *v.* Combs, 102 Ill. 428 (1882). "Oral evidence, in aid of insufficient written evidence of a contract, is certainly admissible, when the contract is not by any statute required to be in writing. A writing drawn up after a contract is concluded by parol, which is meant merely as a memorandum of the transaction, and which does not amount to a contract, may be given in evidence, concurrently with oral proof of the additional facts and circumstances necessary to constitute a contract and give effect to the transaction." Mobile &c. Ins. Co. *v.* McMillan, 31 Ala. 711, 721 (1858).

It is competent, at all times, to show by parol the extent to which the written agreement presumably represents the entire agreement of the parties. Redfield *v.* Gleason, 61 Vt. 220 (1888); Staples *v.* Lumber Co., 56 Minn. 16 (1893).

An arbitrator cannot by parol evidence vary or impeach the award. Joseph *v.* Ostell, 1 Low. Can. Jur. 265 (1857). The parties cannot contradict their deed. "Oral evidence of conversations between the parties previous to the execution of the deed are never admissible in a court of law to contradict, enlarge or abridge the operation of the deed, or to restrict or enlarge its legal intendment. Nor are the acts or declarations of the parties, before or after its execution, admissible to show their understanding of the deed. The intention of the parties must be derived from the deed itself, and the deed must have effect to convey such land as is included in the description as shown upon its face." Smith *v.* Fitzgerald, 59 Vt. 451, 458 (1887).

It cannot be shown that at the time a certain bond was signed it was stated that it was not to become operative unless all the creditors signed it. Van Bokkelen *v.* Taylor, 62 N. Y. 105 (1875).

Or that a bond absolutely promising to pay a certain sum of money was limited, by a contemporaneous parol agreement, to "cover what-

ever should be found to be due upon a settlement." Moffitt *v.* Maness, 102 N. C. 457 (1889).

Or that a deed, absolute on its face, was delivered on condition that it should not become operative until certain things were done. Haworth *v.* Norris, 28 Fla. 763 (1891); Magee *v.* Allison (Ia.), 63 N. W. 322 (1895).

"It is easy to see, said the court in Miller *v.* Fletcher, 27 Gratt. 403 (21 Am. Rep. 356), that the most solemn obligations given for the payment of money would be of but little value as securities, if they might, at a future day, be defeated by parol proof of conditions annexed to their delivery, and not performed; and that a doctrine of this kind would, perhaps, be still more mischievous if applied to deeds of real estate; and that if such a doctrine should prevail, the title of the grantee would be liable to be defeated at any time by evidence of non-performed parol conditions annexed to the delivery of the deed; and that in such cases there would be no safeguards against perjury or the mistakes of 'slippery memory,' and all titles would be as unstable as sand upon the sea shore." Hubbard *v.* Greeley, 84 Me. 340, 345 (1892).

It cannot be shown that at the time of executing a written lease an oral agreement was made enlarging its stipulations. Gulliver *v.* Fowler, 64 Conn. 556 (1894).

Or at the time a defendant signed a subscription paper that he was not to be held on his promise for any larger sum than a certain other person should subscribe. Parish *v.* Perham, 84 Me. 563 (1892).

The rule under consideration does not apply to writings, merely as such. It applies, only, as has been said, to such as embody in legal form a definite understanding.

A prisoner may contradict by parol his written confession. State *v.* Brown, 1 Mo. App. 86 (1876). "The court seems to have supposed that there was an analogy between the written contract, which is the result of a long negotiation between two parties, and the confession in this case. Obviously there is no analogy whatever. When two parties meet to make a bargain respecting a controverted matter, it would throw no light upon the conclusion at last reached and made the basis of a settlement to know their respective pretensions on first opening the conference, and their successive approximations to an agreement. When the question arises, 'What contract did they make?' it would be worse than useless to inquire what were their positions before they agreed at all, and, if they committed their agreement to writing and signed it, the written instrument is so plainly the best and only evidence of the understanding reached by the parties, that words would be wasted to show that all the disputations which preceded that conclusion are wholly irrelevant. But, when a person is giving a narrative of a past transaction, every

word he uses, the very gestures and emphases he employs, go to make up the picture he gives of the event which he describes. If, after stating his recollection diffusely in words, the narrator should himself sit down and in his own language write down what he considered the substance of his narrative, no one, we think, would consider that this more studied statement was more likely to convey the image of the real event to the hearer than the diffuse terms before employed. In such cases, the more naturally and unpremeditatedly the words fall, the greater is the credit due to them. When, instead of writing down his statement in his own language, his words (or the substance of them) are taken down by a transcriber who admits that he changed the 'language and the grammar' of the speaker, it must be very clear that there is room for mistake in the sense which the speaker desired to convey, and when a man on trial for his life offers to show that, not only has his language been changed, but his meaning perverted, it is grave error for a court of justice to silence him." State *v.* Brown, 1 Mo. App. 86 (1876).

So the rule permits a party to contradict a letter apparently amounting to an admission of guilt. "The rule relied upon by the appellant forbidding the introduction of oral evidence to vary the terms of written instruments has no application to the case. This writing did not embody a contract, nor any element of one. No principle of estoppel was applicable. The matter to which this testimony was directed was of no effect, unless as an admission by the defendant of a fact in issue. As a mere admission, it might be contradicted or explained by oral testimony." Bingham *v.* Bernard, 36 Minn. 114 (1886).

The rule does not apply to a mere memorandum of a contract. Kreuzberger *v.* Wingfield, 96 Cal. 251 (1892).

Nor to a written order for goods. "A written order given to plaintiff's agent to 'please ship' a certain article for which 'we agree to pay' a fixed price, named therein, is not necessarily a contract; and, when there is no evidence that such order was ever received and acted upon by the plaintiff, parol evidence is admissible to prove that the article was delivered to defendants under a verbal agreement that it should be taken on thirty days' trial, and returned to plaintiff by defendants if it failed to give entire satisfaction; and, under a proper pleading, parol evidence is admissible to prove that the order, and an acceptance to a certain sight draft, were obtained by false and fraudulent representations." Nat. Cash Reg. *v.* Pfister, 5 So. Dak. 143 (1894).

Neither does the rule apply to the merely formal parts of the written instrument.

Thus the date of a deed may be controlled by parol. Moore *v.* Smead, 89 Wis. 558 (1895).

Receipt. — A receipt is not a solemn embodiment of an agreement of the parties.

"The case of receipts is an exception to the general rule that oral testimony is not admissible to contradict or vary a written contract. They may always be explained by oral testimony." Richardson *v.* Beebe, 43 Me. 161 (1857).

It is a mere *prima facie* admission and may be controlled by oral evidence. Tuley *v.* Barton, 79 Va. 387 (1884); Wilson *v.* Derr, 69 N. C. 137 (1873); Stapleton *v.* King, 33 Ia. 28 (1871); Thompson *v.* Maxwell, 74 Ia. 415 (1888); Ditch *v.* Vollhardt, 82 Ill. 134 (1876); Calhoun *v.* Richardson, 30 Conn. 210 (1861); Russell *v.* Church, 65 Pa. St. 9 (1870); Foster *v.* Newbrough, 58 N. Y. 481 (1874); Pool *v.* Chase, 46 Tex. 207 (1876); Watson *v.* Miller, 82 Tex. 279 (1891); Wildrick *v.* Swain, 34 N. J. L. Eq. 167 (1881); Steinhoff *v.* M'Rae, 13 Ont. 546 (1887); Whitney *v.* Clark, 3 Low. Can. Jur. 318 (1859); Cowan *v.* Sapp, 74 Ala. 44 (1883); Springfield, &c. R. R. *v.* Allen, 46 Ark. 217 (1885); Prairie School Township *v.* Haseleu, 3 No. Dak. 328 (1893); Laughlin *v.* Fidelity Ins. Co. 28 S. W. 411 (1894); Adams *v.* Davis, 109 Ind. 10 (1886); Burke *v.* Ray, 40 Minn. 34 (1889); Macdonald *v.* Dana, 154 Mass. 152 (1891); McLane *v.* Johnson, 59 Vt. 237 (1886); Chapman *v.* Sutton, 68 Wis. 657 (1887); Bowen *v.* Humphreys, 24 S. C. 452 (1885); Rapley *v.* Klugh, 40 S. C. 134 (1893); Rader *v.* McElvane, 21 Oreg. 56 (1891); Furbush *v.* Goodwin, 25 N. H. 425 (1852); Bladen *v.* Wells, 30 Md. 577 (1869); Shepherd *v.* Busch, 154 Pa. St. 149 (1893); Osborne *v.* Stringham, 4 So. Dak. 593 (1894); Ostrander *v.* Snyder, 73 Hun, 378 (1893); see also Livingston *v.* Wood, 27 Grant's Chan. 515 (1880).

"A receipt is like any other parol admission of the party signing it, and is open to explanation or correction; and he may show that it was made by mistake or does not exhibit the real state of facts." Shoemaker *v.* Stiles, 102 Pa. St. 549 (1883).

That the receipt is contained in a written bill of sale does not affect the rule. "A further contention of the appellant is that, as the plaintiff executed to Nichols written bills of sale for the cattle, in which they acknowledge the receipt of the purchase money, they cannot show by parol testimony that the price was not paid, and that there was an agreement that they should have a lien upon the cattle until it was paid. The objection is not tenable. Parol testimony is not admissible to contradict or vary the bill of sale so far as it contains a contract; but so far as it is a receipt for the purchase money of the property it may be explained, varied, or contradicted to the same extent that it could be if it was simply a receipt for the purchase money separate from the contract of sale. It is common learning that, so far as a receipt goes only to the acknowledgment of payment, it is merely *prima facie* evidence of the fact of payment, and may be explained, varied, or contradicted by parol testimony." Riddle *v.* Hudgins, 58 Fed. Rep. 490 (1893).

If a receipt amounts to a contract, the same rule applies to it as to any other contract. Wilson *v.* Derr, 69 N. C. 137 (1873); Stapleton *v.* King, 33 Ia. 28 (1871); Burke *v.* Ray, 40 Minn. 34 (1889); West *v.* Fleck, 15 Low. Can. Rep. 422 (1864); Tuley *v.* Barton, 79 Va. 387 (1884); Morse *v.* Rice, 36 Neb. 212 (1893); Wells &c. Express *v.* Fuller, 4 Tex. Civ. App. 213 (1893). So where a receipt contains also covenants of release and discharge. The Cayuga, 59 Fed. Rep. 483 (1893). Where an instrument is both a receipt and a contract, parol evidence is admissible to vary only the portion constituting a receipt. Prairie School Township *v.* Haseleu (No. Dak.), 55 N. W. 938 (1893).

"While a receipt is not conclusive evidence of all the facts and statements contained therein, and is open to explanation and contradiction by the party giving it, yet it is always considered as *prima facie* evidence of such facts, and in the absence of a sufficient explanation showing its incorrectness becomes conclusive evidence against the party giving it." Riley *v.* Mayor, 96 N. Y. 331, 338 (1884). So the date of a receipt is *prima facie* correct, and if wrongly stated, may be corrected by parol. Erickson *v.* Brookings Co., 3 So. Dak. 434 (1892).

It is immaterial that the receipt purports to be one in full of all demands. Richardson *v.* Beede, 43 Me. 161 (1857); Guyette *v.* Bolton, 46 Vt. 228 (1873); Schultz *v.* Chicago &c. R. R., 44 Wis. 638 (1878); Grumley *v.* Webb, 44 Mo. 444 (1869); City Bank of Macon *v.* Kent, 57 Ga. 283 (1876); Montforton *v.* Bondit, 1 Q. B. U. C. 362 (1845); Cowan *v.* Abbott, 92 Cal. 100 (1891); Hicks *v.* Leaton, 67 Mich. 371 (1887); Connell *v.* Vanderwerken, 1 Mackey, 242 (1881); Fire Association *v.* Wickham, 141 U. S. 564 (1891); Grant *v.* Hughes, 96 N. C. 177 (1887); The Sophia, 1 Stuart (Low. Can.) Adm. 219 (1839). Such a receipt, however, naturally affords cogent evidence (though not conclusive) of an accord and satisfaction. Grant *v.* Hughes, 96 N. C. 177 (1887).

A written approval of an account as being correct stands in the same position as a receipt. Nelson *v.* Weeks, 111 Mass. 223 (1872).

Bill of Lading. — A bill of lading, so far as it is a contract between the parties, is regarded as an embodiment of agreement and cannot be varied by parol. Arnold *v.* Jones, 26 Tex. 335 (1862); Cox *v.* Peterson, 30 Ala. 608 (1857); Minneapolis &c. R. R. *v.* Home Ins. Co., 55 Minn. 236 (1893). So far as it is a receipt, a bill of lading, like any other receipt, may be varied by parol. Fowler *v.* Stirling, 3 Low. Can. Jur. 103 (1858); Hedricks *v.* Morning Star, 18 La. Ann. 353 (1866); Harkness *v.* Sears, 26 Ala. 493 (1855); Lazard *v.* Merchants' &c. Co., 78 Md. 1 (1893). Parol evidence is admissible to show that the carrying was performed under a prior parol contract. Baker *v.* Michigan &c. R. R., 42 Ill. 73 (1866).

It has been held that a bill of lading is in no case more than a

mere memorandum of a contract. "We do not think the doctrine to the extent contended for can be maintained in regard to a bill of lading, and that it is such a complete contract as to exclude all testimony of what is not expressed and necessary to a complete contract. On its face it is but a memorandum, and not in form a contract *inter partes*. It is doubtless an instrument fitted for the occasions in which it is usually employed, and while what it clearly expresses may not be contradicted by oral testimony, unless under the qualification of fraud or mistake, yet there is no rule which excludes testimony to explain it, and to show what the real contract was, of which it is but a note or memorandum at best." Balto. &c. Steamboat Co. *v.* Brown, 54 Pa. St. 77 (1867). And that such an instrument does not exclude evidence of a contemporaneous parol agreement for additional transportation. Saltsman *v.* New York &c. R. R., 65 Hun, 448 (1892).

Bill of Parcels. — Similarly to receipts, contained in bills of lading or otherwise, bills of parcels are not regarded as embodying the agreement of parties and, consequently, may be varied by parol. Harris *v.* Johnston, 3 Cranch, 311 (1806); Linsley *v.* Lovely, 26 Vt. 123 (1853); Grant *v.* Frost, 80 Me. 202 (1888). With the same similarity to receipts, however, if a bill of parcels express the contract of the parties, it is no more subject to variation or control by parol evidence than any other contract. Linsley *v.* Lovely, 26 Vt. 123 (1853).

A "berth check" issued by a sleeping car company, though evidence of a contract by the company, is not within the parol evidence rule, and may be contradicted by parol. Mann Boudoir Car Co. *v.* Dupre, 54 Fed. Rep. 646 (1893). "An expert railroad officer, employee, or traveler may be familiar enough with the current forms of these berth checks to decipher, on a blue or other colored ground, by the lights in a sleeping car at night, the marks of a lead pencil, made by the average conductor, standing in a car on a moving train, on an average track in this circuit, so as safely to accept it, as the only admissible evidence to him and to the courts, as to the berth he was allowed to select and did select, and had delivered to him, but, speaking from an average experience and observation, it is safe to say that if it is, or ever becomes, the sound and settled rule of law that such berth checks as are now commonly issued shall be conclusive evidence as to the berth contracted for, whenever any question arises between the company and the passenger as to that matter, the rule will put one of the parties largely and in many instances wholly in the power of the other." Mann, &c. Co. *v.* Dupre, 54 Fed. Rep. 646 (1893).

Collateral Agreement. — Questions of considerable nicety frequently arise as to whether the subject matter of a contemporaneous or prior parol agreement was intended by the parties to be

covered by the parties in their subsequent written agreement; —in which case the rule applies to exclude the parol evidence; or, on the other hand, was on a collateral matter not intended to be so embraced. The rule has no "application to collateral undertakings." Chapin *v.* Dobson, 78 N. Y. 74 (1879); Bladen *v.* Wells, 30 Md. 577 (1869).

The difficulty is not so much in deciding what a collateral agreement is. As is said in a well considered New Jersey case, "There is a class of cases where the parties concluding an agreement which is reduced to writing, have, at the same time and on the same consideration, negotiated by parol another agreement which is collateral and on a subject distinct from that to which the written contract relates, in which oral evidence of such an agreement is held to be competent." Naumberg *v.* Young, 44 N. J. L. 331 (1882).

Speaking of the rule under consideration the Court say: —

"Undoubtedly this rule of evidence presupposes that the parties intended to have the terms of their agreement embraced in the written contract. If it was designed that the written contract should contain only a portion of the terms mutually agreed upon, and that the rest should remain in parol, the parties have not put themselves under the protection of the rule. But in what manner shall it be ascertained whether the parties intended to express the whole of their agreement in the written contract? The question is one for the court, for it relates to the admission or rejection of evidence. It cannot be assumed that the written contract was designed as an imperfect expression of the parties' agreement, from the mere fact that the written agreement contains nothing on the subject to which the parol evidence is directed. On that assumption that part of the rule which excludes parol proof as a means of adding to the written contract would be entirely abrogated. And to permit the parties to lay the foundation for such parol evidence by oral testimony that they agreed that that part only of their contract should be included in the written agreement, would open the door to the very evil against which the rule was designed to protect. The only safe criterion of the completeness of a written contract as a full expression of the terms of the parties' agreement, is the contract itself." Naumberg *v.* Young, 44 N. J. L. 331, 339 (1882). "It is well settled that it is not competent for a party to prove an oral agreement contradictory of or inconsistent with the written contract, but any collateral, independent fact, about which the written agreement is silent can be given in evidence." Stallings *v.* Gottschalk, 77 Md. 429 (1893).

The difficulty arises where the contemporaneous parol agreement is on a subject matter which is cognate to the subject matter of the written contract. In such a case, if the subject matter of the parol

agreement, in the opinion of the court, was, to the contemplation of the parties, covered by their written agreement, then, even where the written contract is silent on the subject, evidence of the parol agreement is excluded.

In deciding the question, the court may be guided by the minuteness with which the written contract covers the details of the agreement of the parties. Where such written contract minutely covered the sale of a stock of goods, "an oral contract between the parties to the effect that in consideration of such contract of sale, the seller will not engage in the same business in the same city, is not such a collateral undertaking as to permit parol proof thereof in explanation of the written contract." Gordon *v.* Parke & Co., 10 Wash. 18 (1894).

It is as much against the rule to add a term to a written contract on which the contract is silent by an oral agreement, as to modify by oral agreement the terms as to which the written contract speaks. "Parol testimony is no more admissible to vary the clear and settled legal meaning and effect of a contract, than it is to vary its terms." Brandon Mfg. Co. *v.* Morse, 48 Vt. 322 (1875).

Certainly where the provision sought to be established by parol was intentionally omitted from the written agreement. Sanborn *v.* Murphy, 86 Tex. 437 (1894).

But where the written contract is silent as to price, it is competent to show the contract of the parties and their course of dealing. Staples *v.* Edwards &c. Lumber Co., 56 Minn. 16 (1893). And where the price is left blank in a freight receipt, the actual amount paid can be shown by parol. Georgia, &c. Co. *v.* Reid, 91 Ga. 377 (1893). So where a written contract for the delivery of wood fails to specify the time of payment, the plaintiff cannot show a contemporaneous oral agreement to pay for the wood as delivered. Brandon Mfg. Co. *v.* Mor[illegible], 48 Vt. 322 (1875). So in a contract for delivery of milk the duration of the contract on which the writing is silent, cannot be shown by parol. Irish *v.* Dean, 39 Wis. 562 (1876).

An agreement to surrender a note given for stock and accept back the stock if the makers of the note became dissatisfied cannot be shown in defence of an action on the note which provides merely for the payment of money. Riley *v.* Treanor, (Tex. Civ. App.) 25 S. W. 1054 (1894).

If, on the other hand, the parties have not, in the opinion of the court, seen fit to cover this portion of their entire agreement in the final written form, then evidence of the parol contemporaneous agreement is competent; the circumstance that the parties might with entire propriety have included the subject matter of the parol agreement being regarded as immaterial. Phœnix Pub. Co. *v.* Riverside Clothing Co., 54 Minn. 205 (1893).

It is a natural result of the narrowness of this line of demarkation which, in the intricacy and complexity of the varying facts of particular cases, assumes at times a vagueness almost nebulous, that close questions of construction are constantly arising and that decisions in individual cases will be found to be dependent rather upon the feeling or judicial instinct of particular judges than upon any more well defined rule.

Illustrations. — A verbal warranty that a vessel shall be insurable in a given sum at a certain rating, made at the time of a written contract of sale of the vessel, is competent as not varying the contract. La Roche *v.* O'Hagan, 1 Ont. Rep. 300 (1882). A verbal agreement of warranty made at the time of a written contract of sale is sufficient consideration for a subsequent written warranty. Or may be set up in defence. Chapin *v.* Dobson, 78 N. Y. 74 (1879). Collette *v.* Weed, 68 Wis. 428 (1887). So a verbal agreement to pay a certain mortgage made at the time of a deed of the premises, can be shown. Clark *v.* Hayward, 51 Vt. 14 (1878).

So where, in consideration that A. would execute a lease of certain premises to B., B. verbally agreed that A. might enter and remove a certain crop of wheat on the premises, it was held that the verbal independent agreement could be shown in defence of an action of trespass by A. against B. for the removal of the crop. McGinness *v.* Kennedy, 29 Q. B. U. C. 93 (1869). A collateral agreement to grade certain premises, made as an inducement for their sale, can be enforced. Durkin *v.* Cobleigh, 156 Mass. 108 (1892). On a sale of soap by written order, a contemporaneous "collateral oral undertaking by the defendant to advertize" the soap may be shown. Ayer *v.* Bell Mfg. Co., 147 Mass. 46 (1888).

A verbal contract to do a specified thing with certain bonds when delivered in pursuance of a contemporaneous written contract is enforceable. Snow *v.* Alley, 151 Mass. 14 (1890). So of a parol agreement to apply the proceeds of certain unsettled accounts to the discharge of a mortgage indebtedness. Redfield *v.* Chesson, 61 Vt. 220 (1888).

In an action of contract on a written agreement for the exchange of a tract of land which merely specifies the location of the land and its price, evidence is competent that the plaintiff orally agreed that the land was in a certain state of cultivation and had been built upon. "We think, however, that this evidence does not vary, alter, or change the contract or memorandum, whatever the writing may be called. The evidence of the quality and condition of the land was about matters not attempted to be put in writing; it was outside of the contract and memorandum; contemporaneous with it, to be sure, but in no way conflicting with, altering or changing it; neither party thought of putting a description of the quality of the

land or improvements thereon, in writing; the contract was simply to furnish data from which to execute the deed to the land, and the mortgages to secure the deferred payments. The contract being about another matter entirely, does not change the memorandum in writing." Schoen *v.* Sunderland, 39 Kans. 758 (1888).

An independent agreement, at the time of making a written contract for cutting certain wood, that the cutter should have a lien on the wood to secure payment for his work, is competent in an action of replevin for the wood. Byers *v.* McMillan, 15 Can. Supreme Ct. 194 (1887).

In an action on a promissory note for the price of a sewing machine evidence is competent of a contemporaneous parol agreement "to furnish the defendant all the material necessary for the manufacture of quilts enough, at a stipulated price, to pay for the machine, and that payment of the notes was to be demanded only in case of a failure on the part of the defendant to manufacture the material as furnished into quilts." Weeks *v.* Medler, 20 Kans. 57, 64 (1878).

A parol agreement to grade certain premises, made at the time of their sale, can be sued upon. McCormick *v.* Cheevers, 124 Mass. 262 (1878).

A parol agreement, on giving a deed, that the grantor shall remain in possession for a certain time, is competent. Hamilton *v.* Clark (Tex. Civ. App.), 26 S. W. 515 (1894).

A parol agreement by a mutual life insurance company to allow a certain rebate on a premium note at maturity can be shown in defence of a suit on the premium note. Michigan Mut. Life Ins. Co. *v.* Williams, 155 Pa. St. 405 (1893).

On the other hand, a verbal warranty that the goods sold were adapted to a certain purpose cannot be shown in defence of an action to recover for their price under a written contract of sale. "Assuming that the talk was not seller's talk, such an arrangement was executory in its character, and constituted a part of the agreement as made, and should have been embraced in the written contract. To admit evidence of it now would be to vary essentially by oral testimony the written contract." Kinnard Co. *v.* Cutter Co., 159 Mass. 391 (1893); Wilcox *v.* Cate, 65 Vt. 478 (1893).

To the contrary effect, see Aultman *v.* Clifford, 55 Minn. 159 (1893). "The written instrument or order being incomplete, and not purporting on its face to express the whole of the mutual agreement of the parties, parol evidence was admissible to show an oral agreement on the part of plaintiff, which constituted a condition on which defendant gave the written order, and on which performance on his part was to depend, as that the binder should be of a certain quality."

The further limitations on this rule are well stated in Case *v.* Phœnix Bridge Co., 134 N. Y. 78 (1892). "To bring a case within

the rule admitting parol evidence to complete an entire agreement of which a writing is only a part, two things are essential: First. The writing must appear on inspection to be an incomplete contract; and Second. The parol evidence must be consistent with and not contradictory to the written instrument." Tuley *v.* Barton, 79 Va. 387 (1884).

The mischief of too lax an interpretation of the rules admitting parol evidence of collateral agreements is well stated in Northwestern Fuel Co. *v.* Bruns, 1 No. Dak. 137 (1890). "In attempts to mete out justice in individual cases, so many distinctions have been made, in order to escape the force of the doctrine excluding all oral stipulations not embraced in a written contract, that the proper application of the rule has become a problem so difficult of solution that the value of the rule has been seriously impaired. The uncertainty which has resulted has given rise to much litigation in which each party has been sanguine of success because precedents to support each theory could be found. This is to be deplored, and it is wise that this court should at the outset uphold this principle in its full integrity."

Presumption. — In solving the difficulties attending a decision as to whether a contemporaneous parol agreement is or is not "collateral" use has been made in certain states of the aid of a rule that "when a contract has been reduced to writing without any uncertainty as to the object and extent of the obligation, the presumption is that the entire contract was reduced to writing." Dodge *v.* Kiene, 28 Neb. 216 (1889); Weaver *v.* Gainesville, 1 Tex. Civ. App. 286 (1892); Societa Italiana *v.* Sulzer, 138 N. Y. 468 (1893); Caulfield *v.* Hermann, 64 Conn. 325 (1894); Case *v.* Phœnix Bridge Co., 134 N. Y. 78 (1892); Beyerstedt *v.* Winona Mill Co., 49 Minn. 1 (1892). "In the absence of fraud, or mistake, a writing in itself complete, and which has been executed with deliberation, cannot be varied or altered by oral evidence. It is presumed to contain the sole memorial of the contract of the parties: in it all prior negotiations or stipulations are merged; and when these are intentionally omitted, it cannot be said by either party subsequently that they were not waived." Couch *v.* Woodruff, 63 Ala. 466 (1879). The presumption has even been stated by a well esteemed court as a "conclusive presumption" which, as has been said, is a contradiction in terms. "When the parties to a contract have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of their engagements, it is conclusively presumed that every part of their contract was reduced to writing, and all oral evidence, therefore, of what was said during the negotiation of the contract, or at the time of its execution, must be excluded on the ground that the parties have made the writing the only repository

and memorial of the truth, and whatever is not found in the writing must be understood to have been waived and abandoned." Van Syckel *v.* Dalrymple, 32 N. J. E. 233 (1880); Broughton *v.* Null, 56 Mo. App. 231 (1893).

As usual, this "conclusive presumption" is a transferrence into the law of evidence of a rule of the positive law; — as where it is said that where a lease is in writing the rights and duties of the parties depend upon the terms or legal intendment of the lease itself, as it is conclusively presumed that the whole engagement is embraced therein. Wilson *v.* Deen, 74 N. Y. 531 (1878).

A Question for the Court. — "In what manner shall it be ascertained whether the parties intended to express the whole of their agreement in the written contract? The question is one for the Court, for it relates to the admission or rejection of evidence." Naumberg *v.* Young, 44 N. J. Law, 331, 339 (1882).

Scope of the Rule. — The primary object of the parol evidence rule is to protect the integrity of written instruments. It assumes that the parties by reducing their negotiations or agreements to this form have intended that the treachery of memory and the uncertainty of unformulated agreements shall be, so far as this matter is concerned, eliminated from their relations. To receive parol evidence on the points covered by the written agreement would be to introduce precisely the elements which the parties have agreed to eliminate; expose them to the exact danger against which they have endeavored to guard.

But while the "parol evidence rule" endeavors to provide that a written instrument shall be allowed to mean exactly what it says it means and continue to be the final repository of the intention of the parties as to the points which it covers, it does not undertake to prescribe what the effect of the instrument shall be as between the parties, either at law or in equity. It says of the written instrument, in a proper case, "This is the agreement of the parties." But it does not go forward and say, "This agreement shall be enforced as made," or "This agreement is conclusive as between the parties." With this the "parol evidence rule" has nothing whatever to do. It is, of course, a widely different thing to say that a written instrument shall not be varied by parol evidence and to say that a party cannot show facts, by parol or otherwise, which will entitle him to relief from the effect of the instrument itself, in its unvaried condition. The first is settled by a rule of evidence, now under consideration. The second is a matter of substantive law. Whatever, under the rules of substantive law, may be shown, at law or in equity, to enable a party to protect himself against the legal effect of a written instrument, he may prove; — entirely apart from any consideration of the "parol evidence rule" which has simply provided that the language of the instrument itself should not be

altered. In ascertaining what these proveable facts are, the rules of evidence are not concerned. Such rules simply decide how these proveable facts may be established.

For example, where a settlement is relied on in defence of an action it is competent for the plaintiff to show that he did not read or write the language and did not understand the effect of what he was signing. Lord *v.* American, &c. Ins. Co., 89 Wis. 19 (1894).

Mortgage or Trust. — So, as equity will refuse a deed absolute on its face, its *prima facie* legal effect if satisfied that it was, as between the parties, a mortgage, parol evidence is admissible to establish the fact that the deed is merely security for a debt. "It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice." Peugh *v.* Davis, 96 U. S. 332 (1877); Eckford *v.* Berry, 87 Tex. 415 (1894); Kibby *v.* Harsh, 61 Ia. 196 (1883); Matthews *v.* Sheehan, 69 N. Y. 585 (1877); Weathersly *v.* Weathersly, 40 Miss. 462 (1866); Raynor *v.* Lyons, 37 Cal. 452 (1869); Holt *v.* Moore, 37 Ark. 145 (1881); Wright *v.* Gay, 101 Ill. 233 (1882); Lawrence *v.* Du Bois, 16 W. Va. 443 (1880); Matthews *v.* Holmes, 5 Grant's Chan. & App. 1 (1853); Peagler *v.* Stabler, 91 Ala. 308 (1890); Pancake *v.* Cauffman, 114 Pa. St. 113 (1886); Perkins *v.* West, 55 Vt. 265 (1882); Lewis *v.* Bayliss, 90 Tenn. 280 (1891); Nesbitt *v.* Cavender, 27 S. C. 1 (1887); Winters *v.* Earl, 52 N. J. Eq. 52 (1893); McCormick *v.* Herndon, 67 Wis. 648 (1887); First Nat. Bk. *v.* Ashmead, 23 Fla. 379 (1887); Gilchrist *v.* Beswick, 33 W. Va. 168 (1889); Campbell *v.* Dearborn, 109 Mass. 130 (1872); Cruteher *v.* Muir, 90 Ky. 142 (1890); Bernard *v.* Walker, 2 E. & A. (Ont.), 121 (1862); Smith *v.* Lang, 2 Tex. Civ. App. 683 (1893); Davis *v.* Hopkins, 18 Col. 153 (1893).

So it may be shown by parol, under proper circumstances, that a

bill of sale is as between the parties to be treated as a chattel mortgage. Voorhies *v.* Hennessy, 7 Wash. 243 (1893).

Or that an absolute assignment of a note, was intended as collateral security. Vickers *v.* Battershall, 84 Hun, 496 (1895); McCathern *v.* Bell, 93 Ga. 290 (1893). Or that a judgment was intended merely to secure collateral results to the creditor. Davidson *v.* Young, 167 Pa. St. 265 (1895).

For similar reasons, it may be shown by parol that the *prima facie* effect of an absolute conveyance should be refused a given instrument because the holder really is a trustee. Williams *v.* Jenkins, 18 Grant's Chan. 536 (1871); Barr *v.* Barr, 15 Grant's Chan. 27 (1868); Ripley *v.* Seligman, 88 Mich. 177 (1891); Beck *v.* Beck, 43 N. J. Eq. 39 (1887); Ryan *v.* O'Connor, 41 Oh. St. 368 (1884); Parker *v.* Logan, 82 Va. 376 (1886); Lofton *v.* Sterrett, 23 Fla. 565 (1887); Clark *v.* Haney, 62 Tex. 511 (1884); Marsh *v.* Davis, 33 Kans. 326 (1885); Learned *v.* Tritch, 6 Colo. 432 (1882); Bright *v.* Knight, 35 W. Va. 40 (1891); Crow *v.* Watkins, 48 Ark. 169 (1886); Brick *v.* Brick, 98 U. S. 514 (1878); Minehin *v.* Minehin, 157 Mass. 265 (1892).

For example, it in no sense varies the terms of a deed to A. for B. to establish by parol a resulting trust in his own favor. Harvey *v.* Pennypacker, 4 Del. Chan. 445 (1872); Collins *v.* Corson (N. J. Eq.), 30 Atl. 862 (1894).

Duress and Undue Influence. — So it in no way infringes the rule under consideration to deny the written instrument its legal effect on the ground that its execution was obtained by duress. Miller *v.* Miller, 68 Pa. St. 486 (1871); Moore *v.* Rush, 30 La. Ann. 1157 (1878); Spaids *v.* Barrett, 57 Ill. 289 (1870); Seiber *v.* Price, 26 Mich. 518 (1873); Vicknair *v.* Trosclair, 45 La. Ann. 373 (1893).

Or, as in case of a will, by undue influence. Harvey *v.* Sullens, 46 Mo. 147 (1870); Lewis *v.* Mason, 109 Mass. 169 (1872); Wiley *v.* Ewalt, 66 Ill. 26 (1872).

So in case of a conveyance *inter vivos*. Taylor *v.* Crockett, 123 Mo. 300 (1894).

Illegality. — So it is no infringement of the rule excluding parol evidence to receive such evidence for the purpose of showing that the instrument should not be enforced because executed for an illegal object. Friend *v.* Miller, 52 Kans. 139 (1893).

For example, to obtain usurious interest. Chamberlain *v.* M'Clurg, 8 W. & S. 31 (1844); Newsom *v.* Thighen, 30 Miss. 414 (1855); Hewett *v.* Dement, 57 Ill. 500 (1870); Daw *v.* Niles (Cal.), 33 Pac. 1114 (1893).

To obtain payment of the price of intoxicating liquors contrary to law. Pratt *v.* Langdon, 97 Mass. 97 (1867).

To avoid a legal prohibition against gifts between persons

living together in concubinage. Lazare *v.* Jacques, 15 La. Ann. 599 (1860).

To obtain an undue preference over other creditors of a common debtor. Benicia, &c., Works *v.* Estes (Cal.), 32 Pac. 938 (1893).

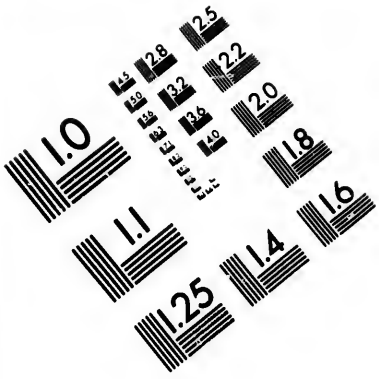
"This rule of evidence is not infringed by the admission of parol testimony which is not intended as a substitution for or an addition to a written contract, but which goes to show that the instrument is void or voidable, and that it never had any legal existence or binding force either by reason of fraud, or for want of due execution and delivery, or for the illegality of the subject matter of the contract. . . . Parol testimony may be admitted to show that the execution of a written contract was brought about by a fraudulent representation." State *v.* Cass, 52 N. J. L. 77 (1889).

INCAPACITY. — There is nothing objectionable to the "parol evidence rule" in refusing operation to an instrument on the ground that it was executed by a person who at the time was incapacitated by reason of insanity. Staples *v.* Wellington, 58 Me. 453 (1870); Webster *v.* Woodford, 3 Day, 90 (1808); Mitchell *v.* Kingman, 5 Pick. 431 (1827); Beals *v.* See, 10 Barr, 56 (1848); Wiley *v.* Ewalt, 66 Ill. 26 (1872); Parker *v.* Davis, 8 Jones (N. C.), Law, 460 (1862).

Or by reason of intoxication. Wigglesworth *v.* Steers, 1 H. & M. (Va.), 69 (1806); Phelan *v.* Gardner, 43 Cal. 306 (1872).

FRAUD. — A party is entitled to prove that a certain instrument is inoperative because obtained by fraud. Calhoun *v.* Richardson, 30 Conn. 210 (1861); Feltz *v.* Walker, 49 Conn. 93 (1881); Cushing *v.* Rice, 46 Me. 303 (1858); Thompson *v.* Bell, 37 Ala. 438 (1861); Lull *v.* Cass, 43 N. H. 62 (1861); Burtners *v.* Keran, 24 Gratt. 42 (1873); Wharton *v.* Douglass, 76 Pa. St. 273 (1874); Kostenbader *v.* Peters, 80 Pa. St. 438 (1876); Hines *v.* Driver, 72 Ind. 125(1880); Gage *v.* Lewis, 68 Ill. 604 (1873); Barnard *v.* Roane Iron Co., 85 Tenn. 139 (1886); Mayer *v.* Dean, 115 N. Y. 556 (1889); Van Alstyne *v.* Smith, 82 Hun, 382 (1894); Kirkpatrick *v.* Clark, 132 Ill. 342 (1890); Gross *v.* Drager, 66 Wis. 150 (1886); National, &c. Co. *v.* Pfister, 5 So. Dak. 143 (1894); Case *v.* Case, 26 Mich. 484 (1873); Kranich *v.* Sherwood, 92 Mich. 397 (1892); Scroggin *v.* Wood, 87 Ia. 497 (1893); Ewing *v.* Smith, 132 Ind. 205 (1892); Volkenaud *v.* Drum, 154 Pa. St. 616 (1893); Dinkler *v.* Baer, (Ga.) 17 S. E. 953 (1893). Grand Tower, &c. R. R. *v.* Walton, 150 Ill. 428 (1894); Peck *v.* Jenison, 99 Mich. 326 (1894); Sherff *v.* Jacobi, 71 Hun, 391 (1893); Halsell *v.* Musgrave, 5 Tex. Civ. App. 476 (1893); Taylor *v.* Crockett, 123 Mo. 300 (1894).

This ability to prove fraud is not only a shield. It may be used as a basis for invoking the active aid of the court. McLean *v.* Clark, 47 Ga. 24 (1872); Turner *v.* Turner, 44 Mo. 535 (1869); Thomas *v.* Kennedy, 24 La. Ann. 209 (1872); Grider *v.* Clopton, 27 Ark. 244 (1871); Wilson *v.* Higbee, 62 Fed. Rep. 723 (1894);



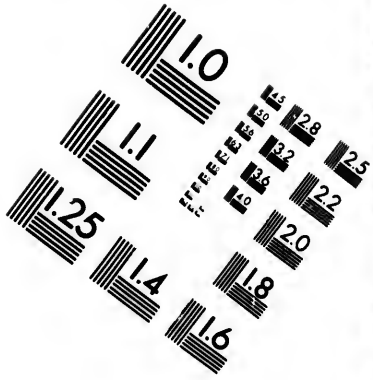
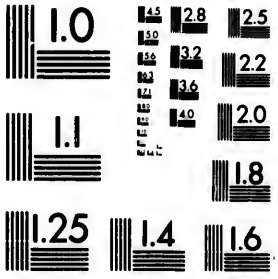
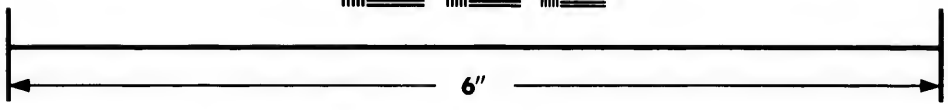
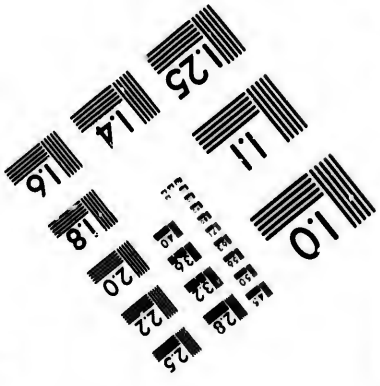


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

The rule applies equally to wills. McLaughlin *v.* McDevitt, 63 N. Y. 213 (1875).

Consideration. — The consideration for executing a written agreement may be shown by parol. The underlying reasoning of this line of cases seems to be that of fraud or estoppel. The grantors in a deed of land to a railroad, the consideration of which was a contemporaneous parol agreement to maintain perpetually a station at a certain place may, on removal of the station, sue for the value of the land as for a failure of consideration. International, &c. R. R. *v.* Dawson, 62 Tex. 260 (1884). Provided, the contract does not provide otherwise. Faires *v.* Cockrill, (Tex.) 31 S. W. 190 (1895). But see, *contra*, Conwell *v.* Springfield, &c. R. R., 81 Ill. 232 (1876). So of putting in a side track. Huckestein *v.* Kelly, 152 Pa. St. 631 (1893).

So of the promised non-erection of a church. Kelly *v.* Carter, 55 Ark. 112 (1891). Or the location of a railroad. Lake, &c. R. R. *v.* Squire, (Ia.) 57 N. W. 307 (1894). Or an agreement to cancel a prior instrument. Guidery *v.* Green, 95 Cal. 630 (1892).

Where the execution of a written contract was induced by a parol agreement that a certain printed clause should not be binding, such parol agreement can be shown. "No principle is better settled . . . than that parol evidence is admissible to show a verbal contemporaneous agreement, which induced the execution of a written obligation, though it may vary or change the terms of the written contract. . . It is a fraud in the defendants, in order to procure an unfair advantage, subsequently to deny the parol qualification, upon the faith of which the contract was made." Cullmans *v.* Lindsay, 114 Pa. St. 166 (1886); Ferguson *v.* Rafferty, 128 Pa. St. 337, 349 (1889).

Where the execution of a written agreement is procured by giving a parol agreement, such agreement can be shown. "It is settled by a considerable line of authority that where the execution of a written agreement has been induced upon the faith of an oral stipulation made at the time, but omitted from the written agreement, though not by accident or mistake, parol evidence of the oral stipulation is admissible, although it may add to or contradict the terms of the written instrument. Among the cases establishing this principle are: Chapin *v.* Dobson, 78 N. Y. 74; Ferguson *v.* Rafferty, 128 Pa. St. 337." Barnett *v.* Pratt, 37 Neb. 349 (1893). American, &c. Association *v.* Dahl, 54 Minn. 355 (1893).

Where a railroad employee executed a release for injuries caused by the negligence of the company, in consideration of the company giving him "steady and permanent employment," such an agreement is not merged in the written release. Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109 (1892).

But in a similar case where the consideration recited was the

nominal one of "one dollar" the employee was not allowed to prove that the actual consideration of the release was the payment of certain expenses of his illness. St. Louis, &c. R. R. *v.* Dearborn, 60 Fed. Rep. 880 (1894). So it cannot be shown that the company agreed, as an additional consideration, to give the releasor remunerative employment. Myron *v.* Union R. R. (R. I.), 32 Atl. 165 (1895). And it has been held that where rent in money is reserved in a written lease, parol evidence will not be admitted to show that immediately prior to the execution of the lease, the lessee was induced to sign it by an agreement that part of the rent was to be taken out in boarding. Stull Thompson, 154 Pa. St. 43 (1893). Or that repairs other than those specified should be made. Averill *v.* Sawyer, 62 Conn. 560 (1893); Gulliver *v.* Fowler, 64 Conn. 556 (1894). Or, in case of a mortgage, that as part of the consideration, the mortgagor was to board the mortgagee free, though the court suggest that a counterclaim might be maintained on such an agreement. Kracke *v.* Homeyer, 91 Ia. 51 (1894). Or, as an inducement to a sale of a farm, that the vendee would give the vendor a third of the net proceeds of the wheat crop standing on the same.

"It is not a question of the statute of frauds, but an attempt to vary the terms and effect of a written instrument by parol." Adams *v.* Watkins, 103 Mich. 431 (1894).

In general, it may be shown by parol what is the real consideration of a written instrument. Manning *v.* Pippen, 86 Ala. 357 (1888); Wolfe *v.* McMillan, 117 Ind. 587 (1888); Wood *v.* Moriarty, 15 R. I. 518 (1887); Straus *v.* Bodeker, 86 Va. 543 (1889); Womack *v.* Wamble, (Tex.) 27 S. W. 154 (1894); Shank *v.* Coulthard, 19 Grant's Chan. 324 (1872); Davis *v.* McSherry, 7 Q. B. U. C. 490 (1850); Guidery *v.* Green, 95 Cal. 630 (1892); Reese *v.* Strickland, 96 Ga. 784 (1895); Brice *v.* Miller, 35 S. C. 537 (1891); Bradshaw *v.* Coombs, 102 Ill. 428 (1882); Luce *v.* Foster, 42 Neb. 818 (1894); Fire Ins. Co. *v.* Wickham, 141 U. S. 564 (1891); Velten *v.* Carmack, 23 Oreg. 282 (1892); Horn *v.* Hansen, 56 Minn. 43 (1893); Jackson *v.* Chicago, &c. R. R., 54 Mo. App. 636 (1893); Beckman *v.* Beckman, 86 Wis. 655 (1894); Luce *v.* Foster, 42 Neb. 818 (1894); Zelch *v.* Hirt, 59 Minn. 360 (1894). Or that there was a consideration in addition to that stated. Hill *v.* Whidden, 158 Mass. 267 (1893); Bolles *v.* Sachs, 37 Minn. 315 (1887); Champion *v.* Munday, 85 Ky. 31 (1887); Hickman *v.* Hickman, 55 Mo. App. 303 (1893); Johnson *v.* East Carolina, &c. R. R. 116 N. C. 926 (1895); Green *v.* Randall, 51 Vt. 67 (1878).

But the additional consideration must, it is said, be consistent with the deed, and it has accordingly been held that where a deed conveying land contains a covenant against incumbrances, evidence of a contemporaneous oral agreement by the grantee to assume an existing incumbrance, as part of the consideration, is not competent.

Brown *v.* Morgan, 56 Mo. App. 382 (1893). To contrary effect, see Newcomb *v.* Wallace, 112 Mass. 25 (1873). The use of the phrase "value received" does not prevent evidence that the real consideration was executory. Sullivan *v.* Lear, 23 Fla. 463 (1887); But it is not competent to show by parol that a deed reciting a consideration was in fact given without consideration. Magee *v.* Allison, (Ia.) 63 N. W. 322 (1895). But where a mortgage was given without consideration that fact may be established by parol. Baird *v.* Baird, 145 N. Y. 659 (1895). A deed purporting to be upon a money consideration can be shown by parol to have been given in consideration of marriage. Tolman *v.* Ward, 86 Me. 303 (1894).

The rule applies to negotiable instruments in suits between the original parties. Ohleyer *v.* Bernheim, 67 Miss. 75 (1889); Pitts *v.* Allen, 72 Ga. 69 (1883); Branch *v.* Howard, 4 Tex. Civ. App. 271 (1893). Or as against parties taking after maturity or with notice. Peck *v.* Beckwith, 10 Oh. St. 497 (1860).

A purchaser of real estate may prove a contemporaneous parol agreement by the vendor to grade and build a certain street and cause water to be put therein which was the inducement and consideration of the purchase. Durkin *v.* Cobleigh, 156 Mass. 108 (1892); Cole *v.* Hadley, 162 Mass. 579 (1895).

"The defendant further contends that the deed offered in evidence is conclusively presumed to include the whole contract between the parties thereto. While this contention may be conceded to the defendant, it is, nevertheless, true that, in a deed like that in this case, where there is a mere statement of a certain amount of money without more as the consideration, it is but inattentive recital common in conveyancing of a consideration in most general use, which forms no part of the contract. The statement of the amount of the consideration in a deed, and the acknowledgment of its payment is no more than a receipt — a statement of a fact which is not necessary to the validity of the deed. It is only prima facie evidence of what it states, but not conclusive except that there was some consideration. Such a recited consideration is not intended to be contractual, and therefore, works no estoppel as to amount or character, or, in other words, the parties in such case are not estopped from showing by parol evidence the amount and character of the consideration to be different from that recited in the deed." Holt *v.* Holt, 57 Mo. App. 272 (1894); Kiser *v.* Carrollton Dry Goods Co., (Ga.) 22 S. E. 303 (1895).

Mistake. — It is not a violation of the "parol evidence rule" to admit parol evidence to show that a written instrument was executed under a mutual mistake of fact.

Either for the purpose of reforming the instrument itself. Bryce Lorillard *v.* Ins. Co., 55 N. Y. 240 (1873); Milmine *v.* Burnham, 76

Ill. 362 (1875); Merchants' Bank *v.* Morrison, 19 Grant's Chan. Rep. 1 (1872); Elofrson *v.* Lindsay, 63 N. W. 89 (1895); Avery *v.* Miller, 86 Ala. 495 (1888); Goode *v.* Riley, 153 Mass. 585 (1891); Nelson *v.* Davis, 40 Ind. 366 (1872); Smith *v.* Butler, 11 Oreg. 46 (1883); Cleveland *v.* Burnham, 64 Wis. 347 (1885); Fudge *v.* Payne, 86 Va. 303 (1889); Ewing *v.* Sandoval, &c. Co., 110 Ill. 290 (1884); Miller *v.* Davis, 10 Kans. 541 (1873); Allen *v.* Yeater, 17 W. Va. 128 (1880); Gammage *v.* Moore, 42 Tex. 170 (1875); Dickinson *v.* Glenney, 27 Conn. 104 (1858).

Or of refusing it any legal effect. Mayo *v.* Dwight, 82 Pa. St. 462 (1876); Vignie *v.* Brady, 35 La. Ann. 560 (1883); Gladdish *v.* Godchaux, 46 La. Ann. 1571 (1894); Montgomery *v.* Shockey, 37 Ia. 107 (1873); Hearst *v.* Pujol, 44 Cal. 230 (1872); Goltra *v.* Sanasack, 53 Ill. 456 (1870); McMurray *v.* St. Louis Oil Co., 33 Mo. 377 (1863); Winslow *v.* Driskell, 9 Gray, 363 (1857); Byrd *v.* Campbell, &c. Co., 94 Ga. 41 (1894).

"So it is settled, at least in equity, that this particular kind of parol evidence, that is to say, evidence of mutual mistake as to the meaning of the words used, is admissible for the negative purpose we have mentioned. And this principle is entirely consistent with the rule that you cannot set up prior or contemporaneous oral dealings to modify or override what you knew was the effect of your writing." Goode *v.* Riley, 153 Mass. 585 (1891).

As in other cases, the parol evidence in cases of mistake is admissible solely because, as a matter of the substantive law, the facts sought to be established in this way constituted a ground for relief against the effect of the ascertained purport of the instrument. Where the facts sought to be proved are not competent as constituting ground for relief, parol evidence is not admissible to prove them.

So a mistake of law cannot be proved by parol; — not because the evidence is by parol but because the fact of such a mistake would not afford ground for relief against the operation of the written instrument. Mellish *v.* Robertson, 25 Vt. 603 (1853); Gebb *v.* Howell, 40 Md. 387 (1874); Thurmond *v.* Clark, 47 Ga. 500 (1873); Moorman *v* Collier, 32 Ia. 138 (1871); Heavenridge *v.* Moody, 49 Ind. 434 (1875).

Incomplete Delivery. — It in no way contradicts or varies a written instrument to show that it was never delivered as an operative instrument. Lipscomb *v.* Lipscomb, 32 S. C. 243 (1889). "A party, sued by his promisee, is always permitted to show a want or failure of consideration for the promise relied upon, and so he may prove by parol that the instrument itself was delivered even to the payee to take effect only on the happening of some future event. (Seymour *v.* Cowing, 1 Keyes, 532; Benton *v.* Martin, 52 N. Y. 570; Eastman *v.* Shaw, 65 id. 522), or that its design and object were different from

what its language, if alone considered, would indicate. (Denton *v.* Peters, L. R., 5 Q. B. 474; Blossom *v.* Griffin, 3 Kern. 569; Hutchins *v.* Hebbard, 34 N. Y. 24; Seymour *v.* Cowing, *supra*; Barker *v.* Bradley, 42 N. Y. 316, 1 Am. Rep. 521; Grierson *v.* Mason, 60 N. Y. 394; De Lavallette *v.* Wendt, 75 id. 579, 31 Am. Rep. 494). He may also show that the instrument relied upon was executed in part performance only of an entire oral agreement (Chapin *v.* Dodson, 78 N. Y. 74; 34 Am. Rep. 512), or that the obligation of the instrument has been discharged by the execution of a parol agreement collateral thereto (Crosman *v.* Fuller, 17 Pick. 171), or he may set up any agreement in regard to the note which makes its enforcement inequitable." Juilliard *v.* Chaffee, 92 N. Y. 529 (1883).

So it may be shown by parol that a written instrument is not to become operative except upon the happening of a certain contingency. P[illegible]switt *v.* Boorum, 142 N. Y. 357 (1894); Smith *v.* Mussetter, 58 Mi[illegible]59 (1894). For example, the assent of a surety. Wilson *v.* Powers, 131 Mass. 539 (1881). Or that the indebtedness of a partnership did not exceed a certain amount. Beall *v.* Poole, 27 Md. 645 (1867).

Or that a certain partnership should continue. Norman *v.* Waite, 30 Neb. 302 (1890).

Or that the approval of A. should be first obtained. McCormick, &c. Co. *v.* Richardson, 89 Ia. 525 (1893).

Or that satisfactory reports should be obtained from a commercial agency. Reynolds *v.* Robinson, 110 N. Y. 654 (1888).

It may be shown by parol that an instrument was delivered signed in blank with instructions as to filling in which have not been complied with. Richards *v.* Day, 137 N. Y. 183 (1893). Or that it was not delivered in payment of certain debts. "It is our opinion that the pleading of this matter was not an offer of parol testimony to vary the terms of a written instrument. It is not the terms of the written instrument that are sought to be varied or contradicted by this evidence. Instead of that, it is simply a presumption, which, it is claimed by the plaintiff, arose from the fact of executing the instrument that is sought to be varied by this parol testimony. The defendant concedes the written instrument, in all its force. He concedes his liability upon it. The plaintiff contends that the execution of this instrument — that is, the acceptance of the bill of exchange — was a waiver of defendant's alleged counterclaims existing at that time. The written instrument itself does not, on its face, disclose such waiver, but the waiver, if any there were, is a result, or an inference, or a presumption from the fact of executing the instrument, and the fact of the existence of the counterclaims at the time of such execution. Now, this parol evidence is offered to overthrow nothing in the instrument itself, but simply to combat an inference or presumption drawn from the instrument and other

facts. This presumption is not a written instrument, nor contained in the terms of a written instrument. Therefore to overthrow it is not varying the terms of the instrument." Bohn Mfg. Co. *v.* Harrison, 13 Mont. 293 (1893).

So it may be shown in case of a promissory note, in an action between the maker and payee, that it was verbally agreed, at the time of making the note, that it should not become operative as a note until the maker could examine the property for which it was to be given and determine whether he would purchase it. Burke *v.* Dulaney, 153 U. S. 228 (1893).

Or was signed by the parties not intending it as an operative instrument. Earle *v.* Rice, 111 Mass. 17 (1872).

Or was deposited in escrow. Roberts *v.* Mullenix, 10 Kans. 22 (1872); Stanton *v.* Miller, 65 Barb. 58 (1873).

Or was to become operative only in case the signatures of other persons should be procured. "This condition was independent of the terms of the agreement, or the things agreed to be done, and therefore it pertained to the consideration upon which the agreement was founded. The evidence showing it, does not vary or add to the obligations which the defendants had undertaken, by the terms of the agreement, but goes to the performance of a condition as the basis on which it was founded; and for this reason the evidence was competent in law, and it fully warranted the opinion, that the consideration for the agreement had failed, and consequently, that the defendants were not bound by it." Butler *v.* Smith, 35 Miss. 457, 463 (1858); Belleville Savings Bank *v.* Bornman, 124 Ill. 200 (1888); Kelly *v.* Oliver, 113 N. C. 442 (1893); Merchants' Nat. Bank *v.* McAnulty (Tex.), 31 S. W. 1091 (1895).

But, on the contrary, it has been held in New York that it is not competent to prove that at the time a composition release by creditors was signed by the plaintiff there was an oral statement made to him by the debtor that the release should not be operative unless all the creditors had signed. "They sought to incorporate in the instrument, by oral evidence, a condition not expressed in the writing. The release on its face purported to be absolute and unconditional, and binding upon all the creditors who should sign it." Van Bokkelen *v.* Taylor, 62 N. Y. 105 (1875).

To receive this evidence the supreme court of Connecticut say would not only be to substitute fallible media "for a medium whose accuracy the parties affirm" but would often be "to substitute an abandoned for a rejected contract." Beard *v.* Boylan, 59 Conn. 181 (1890).

While a conditional delivery of a deed to a grantee gives absolute effect to the instrument, yet where a contract under seal, not required to be so executed, is claimed to have been conditionally delivered the condition may be shown by parol. Blewitt *v.* Boorum, 142 N. Y. 357 (1894).

That even a delivery of a deed to a grantee may be shown by parol to have been conditional, see Black *v.* Sharkey, 104 Cal. 279 (1894).

Discharge, Waiver, Modification, &c. — The parol evidence rule is in no way contravened by evidence tending to show that a written instrument should not operate according to its tenor because it has been discharged or rescinded. Walker *v.* Wheatly, 2 Humph. 119 (1840); Maysville, &c. R. R. *v.* Pellam, 20 S. W. 384 (1892).

Or waived by the declarations or other acts of the parties. Leathe *v.* Bullard, 8 Gray, 545 (1857); Lawrence *v.* Dole, 11 Vt. 549 (1839); Renier *v.* Dwelling House Ins. Co., 74 Wis. 89 (1889); Brady *v.* Cassidy, 145 N. Y. 171 (1895).

Or that a subsequent agreement has been substituted by consent. Le Fevre *v.* Le Fevre, 4 S. & R. 241 (1818); Guidery *v.* Green, 95 Cal. 630 (1892); Magill *v.* Stoddard, 70 Wis. 75 (1887); Marshall *v.* Baker, 19 Me. 402 (1841); Bannon *v.* Aultman, 80 Wis. 307 (1891); Branch *v.* Wilson, 12 Fla. 543 (1868); Whitney *v.* Wall, 17 U. C. C. P. 474 (1867); Gibbons *v.* Ellis, 83 Wis. 434 (1892); Wilson *v.* McClenny, 32 Fla. 363 (1893); Osborne *v.* Stringham, 4 So. Dak. 593 (1894); Collins *v.* Stanfield, 139 Ind. 184 (1894).

Though the original agreement was within the statute of frauds, the modification may be by parol. Stearns *v.* Hall, 9 Cush. 31 (1851); Eastman *v.* Roland, 2 L. C. Law Jour. 216 (1867).

Or that the terms of a written contract have been subsequently modified by parol. Brown *v.* Deacon, 12 Grant's Ch. 198 (1866); First Nat. Bank *v.* Post, 65 Vt. 222 (1892); Strauss *v.* Gross, 2 Tex. Civ. App. 432 (1893).

It is equally unobjectionable to introduce parol evidence of excuses for non-performance of a written contract. Davis *v.* Crookston, &c. Co., 57 Minn. 402 (1894).

PART V.

INSTRUMENTS OF EVIDENCE.

CHAPTER I.

WITNESSES, AND THE MEANS OF PROCURING THEIR ATTENDANCE.

§ 1232. The *Fifth Part* of this work will treat of the Instruments of evidence, or, in other words, of the means by which facts are proved. It will be endeavoured to show how such instruments are obtained, in what manner they are used, to what extent, and under what circumstances, they are admissible, and what is their effect.

§ 1233.[1] Now, the Instruments of Evidence are of two classes—the *unwritten* and the *written*. By *unwritten*, or *oral evidence*, is meant the testimony given by witnesses, vivâ voce, either in open court, or before a magistrate or other officer, acting by virtue of a commission or other legal authority. Under this head will be briefly considered, first, the methods, in general, of procuring the attendance and testimony of witnesses; secondly, the competency of witnesses; and, thirdly, the practice which obtains in the examination of witnesses, and herein, of the impeachment and corroboration of their testimony.

§ 1234. The attendance of witnesses, whether for the prosecution or the defence, before justices of the peace is enforced by summons.[2]

[1] Gr. Ev. §§ 307, 308, in great part.

[2] See 11 & 12 V. c. 43 ("The Summary Jurisdiction Act, 1848") § 7; 32 & 33 V. c. 49 ("The Summary Jurisdiction Act, 1879"), § 36,

§ 1234A. Witnesses who have given evidence before justices of the peace are, if the accused be committed for trial or if notice of appeal is given, usually bound over by recognizance to attend and give evidence at the trial or hearing of the appeal. A *recognizance* is a bond of record, testifying that the recognizor owes the Queen a certain sum, to be levied on his goods and tenements for the use of her Majesty, if he fail to appear and give evidence at the time and place specified in the condition.[1] By the Indictable Offences Act, 1848,[2] the justice before whom the preliminary investigation is heard, is authorised in all cases, whether of felony or misdemeanor, to bind by recognizance all such persons as know the facts or circumstances of the case, to appear and give evidence before the grand jury and at the trial against the party accused;[2] and the Coroners Act, 1887,[3] gives similar power to all coroners taking an inquisition, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact. These provisions respectively apply to justices and coroners, not only of counties, but of all other jurisdictions.[4] In order to avoid any hardship from indiscriminate estreat, it is enacted that, the officer of the court, by whom the estreats are made out, shall prepare a written list of defaulters, specifying the name, residence, and trade or profession of each, the nature of the offence respecting which he was to testify, the cause, if known, of his absence, and the fact whether by reason of his non-attendance the ends of justice have been defeated or delayed. This list must then be laid before the judge at the assizes, or before the recorder or other corporate officer, or the chairman or two other justices of the peace at the sessions, who are respectively required to examine it, and to

[1] See Form No. 36 in Appendix to Rules under "The Summary Jurisdiction Act, 1879," issued 16th July, 1886.

[2] 11 & 12 V. c. 42, § 20. The corresponding Irish Act (14 & 15 V. c. 93) enacts, in § 13, cl. 6, that "whenever in cases of indictable offences the justice or justices shall see fit, they may bind the witnesses by recognizance to appear at the trial of the offender and give evidence against him," and if such witnesses refuse to be bound, they may be committed. The form of the recognizance is given in the schedule.

[3] 50 & 51 V. c. 71, § 5; 9 G. 4, c. 54, § 4, Ir.

[4] 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), §§ 1, 16, 20, the latter section being amended by "The Summary Jurisdiction Act, 1879" (42 & 43 V. c. 49); 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 6; 14 & 15 V. c. 93, § 44, Ir.

make such order touching the estreating of the recognizances as they shall consider just; but no recognizance can be estreated or put in process, without the written order of the presiding judge or other persons, before whom the list has been laid.[1] It seems that a recognizance to prosecute or give evidence is binding on an infant; at least, it has been held that infancy is no ground for discharging a forfeited recognizance to appear at the assizes to prosecute for felony.[2]

§ 1235. If a witness, after having been examined on oath before a magistrate or coroner, refuse to be bound over, he may be committed;[3] and where a married woman, who could not enter into her own recognizances, refused either to appear at the sessions or to find sureties for her appearance, the justice was held fully warranted in committing her, in order that she might be forthcoming as a witness at the trial.[4] But a justice cannot commit any witness for refusing to find sureties to be bound with him, who is willing to enter into his own recognizance.[5]

§ 1236. By an Act passed in 1867, every committing justice must ask the accused "whether he desires to call any witnesses," and if he answers in the affirmative, the witnesses are sworn, and examined; their depositions are reduced to writing;[6] and "such witnesses,—not being witnesses merely to the character of the accused,—as shall in the opinion of the justice give evidence any way material to the case, or tending to prove the innocence of the accused, shall be bound by recognizance to appear and give evidence at the trial."[7]

§§ 1237-8. Formerly, committing justices in various cases in which they might convict summarily, but in which an appeal from their decisions lay to the quarter sessions, had power on notice of such an appeal being given, to bind the witnesses in the case over by recognizance to appear at quarter sessions on

[1] 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 31; 9 G. 4, c. 54, § 34, Ir.

[2] Ex parte Williams, 1824.

[3] 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), § 20; Bennet *v.* Watson, 1814; 9 G. 4, c. 54, § 2, Ir. See Ashton's case, 1845.

[4] Bennet *v.* Watson, 1814.

[5] Graham, B., as cited 2 Burn, Just. 122; Evans *v.* Rees, 1840 (Ld. Denman).

[6] 30 & 31 V. c. 35, §§ 3 and 4, cited ante, § 490, n.

[7] Id. § 3.

the hearing of the appeal. Other statutes giving a right of appeal to quarter sessions did not however confer on the Court of Summary Jurisdiction such power, and now by the Summary Jurisdiction Act, 1879,[1] it is provided,[2] "Where, in pursuance of any Act, whether past or future, any person is adjudged by a conviction or order of a Court of Summary Jurisdiction to be imprisoned without the option of a fine, either as a punishment for an offence, or, save as hereinafter mentioned, for failing to do or to abstain from doing any act or thing required to be done or left undone, and such person is not otherwise authorised to appeal to a Court of General or Quarter Sessions, and did not plead guilty, or admit the truth of the information or complaint, he may, notwithstanding anything in the said Act, appeal to a Court of General or Quarter Sessions against such conviction or order: Provided that this section shall not apply where the imprisonment is adjudged for failure to comply with an order for the payment of money, for the finding of sureties, for the entering into any recognizance, or for the giving of any security." The attendance of the witnesses on the hearing of any appeal under the above section is secured by means of the issue of a Crown Office subpœna from the court of quarter sessions.

§ 1239.[3] This brings us to the second mode in which the attendance of witnesses may be procured in criminal cases. This is by means of a Crown Office subpœna. A "subpœna" is the ordinary mode of summons to attend as a witness at trials of any civil case, being served upon the witness. This is a judicial writ, which the proper officer, on production to him of a præcipe in due form for filing,[4] is bound to issue at the instance of the party applying for it, without any order of the court for that purpose having first been obtained.[5] It must, in the High Court, be in one or other of seven Forms given in the Rules;[6] containing, if the witness be required to produce any documents, a clause to that effect, in which case the writ is termed a *subpœna duces tecum*.

[1] 42 & 43 V. c. 49.
[2] § 19.
[3] Gr. Ev. § 309, in part.
[4] R. S. C. 1883, Ord. XXXVII. r. 26, and Form 21 in App. G.
[5] Holden *v.* Holden, 1857; and Hill *v.* Dolt, 1857.
[6] See Ord. XXXVII. r. 27; and Forms 1 to 7 in App. J.

When the attendance of a witness is required to be given before a court possessing criminal jurisdiction, it is (as in civil cases) commanded by "subpœna," but such subpœna is issued out of the Crown Office Department of the Court of Queen's Bench, and is hence briefly called "a Crown Office subpœna." A Crown Office subpœna may either simply require the attendance of the witness, or be a subpœna duces tecum. When a Crown Office subpœna is required to secure the attendance of a witness at petty sessions, quarter sessions, or assizes, it cannot be obtained from the Clerk of the Peace or from the Clerk of Assize. Its issue must be obtained from the Crown Office in London. This is usually done by the London agents of the solicitor employed by the party by whom the attendance of the witness, before either of the tribunals just mentioned, is required. A few days ought usually to be allowed for procuring the writ, but, in urgent cases, it may be obtained by return of post, or even in answer to a telegram to agents in London in a much less time. The application at the Crown Office for a Crown Office subpœna is made by a solicitor or by a solicitor's clerk, but it is sometimes made by the party in person. An applicant for a Crown Office subpœna fills up a proper form of subpœna on parchment with the name of at least one witness, pays for and affixes to it a stamp for five shillings, upon which it is sealed for him. Subpœnas are not allowed to be issued in blank except to the police and to the solicitors to the Treasury. A Crown Office subpœna may be obtained where a summons to a witness has been issued instead of reliance being entirely placed upon the summons being "backed" under the provisions of the Summary Jurisdiction Acts.[1] But in general a Crown Office subpœna will not be sealed for parties in person till after particular enquiry by the Crown Office into the matter, and on their being satisfied that such subpœna is not sought for some malicious purpose or for annoyance. A Crown Office subpœna may be served anywhere in England.

§ 1240. A subpœna duces tecum must specify with reasonable distinctness the particular documents required; and a general direction to produce all papers relating to the subject in dispute will not be enforced.[2] When a witness is served with a subpœna

[1] See infra, § 1318A.

[2] Lee *v.* Angas, 1866 (Wood. V.-C.); Att.-Gen. *v.* Wilson, 1839.

duces tecum, he is bound to attend with the documents demanded therein, if he has them in his possession, and he must leave the question of their actual production to the judge, who will decide upon the validity of any excuse that may be offered for withholding them.[1] For example, an attachment will lie against an overseer or solicitor of a parish, who, in an inquiry touching the settlement of a pauper, refuses to bring the rate-books of such parish to the petty sessions, in obedience to a Crown Office subpœna; though it may be very questionable whether he would be bound to submit these books to examination, in the event of his bringing them into court.[2] Moreover, as a rule, even the fact that the legal custody of the document belongs to another person will not authorise a witness to disobey the subpœna, where such document is in his actual possession.[3] But documents filed in a public office are not so in the possession of a clerk there, as to render it necessary, or even allowable, for him to bring them into court without the permission of the head of the office;[4] and the secretary of a company will not be attached for declining to produce at a trial documents, which have been entrusted to him simply as a servant of the company, and which the directors have specially forbidden him to produce.[5]

§ 1241. A writ of subpœna, though commanding the witness to attend "from day to day until the cause be tried," suffices for only one sitting of the court, or for one assize; and, therefore, if the cause be made a remanet, or be adjourned to another session, or assize, the writ must be resealed, and the witness summoned anew.[6] Again, if any alteration be made in the writ, after it is sued out, though before it is served, it must be resealed;[7] and, therefore, when the day of appearance named in a subpœna was altered by an attorney from one term to another, it was held that the writ thereby became void, and that a witness, on whom it was served subsequently to the alteration, might treat it as waste paper.[8]

§ 1241A. An ordinary writ of subpœna differs from a subpœna duces tecum in this respect, that while the former "contains three names when necessary or required, and may contain any larger

[1] Amey *v.* Long, 1808. See ante, § 23; and as to what is a valid excuse, see ante, §§ 458—460.
[2] R. *v.* Greenaway, and R. *v.* Carey, 1845.
[3] Amey *v.* Long, 1807 (Ld. Ellenborough).
[4] Thornhill *v.* Thornhill, 1820; Austin *v.* Evans, 1841.
[5] Crowther *v.* Appleby, 1873.
[6] Sydenham *v.* Rand, 1784.
[7] See Ord. XXXVII. r. 31.
[8] Barber *v.* Wood, 1838 (Ld. Abinger).

number of names,"[1] the latter cannot include more than three persons, and the party suing it out may, if it be deemed desirable, have a separate writ for each person.[2]

§ 1242.[3] The service of a subpœna upon a witness is of no validity if not made within twelve weeks after the *teste* of the writ.[4] It must also in all cases be made a *reasonable time* before trial, to enable the witness to put his affairs in such order, that his attendance on the court may be as little detrimental as possible to his interests.[5] On this principle, a summons in the morning to attend in the afternoon of the same day is insufficient, though the witness live in the same town, and very near to the place of trial.[6] Where, however, a witness was served at noon, while standing on the steps of the court-house, and being then told that the cause was coming on that day, replied, "very well," his non-attendance at five o'clock, when the trial was heard, was held to render him liable to an action, since his answer was equivalent to an admission that the service was in time.[7] If a witness attend a trial in obedience to a subpœna, he cannot refuse to be examined on the ground of any irregularity in the service.[8] If, too, a witness be in court as a spectator, he cannot, it seems, object to give evidence, on the ground that the subpœna has only just been served upon him;[9] though, if he be a solicitor, who is engaged in winding up another cause, the rule may be different; and it is highly probable that he would not be liable to an attachment for disobedience.[10] Moreover, in criminal prosecutions, a witness cannot decline to be sworn, though he has not been subpœnaed at all.[11] In civil cases a witness may, however, always refuse to be examined, unless he be properly served with a subpœna, "proper service" being only effected when accompanied by the payment of proper "conduct money."[12] But an objection to give evidence

[1] Ord. XXXVII. r. 29.
[2] R. 30.
[3] Gr. Ev. § 314, in part.
[4] R. 34.
[5] Hammond *v.* Stewart, 1734-5.
[6] Id.; Barber *v.* Wood, 1838 (Ld. Abinger).
[7] Maunsell *v.* Ainsworth, 1840 (Parke and Alderson, BB.).; Jackson *v.* Seagar, 1844 (Wightman, J.).
[8] Wisden *v.* Wisden, 1849 (Wigram, V.-C.).
[9] Doe *v.* Andrews, 1778.
[10] Pitcher *v.* King, 1845 (Williams, J.).
[11] R. *v.* Sadler, 1830 (Littledale, J.).
[12] Bowles *v.* Johnson, 1748; contra Blackburn *v.* Hargreave, 1828, where Hullock, B., is reported to have held that, if a witness be in court, having come there on other business, he cannot refuse to be sworn, though his expenses be not tendered, is never followed in practice. Indeed, Hullock, B., in the very case just cited, held that a witness is not bound to obey a subpœna in a civil cause, unless his expenses be tendered, although the party who requires his testimony is suing in formâ pauperis.

which is founded on this ground must be made before the witness is sworn, and will not be entertained afterwards.

§ 1243. Where a subpœna, requiring the attendance of a witness on the 31st of March, and so on from day to day until the action should be tried, was served on the 2nd of April, when the witness was distinctly told that the trial had not come on, he was held civilly responsible for disobeying the writ on the 6th of April when the cause was heard;[1] though, had he received no notice at the time of service that the cause had not then been tried, the result might have been different, and he would at least have avoided the penalty of an attachment.[2] The question whether a subpœna has been served within a reasonable time is, however, entirely one for the discretion of the judge,[3] and will vary according to the circumstances of each case.[4]

§ 1244. Under the R. S. C., 1883, "the *service* of a subpœna shall be effected by delivering a copy of the writ, and of the indorsement thereon, and at the same time producing the original writ."[5] Personal service will not be dispensed with, even though it be sworn that the witness keeps out of the way to avoid such service;[6] and the provision, which requires the production of the original writ at the time of serving the copy, must be strictly followed, since otherwise the witness cannot be chargeable with a contempt in not appearing upon the summons.[7] Again,[8] "affidavits filed for the purpose of proving the service of a subpœna upon any *defendant*, must state when, where, and how, and by whom, such service was effected."

§ 1245. If the copy of the writ vary in any material degree from the original subpœna, as where the copy required the witness to attend on the 24th of May, and the writ itself specified the 27th, an attachment for disobedience cannot be obtained.[9] The writ, too, must state, with reasonable certainty, the name of the cause, as also the place in which the attendance of the witness is

[1] Davis *v.* Lovell, 1839.
[2] Alexander *v.* Dixon, 1823.
[3] Barber *v.* Wood, 1838; ante, § 23.
[4] See, further, the analogous cases respecting the reasonable service of a notice to produce, ante, § 445. In the United States, the reasonableness of the time is generally fixed by statute, one day being usually allowed for every twenty miles that intervene between the residence of the witness and the place of trial. Perhaps a somewhat similar rule might with advantage be adopted in this country.
[5] Ord. XXXVII. r. 32.
[6] See In re Pyne, 1843.
[7] Wadsworth *v.* Marshall, 1832; R. *v.* Wood, 1832 (Littledale, J.); Garden *v.* Cresswell, 1837; Jacob *v.* Hungate, 1835; Pitcher *v.* King, 1845 (Williams, J.).
[8] By R. S. C. Ord. XXXVII. r. 33.
[9] Doe *v.* Thomson, 1841 (Wightman, J.).

required.[1] Where, however, a subpœna required the attendance of the witness at Westminster Hall, the Nisi Prius sittings being in fact held at the adjoining sessions-house, it was ruled that an attachment might be granted for non-attendance at the sessions-house, notices having been affixed to the wall of the court in Westminster Hall, directing witnesses to proceed to that place.[2] So, where a subpœna, tested the 9th of *May* and served on the 19th required attendance on the 21st of *March* instant, this was considered an error which could not mislead.[3]

§ 1246. A witness served with a subpœna is, in civil cases, entitled to be paid or tendered his expenses.[4] By an Act of Parliament of the reign of Elizabeth,[4] if any person, upon whom any process of subpœna out of a Court of Record shall be served, "and having tendered to him, according to his countenance or calling, such reasonable sum for his costs and charges, as, having regard to the distance of the places, is necessary to be allowed," shall, without lawful cause, neglect to appear, he shall *forfeit* 10*l.*, and yield such further recompense to the party aggrieved, as the judge in his discretion shall award. The question as to what constitutes the "*reasonable costs and charges*" of a witness under this statute was, in former times, left very much to the discretion of the taxing officers. It is now largely set at rest by the formal adoption of scales of remuneration.[5]

§ 1246A. For in the various Divisions of the High Court there now are regular scales of allowances to witnesses.[5] The allowances to witnesses in bankruptcy proceedings are in the High Court the same as in other proceedings in the High Court; in the County Courts such allowances are in accordance with the scale for the time being in force in county courts.[6] Such witnesses have a statutory right to the payment of expenses similar to the above.[7] But[8] a petitioning creditor is not regarded as a witness, or to be paid for loss of time, though he may claim his expenses of travelling and subsistence.

§ 1246B. There are also scales of allowances to witnesses in criminal cases at quarter sessions or assizes.[6] The scale of remune-

[1] Id.; Swanne *v.* Taaffe, 1845; Milson *v.* Day, 1829.
[2] Chapman *v.* Davis, 1841.
[3] Page *v.* Carew, 1831.
[4] 5 E. c. 9, § 12. Made perpetual by 26 & 27 V. c. 125. See infra, and also §§ 1247 et seq., as to what may be claimed for these.
[5] See Appendix for the various scales.
[6] General Regulations in Bankruptcy, No. 20.
[7] Chamberlain *v.* Stoneham, 1889.
[8] Bankruptcy Rules, 1886 and 1890, r. 71; Williams' Bankruptcy, p. 386.

ration in courts for the trial of either parliamentary or municipal petitions is by statute[1] the same as in the High Court. In the County Court witnesses are less liberally remunerated than in the Royal Courts of Justice.

§ 1247. The taxing officers will be justified,[2] under special circumstances, in allowing costs for the attendance of witnesses who have not been subpœnaed, or for the detention of witnesses beyond the actual period of the trial, or for services rendered by skilled witnesses, who either prior to the trial have been employed under the direction of the court,[3] or at the trial have been retained to watch the testimony of other witnesses.[4] In the High Court, too, a rule[5] now provides that, "as to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed." Under this rule, a taxing officer may, in his discretion, allow to *scientific* witnesses for their attendance larger sums than can be awarded to ordinary witnesses under the general scale of allowances.[6] Moreover, the term "*procuring evidence*," includes all preliminary costs incurred in *qualifying* witnesses to give evidence at the trial.[7]

§ 1248. In the High Court, if a foreign witness, not accessible by subpœna, whose evidence is material in the cause, refuses to leave his home unless remunerated for his trouble, the compensation paid to him, if reasonable in amount, will generally be allowed and taxed against the losing party.[8] And where the captain of a ship has been detained for a long time in this country in order to give evidence on a trial, a large sum, such as £100 in all, may be allowed for his detention.[9] In that Court, under very special

[1] 31 & 32 V. c. 125 ("The Parliamentary Elections Act, 1868"), § 34, amended by 42 & 43 V. c. 75, and 46 & 47 V. c. 51; continued till 31st December, 1895, by 57 & 58 V. c. 48. On its construction, see McLaren *v.* Home, 1881.

[2] See D. of Beaufort *v.* Ld. Ashburnham, 1863; Churton *v.* Frewen, 1877.

[3] Robb *v.* Connor, 1874 (Ir.).

[4] Ryan *v.* Dolan, 1872 (Ir.).

[5] R. S. C. 1883, Ord. LXV. r. 27, subs. 9. This rule rejects the old practice of the Common Law Court, as laid down in Nolan *v.* Copeman, 1873 (Ir.); May *v.* Selby, 1842; Murphy *v.* Nolan, 1873 (Ir.); and adopts that formerly prevailing in Chancery, as shown by Batley *v.* Kynock, 1875; Smith *v.* Buller, 1875.

[6] Turnbull *v.* Janson, 1878.

[7] Muckley *v.* Chillingworth, 1877; Turnbull *v.* Janson, 1878.

[8] Lonergan *v.* Roy. Ex. Ass., 1831; Tremain *v.* Barrett, 1815.

[9] As much as a guinea a day, and a total of over 100*l.*, has been allowed. See Stewart *v.* Steele, 1842; Mount *v.* Larkins, 1832; Temperley *v.* Scott, 1832; Potter *v.* Rankin, 1870; Evans *v.* Watson, 1846; Berry *v.* Pratt, 1823. See **The Bahia**, 1865; The Karla, 1864.

circumstances, on taxation of costs subsistence money has been allowed to a seafaring man, who was a necessary witness in his own cause, and who, after having obtained a verdict, remained in England until an application for a new trial, made by his opponent, had been refused.[1] But where no special circumstances intervene, the expenses of the attendance of witnesses on the commission day of the assizes will not be allowed as against the losing party on taxation of costs.[2] In the County Courts, special provision is made for an allowance to seafaring men, &c., detained on shore.[3]

§ 1249. The reasonable expenses of a witness ought to be tendered to him at the time when he is served with the subpœna,[4] or, at least, a reasonable time before the trial;[5] and even though he actually appears, he cannot be attached for declining to give evidence, unless these charges are paid or tendered.[6] If, however, he chooses to give his evidence without these being first paid, he cannot subsequently maintain any action for them.[7] He has, moreover, no right to refuse to be examined on the ground that the expenses incurred by him on former attendances have not been paid.[8] If the witness be a married woman, the tender should be to her, rather than to her husband.[9] If a person be subpœnaed by both parties, before giving evidence he is entitled to be paid by the party actually calling him all the expenses to which he will be liable, after exhausting what he may have received from the opposite side.[10] Of course a witness may waive his right to demand the payment of his expenses, and if he does so, either directly, by agreeing to take a less sum than that to which he is entitled,[11] or indirectly, by accompanying the parties to the place of trial without previously making any claim,[12] he will be liable to all the consequences of disobedience, should he subsequently refuse to appear as a witness.[13]

[1] Dowdell *v.* Austral. Roy. Mail Co., 1854. See Howes *v.* Barber, 1852; Calvert *v.* Scinde Rail. Co., 1865.
[2] Harvey *v.* Divers, 1855.
[3] C. C. R. 1889, Ord. IVA., r. 30.
[4] Fuller *v.* Prentice, 1788.
[5] Horne *v.* Smith, 1815.
[6] Bowles *v.* Johnson, 1748; Newton *v.* Harland, 1840; Brocas *v.* Lloyd, 1857.
[7] Collins *v.* Godefroy, 1831.
[8] Gaunt *v.* Johnson, 1848.
[9] Goodwin *v.* West, 1637, as reported Cro. Car. 522; W. Jon. 430.
[10] Allen *v.* Yoxall, 1844 (Rolfe, B.); Betteley *v.* M'Leod, 1837.
[11] Betteley *v.* M'Leod, 1837.
[12] In Newton *v.* Harland, 1840, a witness who accompanied the plaintiffs to the place of trial, and lived with them there, was deemed to have waived her right to remuneration up to the time of the trial, but to be still entitled to claim her fair expenses for returning home.
[13] Goodwin *v.* West, 1637.

§ 1250. In an action brought by a witness, who, in obedience to a subpœna, has attended a trial in a civil cause, for his "costs and charges," the law as to what circumstances will support the claim is not very clear, and the following propositions are therefore only submitted with some hesitation. First, a witness can only maintain such an action against the party to the suit who has subpœnaed him, if an express or implied contract upon the subject can be shewn;[1] secondly, the jury may, according to the better opinion, in some circumstances reasonably infer a promise to pay from the mere fact of the attendance of the witness at the trial, and where such an inference is drawn, the action can be supported by the implied contract;[2] thirdly, a witness cannot recover any larger amount than the sum specified in the scale of allowance as fixed by the judges, even though he rests his claim on an express promise;[3] and, lastly, no action can usually be maintained by a witness against the solicitor who subpœnaed him, on an implied contract to pay the expenses of attendance,[4] though such an action will succeed, if an express agreement for any payment can be established.[5]

§ 1251. Conduct-money received by a witness with a subpœna, may be recovered back by the party who paid it, as money had and received, where the attendance of the witness has become unnecessary, and no expenses have been incurred under the writ.[6]

§ 1252.[7] In *criminal cases* it is not in general necessary that there should be any *tender of fees*, either on the part of the Crown or of a prisoner, to compel the attendance of the respective witnesses.[8] This rule will prevail, though the indictment has been removed by certiorari, and is, consequently, tried in the Nisi Prius Court.[9] An exception exists, however, in favour of witnesses, who, living in one distinct part of the United Kingdom, are required to obey subpœnas directing their attendance in another; for these are not liable to punishment for disobedience of the process, unless, at the time of service, a reasonable and sufficient sum of money, to defray their expenses in coming, attending, and

[1] Hallet *v.* Mears, 1810; Goodwin *v.* West, 1637.
[2] Pell *v.* Daubeny, 1850.
[3] Willis *v.* Peckham, 1820; Collins *v.* Godefroy, 1831.
[4] Robins *v.* Bridge, 1837; Lee *v.* Everest, 1857.
[5] Robins *v.* Bridge, 1837; and cases there cited. Also, Lee *v.* Everest, 1857 (Bramwell, B.).
[6] Martin *v.* Andrews, 1856.
[7] Gr. Ev. § 311, as to first three lines.
[8] Pell *v.* Daubeny, 1850 (Parke and Alderson, BB.), 1820 (Bayley, J.); R. *v.* Cousens, 1850 (Wightman, J.); R. *v.* Cooke, 1824 (Parke, J., and Garrow, B.).
[9] R. *v.* Cooke, 1824. See post, § 1256.

returning, has been tendered to them.[1] And although the Army Act, 1881,[2] contains no positive enactment enforcing the payment of fees to a witness attending a court martial, such a witness cannot be punished for making default in his attendance, unless previously to the trial he was paid or tendered his reasonable expenses.

§ 1253. In order, however, to encourage the due prosecution of offenders, criminal courts have power to grant to those prosecutors and witnesses for the Crown who attend on recognizance[3] or subpœna,[4] such costs as will reimburse them for the expenses they have incurred, or shall incur,[5] in all cases of felony,[6] save one or two.[7]

[1] 45 G. 3, c. 92, § 4. See, also, 44 & 45 V. c. 24, § 4, subs. 3; and 44 & 45 V. c. 69, §§ 15 and 27.

[2] 44 & 45 V. c. 58, § 126, subs. 1*a*.

[3] A party will be entitled to his expenses under this term, though he has been bound over to prosecute by the Quarter Sessions: R. *v.* Paine, 1834.

[4] The expenses of a prosecutor, whose name is included in a subpœna, are not confined, under this term, to his costs as a witness only, though he has not been bound over by the magistrate to prosecute: R. *v.* Sheering, 1836 (by all the judges). See R. *v.* Joyes, 1835.

[5] A judge reserving a case for the C. C. C. R. may allow the prosecutor the costs he will incur in arguing such case; and the officer of the court above will tax and ascertain such costs, and certify the amount to the officer of the court below: R. *v.* Lewis, 1857; R. *v.* Cluderoy, 1849.

[6] By 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 22, "the court before which any person shall be prosecuted or tried for any felony is hereby authorised and empowered, at the request of the prosecutor or of any other person, who shall appear on recognizance or subpœna to prosecute or give evidence against any person accused of *any felony*, to order payment unto the prosecu or of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the court shall seem reasonable and sufficient, to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution; and also to compensate them for their trouble and loss of time therein; and, although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall, in the opinion of the court, bonâ fide have attended the court in obedience to any such recognizance or subpœna, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient, to reimburse such person for the expenses which he or she shall have bonâ fide incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpœna; and also to compensate such person for trouble and loss of time; and the amount of the expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned." As to Ireland, see 6 & 7 W. 4, c. 116 ("The Grand Jury (Ireland) Act, 1836"), § 105, Ir.; and 7 & 8 V. c. 106 ("The County Dublin Grand Jury Act, 1844"), § 40, Ir.

[7] The chief exceptions appear to be

§ 1254. Similar powers of awarding costs are also possessed by the court on prosecutions for any of the following *misdemeanors or offences*:—attempts to commit felony;[1] assaults with intent to commit felony;[2] assaults upon a peace officer in the execution of his duty, or upon any person acting in his aid;[3] assaults in

in the case of offences against "The Treason Felony Act, 1848" (11 & 12 V. c. 12), § 10, and prosecutions, not conducted by the Crown, and successful in obtaining a conviction for offences against the coinage, under 24 & 25 V. c. 99 ("The Coinage Offences Act, 1861"), by § 42 of which "in all prosecutions for any offence against this Act, in England, which shall be conducted under the direction of the solicitors of Her Majesty's Treasury, the court . . . *shall* allow the expenses of the prosecutors, in all respects as in cases of felony; and in all prosecutions for any such offence, in England, which shall not be so conducted, it shall be *lawful* for such court, *in case a conviction shall take place, but not otherwise*, to allow such expenses."

[1] By 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 23, "where any prosecutor or other person shall appear before any court, on recognizance or subpœna, to prosecute or give evidence against any person indicted of *any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stole property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury*, every such court is hereby authorised and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorised and empowered to order the same in cases of felony; and, although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall have bonâ fide attended the court in obedience to any such recognizance, to order payment of the expenses of any such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony." A proviso originally contained in this section, excluding expenses of attendance before the examining magistrate from its operation, is repealed by § 1 of 14 & 15 V. c. 55 ("The Criminal Justice Administration Act, 1851"). By §§ 24 & 25 of 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), the order for payment is to be made out by the proper officer of the court, and the money is to be paid by the treasurer of the county, &c., or by such other person as is mentioned in the Act. If the treasurer refuses to pay the expenses in obedience to the order, the remedy is by indictment, and not by mandamus: R. *v.* Jeyes, 1835. See 5 A. & E. 812, n. But to render the treasurer liable to prosecution, the entire order of the court must be served upon him: R. *v.* Jones, 1840. § 27 of the Act provides for the payment of the expenses of prosecutions in the Court of Admiralty. By 4 & 5 W. 4, c. 36 ("The Central Criminal Court Act, 1834"), § 12, any two judges of the Central Criminal Court may order the costs of prosecutors and witnesses to be paid by the treasurer of the county in which, but for that Act, the offender would have been tried. See 7 & 8 V. c. 106 ("The County Dublin Grand Jury Act, 1844"), § 40, Ir., as to what remuneration will be allowed to prosecutors and witnesses attending the trial of misdemeanors in the county of Dublin.

[2] 7 G. 4, c. 64, § 23, cited in last note.

[3] Id.

pursuance of any conspiracy to raise the rate of wages;[1] the receiving stolen property knowing it to have been stolen;[2] riot;[3] perjury;[4] subornation of perjury;[5] neglect or breach of duty as a peace officer;[6] obtaining property by false pretences;[7] wilful and indecent exposure of the person;[8] endeavouring to conceal the birth of a child;[9] the felony of having or attempting to have carnal knowledge of girls under thirteen years of age;[10] the misdemeanor of having or attempting to have carnal knowledge of a girl over thirteen and under sixteen, and other offences against the Criminal Law Amendment Act;[11] taking or causing to be taken any unmarried girl under the age of sixteen years from her father, mother, or guardian;[12] conspiring to charge any person with felony, or to indict him for felony;[13] conspiring to commit any felony;[14] committing any corrupt practice, whether it be a felony, or misdemeanor, either at a parliamentary[15] or at a municipal[16] election, and all misdemeanors under the Merchant Shipping Act, 1894,[17] under the Prevention of Offences Act, 1851,[18] or under any of the Acts of 1861, relating to larcenies, to

[1] 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 23, cited ante, note [1], p. 822.

[2] Id. [3] Id. [4] Id.
[5] Id. [6] Id. [7] Id.
[8] Id.

[9] 7 W. 4 & 1 V. c. 44.

[10] See 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), ante, § 1253.

[11] By 48 & 49 V. c. 69 ("The Criminal Law Amendment Act, 1885"), § 18, "The court before which a misdemeanor indictable under this Act, or any case of indecent assault, shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony, and may in like manner on conviction order payment of such costs by the person convicted; and every order for the allowance or payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid upon the same terms and in the same manner in all respects as in cases of felony."

[12] 14 & 15 V. c. 55 ("The Criminal Justice Administration Act, 1851"), § 2. And see, also, 48 & 49 V. c. 69 ("The Criminal Law Amendment Act, 1885"), § 10.

[13] 14 & 15 V. c. 55, § 2.

[14] Id.

[15] 46 & 47 V. c. 51 ("The Corrupt and Illegal Practices Prevention Act, 1883"), § 53, embodying §§ 10 and 13 of 17 & 18 V. c. 102 ("The Corrupt Practices Prevention Act, 1854"), and applied to prosecutions under 47 & 48 V. c. 70 ("The Municipal Elections (Corrupt and Illegal Practices) Act, 1884"), by § 30 of latter Act, and continued till 31st December, 1895, by "The Expiring Laws Continuance Act, 1894" (57 & 58 V. c. 48).

[16] See 47 & 48 V. c. 70 ("The Municipal Elections (Corrupt and Illegal Practices) Act, 1884"), § 30, incorporating 17 & 18 V. c. 102 ("The Corrupt Practices Prevention Act, 1854"), § 10, and continued till 31st December, 1895, by "The Expiring Laws Continuance Act, 1894" (57 & 58 V. c. 48).

[17] 57 & 58 V. c. 60, §§ 680, (1), 682, and 700.

[18] 14 & 15 V. c. 19, § 14.

malicious injuries to property, to forgery, or to offences against the person.[1]

§ 1255. If a bankrupt be prosecuted by order of any court, for any misdemeanor under the Debtors Act, 1869, or the Bankruptcy Act, 1883, the costs of the prosecution will be allowed on production of an order from the Court.[2]

§ 1256. The Acts, which authorise the awarding of costs to prosecutors and witnesses for the Crown in criminal trials, do not apply to cases where the indictment has been removed into the Queen's Bench Division of the High Court by certiorari;[3] and no distinction in this respect is recognized between a removal by the prosecutor and a removal by the defendant.[4]

§ 1256A. Where the Acts apply, all extra expenses incurred in getting up a prosecution may be reimbursed, *except* the attendance of witnesses before a *coroner*.[5] Thus, where a witness, in consequence of being taken ill during his attendance at the trial, was put to some extra charges, these have been awarded to him;[6] and the costs of an argument before the Court for Crown Cases Reserved may be allowed.[7] Expenses may also be allowed to the prosecutor and his witnesses,[8] though the accused, who had not been apprehended, and was under no recognizance, did not appear to take his trial:[9] or though the prisoner had been apprehended under a bench-warrant, and the prosecutor and his witnesses were under no recognizances, and only one of them had been subpœnaed;[10] or though the accused was not forthcoming, having been (through some mistake) discharged by proclamation at a preceding ses-

[1] 24 & 25 V. c. 96 ("The Larceny Act, 1861") § 121; 24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 77; 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 54; 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 77.

[2] 32 & 33 V. c. 62 ("The Debtors Act, 1869"), § 17; 46 & 47 V. c. 52, § 149, subs. 2, and § 166; 35 & 36 V. c. 57, § 17, Ir.; R. *v.* Thomas, 1870. See Ex parte Berry, 1872.

[3] R. *v.* Kelsey, 1832; R. *v.* Richards, 1828; R. *v.* Johnson, 1827; R. *v.* Jeyes, 1835 (Littledale, J.). See ante, § 1252.

[4] R. *v.* Treasurer of Exeter, 1829 (Littledale, J.), sed qu.; and see R. *v.* ———, 1838.

[5] R. *v.* Lewen, 1836 (Ld. Denman); R. *v.* Rees, 1832 (Littledale, J.); R. *v.* Taylor, 1832 (id.).

[6] In re Mallison, 1832 (Patteson. J.); Anon., 1833 (Parke, J.).

[7] R. *v.* Cluderoy, 1849; R. *v.* Lewis, 1857. See ante, § 1253, n.

[8] Anon., 1833 (Hullock, B.).

[9] Flannery's case, 1832 (Alderson, B.); Anon., 1833 (Gurney, B.).

[10] R. *v.* Butterwick, 1839 (Parke, B.).

sions,[1] or did not reach the town till the grand jury were discharged.[2]

§ 1257. In August, 1851, the Home Secretary was authorised to make regulations as to the amount of costs to be allowed to prosecutors and their witnesses in the criminal cases above stated;[3] and rules on this subject were promulgated on the 9th of February, 1858.[4]

§ 1257A. In some grave cases of felony the court has power[5] to

[1] R. *v.* Robey, 1833 (Taunton, J.). In this case the witnesses had been bound over to appear, and a true bill had been actually found.

[2] Anon., 1833 (Hullock, B.).

[3] 14 & 15 V. c. 55 ("The Criminal Justice Administration Act, 1851"), §§ 4, 5, 6, repealing 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 26.

[4] The scale established by these rules will be found in the Appendix.

[5] Under 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 28, which enacts that, "where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with *murder or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded firearms at, any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary or felonious housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen*, every such court is hereby authorised and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed, to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time in or towards such apprehension; and where any person shall appear to *any court of sessions of the peace* to have been active in or towards the apprehension of any party, charged with *receiving stolen property* knowing the same to have been stolen, such court shall have the power to order compensation to such person in the same manner as the other courts hereinbefore mentioned: provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation, as courts are by this Act empowered to allow to prosecutors and witnesses respectively." § 29 provides that the sheriff shall pay the amount awarded, and shall be repaid by her Majesty's Treasury; and § 30 enacts, that if any man shall be killed in endeavouring to apprehend any person charged with any of the offences mentioned in § 28, the court may order the sheriff to pay to his widow, child, father, or mother such sum as in its discretion shall seem meet. It is provided by 14 & 15 V. c. 55 ("The Criminal Justice Administration Act, 1851"), § 7, that "nothing in this Act or in any regulations under this Act, shall interfere with or affect the power of any court to order payment to any person who may appear to such court to have shown extraordinary courage, diligence, or exertion, in, or towards any such apprehension as hereinbefore mentioned, of such sum as such court shall think reasonable.

order that persons who have been especially active in apprehending the accused, shall be paid some additional remuneration for their expenses,[1] exertions,[2] and loss of time. This power exists in cases of murder;[3] attempting to murder;[4] stabbing, cutting, or poisoning;[5] shooting at any one, or attempting to discharge loaded firearms at him;[6] administering anything to a woman to procure her miscarriage;[7] rape;[8] house-breaking;[9] robbery;[10] arson;[11] horse-stealing;[12] bullock-stealing;[13] or sheep-stealing;[14] and receiving stolen property knowing it to have been stolen;[15]—and may be exercised by courts either of oyer and terminer and gaol delivery, or by sessions of the peace.[16]

§§ 1258-9. An Act[17] which is still in form only temporary, but which has now been in operation for nearly thirty years and is still in force,[18] empowers magistrates, on all charges of felony

and adjudge to be paid, in respect of such extraordinary courage, diligence, or exertion."

[1] This does not include expenses incurred in apprehending a prisoner out of England: R. *v.* Barrett, 1852 (Williams, J.). But the Secretary of State must in such case be memorialised: Id.

[2] Under this word, a gratuity may be awarded to a prosecutor for his courage in apprehending the prisoner: R. *v.* Womersly, 1836 (Parke, B.), though he has not been put to any expense: R. *v.* Barnes, 1835. If the facts do not appear in evidence, the judge will require them to be laid before him on affidavit: R. *v.* Jones, 1834 (Park, J.).

[3] 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), cited in note on last page.

[4] This offence, though not mentioned in the statute, is within the spirit of the enactment, and extra expenses incurred in apprehending a prisoner charged with attempting to murder have been allowed: R. *v.* Durkin, 1837 (Patteson, J.).

[5] 7 G. 4, c. 64, § 28, cited in note on last page.

[6] Id. [7] Id. [8] Id.

[9] Id. This seems not to include sacrilege: R. *v.* Robinson, 1828 (Hulleck, Bolland, and Parke, BB.).

[10] Id. [11] Id. [12] Id.

[13] Id. This word describes a *class* of offences, and includes the crime of stealing cows, heifers, &c.: R. *v.* Gillbrass, 1836. [14] Id.

[15] Id. See, also, 5 G. 4, c. 84 ("The Transportation Act, 1824"), § 22, on the construction of which see R. *v.* Emmons, 1840; R. *v.* Ambury, 1852 (Williams, J.). See the Irish Acts of 6 & 7 W. 4, c. 116 ("The Grand Jury (Ireland) Act, 1836"), §§ 106, 107; and 7 & 8 V. c. 106 ("The County Dublin Grand Jury Act, 1844"), §§ 41, 42.

[16] 14 & 15 V. c. 55 ("The Criminal Justice Administration Act, 1851"), § 8, enacts that, "when any person appears to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with any of the offences in the said enactment mentioned" (that is, in § 28 of 7 G. 4, c. 64) "which such sessions may have power to try, such court of sessions shall have power to order compensation to be paid to such person in the same manner as the other courts in the said enactment mentioned; provided that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation, be made out and delivered by the proper officer of the court unto such person without fee or payment for the same."

[17] 29 & 30 V. c. 52.

[18] Being by "The Expiring Laws

"bonâ fide made upon reasonable and probable cause,"[1] or on a charge of any misdemeanor, bonâ fide preferred, in which they possess a general power to allow costs,[1] to grant to prosecutors and witnesses certificates of their expenses, and of their allowances for trouble and loss of time, although they may not be bound over by recognizance or subpœna to prosecute or give evidence, and although no committal for trial may take place. The Court of Quarter Sessions is then empowered to allow the amount named in any such certificate, and to sign an order for payment.[2] Again, the Summary Jurisdiction Act, 1879,[3] which empowers justices in petty sessions to dispose of many indictable offences in a summary way, provides, in § 28, that, subject to the Home Office regulations, such justices may, if they think fit, order payment of the expenses of the prosecutors and witnesses.

§ 1260. By the common law, alike in England and in America, in all criminal cases, the prisoner is entitled to have compulsory process for obtaining witnesses in his favour.[4] In England, by an Act known as "Russell Gurney's Act," and passed in 1867, the court, before which any accused person is tried either for felony or misdemeanor, may order that any of his witnesses, who shall appear on recognizance, shall be paid such sum as will compensate them for the expenses, trouble, and loss of time they may have incurred in attending either before the magistrate or before the court.[5] By the same Act, on certain charges of misde-

Continuance Act, 1894" (57 & 58 V. c. 48), § 1, and schedule, continued until 31st December, 1895.

[1] Under any of the Acts already referred to.

[2] 29 & 30 V. c. 52, § 2.

[3] 42 & 43 V. c. 49.

[4] 2 Hawk. P. C. c. 46, §§ 170, 172; 2 Ph. Ev. 434; 3 Russ. C. & M. 598; Const. U. S. Amendm. Art. 6. See, also, 30 & 31 V. c. 35, §§ 3 and 4, extending § 23 of 7 G. 4, c. 64 (set out ante, note to § 1254); § 2 of 14 & 15 V. c. 55 (set out ibid.), and 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), §§ 16 and 20, to witnesses for a defendant, and itself extended to Scotland by 55 & 56 V. c. 55 ("The Burgh Police (Scotland) Act, 1892"), § 475.

[5] 30 & 31 V. c. 35, § 5, enacts that "the court before which any accused person shall be prosecuted or tried, or for trial before which he may be committed or bailed to appear for any felony or misdemeanor, is hereby authorised and empowered, in its discretion, at the request of any person who shall appear before such court on recognizance to give evidence on behalf of the person accused, to order payment unto such witness so appearing such sum of money as to the court shall seem reasonable and sufficient to compensate such witness for the expenses, trouble, and loss of time he shall have incurred or sustained in attending before the examining magistrate, and at or before such court; and the amount of such

meanor,[1] which may form the subject of vexatious indictments, the court, in the event of the accused being acquitted, may, under certain circumstances, order his costs, and the costs of his witnesses, to be defrayed by the prosecutor.[2] A similar power also prevails with respect to certain other misdemeanors.[3]

expenses of attending before the examining magistrate, and compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate, granted before the attendance in court; and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, who shall, upon receipt of the sum of *sixpence* for each witness [but now, as to this fee, see 32 & 33 V. c. 89, §§ 10, 11], make out and deliver to the person entitled thereto an order for such expenses and compensation, together with the said fee of sixpence, upon such and the same treasurers and officers as would now by law be liable to payment of an order for the expenses of the prosecutor or witnesses against such accused person; and if the accusation be of such kind that the court shall have no power to order the expenses of the prosecutor, then upon the treasurer or other officer in the capacity of a treasurer of the county, riding, division, city, borough, or place where the offence of such accused person may be alleged to have been committed, which treasurer or other officer is hereby required to pay the same orders upon sight thereof, and shall be allowed the same in his accounts: Provided always, that in no case shall any such allowances or compensation exceed the amount now by law permitted to be made to prosecutors and witnesses for the prosecution; and provided always, that such allowances and compensation shall be allowed and paid as part of the expenses of the prosecution."

[1] Viz.: perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling or disorderly house, and any indecent assault.

[2] By 30 & 31 V. c. 35, § 2, "whenever any bill of indictment shall be preferred to any grand jury, under the provisions of 'The Vexatious Indictments Act, 1859' (22 & 23 V. c. 17") [for any offence named in the last preceding note] "against any person who has not been committed to or detained in custody, or bound by recognizance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court before which such indictment shall be tried, in its discretion, to direct and order that the prosecutor, or other person by or at whose instance such indictment shall have been preferred, shall pay unto the accused person the just and reasonable costs, charges, and expenses of such accused person and his witnesses (if any) caused or occasioned by or consequent upon the preferring of such bill of indictment, to be taxed by the proper officer of the court; and upon non-payment of such costs, charges, and expenses within one calendar month after the date of such direction and order, it shall be lawful for" [the Queen's Bench Division of the High Court], "or any judge thereof, or for the justices and judges of the Central Criminal Court (if the bill of indictment has been preferred in that Court), to issue against the person on whom such order is made such and the like writ or writs, process or processes, as may now be lawfully issued by any of the said superior courts for enforcing judgment thereof."

[3] Namely, misdemeanors under "The English Debtors Act, 1869" (32 & 33 V. c. 62, § 18); "The Bankruptcy Act, 1883" (46 & 47 V. c. 52, § 149, subs. 2); "The Irish Debtors Act, 1872" (35 & 36 V. c. 57, § 18, Ir.); "The Corrupt Practices Prevention Act, 1854 (17 & 18 V. c. 102, § 12, continued by 57 & 58 V. c. 48,

§ 1260A. Independently of enactment, the court may, for the purposes of defence, direct constables to restore to prisoners any property which may have been taken from them, provided only that it be not required as an instrument of proof at the trial, and that it do not fairly appear to be the produce of the crime with which they stand charged.[1]

§ 1261. Writs of subpœna have at common law no force beyond the jurisdictional limits of the court from which they issue. To secure the due administration of justice, additional powers were required to compel the attendance of witnesses resident in one part of the United Kingdom at a trial in another part. In 1805, an Act was passed supplying a remedy for the evil, so far as regarded *criminal prosecutions*.[2]

§ 1262. Nearly half a century later, the Attendance of Witnesses Act, 1854, provided means by which, in *civil cases*, the attendance of witnesses who are in one kingdom of the British Empire can be enforced in any other such kingdom.[3]

till 31st December, 1895), and probably "The Municipal Corporations Act, 1882, Part IV." (47 & 48 V. c. 70, § 30), and "The Newspaper Libel and Registration Act, 1881" (44 & 45 V. c. 60, § 6).

[1] R. *v.* Barnett, 1829; R. *v.* Jones, 1834; R. *v.* O'Donnell, 1835; R. *v.* Kinsey, 1836; R. *v.* Burgiss, 1836; R. *v.* Rooney, 1836; R. *v.* Frost, 1839.

[2] 45 G. 3, c. 92, §§ 3, 4, which in substance enacts that the service of a subpœna or other process upon any person in one part of the United Kingdom, requiring his appearance to give evidence in any *criminal prosecution* in another part, shall be as effectual as if the process had been served in that part where the witness is required to appear. If the person served does not appear, the court out of which the process issued may, upon proof of service, transmit a certificate of the default, under the seal of the court, or under the hand of one of the judges, to the Queen's Bench Division of the High Court in England or Ireland, or to the Court of Justiciary in Scotland, according as the writ may have been served in one or other of these parts of the kingdom; and such courts respectively, on proof that a reasonable sum was tendered to the witness for his expenses, may punish him for his default, in like manner as if he had refused to appear in obedience to process issuing out of these respective courts.

[3] 17 & 18 V. c. 34 ("The Attendance of Witnesses Act, 1854"), in substance enacts, "I. If in any action or suit now or at any time hereafter depending in any Division of her Majesty's High Court of Justice" (these words must be read here by the Judicature Act, 1873 (36 & 37 V. c. 66)), "at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, it shall appear to the court in which such action is pending, or if such court is not sitting, to any judge of any of the said courts respectively, that it is proper" (the affidavit on which the application is founded, must disclose facts to show that the attendance of the witness is reasonably necessary: Allen *v.* D. of Hamilton, 1867) "to compel the personal attendance at any trial"—(this term will not include the hearing of an action, which "with all matters in difference" has been referred to an arbitrator: Hall *v.*

§ 1262A. By the Judicature Act, 1884,[1] a judge may now exercise the powers thus given, whether a court be sitting or not.

§ 1263. The salutary powers conferred by the above enactments, ought to be extended to all important tribunals alike in criminal and civil cases.[2]

Brand, 1883, C. A. Quære, will it include the hearing of a claim in chambers: Power v. Webber, 1876 (Ir.); or a reference before a master: O'Flanagan *v.* Geoghegan, 1864. See Hall *v.* Brand, supra, and see post, § 1308)—"of any witness, who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ called a writ of subpœna ad testificandum, or of subpœna duces tecum, or warrant of citation, shall issue in special form commanding such witness to attend such trial wherever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if the same had been served within the jurisdiction of the court from which it issues. II. Every such writ shall have at the foot thereof a statement or notice that the same is issued by the special order of the court or judge, as the case may be; and no such writ shall issue without such special order. III. In case any person so served shall not appear according to the exigency of such writ or process, it shall be lawful for the court out of which the same issued, upon proof made of the service thereof, and of such default, to the satisfaction of the said court, to transmit a certificate of such default, under the seal of the same court, or under the hand of one of the judges or justices of the same, to any of her Majesty's Superior Courts of Common Law at Westminster, in case such service was had in England, or, in case such service was had in Scotland, to the Court of Session or Exchequer at Edinburgh, or, in case such service was had in Ireland, to any of her Majesty's Superior Courts of Common Law at Dublin; and the court to which such certificate is so sent, shall and may thereupon proceed against and punish the person so having made default, in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpœna or other process issued out of such last-mentioned court. IV. None of the said courts shall in any case proceed against or punish any person, for having made default by not appearing to give evidence in obedience to any writ of subpœna or other process issued under the powers given by this Act, unless it shall be made to appear to such court, that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpœna or process was served upon such person. V. Nothing herein contained shall alter or affect the power of any of such courts to issue a commission for the examination of witnesses out of their jurisdiction, in any case in which, notwithstanding this Act, they shall think fit to issue such commission. VI. Nothing herein contained shall alter or affect the admissibility of any evidence at any trial, where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the court, but the admissibility of all such evidence shall be determined as if this Act had not passed." In addition to the power of ordering the *attendance* of witnesses who are in another part of the United Kingdom, which is conferred by the above enactment, there also is power to order their examination on commission and their attendance before the commissioners; see infra, § 1312.

[1] 47 & 48 V. c. 61, § 16, and 40 & 41 V. c. 57, § 21, Ir.

[2] As to the details of practice now rendering such extension desirable, and of the manner in which it should

§ 1264. At all events, all inferior courts of record ought to be empowered to issue subpœnas into any part of England. At present, such courts can only, in general,[1] serve them within their own jurisdiction. Subpœnas, therefore, which are granted by the clerk of assize or clerk of the peace are not compulsory except within a single county or other more limited district; and the consequence is, that if a necessary but unwilling witness happens to live beyond these limits, application must be made, at the cost of much time and trouble, to the Central Office of the Supreme Court, whence subpœnas may issue to any place within the jurisdiction of the Supreme Court, and be served anywhere in England.[2]

§ 1265.[3] If a witness, having been duly served with a subpœna, wilfully neglects to appear, he is guilty of *contempt* of court. If a witness duly served, and having his expenses paid, intentionally refuses to be sworn or to testify, he is guilty of contempt, and may, as in all cases of contempt, be punished by fine and imprisonment, at the discretion of the court.[4] The usual proceeding employed against a witness who neglects to appear at all is by *attachment*. In order to render a witness liable to this summary proceeding, it is requisite to show distinctly, though by any species of proof, that, on the cause being called on for trial, he was wilfully absent under such circumstances, that, had the trial proceeded, he would not have been forthcoming when required to give evidence. The jury need not be sworn; and it is not essential even that the witness should be called upon his subpœna.[5]

be effected, see infra, § 1268. In the counties bordering on Scotland, the want of such a power is much felt in the County Courts. In the United States, courts sitting in any district are empowered by statute to send subpœnas for witnesses into any other district, provided that, in civil causes, the witness do not live at a greater distance than one hundred miles from the place of trial: Stat. 1793, ch. 66 [22,] § 6; 1 L. L., U. S. p. 312, Story's ed.

[1] See post, § 1305, as to the County Courts.

[2] Corner, Cr. Pr. 256, 257; Crown Cir. Comp. 9, 21; 42 & 43 V. c. 78, § 5. See post, § 1268.

[3] Gr. Ev. § 319, in some part.

[4] 4 Bl. Com. 284—288.

[5] See Lamont *v.* Crook, 1840; Barrow *v.* Humphreys, 1820; Dixon *v.* Lee, 1834; Mullett *v.* Hunt, 1833; Goff *v.* Mills, 1844 (Wightman, J.). These cases overrule Malcolm *v.* Ray, 1819, and Bland *v.* Swafford, 1791; and resolve the doubt expressed in R. *v.* Stretch, 1835. See Cust *v.* Poyser, 1856. The form of calling a witness on his subpœna is, indeed, usually followed, and is convenient, as furnishing satisfactory and cheap evidence of the absence of the witness. In some cases (as if the witness had left England two days before the trial) it would be idle.

§ 1266.[1] As an attachment for contempt does not proceed upon the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the court,[2] the case must be perfectly clear to justify the exercise of this extraordinary jurisdiction.[3] For this reason, too, the motion for an attachment should be brought forward as soon as possible,[4] and the party applying must show by affidavit that a copy of the subpœna was personally and in due time served on the witness,[5] that when such service was effected, the original writ was shown to him,[6] that his fees, if he were entitled to them, were paid or tendered,[7] or the tender expressly waived,[8] and, in short, that everything has been done which was necessary to secure his attendance.[9] It must also appear from the affidavits, that the absence of the witness was an *intentional* defiance of the process of the court.[10] If, however, all this be clearly shown, the witness, it seems, cannot justify his conduct by proving that his evidence was immaterial.[11]

§ 1267. The fact of immateriality, however, sometimes tends to negative there having been any *intentional* defiance of the court. Thus, an attachment against Lord Brougham was refused, when it was evident, from the notes of the judge, that his presence at the trial would not have served the complainant;[12] the court observing that they would not allow their process to be used for purposes of needless vexation; and in discharging a rule for attachments against Lord John Russell and Mr. Fox Maule, for disobeying writs of subpœna duces tecum, the court relied on the fact that the documents, if produced, would not have been admissible.[13] In another case,[14] the rule for an attachment was refused, the witness having had reasonable ground for believing that he would not be

[1] Gr. Ev. § 319, in part.
[2] Barrow *v.* Humphreys, 1820 (Best, J.).
[3] Horne *v.* Smith, 1815; Garden *v.* Crosswell, 1837; Scholes *v.* Hilton, 1842; R. *v.* Lord J. Russell, 1839.
[4] R. *v.* Stretch, 1835.
[5] Ante, §§ 1242—1244.
[6] Garden *v.* Cresswell, 1837; Jacob *v.* Hungate, 1885; R. *v.* Sloman, 1832; Smith *v.* Truscott, 1843; Marshall *v.* York, &c. Rail. Co., 1851.
[7] Ante, § 1246; Connor *v.* ——, 1842 (Ir.) (Pennefather, B.); Brocas *v.* Lloyd, 1856.
[8] Goff *v.* Mills, 1844 (Wightman, J.).
[9] 2 Ph. Ev. 432; Garden *v.* Cresswell, 1837. See Hempston *v.* Humphreys, 1867 (Ir.).
[10] Scholes *v.* Hilton, 1842; Netherwood *v.* Wilkinson, 1855.
[11] Chapman *v.* Davis, 1841; Scholes *v.* Hilton, 1842. These cases appear to overrule Tinley *v.* Porter, 1837, and Taylor *v.* Williams, 1830.
[12] Dicas *v.* Lawson, 1835.
[13] R. *v.* Ld. John Russell, and R. *v.* Fox Maule, 1839.
[14] R. *v.* Sloman, 1832.

wanted at the trial. Of course, if a witness be so ill to attend,[1] or if leave of absence has been given him by the solicitor of the party requiring his attendance,[2] no attachment will lie; and, on ordinary principles of justice, it would seem that if in a criminal case, where no fees were tendered, a witness from real poverty should be unable to obey the summons, he would not be guilty of contempt.[3] On the other hand, the duty of attending a court of justice in pursuance of a subpœna is paramount to the duty of obedience to the commands of any master, however stringent and express those commands may be;[4] and on this ground an attachment has issued against a solicitor, who, being served with a subpœna to attend a trial on the following day, went in the morning to a board of guardians to discharge his duty as clerk, and found on his return that the cause had been unexpectedly called on in his absence, the court holding that he had no right to speculate on the chance of being in time.[5]

§ 1268. The High Court will grant an attachment against a witness for disobeying a Central Office[6] subpœna to give evidence in an inferior court,[7] provided that distinct proof be given by affidavit that the inferior court had jurisdiction to examine the witness.[8] But it has no power, either at common law or by statute,[9] to interfere, unless the writ has issued from the Central Office.[10] In all those cases where process other than a Crown Office subpœna has been granted by a clerk of assize, or clerk of the peace, and a witness has disobeyed the process of the inferior court from which it has issued, such inferior court can only proceed against him, either by the doubtful and arbitrary course of fining him in his absence for the contempt,[11] or by the tedious, and therefore useless, process of indictment. In remote counties, to obtain a subpœna from the Central Office is often highly inconvenient, occasioning

[1] In re Jacobs, 1835. See Scholes v. Hilton, 1842.

[2] Farrah v. Keat, 1838.

[3] 2 Ph. Ev. 441.

[4] Goff v. Mills, 1844 (Wightman, J.).

[5] Jackson v. Seager, 1844 (id.).

[6] The Crown Office (which formerly issued these subpœnas) is now a department of the Central Office: 42 & 43 V. c. 78, § 5; R. S. C. 1883, Ord. LXI. r. 1.

[7] R. v. Ring, 1800; R. v. Greer away, 1845.

[8] R. v. Vickery, 1848.

[9] Viz.: 45 G. 3, c. 92, as to which see ante, § 1261.

[10] R. v. Brownell, 1834.

[11] See R. v. Clement, 1821, where the fine was imposed by one of the superior judges. Qu. whether justices at sessions could safely exercise the like power.

considerable loss of time, and, if a town agent be employed, needless additional expense. A simple and effectual process would be to enact, that every inferior court should, like the Central Office, have the power of issuing subpœnas for witnesses, in whatever part of the country they might reside, and that the High Court should enforce obedience to such subpœnas by the ordinary process of attachment.[1] It is only reasonable that every court, having power definitely to determine any suit, should be enabled, of itself, to compel both the attendance of witnesses and the production of all adequate proofs of the facts in controversy.

§ 1269. The Court will not grant an attachment in the first instance, even though a flagrant case of palpable contempt be shown, such as an express and positive refusal to attend. The uniform practice now is to obtain the leave of the court or a judge, "to be applied for on notice to the party against whom the attachment is to be issued."[2]

§ 1270. Besides proceedings by attachment, in a civil suit the party injured by the non-attendance of a witness has his remedy, either by an "*action of debt*,"[3] or by an action for damages at common law. Recourse is seldom had to the action of debt, because, although the party aggrieved may recover thereby a penalty of 10*l.*, in addition to what the court might assess as a satisfaction in damages, yet this assessment must be made, not by the jury or judge at Nisi Prius, but by the court out of which the process issued; and, this being inconvenient, it is more advisable to rely on the remedy by attachment, where, if the witness redeems his offence by making satisfaction to the party, the court will generally remit the punishment.[4]

§ 1271. An action for damages is, however, more frequent. To support this it is not necessary, any more than in proceeding by attachment, to show that the jury were sworn, or that the witness was called upon his subpœna;[5] neither is it requisite that the state-

[1] Ante, § 1264.

[2] R. S. C. 1883, Ord. XLIV. r. 2. Service of notice on the party's solicitor, or at his place of residence, is sufficient, without personal service on the party himself: Browning *v.* Sabin, 1877 (Jessel, M.R.); In re a Solicitor, 1880 (id.). A judge at chambers may order the writ to issue: Salm Kyrburg *v.* Posnanski, 1884.

[3] Under § 12 of 5 E. c. 9, cited ante, § 1246.

[4] Pearson *v.* Isles, 1781 (Ld. Mansfield).

[5] Lamont *v.* Crook, 1840. See ante, § 1265.

ment of claim should contain a direct and positive averment that the party had a good cause of action or a good defence, but it will suffice to state and prove, that the witness was material, that the trial could not safely proceed without him, and that, in point of fact, the party has sustained some damage by the absence of the witness.[1] If, however, *only one issue* was joined in the former action, the plaintiff practically cannot proceed against a witness for having disobeyed his subpœna, unless he had a good case in the original action as against the other party to it; because, to recover damages from the witness, he must show that he has sustained some loss through his default, and he cannot do this unless he had good grounds on his side in the former suit.[2] Where, however, *several issues* were joined in the original action, it may well happen that the plaintiff, though he had no complete cause of action or defence, may have sustained damage in respect of the *costs* of some of the issues, on which, although failing generally in his suit, he might have succeeded by the testimony of the witness, had he duly attended the trial.[3] In this last class of cases, therefore, the traverse of an averment of a complete ground of action or defence, would simply raise an immaterial issue.[4] The same strictness of proof with respect to the form and service of the writ, which is necessary to render a witness guilty of contempt, will (it is said) not be requisite in order to sustain an action;[5] and although for the purpose of bringing the witness into contempt, the original writ must be shown at the time when the copy is served, this is not necessary as the foundation of an action, unless, perhaps, when a sight of the writ has been expressly demanded.[6]

§ 1272. When a *witness is in custody*, a writ of subpœna is of no avail, and the party requiring the evidence of such witness must either apply for a *habeas corpus ad testificandum*,[7] or obtain a warrant or order under the hand of one of the judges of the High Court.[8] Power to issue such warrants is expressly given in many

[1] Mullett *v.* Hunt, 1833; Davis *v.* Lovell, 1839; Couling *v.* Coxe, 1848. See Yeatman *v.* Dempsey, 1861; Needham *v.* Fraser, 1845.
[2] Couling *v.* Coxe, 1848 (Wilde, C.J.).
[3] Id.
[4] Id.
[5] Davis *v.* Lovell, 1839 (Parke, B.).
[6] Mullett *v.* Hunt, 1833 (Bayley, B.).
[7] See R. S. C. 1883, App. J., Form 2.
[8] See § 1276, post.

cases by statute. Any judge of the [High Court] may,[1] at his discretion, award a writ of habeas corpus for bringing any prisoner, detained in a gaol or prison in England, before any court-martial, any commissioners for auditing public accounts, or other commissioners acting by virtue of any royal commission or warrant, for trial, or to be examined touching any matter depending before such court-martial or commissioners. A judge of the High Court in England or in Ireland may, at his discretion,[2] grant a habeas corpus to bring up *any prisoner*, detained in a gaol or prison, before *any Court of Record*, to be there examined as a witness, and to testify the truth before such court, or any grand, petit, or other jury, in any cause or matter, civil or criminal, depending, or to be inquired into or determined, in any such court. To enable commissioners appointed to take evidence before the trial to obtain evidence from persons in custody, it has been provided,[3] that "it shall be lawful for any sheriff, gaoler, or other officer having the custody of any prisoner, to take such prisoner for examination under the authority of that Act, by virtue of a writ of habeas corpus to be issued for that purpose, which writ shall and may be issued by any court or judge under such circumstances, and in such manner, as such court or judge may now by law issue the writ commonly called a writ of habeas corpus ad testificandum."

§ 1273. The application for a writ in either of the two first-mentioned cases, if not in the last case, must be made to a judge at chambers,[4] on an affidavit, stating the place and cause of confinement of the witness, and further that his evidence is material, and that the party cannot, in his absence, safely proceed to trial;[5] and if the prisoner be confined at a great distance from the place of trial, the judge will perhaps require that the affidavit should point out in what manner his testimony is material.[6] If the witness is to give evidence in a civil suit, it is usual to add in the affidavit that he is willing to attend; but this would seem to be a needless averment, and it is certainly not required in criminal proceedings.[7]

[1] By 43 G. 3, c. 140 ("The Habeas Corpus Act, 1803").

[2] By 44 G. 3, c. 102 ("The Habeas Corpus Act, 1804").

[3] By 1 W. 4, c. 22, § 6; and by 3 & 4 V. c. 105 ("The Debtors (Ireland) Act, 1840"), § 71, Ir.

[4] Gordon's case, 1814; Browne *v.* Gisborne, 1843 (Coleridge, J.).

[5] See the form, Chit. Forms, 60; Corner, Cr. Pr., App. 66.

[6] Standard *v.* Baker, 1785-6, cited Tidd, 858.

[7] Corner, Cr. Pr. 118.

When a party to the record is in custody, he is entitled to the writ for himself as much as for any other witness, provided that his evidence be necessary at the trial.[1]

§ 1274. Until 1804 neither a *prisoner* in custody for *high treason*,[2] nor a *prisoner of war*,[3] could be brought up by a habeas corpus ad testificandum. But the words of the Habeas Corpus Act, 1804,[4] "*any* prisoner detained in *any* prison," are perhaps sufficiently large to warrant the interference of the judge in both these cases; and though considerations of state policy might possibly lead the judges to narrow the interpretation of the statute in the case of prisoners of war, no valid reason can be urged why prisoners charged with high treason should not be placed on the same footing as other prisoners.

§ 1275. Independently of the statutory powers above referred to, the Queen's Bench Division of the High Court would seem, at *common law*,[5] to possess the right of awarding writs of habeas corpus ad testificandum in certain cases, though the extent of such authority is not distinctly defined. The Legislature has indirectly recognised the power of the superior judges to bring persons detained in *custody* under civil or criminal process before *magistrates*, or Courts of Record;[6] and the judges have claimed the right of granting these writs in other analogous cases.[7] Thus, on an affidavit that he is not dangerous, and is in a fit state to be examined, a writ has been awarded to bring up the body of a person confined as a lunatic, to give evidence in a cause;[8] a prisoner in civil custody has been brought up by habeas corpus, for the

[1] Ex parte Cobbett, 1858.

[2] Langston *v.* Cotton, 1795.

[3] Furly *v.* Newnham, 1780. Lord Mansfield stated, with respect to a prisoner of war, that application should be made to the Secretary of State. The court, however, on the Secretary of State refusing to interfere, granted a rule to show cause why the adverse party should not consent, either to admit the facts, or that the prisoner should be examined on interrogatories; adding, that if this consent should be refused, they would put off the trial from time to time, in order to give the applicant an opportunity of filing a bill in equity.

[4] Contained in the Act 44 G. 3, c. 102.

[5] See R. *v.* Froind, 1696; R. *v.* Burbage, 1763.

[6] See preamble of 43 G. 3, c. 140 ("The Habeas Corpus Act, 1803"); and Ex parte Griffiths, 1822.

[7] See In re Cook, 1845, where the issue of a writ of habeas corpus to bring up a prisoner, committed on a charge of murdering A., before a coroner's jury, who were sitting on A.'s body, for the purpose of his being *identified* by the witnesses was refused, but the judges seemed to be of opinion, that they had power to issue such writ in a case of necessity. See, also, Daniel *v.* Thompson, 1812; Att.-Gen. *v.* Fadden, 1815.

[8] Fennell *v.* Tait, 1834.

purpose of being examined as a witness before an arbitrator;[1] and on an affidavit that the rule to show cause had been served on the under-sheriff, on the Solicitor of the Treasury, on the prisoner himself, and on the party at whose suit he was in execution, and on no cause being shown, a habeas corpus has issued to bring up a prisoner committed for non-payment of a fine, to give evidence before an election committee.[2] On a similar application to that in the last case being subsequently made to the court (the only difference being that the prisoner was in custody on a charge of felony), the judges, however, doubted their power, but granted a rule nisi, directing notice to be given to the Attorney-General, to the committing magistrate, to the person having the custody of the prisoner, and to all parties at whose suit he might be detained on civil process;[3] but the point was not settled, as it eventually became unnecessary to call upon the court to make the rule absolute. A witness in the military or naval service, who is not at liberty to attend without the leave of his superior officer, which he cannot obtain, may be brought into court to testify by a writ of habeas corpus, which, however, will be refused, unless the affidavit states that the witness has been served with a subpœna, and is willing to attend; for a free man cannot be brought up as a prisoner against his consent.[4] The writ in such cases as the above will be directed to the gaoler, sheriff, commanding officer, or other person, in whose custody, or under whose control, the witness is detained, who, on being served with it, and being paid or tendered his reasonable charges, will be bound to produce him according to the exigency of the writ.

§ 1276. In certain cases, in consequence of Lord Denman's Act[5] rendering convicted persons competent witnesses, and in pursuance of its policy it, in 1853, was provided[6] that any secretary of state and any Common Law judge of the Queen's Bench Division of the High Court[7] may, if he think fit, "upon application by affidavit, issue a warrant or order under his hand, for bringing up any prisoner or person confined in any gaol, prison, or place, under any

[1] Graham *v.* Glover, 1855; Marsden *v.* Overbury, 1856.
[2] In re Price, 1804.
[3] In re Pilgrim, 1835.
[4] R. *v.* Roddam, 1777.
[5] 6 & 7 V. c. 85.
[6] By 16 & 17 V. c. 30 ("The Criminal Proceedure Act, 1853"), § 9.
[7] It is doubtful whether those powers are not still confined to the judges of the Queen's Bench Division of the High Court. Sed qu.

sentence, or under commitment for trial or otherwise, (*except* under process in any *civil* action, suit, or proceeding,) before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired of, or determined in or before such court, judge, justice, or judicature; and the person required by any such warrant or order to be so brought before such court, judge, justice, or judicature, shall be so brought under the same care and custody, and be dealt with in like manner in all respects, as a prisoner required by any writ of habeas corpus awarded by any of her Majesty's Superior Courts of Law at Westminster, to be brought before such court to be examined as a witness in any cause or matter depending before such court, is now by law required to be dealt with."[1]

§ 1277. It will now be convenient to consider the powers possessed by some courts of enforcing the attendance of witnesses either to actually appear before them, at a trial or hearing, or to take the evidence of witnesses on commission, and to enforce the attendance of witnesses before such commission. After this[2] the mode of compelling the attendance of witnesses before magistrates will be considered.

§ 1277A. Stated in the order of their comparative importance, the eight most important of the tribunals possessed of one or both of these powers would appear to be—(i.) The Houses of Parliament; (ii.) The Privy Council; (iii.) The High Court, at Assizes, and upon other occasions in its various Divisions, in its Chambers,

[1] As to Ireland, it was long previously enacted by § 2 of 38 G. 3, c. 26, that "it shall be lawful for the justices of Assize, or Nisi Prius, or the commissioners of oyer and terminer and gaol delivery, by order in writing to be by them respectively signed, to direct any person in execution, and in the custody of any sheriff or other officer, in any county wherein they shall sit, to be brought up for the purpose of giving evidence in any cause or trial to be had before them respectively." The Court of Bankruptcy in Ireland is also empowered by warrant or order to cause any bankrupt, or any person supposed to be possessed of his goods, or to be indebted to him, or to be acquainted with his dealings, to be brought from any prison in which he may be in custody for the purpose of being examined (35 & 36 V. c. 58, § 73, Ir. See, also, § 74, as to the costs of such removal.) Again, both in England and Ireland even "the county court judges" have been intrusted, to a limited extent, with the power of ordering prisoners to be brought up as witnesses before their respective courts (19 & 20 V. c. 108, § 31; 27 & 28 V. c. 99, § 43, Ir.; 40 & 41 V. c. 56, § 3, Ir.) Similar powers have been conferred on certain functionaries, for the purpose of bringing military convicts under special circumstances before courts-martial or civil courts as witnesses (44 & 45 V. c. 58, § 60, subs. 8; and § 63, subs. 7.)

[2] Infra, § 1316.

and before its Examiners; (iv.) Ecclesiastical Courts; (v.) Bankruptcy Courts; (vi.) Coroners Courts; (vii.) County Courts; and, (viii.) Arbitrators Courts.

§ 1278. A short statement of the practice of each of these, as regards the summoning of witnesses to actually appear before them and give evidence, will accordingly be given in the above order.

§ 1278A. In the first place, the attendance of witnesses before either House of Parliament, or a committee thereof, is regulated as follows:—

§ 1279. In the House of Lords, witnesses who are required to give evidence before the House itself, are served with an order of the House, signed by the assistant clerk of the Parliaments, which directs them to attend at the bar on a certain day to be sworn and examined.[1] A witness required to testify before a committee of the House of Lords is ordered to attend, not at the bar of the House, but before the particular committee. Any committee may administer an oath to the witnesses examined before it;[2] and the committees on Private Bills, in the event of the House making no special order, take evidence on oath.[3] The *Select Committees*, however, now examine witnesses unsworn, unless otherwise ordered by the House.[4] The service of the order must, generally, be personal, but if the witness be purposely keeping out of the way, it is usual to direct that a service at his house shall be deemed sufficient.[5] If he disobey this summons, the House will order him to be taken into custody, either forthwith,[6] or after the expiration of a certain time;[7] and if the Black Rod cannot succeed in taking him, the House will address the Crown to issue a proclamation, offering a reward for his apprehension.[8] When the evidence of peers, peeresses, or Lords of Parliament is required, the Lord Chancellor is ordered to write letters to them, desiring their attendance to be examined as witnesses;[9] and such persons are sworn by the Lord Chancellor at the table,[10] while all other witnesses, if required to be examined on oath, are sworn at the bar by the officer of the

[1] 66 Lords' J. 400; May, L. of Parl. 397 et seq.
[2] 21 & 22 V. c. 78, § 2.
[3] Min. of H. L. 4th June, 1857.
[4] Id.
[5] 66 Lords' J. 295.
[6] Id. 400.
[7] Id. 358.
[8] Id. 441.
[9] 75 Lords' J. 144.
[10] Id. 201.

House.[1] If the witness be a member, or an officer, of the House of Commons, a message is sent to that House requesting his attendance;[2] upon which the Lower House returns answer, by its messenger, that it gives him leave to attend, adding, in case he be a member, "if he think fit."[3] If the witness, on attending, refuse to be sworn, or prevaricate, or otherwise misbehave, he will be punished by the House as for contempt; and if he give false evidence after being sworn, he may be indicted for perjury.[4]

§ 1280. In the *House of Commons* the practice pursued is very similar. Witnesses required to give evidence before the House itself are summoned to attend by an order of the House signed by the clerk, which is either personally served upon them, or, if they live at a distance, is forwarded to them by post, or sometimes by a special messenger. If, after service, the witness neglect to attend, or if he abscond, the Speaker, by order of the House, will issue his warrant, directing the serjeant-at-arms to apprehend the witness, and to bring him to the bar; whereupon he will generally be committed to Newgate; as will also all persons who aid him in his endeavours to keep out of the way.[5] If the attendance in the House of Commons as a witness of a Lord of Parliament or of an officer of the Upper House be desired, the Commons adopt the same form of proceeding as that adopted by the Lords, when they require the attendance of a member of the Lower House;[6] but whether this form be necessary, if the witness be simply a peer or peeress, is a matter upon which the two branches of the Legislature appear to be at issue.[7] If the testimony of a member be desired by the House, or by a committee of the whole House, he is ordered to attend in his place; but if he be required to give evidence before a select committee, such committee should request his attendance, and if he refuse to appear, should acquaint the House therewith, who will then order him to attend, and, if necessary, will even commit him to the custody of the serjeant-at-arms, that he may be forthcoming at the proper time.[8] If a person in custody

[1] May, L. of Parl. 404.
[2] 75 Lords' J. 157.
[3] Id. 164.
[4] May, L. of Parl. 405, 406.
[5] Id. 398; Gossett *v.* Howard, 1845.
[6] May, L. of Parl. 401, 402; 83 Com. J. 278; 91 id. 75; 82 id. 465.
[7] May, L. of Parl. 402; 4 Lords' J. 812.
[8] May, L. of Parl. 400.

is required to give evidence, the Speaker usually issues his warrant, which is personally served on the gaoler by a messenger of the House, and by which he is directed to bring the witness in his custody to be examined.[1] Some doubts, however, have been entertained as to the legality of this course, and on one or two occasions, writs of habeas corpus ad testificandum have, in order to protect the gaoler, been applied for.[2] When a witness is required to be examined before a *Select Committee*, the chairman, by direction of the committee, in general signs an order for his attendance; and if this order be disobeyed, his conduct is reported to the House, which immediately issues the usual order, to be enforced as in other cases. The attendance of a witness before a committee on a private bill can only be enforced by an order of the House.[3]

§ 1281. Under "The Parliamentary Witnesses Oaths Act, 1871,"[4] the House of Commons is now empowered to administer an oath to the witnesses examined at the bar of the House, and any committee of the House may administer an oath to the witnesses examined before such committee. Any oath under the Act may be administered by the Speaker,[5] or, in the case of a witness before the House or a committee of the whole House, by the clerk at the table;[6] and any witness before a select committee may be sworn by the chairman, or by the clerk attending such committee.[7] Any attempt to intimidate a witness summoned before a committee of either House or a Royal Commission is a misdemeanour, and the person committing it is liable not only to a fine not exceeding 100*l.* and to three months' imprisonment, but also to be ordered to make compensation to the witness.[8]

§ 1282. In the second place, witnesses are forced to attend before the *Judicial Committee of the Privy Council* by the President of the Council requiring the attendance of such witnesses, and the production of any deeds, evidences, or writings, by writ issued by him

[1] May, L. of Parl. 398; 90 Com. J. 533. The order of the House of Lords has been used for the same purpose: May, L. of Parl. 397.
[2] See ante, § 1275; In re Price, 1804; In re Pilgrim, 1835.
[3] May, L. of Parl. 399; 98 Com. J. 153, 174, 279, 288.
[4] 34 & 35 V. c. 83, § 1.
[5] Id.
[6] Stand. Ord. passed 20th Feb., 1872.
[7] Id.
[8] See 55 & 56 V. c. 64 ("The Witnesses (Public Inquiries) Protection Act, 1892").

in the same form, as nearly as may be, as that in which a writ of subpœna ad testificandum, or of subpœna duces tecum, is now issued by the High Court; and every person disobeying such writ is considered as in contempt of the Judicial Committee, and liable to the same penalties and consequences as if such writ had issued out of the Queen's Bench Division of the High Court; and may be sued for such penalties in that court.[1]

§ 1283. The third subject for consideration is as to how the attendance of witnesses is secured at Assizes and at sittings of the High Court. In *criminal* cases, this is done either by a recognizance[2] or by a subpœna being issued from the Crown Office[3] and served upon him; and in civil cases it is effected by a subpœna being issued out of the Central Office.[4] It has been enacted that "the service in any part of Great Britain or Ireland of any writ of subpœna ad testificandum, or subpœna duces tecum, issued under seal of the Admiralty Division, shall be as effectual as if the same had been served in England or Wales."[5] The Divorce Division of the High Court in England[6] "may, under its seal, issue writs of subpœna or subpœna duces tecum, commanding the attendance of witnesses at such time and place as shall be therein expressed; and such writs may be served in *any part of Great Britain or Ireland;* and every person served with such writ shall be bound to attend and to be sworn and give evidence in obedience thereto in the same manner as writs of subpœna or subpœna duces tecum issued from any of the said superior courts of common law and served in Great Britain or Ireland."[7] The attendance of witnesses and the production of

[1] See 3 & 4 W. 4, c. 41, § 19. Similar powers are conferred on the Court of Appeal in Chancery in Ireland by § 104 of "The Court of Admiralty (Ireland) Act, 1867."

[2] See ante, §§ 1234 et seq.

[3] See ante, § 1249.

[4] See ante, §§ 1239, 1265. As to cases in bankruptcy, see infra, § 1289.

[5] 24 V. c. 10 ("The Admiralty Court Act, 1861") § 21. See similar enactments in "The Court of Admiralty (Ireland) Act, 1867" (30 & 31 V. c. 114, §§ 52, 69, Ir.).

[6] "The Matrimonial Division" of the High Court in Ireland would seem to have the same powers as the Chancery Division "for enforcing the attendance of persons required by it" (34 & 35 V. c. 49, § 6, Ir.; 40 & 41 V. c. 57, § 34, Ir.).

[7] 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"). A subpœna in the Divorce Division is written, or printed on parchment, and may include the names of any number of witnesses. See Rules of 1865 for Court of Divorce and Matrimonial Causes, r. 106, and Forms 16 and 18; and see, also, r. 180 for the same Court, made 30th January, 1869, and set out L. R. 1 P. & D. 757, 765—768.

documents are now enforced in the Probate Divisions of the High Courts, whether for England or Ireland, by the ordinary writs of subpœna ad testificandum and subpœna duces tecum, which are issued by the High Court;[1] and "every person disobeying any such writ shall be considered as in contempt of the court, and also be liable to forfeit a sum not exceeding 100*l.*"[1]

§ 1284. The attendance of a witness in the *chambers* of the High Court is enforced by means of a subpœna. Such subpœna issues from the Central Office upon a note from the judge.[2] Again, when a Chief Clerk[3] is directed by a judge in the Chancery Division to examine any party or witness, he is authorised to enforce the attendance of such party or witness by *summons*;[4] and if this summons be not obeyed, the party or witness will be liable to process of contempt, in like manner as he would be, were he to disobey any order of the court, or any writ of subpœna.[5] A witness who refuses to be sworn, when summoned before a Chief Clerk, does so at the risk of being committed by the court;[6] and if he answers in an unsatisfactory manner, an application should be made to have him examined by the judge.[7] He may, it seems, himself apply to the Chief Clerk, on special grounds, either to have the assistance of counsel, or to have the inquiry adjourned into court.[8]

§ 1285. The attendance of a witness before an Examiner of the High Court can only be enforced by the somewhat awkward and unwieldy, as well as costly, means of an application to the

[1] 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), § 24; 20 & 21 V. c. 79, § 29, Ir. See also Shepheard *v.* Beetham, 1872. 21 & 22 V. c. 95, § 23, empowers the registrars of the Principal Registry of the Court of Probate in England, whether any suit or proceeding be pending in the court or not, to issue subpœnas, requiring any persons to produce testamentary papers. See also, ante, § 1265.

[2] R. S. C. 1883, Ord. XXXVII. r. 28.

[3] As to the attendance of witnesses before "the Taxing Officers of the Supreme Court, or of any Division thereof," see R. S. C. 1883, Ord. LXV. r. 27, subs. 25.

[4] For "Form of Summons by Chief Clerk," see App. L. No. 1 of the Rules of 1883. This summons is only good for one attendance, unless the examination of the witness be adjourned: Lawson *v.* Stoddart, 1863 (Kindersley, V.-C.).

[5] R. S. C. 1883, Ord. LV. rr. 16, 17.

[6] In re The Elect. Telegr. Co. of Ireland, Ex parte Bunn, 1857.

[7] Hayward *v.* Hayward, 1854. See, however, Venables *v.* Schweitzer, 1873.

[8] In re The Elect. Telegr. Co. of Ireland, Ex parte Bunn, 1857.

Court itself.[1] An examiner, however, has power to administer an oath.[2]

§ 1286. Under the Companies Act, 1862, the High Court is empowered to wind up the affairs of any company, and such court and any of its commissioners who are authorised to take evidence for the purposes of the Act, may respectively enforce the attendance of witnesses,[3] and the production of documents,[4] by summons and warrant. A summons cannot be claimed as a matter of right, but the court must be satisfied that to grant it will be just and beneficial.[5] As a general rule the examination of the witness rests with the official liquidator, but the court, in its discretion, may empower any contributories to issue summonses, to attend the inquiry, and to examine or cross-examine the persons summoned.[6] The practice in these cases has been assimilated to that in bankruptcy, and there is a disposition to put a liberal interpretation upon the statute, which enables the judges to summon "any person whom the court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company."[7] A witness summoned under this enactment apparently has no locus standi, unless he can establish a want of jurisdiction,[8] to appeal against the order;[9] and even if this be not so, it is clear that a court of appeal would not interfere with the discretion of the judge, unless under extremely special circumstances.[9] A witness is, however, entitled to be attended by his counsel or solicitor, who may ask him such questions as may be necessary to explain the evidence he has given, and who may also take notes of the proceedings for the purpose of

[1] See R. S. C. Order XXXVII. cited ante, § 506, rr. 5—7, cited infra, § 1310; and also Stewart *v.* The Balkis Co., 1883, cited § 512. And see further, infra, § 1310.

[2] See R. S. C. Order XXXVII. r. 19, cited ante, § 506.

[3] 25 & 26 V. c. 89, §§ 115, 126, 138. See Swan's case, 1870; In re Engl. Jt. Stock Bk., 1866; In re Financial Ins. Co., 1867; In re Breech Loading Armoury Co., and In re Merchant's Co., 1867; In re Accidental & Mar. Ins. Co., 1867; In re The Mercant. Credit Associat., Clement's case, 1868; In re Contract Corp., 1871; Re The London Gas Meter Co., 1872; Druitt's case, 1872; Trower and Lawson's case, 1872; Forbes' case, 1872; In re Bk. of Hindustan, Fricker's case, 1871 (Wickens, V.-C.); Massey *v.* Allen, 1878.

[4] See Ex parte Paine and Layton, 1869; In re Smith, Knight & Co., 1869.

[5] Heiron's case, 1880, C. A.

[6] Whitworth's case, 1881, C. A.

[7] See cases cited in last four notes. Also Re Lisbon Steam Tramways Co., 1876.

[8] Whitworth's case, 1880, C. A.

[9] Re The Gold Co., 1879.

conducting such re-examination, but for that purpose only.[1] Any deposition, taken in accordance with the above provisions, may be used as evidence on a summons against the party by whom it has been made, but the court might possibly require that notice of the intention to read the deposition be first given.[2]

§ 1287. The fourth matter for consideration is as to enforcing the attendance of witnesses before *Ecclesiastical Courts*. This is in England required by a *compulsory*, which is an instrument somewhat in the nature of a subpœna.[3] If the witness on the return of this process does not appear, the court may pronounce him contumacious,[4] and signify the same to her Majesty in Chancery within ten days.[5] On the "significavit" being lodged at the Crown Office,[6] the offending party will be arrested and detained in custody[7] unless he be a Peer or Lord of Parliament, or a member of the House of Commons, until he either submit to the court, or be absolved or discharged by order of the Ecclesiastical Judge.[8] His expenses, however, must be tendered or paid by the party calling him, as in civil proceedings before the common-law courts.[9] The Clergy Discipline Act, 1892,[10] provides for the prosecution, in the Consistory Court of the diocese, of clergymen charged with certain offences.[11] Witnesses as to any charge under the Act are summoned by a "compulsory," issued according to the ordinary practice of the Consistory Court.

§ 1288. By the Public Worship Regulation Act, 1874,[12] in all proceedings before the Judge appointed under that Act, the evidence must be given vivâ voce, in open court, and upon oath.[13] The Act just named also provides that "the judge shall have the power of a court of record, and may require and enforce the attendance of witnesses, and the production of evidences, books, or writings, in the like manner as a judge of the High Court."[14]

[1] In re Cambrian Mining Co., 1881.
[2] Pugh and Sharman's case, 1872.
[3] Coote's Eccl. Pr. 780. See the rules and regulations of the Arches Court, 1867, and Reg.-Gen. of 1877, for Consist. Court of London, Ord. IX. r. 4.
[4] Wyllie *v.* Mott, 1827.
[5] 53 G. 3, c. 127, § 1; and see 2 & 3 W. 4, c. 93, § 1.
[6] R. S. C. Jan. 1889.
[7] Dale's case, 1881; and see Green *v.* Lord Penzance, 1881.
[8] Hudson *v.* Tooth, 1877; Dean *v.* Green, 1882.
[9] Ayliffe, Par. 536; 1 Ought. 121; 3 Burn. Ec. Law, 309.
[10] 55 & 56 V. c. 32, § 9.
[11] Id. § 2.
[12] 37 & 38 V. c. 85.
[13] Id. § 9.
[14] See Rules and Orders, made under the Act, on 22nd Feb. 1879, and contained in 4 P. D. 250, 261, 283; and in 49 L. J. Ord. and Rules, pp. 7, 22.

§ 1289. The fifth subject to be considered is the means of obliging witnesses to attend in Courts of Bankruptcy. The attendance of witnesses before Courts of Bankruptcy is enforced in part under Regulations contained in the Bankruptcy Rules of 1886, and in part under the Bankruptcy Act, 1883.[1] The former provide, by R. 61, that "a subpœna for the attendance of a witness shall be issued by the court at the instance of an official receiver, a trustee, a creditor, a debtor, or any applicant or respondent in any matter, with or without a clause requiring the production of books, deeds, papers, documents, and writings in his possession or control, and in such subpœna the names of three witnesses may be inserted."[2] R. 62 then directs, that "a sealed copy of the subpœna shall be served *personally* on the witness by the person at whose instance the same is issued, or by his solicitor, or by an officer of the court, or by some person in their employ, within a reasonable time before the time of the return thereof;" while R. 63 provides, that "service of the subpœna may, where required, be proved by affidavit." Under R. 69, "The court may, in any matter, at any stage of the proceedings, order the attendance of any person, for the purpose of producing any writings or other documents named in the order, which the court may think fit to be produced;" and further, by R. 66, it may, in any matter where it shall appear *necessary* for the purposes of justice, make an order for the examination upon oath of any witness or person, either before the court, or any of its officers, or before any other person and at any place. If any person wilfully disobeys any such *order* or *subpœna*, he shall, under R. 70, "be deemed guilty of contempt of court, and may be dealt with accordingly." The refusal of a witness to be sworn, or to answer any lawful question, will be regarded also in the light of a grave contempt.[3] R. 71 further provides that, "any witness (other than the debtor), required to attend for the purpose of being examined or producing any document, shall be entitled to the like conduct money, and payment for

[1] 46 & 47 V. c. 52.

[2] See Forms 104, 105, and 106, the two former applicable in the London Bankruptcy Court, the last in the County Courts. In not one of the forms is any penalty specified. See ante, § 1239.

[3] Ex parte Close, Re Bennett and Glave, 1877, C. A.

expenses and loss of time, as upon attendance at a trial in court."[1] In addition to the above general regulations, the Bankruptcy Act, 1883,[2] contains, in sect. 27, an enactment, framed with the view of facilitating the discovery of the property of debtors, in these words:—"(1) The court may, on the application of the *official receiver* or *trustee*, at any time after a receiving order has been made against a debtor, summon[3] before it the debtor, or his wife, or any person known or suspected[4] to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings, or property; and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings, or property.[5] (2) If any person so summoned, after having been tendered a reasonable sum,[6] refuses to come before the court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the court at the time of its sitting, and allowed by it the court may, by warrant,[7] cause him to be apprehended and brought up for examination. (3) The court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property." The provisions of the above enactment are not too clear in themselves, but have been greatly explained either by Rule, or by judicial decision. First, a Rule requires,[8] that the application for a summons be in writing, and state shortly the grounds on which it is made; and that where it is *not* made by the trustee, official receiver, or Board of Trade, it be verified by affidavit. Next, the court has power,[9] if it be thought desirable, to act at the instance

[1] See Scale of Allowances, printed in Appendix.

[2] 46 & 47 V. c. 52. The Act of 20 & 21 V. c. 60, Ir., contains, in §§ 126, 308, somewhat similar provisions respecting the attendance of witnesses before the Court of Bankruptcy in Ireland. See 35 & 36 V. c. 58, § 6, Ir. See, also, ante, § 1277.

[3] See Bkptcy. Rules of 1883, F. 107.

[4] See Cooper *v.* Harding, 1845.

[5] See Ex parte Tatton, Re Thorp, 1881.

[6] The witness so summoned is not entitled to the costs of employing a solicitor or counsel: Ex parte Waddell, In re Lutscher, 1877, C. A.; nor to a copy of his deposition, unless he be also a creditor: Ex parte Pratt, Re Hayman, 1882.

[7] See Bkptcy. Rules of 1886, F. 120.

[8] Bkptcy. Rules of 1886, r. 78.

[9] Ex parte Crossley, Re Taylor,

not only of the Board of Trade, but of any creditor, or of the bankrupt himself, and to order the examination of any person, including even the trustee.[1] Thirdly, the court apparently has a discretion to direct, that the summons shall be served by any person who is authorised to serve a subpœna;[2] but it is a matter of doubt whether the summons requires personal service like the subpœna, or whether, in the event of the witness keeping out of the way, it may be served by delivery at his house. The court would, it seems, have no jurisdiction to order a witness thus brought before it to furnish an account in writing of his dealings with the bankrupt;[3] and its power to compel a person to give evidence, who is actually present, but who is not attending in pursuance of subpœna or warrant, is at least doubtful.[4]

§ 1290. The sixth tribunal whose practice as to the attendance of witnesses must be considered, is that of Coroners Courts. The attendance of witnesses before *coroners* is provided for by the Coroners Act, 1887,[5] which enacts,[6] that "where a person, duly summoned to give evidence at an inquest, does not, after being openly called three times, appear to such summons, or appearing refuses, without lawful excuse, to answer a question put to him, the coroner may impose on such person a *fine not exceeding forty shillings*." The same Act,[7] after authorising coroners to order *medical witnesses* to attend inquests, &c., and enabling such witnesses to claim a certain remuneration for their attendance,[8]—enacts, in § 23, that where a medical practitioner fails to obey a summons of a coroner issued in pursuance of the Act he shall,

1872; Ex parte Nicholson, Re Willson, 1880, C. A.; Ex parte Austin, 1876.

[1] Who in such case must be served with notice of the application: Re Whicher, Ex parte Stevens, 1888.

[2] Ex parte Bolland, Re Holden, 1874.

[3] Ex parte Reynolds, 1883.

[4] See § 110 of "The Bankruptcy Act, 1883"; and also ante, § 1242, ad fin.

[5] 50 & 51 V. c. 71.

[6] § 19, subs. 2.

[7] § 21.

[8] The fee to which, in Great Britain, a legally qualified medical practitioner is entitled, for attending to give evidence at an inquest, is one guinea, and for making a post-mortem examination of the deceased, either with or without an analysis of the contents of the stomach or intestines, and for attending to give evidence thereon, is two guineas. (§ 22 of "The Coroners Act, 1887.") These sums must now be paid to the medical man by the coroner immediately after the termination of the proceedings at any inquest, and the coroner will be repaid as provided by "The Coroners Act, 1887" (50 & 51 V. c. 71), § 26. As to the Irish regulations on the subject, see 9 & 10 V. c. 37 ("The Coroners (Ireland) Act, 1846"), §§ 22, 28, 32—35, 44, Ir.; and, also, 44 & 45 V. c. 35, § 5, Ir.

unless he shows a good and sufficient cause for not having obeyed it, be liable on summary conviction, on the prosecution of the coroner or of any two of the jury, to a fine not exceeding £5.

§ 1291. The seventh matter is as to the mode of compelling witnesses to attend before the *County Courts*, and is regulated in part by the County Court Act, 1888,[1] and in part by the C. C. Rules, 1889. The Act provides[2] that "either of the parties to any action or matter may obtain from the registrar summonses 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;[3] 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, be served by a bailiff of the court or otherwise." Order XVIII., Rule 1, of C. C. Rules, 1889, provides that "summonses to witnesses to be served either in the home or in any foreign district[4] may be issued without leave, and may, by leave of the judge or registrar, be issued in blank, and served by the party applying for the same or his solicitor,[5] but in any case only *one* name shall be inserted in such summons." By R. 2 "it shall be sufficient if a summons to a witness be served a reasonable time before the return day, and such summons shall be deemed to have been properly served if it has been served in the manner directed by Order VII.[6] for service of an ordinary summons;" and the County Court Act, 1888,[7] enacts, that "every person summoned as a witness, either personally or in such other manner as shall be prescribed, to whom at the same time payment or a tender of payment of his expenses shall have been made, on the prescribed scale of allowances, and who shall refuse or neglect, without sufficient cause, to appear, or to produce any books, papers, or writings required by such summons to be produced, or who shall refuse to

[1] 51 & 52 V. c. 43, § 110.

[2] Id.

[3] C. C. R. 1889, Appendix H., Form 145A, and Summons to Produce Documents, Form 146A.

[4] This provision resolves a doubt which formerly existed, respecting the legality of the service when the witness lived out of the jurisdiction.

[5] See form of affidavit of service of summons, C. C. R. 1888, Appendix H., Form 147.

[6] Under Ord. VII. service of an ordinary summons may, in general, be effected by delivering it to the defendant or to some person "apparently not less than sixteen years old" at his house, place of dwelling, or place of business (*i. e.*, a place of business of which he is the master or one of the masters).

[7] 51 & 52 V. c. 43, § 111.

be sworn or give evidence; and also every person present in court who shall be required to give evidence, and who shall refuse to be sworn or give evidence, shall forfeit and pay such fine, not exceeding *ten pounds*, as the judge shall direct; 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 be accounted for by the registrar to the Treasury." In addition to the above enactment, it is also provided, that "the court may in any action or matter at any stage of the proceedings order the attendance of any person for the purpose of being examined or of producing to or before any examiner any documents which the court may think fit to be produced: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the trial."[1]

§ 1292. Eighthly, and lastly, the attendance of witnesses before ordinary *arbitrators* acting in England[2] under a submission, is regulated by the Arbitration Act, 1889,[2] by which[3] "any party to a submission may sue out a writ of subpœna ad testificandum, or a writ of subpœna duces tecum, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce at the trial of an action." Where a matter has been referred to a *referee*, whether official or special,[4] the attendance of witnesses before him may also "be enforced by subpœna."[5] Where a matter in bankruptcy is referred to arbitration, the County Court judge has jurisdiction to make an order, and issue a subpœna to compel the attendance of a witness before the arbitrator.[6]

§§ 1293—1309. Besides those applicable to the eight tribunals mentioned above, provisions have been made under which the attendance of witnesses before other tribunals is secured, but it is not practically possible to here enumerate the whole of these.[7]

[1] C. C. R. Ord. XVIII. r. 16.

[2] 52 & 53 V. c. 49. This Act does not extend to Scotland or Ireland. As to the latter, see 3 & 4 V. c. 105, §§ 63 and 64.

[3] § 8. See, also, § 18, subs. 1.

[4] "The Judicature Act, 1873" (36 & 37 V. c. 66), § 57.

[5] See R. S. C. 1883, Ord. XXXVI. r. 49.

[6] Ex parte Belland, Re Ackary, 1876.

[7] A few of the principal of such regulations are applicable to the fol-

§ 1309A. Besides the powers for compelling the actual attendance of witnesses before them at the trial or hearing which have now

lowing tribunals mentioned in alphabetical order:— *Barmote Courts in Derby* have, under "The High Peak Mining Customs and Mineral Courts Act, 1851" (14 & 15 V. c. 94), §§ 31, 40, powers of compelling the attendance of witnesses very similar to those possessed by the Stannaries Court (which see infra). *Councils of Conciliation* have power—under "The Councils of Conciliation Act, 1867" (30 & 31 V. c. 105, § 4, which is not only very obscurely worded, but the forms in the schedule to which have been repealed by 41 & 42 V. c. 79, Sched. I., and in connection with which see 5 G. 4, c. 96 ("The Master and Workman Arbitration Act, 1824"), §§ 2, 9, and Sched.; and 35 & 36 V. c. 46, § 1, subs. 9)—to entertain arbitrations as to certain disputes between masters and workmen, and on any such arbitration, the chairman of the council may summon such witnesses as are required to give evidence, and the arbitrators may examine them upon oath; while any witness disobeying such summons is liable to be committed to prison by a justice of the peace. *Courts-Martial, if Military*, are, by "The Army Act, 1881" (44 & 45 V. c. 58, amended by § 25 of "The Army (Annual) Act, 1884," of 47 V. c. 8), § 125, empowered to summon witnesses, the section enacting that "every person required to give evidence before a court-martial may be summoned and ordered to attend in the prescribed manner," the form of the summons, as given in Appendix II. of the Act of 1881, being a document in the nature of an order under the hand of the convening officer, the president of the court, the judge-advocate, or the commanding officer of the prisoner. (R. 77, B. The mode of serving the summons is not prescribed, but the practice is to employ the police for that purpose, and to serve personally.) The Act further provides that if any witness, "subject to military law," makes default in attending, or refuses to take an oath or make a solemn declaration, or refuses to produce any document in his control legally required to be produced, or refuses to answer any question to which an answer may legally be required, or is guilty of contempt, he shall on conviction by a court-martial other than the court to which he has been summoned, be liable, if an officer, to be cashiered, and if a soldier to be imprisoned, or in either case to suffer such less punishment as is mentioned in § 44 of the Act. (See id. § 28.) When a witness who is *not* subject to military law commits any of the above offences, the president of the court-martial, in the event of the witness having been paid or tendered the reasonable expenses of his attendance (the Allowance Regulations, 1881, in pars. 564—573, give the Rules as to the expenses), may certify the offence "to any court of law in the part of her Majesty's dominions where it is committed, which has power to punish witnesses if guilty of like offences in that court;" and thereupon such last court shall investigate the matter, and if it seem just, punish the offender as if he had committed the offence before itself. (See "Army Act, 1881" (44 & 45 V. c. 58), § 126, subs. 1 and 3). *Courts-Martial, if Naval*, are empowered by "The Naval Discipline Act, 1866" (29 & 30 V. c. 109), §§ 61, 66, to require every person, civil, naval, or military, to give evidence, who shall be summoned either by the judge-advocate, or by his deputy, or by the person duly appointed by the president of the court-martial to officiate as judge-advocate at the trial; and all witnesses so summoned who do not attend, or refuse to be sworn or to affirm, or refuse to give evidence, or to answer all such questions as the court may legally demand of them, or prevaricate, are liable to be attached in the Queen's Bench Division of the High Court in London or Dublin, or in the Court of Session in Scotland, or other court of law in any of her Majesty's dominions, in like manner as if they had disobeyed the process of such courts (29 & 30 V. c. 109, § 66); and if the witness belong to her Majesty's navy, the court-martial, is, in the event of his non-attendance to give evidence on

been considered, various powers are also possessed by them under which certain courts may grant commissions to take the evidence of witnesses,

oath or affirmation, or of his prevarication, also possessed of an alternative power of punishing him by any imprisonment not longer than three months; and to imprison him for any period not exceeding one month, if he be guilty of contempt. (Id.) It being further provided, that "every person not subject to this Act, who may be so summoned to attend, shall be allowed and paid his reasonable expenses for such attendance, under the authority of the admiralty, or of the president of the court-martial on a foreign station." (Id.) *Friendly Societies disputes* may be referred to the chief or other registrar, under "The Friendly Societies Act, 1875" and on any such reference the Act just named gives power to the referee to administer oaths and require the attendance of parties and witnesses, and the production of books and documents; and any person refusing to attend, or to produce any documents, or to give evidence, is guilty of an offence under the Act. (See 38 & 39 V. c. 60, § 22, subs. (*b*); amended by 48 & 49 V. c. 27.) *Irish Land Commissioners* possess all the powers formerly vested in the Chancery Division of the High Court of Justice in Ireland for enforcing the attendance of witnesses after a tender of their expenses, the examination of witnesses orally or by affidavit, the production of documents, the issuing commissions for the examination of witnesses, and the punishing of persons refusing to give evidence or to produce documents, or otherwise guilty of contempt in open court. (See 44 & 45 V. c. 49, § 48, subs. 3, Ir.) *Irish Local Government Board, Irish Poor Law Commissioners*, and *Irish Prison Boards*, and their respective inspectors, may summon persons to give evidence or to produce documents. (See 10 & 11 V. c. 10, §§ 11, 21, and 26; 29 & 30 V. c. 66, § 7; 10 & 11 V. c. 90, §§ 19 and 20; 14 & 15 V. c. 68, §§ 16 and 17; and 40 & 41 V. c. 49, § 23.) *Landed Estates Court, Ireland:* see *Irish Land Commissioners, supra*. "*The Land Transfer Act*, 1875," empowers the registrar appointed under it, or any of his officers, "authorised by him in writing," to administer oaths, and "by summons under the seal of the office" to require the attendance of witnesses, and the production of documents; and if any person, after the delivery to him of such summons, and the payment or tender of his reasonable charges, wilfully neglects or refuses to attend, or produce documents, or give evidence, he is liable to a penalty not exceeding 20*l.*, to be recovered on summary conviction (38 & 39 V. c. 87, §§ 109, 110). *The Palatine Court of Chancery of the County Palatine of Lancaster* has powers of compelling witnesses, who live out of the jurisdiction, to attend either before the Court of Chancery of the County Palatine of Lancaster, or before the registrar of that court as well in his capacity of examiner as in that of master, or before any commissioners appointed by that court for the examination of witnesses. (See 13 & 14 V. c. 43, "The Court of Chancery of Lancaster Act, 1850.") *Courts for the Trial of either Parliamentary or Municipal Election Petitions* are empowered to subpœna and swear witnesses, as in a trial at Nisi Prius (see § 31 of 31 & 32 V. c. 125 ("The Parliamentary Elections Act, 1868"), continued till 31st December, 1895, by 57 & 58 V. c. 48; and see, also, 45 & 46 V. c. 50, § 94, subs. 1), and the judge or presiding barrister has a further power, by order under his hand, of compelling the attendance of any person as a witness who appears to him to have been concerned in the election to which the petition refers (see 31 & 32 V. c. 125 ("The Parliamentary Elections Act, 1868"), § 32; and 45 & 46 V. c. 50, § 94, subs. 2, 3); and disobedience of such an order is of course a contempt of court. A judge of such a court may, moreover, examine any person compelled to attend, and also any person in court, though he be not called and examined by any party to the petition (see id.); but a person so examined by a judge may be cross-examined by either the petitioner or the respondent, or both. (See id., and also subs. 4 of 45 & 46 V. c. 50, § 94.) The form of an order on a witness to attend, made under these Acts may, it is suggested, be as follows:—Court for the Trial of an Election Petition [*or* of a Municipal Election Petition] for [*Title*] the day of . To A. B. [*describe the person*] You are hereby required to

and may enforce the attendance of the witnesses desired to be examined, and the production by them in evidence of any documents which it may be desired to have in evidence.

§ 1310. The powers which, as it has already been incidentally mentioned (supra, § 1285), are possessed by every judge of the High Court, enables him to order[1] witnesses to be examined, or to produce documents, before any officer of the court, or other person

attend before the above court at [*place*], on the day of , at the hour of [*or, forthwith*], to be examined as a witness in the matter of the said petition, and to attend the said court until your examination shall have been completed. As witness my hand, M. N., judge of the said court [*or* A. B., the barrister to whom the trial of the said petition is assigned]." On the subject generally, see Reg.-Gen. of M. T. 1868, r. 21, set out L. R. 4 C. P. 781; and also 37 L. J. C. P. at p. 5; and see, also, Reg.-Gen. of M. T. 1872, r. 41, set out L. R. 7 C. P. 677. "*The Public Worship Regulation Act*, 1874" (37 & 38 V. c. 85), enacts (§ 9) that its judge may enforce the attendance of witnesses and the production of documents in the like manner as a judge of the High Court. (See also Rules, &c. of 22nd February, 1879, made under the Act, and set out L. R. 4 P. D. 250, 261, 283, and also 49 L. J., Order and Rules, pp. 7, 22.) *Revising barristers* are empowered by summonses under their hands, to require the attendance of assessors, overseers, and relieving and other parish officers, who, in the event of disobedience, are liable, upon proof of the service of the summons, to be fined by the barrister any sum not exceeding 5*l.*, nor less than 20*s.* (See 6 & 7 V. c. 18 ("The Parliamentary Voters Registration Act, 1843"), §§ 35, 50, 51; and as to Ireland, 13 & 14 V. c. 69 ("The Representation of the People (Ireland) Act, 1850"), §§ 56, 57). A similar fine may also now be imposed by a revising barrister upon any person, who, having been summoned under the barrister's hand, to attend at the court and give evidence or produce documents for the purpose of the revision, and having had tendered to him his reasonable expenses,—either fails to attend, or fails to answer any legal question or to produce any document that can be legally required of him. (See 41 & 42 V. c. 26, § 36.) *The Stannaries Court* (technically called "The Court of the Vice-Warden of the Stannaries"), enforces the attendance of witnesses before it under provisions which enact, that the service of every writ of subpœna to attend and give evidence hereafter to be issued out of either side of the Court of the Vice-Warden, and served upon any person in any part of England or Wales, shall be as valid and effectual in law, and shall entitle the party suing out the same to all and the like remedies by action or otherwise, as if the same had been served within the jurisdiction of the Court of the Vice-Warden; and that, in case the person so served shall not appear according to the exigency of the writ, the Court of the Vice-Warden, upon oath or affirmation to be taken in open court, or affidavit of the personal service of such writ, may transmit a certificate of such default under the seal of the court, to the Queen's Bench Division of the High Court; and the last-mentioned court shall proceed against, and punish by attachment or otherwise, according to the course and practice of that court, the person so having made default, in such and the like manner as the same court might have done, if such person had neglected or refused to appear in obedience to a writ of subpœna issued to compel the attendance of witnesses out of such last-mentioned court (6 & 7 W. 4, c. 106, being "The Stannaries Act, 1836"), and also that the Queen's Bench Division shall not in any such case as aforesaid, proceed against or punish any person, nor shall any such person be liable to any action for having made default by not appearing to give evidence in obedience to any such writ of subpœna, unless it shall appear to such court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning therefrom, had been tendered to him at the time when the writ of subpœna was served upon him. (Id. § 10.)

[1] Under R. S. C. 1883, Ord. XXXVII. rr. 5, 7.

appointed, and at any place; and a wilful disobedience[1] of any such order is a contempt of court. Any person whose attendance shall be so required is[2] entitled to the like conduct-money, and payment for expenses, and loss of time, as upon attendance at a trial: and[3] no person[4] can be compelled to produce under any such order any document, that he would not be compellable to produce at the hearing or trial. The examiner may, and if need be shall, make a special report to the court touching such examination, and the conduct or absence of any witness or other person thereon: and the court or a judge may direct such proceedings, and make such order as, upon the report, they or he may think just.[5]

§ 1310A. Moreover, when an enquiry respecting the amount of unliquidated damages is directed to be had before an officer of the court, "the attendance of witnesses, and the production of documents before such officer may be compelled by subpœna."[6]

§ 1311. As we also have seen,[7] the judges of the Queen's Bench Division of the High Court, whether in England or in Ireland, possess power to grant *writs of mandamus or commissions* to the judges of India, of the colonies, and of other places under her Majesty's dominion, empowering them to examine witnesses in certain cases; and whenever any such commission issues, "the judge or judges, to whom the same shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses, as the court, whereof they are judges, does or may possess for that purpose in causes or suits depending in such court."[8]

§ 1312. While, as we have seen,[9] there exists power to order the *attendance* of a witness who is in one part of the United Kingdom, at the trial of a cause in a court in another part of the United Kingdom, there are also powers of ordering the *examination on commission* of any such witness. By an Act of the

[1] Under r. 8.
[2] By r. 9.
[3] By r. 7.
[4] An order under this rule will not be made before trial, except in view of a particular motion or other proceeding. See Central News Co. *v.* Eastern News, &c., 1884; Straker *v.* Reynolds, 1889.
[5] R. S. C. Ord. XXXVII. r. 17.
[6] R. S. C. Ord. XXXVI. r. 57.
[7] See ante, §§ 500—505.
[8] § 2 of 1 W. 4, c. 22; and § 67 of 3 & 4 V. c. 105 ("The Debtors (Ireland) Act, 1840").
[9] Supra, § 1262.

year 1843[1]—reciting that "there are at present no means of compelling the attendance of persons to be examined under any commission for the examination of witnesses issued by the Courts of Law or Equity in England or Ireland, or by the Courts of Law in Scotland, to be executed in a part of the realm subject to different laws from that in which such commissions are issued, and great inconvenience may arise by reason thereof,"—it is enacted[2] that, "if any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any such commission for the examination of witnesses as aforesaid (such notice being signed by the commissioner or commissioners, and specifying the time and place of attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners; and it shall thereupon be competent, to or on behalf of any party suing out such commission, to apply to any of the superior courts of *law*[3] in that part of the kingdom within which such commission is to be executed, or any one of the judges of such courts, for a rule or order to compel the person or persons so refusing or failing as aforesaid,[4] to appear before such commissioner or commissioners, and to be examined under such commission; and it shall be lawful for the court or judge to whom such application shall be made, by rule or order to command the attendance and examination of any person to be named, or the production of any writings or documents to be mentioned, in such rule or order." § 6 further enacts, that "upon the service of such rule or order upon the person named therein, if he or she shall not appear before such commissioner or commissioners as aforesaid for examination, or to produce the writings or documents mentioned in such rule or order, the disobedience to such rule or order shall, if the same shall happen in England or in Ireland, render the person disobeying subject and liable to such pains and penalties as he or she would be subject and liable to by reason of disobedience to a writ of subpœna in England or in Ireland; and if such disobedience shall happen in Scotland, it

[1] 6 & 7 V. c. 82.
[2] § 5.
[3] Quære as to the power of the Chancery Division to act under this statute.
[4] Under this enactment there is no power to make an order on persons not parties to produce documents. See Burchard *v.* Macfarlane, 1891, C. A.

shall be competent to the Lord Ordinary on the bills, upon an application made to him, by or on behalf of any party suing out such commission, and upon proof of such disobedience made before him, to direct the issue of letters of second diligence, according to the forms of the law of Scotland, to be used against the person disobeying such rule or order." § 7 then provides, that "every person, whose attendance shall be so required, shall be entitled to the like conduct-money and payment of expenses and for loss of time, as for and upon attendance at any trial in a court of law; and that no person shall be compelled to produce under such rule or order any writing or other document, that he or she would not be compellable to produce at a trial, nor to attend on more than two consecutive days, to be named in such rule or order." Under the above Act there is no power to make an order for persons not parties to a cause which is depending in one of the courts named in it to attend before commissioners of such court and simply produce documents.[1]

§ 1313. In 1856, the Foreign Tribunals Evidence Act[2] authorised the judges of certain superior courts in England, Ireland, Scotland, and the colonies, on application being made to them on behalf of any foreign court in which any *civil* or *commercial* matter is pending, to order any witnesses within the jurisdiction of their respective courts to attend before, and to be examined by, such persons as shall be named in the order; and the examiners are empowered to administer all necessary oaths.[3] This Act further provides, that the witnesses, as at an ordinary trial, shall be entitled to conduct-money, and shall be protected from answering criminatory questions, and from producing documents which they are privileged to withhold. The above Act is, by the Extradition Act, 1870,[4] extended to proceedings for any *criminal* matter which are not of a political character, which may be pending before a foreign court.

§ 1314. In 1859, the Evidence by Commission Act, 1859,[5]

[1] Burchard *v.* Macfarlane, 1891.

[2] 19 & 20 V. c. 113, which may be cited as above described by 41 & 42 V. c. 67, Sched. 1.

[3] As to criminal proceedings, see post, § 1315.

[4] 33 & 34 V. c. 52.

[5] 22 V. c. 20, which may be described as above by "The Evidence by Commission Act, 1881" (48 & 49

extended to *Colonial* courts similar facilities for obtaining evidence to those which had in 1856 been given to foreign courts by the Foreign Tribunals Evidence Act. This later Act, in substance, enacted that whenever any court in her Majesty's dominions shall have authorised, by commission, order, or other process, the obtaining of the testimony of any witness out of its jurisdiction, in or in relation to any action, suit, or proceeding pending in such court, certain superior judges enumerated in the Act shall be empowered,—provided the witness be living within their jurisdiction,—to command his attendance before the appointed commissioners, to order his examination, and to give all other necessary directions on the subject.[1] The witness, as in the two preceding Acts, may claim the payment of his charges, and the usual protection with respect to the answering of questions and the production of papers.

§ 1315. The Evidence by Commission Act, 1885,[2] in any proceedings to which the Evidence by Commission Act, 1859, applies, enables any Indian or Colonial court or judge, to whom the commission, &c., is addressed, to nominate, in civil cases, a fit person,[3] and in criminal cases a judge or magistrate,[4] to take the examination of the required witness. The provisions of the Evidence by Commission Act, 1859, are to apply to proceedings under the Act of 1885, now under consideration;[5] and under both Acts there is a power to make rules.[6]

§ 1315A. County Court judges possess[7] the same power of ordering the examination of witnesses out of court as judges of the High Court. The County Court Rules only anticipate examinations in England and Wales, but the Acts[8] appear to confer power to order them to be taken abroad. Subject to this the procedure of the High Court is in substance adopted in the County Court Rules.[9]

V. c. 74, § 4). Power to make rules under it is conferred by 48 & 49 V. c. 74, § 5.

[1] See Campbell *v.* Att.-Gen. 1867.

[2] 48 & 49 V. c. 74.

[3] § 2.

[4] § 3.

[5] § 4.

[6] See § 5, and also § 6 of 22 V. c. 120.

[7] Under 36 & 37 V. c. 66 ("The Judicature Act, 1873"), § 89.

[8] Viz., the section of "The Judicature Act, 1873," cited above, and 51 & 52 V. c. 43 ("The County Court Act, 1888"), § 164.

[9] See C. C. R. Ord. XVIII.

§ 1315B. The provisions securing the attendance of witnesses before magistrates must next be considered.

§ 1316. Jervis' Acts (as they are commonly called), passed in the year 1848,[1] contain clauses which regulate the English law on this subject.[2] One of the above-named Acts governs the duties of magistrates out of session with respect to *persons charged with indictable offences*, and is called "The Indictable Offences Act, 1848." A section in it enacts[3] that "if it shall be made to appear to any Justice of the Peace by the oath or affirmation of any credible person, that any person within the jurisdiction of such justice is likely to give material evidence for the prosecution, and will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the examination of the witnesses against the accused, such justice may and is hereby required to issue his *summons*[4] to such person, under his hand and seal, requiring him to be and appear at a time and place mentioned in such summons before the said justice, or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, as shall then be there, to testify what he shall know concerning the charge made against such accused party; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by the said summons, and *no just excuse* shall be offered for such neglect or refusal, then (after proof upon oath or affirmation of such summons having been served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode) it shall be lawful for the justice or justices, before whom such person should have appeared, to issue a *warrant*[5] under his or their hands and seals, to bring and have such person at a time and place to be therein mentioned before the justice who issued the said summons, or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or

[1] 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"); 11 & 12 V. c. 43 ("The Summary Jurisdiction Act, 1848").

[2] The mode of enforcing the attendance of witnesses before the inferior courts in *Scotland* is regulated by 27 & 28 V. c. 53, §§ 6, 8, 10, Sched. E. 1 and 2, and Sched. F. 2. With respect to the police courts in Edinburgh, see 30 & 31 V. c. 58, Sch. §§ 175, 179—181.

[3] 11 & 12 V. c. 42, § 16.

[4] See form in Sched. to Act, L. 1.

[5] See Id. L. 2.

place, as shall then be there, to testify as aforesaid, and which said warrant may, if necessary, be backed as hereinbefore is mentioned,[1] in order to its being executed out of the jurisdiction of the justice who shall have issued the same; or if such justice shall be satisfied by evidence upon oath or affirmation that it is *probable* that such person will not attend to give evidence without being compelled so to do, then, instead of issuing such summons, it shall be lawful for him to issue his *warrant*[2] *in the first instance*, and which, if necessary, may be backed as aforesaid;[3] and if on the appearance of such person so summoned before the said last-mentioned justice or justices, either in obedience to the said summons, or upon being brought before him or them by virtue of the said warrant, such person shall refuse to be examined upon oath or affirmation concerning the premises, or shall refuse to take such oath or affirmation, or, having taken such oath or affirmation, shall refuse to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal, any justice of the peace then present, and having there jurisdiction, may by warrant[4] under his hand and seal *commit* the person so refusing to the common gaol or house of correction for the county, riding, liberty, city, borough, or place, where such person so refusing shall then be, there to remain and be imprisoned for any time not exceeding *seven days*, unless he shall in the meantime consent to be examined and to answer concerning the premises."

§ 1317. The second[5] of the two Jervis' Acts governs (subject only to a few exceptions to be presently mentioned),[6] *summary convictions and orders* by justices out of sessions, and is called "The Summary Jurisdiction Act, 1848." It contains[7] similar provisions to those in the other Act which have just been set out for enforcing the attendance of witnesses; with, however, the further provision that, before the justice can issue his warrant for the apprehension of a witness who has disobeyed a summons, proof upon oath or affirmation must be given that "a reasonable sum was paid or tendered to the witness for his costs and expenses in that behalf."

[1] As to the backing of these warrants, see post, § 1318.
[2] See form in Sched. to Act, L. 3.
[3] See post, § 1318.
[4] See form in Sched. to Act, L. 4.
[5] 11 & 12 V. c. 43.
[6] Post, § 1319.
[7] 11 & 12 V. c. 43, § 7.

§ 1318. If a witness against whom any warrant shall be issued under either of these Acts shall not be found within the jurisdiction of the justice issuing the same, or "if he shall escape, go into, reside, or be, or be supposed or suspected to be, in any place beyond such jurisdiction, whether in England, Wales, Ireland, Scotland, or the Channel Islands," any justice or other officer, within whose jurisdiction the witness shall be, or be supposed to be, may, "upon proof alone being made on oath of the handwriting of the justice issuing such warrant," make an indorsement[1] on the same, authorising its execution within his jurisdiction; and the warrant so backed may then be executed as if it had originally issued in such last-mentioned place.[2]

§ 1318A. Where a court of summary jurisdiction would have power to issue a summons to a witness, provided he were within its jurisdiction, it may now, if the witness be in England, still issue the summons, though he be out of its jurisdiction; and any court of summary jurisdiction for the place in which the witness is believed to be, may, on proof on oath of the signature of the summons, indorse it; and the witness, on being served with the summons so indorsed, and being paid or tendered a reasonable sum for his expenses, must attend the court on pain of being apprehended.[3]

§ 1319. The principal summary convictions and orders—which (as just mentioned)[4] were originally *excepted* from the operation of the Act which in general regulates such summary convictions and orders—were[5] orders of removal; orders relating to lunatics; and bastardy orders and warrants. Justices may, however, now enforce by summons and warrant the attendance of witnesses on applications for orders of this description.[6]

[1] See form in Sched. K. to 11 & 12 V. c. 42.

[2] 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), §§ 11—16; extended to Scotland by 55 & 56 V. c. 56, § 475; 11 & 12 V. c. 43 ("The Summary Jurisdiction Act, 1848"), §§ 3, 7.

[3] 42 & 43 V. c. 49, § 36.

[4] Supra, § 1317.

[5] See § 35 of 11 & 12 V. c. 43, as amended by Sched. 2 of 42 & 43 V. c. 49 ("The Summary Jurisdiction Act, 1879").

[6] Under 7 & 8 V. c. 101 ("The Poor Law Amendment Act, 1844"), § 70, which enacts that, "in any proceedings to be had before justices in petty or special sessions, or out of sessions, under the provisions of that Act, or of any of the Acts required to be construed as one Act therewith" [that is, under "The Poor Law Amendment Act, 1844," itself, or

§ 1320. The present Lunacy Acts[1] also contain a clause enabling a "judicial authority" acting under the Acts to enforce the attendance of witnesses.

§ 1321. Various statutes enable the proper authority to inflict a fine upon a witness for non-attendance. Among these "The City of London Sewers Act, 1848,"[2] for instance, fixes the fine at 20*s*.[3]

§ 1322. Notwithstanding the general language of the Acts which empower justices to compel the attendance of witnesses by summons and warrant, they can, in general, only exercise this power within the limits of their own jurisdiction; and whenever the witness lives beyond such limits, recourse must either be had to the cumbrous system of backed warrants,[4] or of backed summonses,[5] or else to a subpœna from the Crown Office Department of the Central Office, except in the very few instances where (as in the Acts relating to the excise[6] and customs[7]) power is expressly given to the justices to issue process beyond their jurisdiction.

§ 1323. In Ireland every court, having by law jurisdiction over

under "The Lunacy Act, 1890" (53 V. c. 5); 5 & 6 V. c. 57 ("The Poor Law Amendment Act, 1842"); 4 & 5 W. 4, c. 76 ("The Poor Law Amendment Act, 1834"); 5 & 6 W. 4, c. 69 ("The Union and Parish Property Act, 1835"); 6 & 7 W. 4, c. 96; 1 & 2 V. c. 25, § 2; 7 W. 4 & 1 V. c. 50; or 2 & 3 V. c. 84 ("The Poor Rate Act, 1839")], "except so far as the provisions of any former Act shall have been expressly altered or amended by the provisions of any subsequent Act, if any party to such proceedings request that any person be summoned to appear as a witness in such proceedings, it shall be lawful for any justice to *summon* such person to appear and give evidence upon the matter of such proceedings; and if any person so summoned neglect or refuse to appear to give evidence at the time and place appointed in such summons, and if proof upon oath be given of personal service of the summons upon such person, and that the reasonable expenses of attendance were paid or tendered to such person, it shall be lawful for such justice, by *warrant* under his hand and seal, to require such person to be brought before him, or any justice before whom such proceedings are to be had; and if any person coming or brought before any such justices in any such proceedings refuse to give evidence thereon, it shall be lawful for such justices to commit such person to any house of correction within their jurisdiction, there to remain without bail or mainprize for any time not exceeding fourteen days, or until such person shall sooner submit himself to be examined; and, in case of such submission, the order of any such justice shall be a sufficient warrant for the discharge of such person."

[1] 53 V. c. 5 § 9; 54 & 55 V. c. 65, Sched. Like power is given to commissioners and visitors (Id. § 332).

[2] 11 & 12 V. c. clxiii. § 258.

[3] For another instance, see 16 & 17 V. c. 112, § 66 ("The Dublin Hackney Carriage Act").

[4] Ante, § 1318.

[5] Ante, § 1318A.

[6] 7 & 8 G. 4, c. 53 ("The Excise Management Act, 1827"), § 74.

[7] 39 & 40 V. c. 36 ("The Customs Consolidation Act, 1876"), § 227.

criminal offences, upon proof being made of the service, either personally, or at the residence of the person required to attend, of any summons to appear and give evidence in such court touching any offence, has power to impose upon the person so served, in case of his disobeying such summons, such fine as the court shall in its discretion think proper.[1]

§§ 1324—5. Various public bodies, such as boards and commissioners, inspectors, and public officers, are entrusted by statute with more or less stringent powers to enforce the attendance of witnesses before them. Only one or two of the most important of these need be here noticed.[2]

§ 1326. Commissioners, authorised to inquire into the existence of corrupt practices at elections for members of Parliament, may, by a summons under their hands and seals, or under the hand and seal of one of them, require the attendance of witnesses, and the production of such books, papers, deeds, and writings as they may deem necessary;[3] and if any such summons be disobeyed, the commissioners may certify the default to one of the superior courts, who will deal with the offender as if he had disobeyed an ordinary subpœna.[4]

§§ 1327—8. The attendance of persons to give evidence before Masters in Lunacy may, in the matter of any lunatic, be enforced by summons; and every person so summoned is bound to attend as required by the summons.[5]

§ 1329. The modes in which the attendance of witnesses may be enforced are very various.[6] It would be very useful if a general

[1] 1 & 2 W. 4, c. 44, § 8. See further as to the enforcing the attendance of witnesses in Ireland under "The Prevention of Crime (Ireland) Act, 1882" (45 & 46 V. c. 25), §§ 16, 17.

[2] See further as to commissioners empowered to try official persons who have been guilty of offences in India, 24 G. 3, c. 25 ("The East India Company's Act, 1784"), §§ 74, 75; 26 G. 3, c. 57 ("The East India Company's Act, 1786"), both amended by "The Statute Law Revision Act, 1888" (51 V. c. 3); as to examiners appointed to take depositions de bene esse, 24 G. 3, c. 25 ("The East India Company's Act, 1784"), § 81, and 42 G. 3, c. 85, § 3.

[3] 15 & 16 V. c. 57 ("The Election Commissioners Act, 1852"), § 8; 31 & 32 V. c. 125, §§ 15, 56, continued till 31st Dec. 1895, by 57 & 58 V. c. 48, Sched. 1.

[4] 15 & 16 V. c. 57 ("The Election Commissioners Act, 1852"), § 12.

[5] 53 V. c. 5, § 114.

[6] Several of the cases in which the attendance of witnesses can be enforced have been already enumerated in the note commencing at p. 851, which is note [7] to §§ 1293—1309. In addition to the instances there specified, the attendance of witnesses may also be enforced in the following cases: — *Charities.* — Commissioners and inspectors under the Charitable Trusts Acts of 1853 and 1855 (see and compare 16 & 17 V. c. 137, §§ 10—14, and 18 & 19 V. c.

Act were passed rendering the procedure clear, simple, and uniform.

124, §§ 6—9), and Assistant Charity Commissioners, who now, under "The Endowed Schools Act, 1874" (37 & 38 V. c. 87), § 1, exercise the powers originally conferred on the commissioners and assistant commissioners under "The Endowed Schools Act, 1869" (32 & 33 V. c. 56), § 49, and the commissioners under "The City of London Parochial Charities Act, 1883" (46 & 47 V. c. 36), § 2, possess powers for enforcing the attendance of particular witnesses. The *Customs Board*, under "The Customs Consolidation Act, 1876" (39 & 40 V. c. 36), §§ 36, 37, whenever it is necessary, and their officers, may institute an inquiry relating to any business under their management, and are, on such inquiry, empowered to summon any person required as a witness to appear before them and to give evidence on oath; and if such person, having his reasonable expenses tendered to him, refuses to attend, or otherwise misbehaves, he renders himself liable to a penalty of five pounds. *Endowed Schools.* See "*Charities.*" *Fisheries (Ireland).*—Special commissioners are, by "The Salmon Fishery (Ireland) Act, 1863" (26 & 27 V. c. 114), § 38, Ir., as amended by "The Fisheries (Ireland) Act, 1869" (32 & 33 V. c. 92, Ir.), intrusted with very peculiar powers; and for the purpose of enforcing the attendance of witnesses, and the production of deeds, books, papers, and documents, they have all such rights as the judges of the Queen's Bench in Ireland have for the like purpose. As to *Inclosure* the Board of Agriculture, or any officer of the board for the time being assigned for that purpose, may, by summons under the seal of the board, or under the hand of such officer, require the attendance of witnesses before themselves, or, if the summons be under seal, before the valuer; and every such witness in case of disobedience, or other misconduct in refusing to be sworn or to give evidence, is liable to a penalty not exceeding ten pounds, to be levied and recovered before two justices of the county in which the land to be inclosed is situate, and he will also be deemed guilty of misdemeanor; but he must be paid or tendered the reasonable charges of his attendance, and he need not travel above ten miles from the place of his abode. (8 & 9 V. c. 118 ("The Inclosure Act, 1845"), §§ 9, 39, 40, 159, 164; 52 & 53 V. c. 30 ("The Board of Agriculture Act, 1889"), §§ 2, 11; see, also, 41 G. 3, c. 109 ("The Inclosure (Consolidation) Act, 1801"), §§ 33, 34). *The Local Government Board for England*, in whom all the powers of the late English Poor Law Board are now vested (34 & 35 V. c. 70 ("The Local Government Board Act, 1871"), § 2), and *the Local Government Board for Ireland*, who now represent the late Irish Poor Law Commissioners (35 & 36 V. c. 69 ("The Local Government Board (Ireland) Act, 1872"), § 5, Ir.), and the inspectors respectively appointed by these bodies, may summon any person for the purpose of being examined upon any matter under their control, or of producing or verifying any document relating to such matter; and in the event of such person disobeying such summons, or refusing to give evidence, or wilfully altering, suppressing, concealing, destroying, or refusing to produce any such document, he shall be deemed guilty of misdemeanor; but no person shall be required to travel more than ten miles in England or twenty miles in Ireland from his place of abode; and if he be summoned by an English inspector he shall be allowed his expenses. (See 10 & 11 V. c. 109 ("The Poor Law Board Act, 1847"), §§ 11, 21, 26; 29 & 30 V. c. 66 ("The New Forest Poor Act"), § 7; 10 & 11 V. c. 90 ("The Poor Relief (Ireland) Act, 1847"), §§ 19, 20, Ir.; 14 & 15 V. c. 68 ("The Poor Relief (Ireland) Act, 1851"), §§ 16, 17, Ir.) The *Prisons (Ireland) Board* (otherwise the General Prisons Board for Ireland) possesses similar powers to those of the Local Government Board for Ireland. (See 40 & 41 V. c. 49 ("The General Prisons (Ireland) Act, 1877"), § 11, Ir.) "*The Preliminaries Inquiries Act*, 1851" (14 &

§ 1330. Witnesses are absolutely protected from any action for defamation with respect to such statements as they may make in the course of a judicial proceeding, and cannot be sued for them even if it be alleged that they are malicious.[1]

§ 1330A. Moreover witnesses, in common with parties, barristers, solicitors, and, in short, all persons who have that relation to a suit which calls for their attendance,[2] are[3] *protected from arrest* upon any civil process, while going to the place of trial, while attending there for the purposes of the cause, and while returning home;[4] *eundo, morando, et redeundo*.[5] Arrest in civil process,

15 V. c. 49), §§ 4, 5, empowers the inspectors appointed by the Lords Commissioners of the Admiralty to summon any person whose evidence in their judgment shall be material; and if such person wilfully neglects or refuses to attend in pursuance of such summons, or to produce such documents as they may under the Act be required to produce, they become liable to a penalty not exceeding five pounds. *Railway Commissioners and Assistant Commissioners*, acting under "The Regulation of Railways Act, 1873" (36 & 37 V. c. 48), §§ 21, 25, and the inspectors and courts holding investigations under "The Regulation of Railways Act, 1871" (34 & 35 V. c. 78), §§ 4, 7, 11, 15, have also powers for enforcing the attendance of witnesses. *Sewers Commissioners* may, when landowners refuse to treat with them, issue their warrants to the sheriff to empanel a compensation jury to attend the sessions; and thereupon the clerk of the peace, or his deputy, shall summon all such persons as shall be thought necessary to be examined as witnesses, who, if they do not appear, or if they refuse to be sworn or to be examined, without lawful excuse to be allowed by the sessions, shall forfeit a sum not exceeding five pounds for every such offence by 3 & 4 W. 4, c. 22 ("The Sewers Act, 1833"), §§ 26, 27. § 29 provides by whom the costs of the witnesses are to be paid. (See 4 & 5 V. c. 45 ("The Sewers Act, 1841"), §§ 13, 14.) As to *Ships*, every Board of Trade inspector appointed under the Merchant Shipping Act, 1894, may, by summons under his hand, require the attendance of witnesses before him; and every person who refuses to obey such summons, after having his expenses tendered to him, becomes liable to a fine not exceeding ten pounds (57 & 58 V. c. 60, §§ 464, 465, 729). See, also, ante, §§ 1305 et seq. For the law in the county courts, see 17 & 18 V. c. 125, §§ 53, 54, 60, extended to the county courts by Order in Council of 18th November, 1867, set out Pitt-Lewis' C. C. Practice, p. 23, and see, also, W. N. 1867, p. 631.

[1] Seaman *v.* Netherclift, 1876, C. A.; Revis *v.* Smith, 1856; Henderson *v.* Broomhead, 1859; Kennedy *v.* Hilliard, 1859 (Ir.); Gildea *v.* Brien, 1821 (Ir.); Dawkins *v.* Ld. Rokeby, 1875, H. L.; Goffin *v.* Donelly, 1881. As to what tribunals confer the privilege, see post, § 1334.

[2] The privilege does not apply to a solicitor's clerk attending at judge's chambers: Phillips *v.* Pound, 1852.

[3] Gr. Ev. § 316, slightly, as to six lines.

[4] See Cons. Ord. Ch. 1860, Ord. LII. r. 1, which, however, is repealed by R. S. C. 1883. No rule has been substituted for it.

[5] Meekins *v.* Smith, 1791; Walpole *v.* Alexander, 1782. In Ex parte Britten, 1840, the husband of a petitioner, who accompanied his wife to the Court of Review to attend the hearing of the petition, was held privileged from arrest; since, being liable to costs of the application, he had a relation to the suit justifying his attendance.

either on mesne process to hold to bail, or by way of execution after judgment (formerly effected by the old writ of *ca. sa.*) has been abolished, and this makes the subject of far less importance than it formerly was. Still, as under some circumstances a power of arrest in the course of civil process still exists, the law by which it is governed cannot properly be omitted.

§ 1330n. To afford a witness the privilege of the immunity from arrest which has been described, the service upon him of a subpœna or other process is not necessary, provided the witness has consented to come without such service,[1] and, in good faith, actually attends.[2] The privilege even extends to a witness coming from abroad without a subpœna.[3] In determining what constitutes a reasonable time for going, staying, and returning, the courts are disposed to be liberal; and provided it substantially appears that there has been no improper loitering or deviation from the way, they will not strictly inquire whether the witness or other privileged party went as quickly as possible and by the nearest route.[4]

§ 1331. Accordingly, the rule of protection has been held to apply where a witness, two hours after he left the court, was arrested about a mile off in the direct road to his house;[5] where a defendant, having attended his cause in the morning, went in the afternoon to a tavern near the court to dine with his attorney and witnesses;[6] where a party who had been staying for some days at a coffee-house near the court, waiting for the trial of a cause, which was a remanet, was arrested on a day on which such cause was not in the list for the day;[7] where a party attending an arbitration was arrested during an adjournment of the reference from one period to another of the same day;[8] where a witness, in a cause tried on a Friday

[1] Arding *v.* Flower, 1800 (Ld. Kenyon); Ex parte Byne, 1813; Rishton *v.* Nisbett, 1834 (Alderson and Taunton, JJ.); Magnay *v.* Burt, 1843 (Tindal, C.J.), contra, however. See, also, Salk. 544.

[2] Meekins *v.* Smith, 1791; Walpole *v.* Alexander, 1782 (Ld. Mansfield).

[3] Walpole *v.* Alexander, 1782; Norris *v.* Beach, 1807 (Am.).

[4] Strong *v.* Dickenson, 1836 (Ld. Abinger); Rickets *v.* Gurney, 1819 (Graham, B.); Willingham *v.* Matthews, 1815; In re M'Kone, 1841 (Ir.); Smythe *v.* Banks, 1797 (Am.).

[5] Selby *v.* Hills, 1832. See Ex parte Clarke, 1832.

[6] Lightfoot *v.* Cameron, 1776.

[7] Childerston *v.* Barrett, 1809; Hurst's case, 1804 (Am.).

[8] Ex parte Temple, 1814; Ex parte Russell, 1812.

afternoon, was arrested in the assize town on Saturday evening, when entering a conveyance to take her home;[1] where a plaintiff, on leaving court, called at his office for refreshment, and then on his way home went to his tailor's, in whose shop he was arrested;[2] and even where a witness from abroad, on finding that the trial was postponed till the next sittings, determined to wait till it came on, and was arrested on the eighth day after his arrival.[3]

§ 1332. On the other hand, the courts have refused to discharge the party out of custody in the cases following, viz., where a witness, subpœnaed out of Chancery, was arrested three days before the time fixed for his examination, while going to his solicitor's office to look at the interrogatories which he would be called upon to answer;[4] where a party having come from the country to town to attend an arbitration, remained, after an adjournment of the reference sine die, till the expiration of the fourth day of an approaching term, in the expectation of a motion being made by the opposite party relative to the order of reference;[5] and where a solicitor, having been arrested during the afternoon at the Auction Mart Coffee House, swore that, having professional business in several causes at Westminster, he had gone into the City on his way to the courts, though he had omitted to state either where his house was, or when he left home.[6] So, though it seems that a witness who comes to town to be examined, is protected from arrest during the whole time that he bonâ fide remains there for the purpose of giving evidence,[7] a witness living in London is not protected in the interval between the service of the subpœna and the day appointed for his examination.[8] Neither can the privilege from arrest be prolonged, in consequence of the party's inability to return home for want of pecuniary means,[9] though possibly, if the detention has been

[1] Holiday *v.* Pitt, 1814. "There she was directly on her way home. The Court did not decide that she might not have been arrested at the assize town on Saturday morning": Alderson, B., in Strong *v.* Dickenson, 1836.

[2] Pitt *v.* Coomes, 1834; Luntly *v.* ———, 1833; Ahearne *v.* M'Guire, 1840 (Ir.); Mahon *v.* Mahon, 1840 (Ir.).

[3] Walpole *v.* Alexander, 1782. See, also, Persse *v.* Persse, 1856, H. L.

[4] Gibbs *v.* Phillipson, 1829.

[5] Spencer *v.* Newton, 1837.

[6] Strong *v.* Dickenson, 1836. See Walsh *v.* Wilson, 1851 (Ir.).

[7] Gibbs *v.* Phillipson, 1829.

[8] Id.

[9] Spencer *v.* Newton, 1837.

caused by illness, the court will consider this circumstance in fixing the extent of the protection.[1] In one case, where a party in London, being summoned to attend a reference at Exeter, went, three days before the time of meeting, with his attorney to Clifton, where his wife lived, to examine documents necessary to be produced before the arbitrator, and was arrested on the second day, before he had completed the arrangement of his papers, the King's Bench held that he was not, but the Exchequer that he was, privileged from arrest.[2]

§ 1333. This protection, however, extends only to arrest on *civil process*, for against criminal process home itself is no protection.[3] For this purpose an attachment against a solicitor, for contempt by disobeying an order of the court, is not regarded as "civil process," though an attachment on an ordinary suitor for non-payment of money will be so considered.[4] Whether a warrant of commitment issued out of a County Court would for such purpose be regarded as criminal process, has, after discussion, been left undecided.[5] In Ireland, where a witness, attending at Quarter Sessions, was arrested under a writ of commission of rebellion, the court out of which the process issued, while declining to express a opinion as to whether this writ was in the nature of a criminal proceeding, discharged the witness from custody, observing that it was highly essential to the interests of the public, that witnesses in criminal courts of justice should be protected and encouraged.[6] A witness is not privileged from being taken by his bail, even during attendance at court, for this is not an arrest, but a retaking.[7]

§ 1334.[8] This privilege of witnesses will be recognised in all cases where the attendance is given in any matter pending before a

[1] Spencer *v.* Newton, 1837.

[2] Randall *v.* Gurney, 1819 (Abbott, C.J., diss.); Ricketts *v.* Gurney, 1819 (Graham and Wood, BB.; Garrow, B., diss.).

[3] Ld. Denman, In re Douglas, 1842, where a warrant issued upon an information ex officio, under the Act of 33 G. 3, c. 52, § 62, and expressed to be to answer for certain misdemeanors whereof the party was impeached, and also for certain penalties sued for by the Att.-Gen., was held to be criminal process, under which the party might be taken redeundo after discharge from illegal custody.

[4] In re Freston, 1883, C. A.; and cases there cited; Harvey *v.* Harvey, 1884.

[5] Kimpton *v.* Lond. & N. West. Rail. Co., 1854.

[6] Graves *v.* M'Carthy, 1838.

[7] Ex parte Lyne, 1822 (Abbott, C.J.); Horne *v.* Swinford, 1822 (Richards, C.B.).

[8] Gr. Ev. § 317, in part.

lawful tribunal having jurisdiction of the cause.[1] Accordingly it extends to parties and witnesses attending before an arbitrator, whether he be appointed by an order of the High Court, or of a judge, or by an agreement of reference containing a clause that it may be made a rule of court, since in all these cases the attendance of witnesses may be enforced;[2] it applies to a party attending at judge's chambers,[3] or before a Master or an examiner of the High Court,[4] or at the Registrar's office on passing the minutes of a decree,[5] or before the under-sheriff on the execution of a writ of inquiry;[6] as also to witnesses attending the Central Criminal Court,[7] the Court of Bankruptcy,[8] a Coroner's Court,[9] Courts-Martial, whether military,[10] marine,[11] or naval,[12] the Houses of Parliament, or committees of either House.[13] It will also protect a prosecutor attending Quarter Sessions[14] or Assizes,[15] even after the bill in which he is interested has been ignored, provided this fact has not been publicly announced.[16] But a meeting of the London County Council for granting music and dancing licenses would not confer the privilege, as such Council is not a judicial tribunal.[17]

§ 1335. The privilege extends to a witness who attends before a *magistrate* or other inferior judicial officer by virtue of a summons or a writ of subpœna, eundo, morando, et redeundo;[18] and also to a person attending before a police magistrate as a witness on a charge of felony after a remand, though he was not under recognizance or summons to appear;[19] but not to a common informer,

[1] Ex parte Cobbett, 1857 (Crompton, J.).
[2] Moore *v.* Booth, 1797; List's case, 1814; Ex parte Temple, 1814; Randall *v.* Gurney, 1819; Webb *v.* Taylor, 1843 (Patteson, J.); Rishton *v.* Nisbett, 1834; Spence *v.* Stewart, 1802; Sanford *v.* Chase, 1824 (Am.).
[3] Moore *v.* Booth, 1797; In re Jewitt, 1864.
[4] Id.; Wheeler *v.* Cox, 1841 (Ir.); Brown *v.* M'Dermott, 1840 (Ir.).
[5] Newton *v.* Askew, 1848.
[6] Walters *v.* Rees, 1819.
[7] Newton *v.* Constable, 1841 (Coleridge, J.).
[8] Arding *v.* Flower, 1800; Ex parte King, 1802; Ex parte Clarke, 1832; Ex parte Burt, 1842; Willingham *v.* Matthews, 1815; Andrews *v.* Martin, 1862.
[9] Thomas *v.* Churton, 1862.
[10] 44 & 45 V. c. 58, § 125, subs. 2.
[11] Id., § 179.
[12] 29 & 30 V. c. 109, § 66.
[13] Goffin *v.* Donelly, 1881; May, L. of Parl. 149—151, and the journals there cited.
[14] See R. *v.* Skinner, 1772; Munster *v.* Lamb, 1883.
[15] Graves *v.* M'Carthy, 1838 (Ir.).
[16] In re M'Kone, 1841 (Ir.).
[17] Royal Aquarium *v.* Parkinson 1892, C. A.
[18] See Webb *v.* Taylor, 1843 (Patteson, J.); Mountague *v.* Harrison, 1857; Ex parte Edme, 1822 (Am.).
[19] Mountague *v.* Harrison, 1857.

nor to a person who voluntarily goes before a justice to obtain a summons against another party for penalties, even though the summons be obtained;[1] nor to a barrister who attends at Petty Sessions for the purpose of obtaining practice;[2] and some doubt has been expressed whether the privilege can be extended further than to protect the bar while attending the Superior Courts, and perhaps counsel before inferior tribunals actually engaged in professional business.[3]

§ 1336. A party discharged from illegal civil process is privileged from arrest during his return home.[4] But *discharge from criminal process*, even in consequence of an acquittal, confers no such protection, unless it should appear that the apprehension on the criminal charge was a mere contrivance to get the party into custody in the civil suit.[5] In Ireland, it has been held that a person who attends *under a recognizance* to answer a criminal charge, and is acquitted and discharged, is privileged from arrest while returning home.[6] The validity of this distinction between persons surrendering to bail and those in custody may well be questioned, since an accused, who surrenders to take his trial, is, during that trial, as much in legal custody as a prisoner who is brought up by the gaoler.

§ 1337. If a person entitled to privilege be *unlawfully arrested*, *application* for his *discharge* can be made, either to the court where the cause is depending, in respect of which the privilege is claimed, or to the court out of which the process issued, upon which the arrest takes place.[7] Though the one court should refuse to interfere, the person arrested may seek relief from the other.[8]

[1] Ex parte Cobbett, 1857.

[2] Newton *v.* Constable, 1841.

[3] See observations of Denman, C.J., in giving judgment of court in Newton *v.* Constable, 1841, which were made notwithstanding Luntly *v.* ———, 1833; noticed 2 Q. B. 165; and 6 & 7 W. 4, c. 14, § 2, empowering persons liable to summary conviction to make their defence before justices by counsel or solicitors.

[4] In re Douglas, 1842 (Ld. Denman); R. *v.* Blake, 1832.

[5] Goodwin *v.* Lordon, 1835; Hare *v.* Hyde, 1851; Anon., 1832; Buckmasters *v.* Cox, 1839 (Ir.); Jacobs *v.* Jacobs, 1834; In re Douglas, 1842.

[6] Callans *v.* Sherry, 1832 (Ir.); Kelly *v.* Barnewall, 1834 (Ir.); Williams *v.* Steele, 1835 (Ir.); Babington *v.* Mahony, 1837 (Ir.).

[7] Att.-Gen. *v.* Skinners' Co., 1837, C. P.; Kimpton *v.* Lond. & N. West. Rail. Co., 1854; Randall *v.* Gurney, 1819; Ex parte Clarke, 1832, Ex parte Burt, 1842; Walker *v.* Webb, 1797; Selby *v.* Hills, 1832; Bours *v.* Tuckerman, 1811 (Am.).

[8] Randall *v.* Gurney, 1819 (Bailey, J.).

Moreover, without applying to either of these courts, the arrested party may obtain his discharge by causing himself to be brought by habeas corpus before any one of the superior judges at chambers.[1] This last appears, indeed, to be the proper course to pursue, whenever the witness has been actually lodged in gaol, and made to appear to give evidence in court by a writ of habeas corpus ad testificandum.[2]

§ 1338. The Houses of Parliament will, of their own authority, respectively discharge all persons duly arrested, while attending before such Houses, or before committees of either House.[3] Witnesses summoned to give evidence before military, marine, or naval courts-martial, must, however, in the event of their arrest, apply by affidavit for their discharge either to the court out of which the process issued, or if such court be not sitting, to some judge of the Queen's Bench Division in England or Ireland, or to the Court of Session in Scotland, or to the courts of law in the East or West Indies, or elsewhere, as the case shall require.[4]

§ 1339. It is not yet clearly determined, *within what time* the motion for discharge must be made, or how far the witness arrested may *waive* his protection. In America the protection is regarded as a personal privilege, and the party arrested may waive it; so that, if he willingly submits to be taken into custody, he cannot afterwards object to the imprisonment as unlawful.[5] In Ireland the privilege is considered as bestowed for the good of the public; but the application for discharge must be made without delay.[6] In this country the courts hold (as in Ireland) that the privilege is not the privilege of the *person* attending the court, but

[1] Ex parte Tillotson, 1816 (Ld. Ellenborough); Towers *v.* Newton, 1841 (Rolfe, B., after consulting Parke, B.). See Newton *v.* Constable, 1841.

[2] For the judge at Nisi Prius has no means of ascertaining whether proper grounds of detention exist, and therefore will not interfere: Astbury *v.* Bolbin, 1850 (Ld. Campbell). And inferior tribunals,—such as the quarter sessions (Clerk *v.* Molineux, 1664), arbitrators (Walters *v.* Rees, 1819), or the Sheriffs' Courts (Id.; Wilson *v.* Sheriffs of London, 1620),—have no power to discharge arrested persons, unless they be arrested in the very face of the court: Wilson *v.* Sheriffs of London, 1620.

[3] May, L. of Parl. 149—151; but the party arrested may apply, if he think fit, to the court out of which the process issued: Att.-Gen. *v.* Skinners' Co., 1837.

[4] See 44 & 45 V. c. 58 ("The Army Act, 1881"), § 125; 29 & 30 V. c. 109 ("The Naval Discipline Act, 1866"), § 66.

[5] Brown *v.* Getchell, 1814 (Am.); Geyer *v.* Irwin, 1790 (Am.).

[6] In re ———, 1841 (Ir.).

of the *court* which he attends, it being established for the benefit of the suitors and the advancement of justice;[1] and they, consequently, appear to consider that a prisoner cannot, by laches, preclude himself from taking advantage of the illegality of his arrest; and that it is immaterial what interval may have been allowed to elapse between the arrest and the application for discharge, unless, perhaps, in a case where the interests of another party have been prejudiced by the delay.[2] The allowance, however, or the disallowance of the privilege, is always discretionary; it is sometimes, therefore, clogged with conditions;[3] and it has been disallowed in collusive, as well as vexatious, actions.[4]

§ 1340. No *action* is maintainable against an officer for arresting a person while privileged as a witness; and this, too, though it be alleged and proved that the arrest was made maliciously, and with ample knowledge of the circumstances.[5] Nor will an action lie against the plaintiff or against his solicitor, by whom the officer was entrusted with the execution of the writ;[6] at any rate if the execution of the process they have enforced took place without full knowledge on their parts of the privilege of the witness.[7] Whether the fact of knowledge and the proof of actual malice will make any difference is, indeed, doubtful. It has been held at Nisi Prius, that under these circumstances an action is maintainable,[8] but this ruling is scarcely reconcilable with the doctrines laid down by the Exchequer Chamber in a later case.[9] But if a witness, who has been improperly arrested, obtains an order from the court for his discharge, and an officer disobeys this order, an action may, as it seems, be brought against such officer; for the further detention of the witness, without the authority of any writ

[1] Anon., 1832 (Parke, J.); Magnay *v.* Burt, 1843 (Tindal, C.J.); Cameron *v.* Lightfoot, 1777-8 (De Grey, C.J.).

[2] Webb *v.* Taylor, 1843 (Patteson, J.), where 23 days had elapsed; Andrews *v.* Martin, 1862 (Willes, J.), where the application was delayed for six months. See Greenshield *v.* Pritchard, 1841, where, after the lapse of a year, the court refused to interfere, though the arrest had been made under void process.

[3] Andrews *v.* Martin, 1862.

[4] Magnay *v.* Burt, 1843; Cameron *v.* Lightfoot, 1777-8; Anon., 1670.

[5] Magnay *v.* Burt, 1843; Cameron *v.* Lightfoot, 1777-8; Tarlton *v.* Fisher, 1781.

[6] Yearsley *v.* Heane, 1845; Ewart *v.* Jones, 1845.

[7] Stokes *v.* White, 1834.

[8] Whalley *v.* Pepper, 1836 (Littledale, J.). See Ewart *v.* Jones, 1845 (Pollock, C.B.); sed qu.

[9] Magnay *v.* Burt, 1843. See, also, Vandevelde *v.* Lluellin, 1661.

to justify it, becomes a new trespass and false imprisonment, in the same manner as if there had been a new caption.[1]

§ 1341. Although the witness arrested has no remedy by action, the party arresting him maliciously, and with a knowledge of the existence of his privilege, may have an *attachment* issued against him for contempt of court.[2]

§ 1341A. The preventing, or using any means to prevent, a witness duly summoned from attending court, is punishable as a contempt.[3] So also is the use of threatening language to any person cognizant of facts in issue in a suit, with the view of preventing him from giving testimony at the hearing.[4] Again, any public and calumnious attack on persons who are expected to be witnesses in a pending trial, is a contempt of the highest order as tending to pollute the source of justice;[5] and any endeavour to intimidate a witness from giving evidence in a prosecution, is indictable as a misdemeanor.[6]

§ 1341B. It will also perhaps be deemed a contempt, to serve a writ of summons upon a witness in the immediate or constructive presence of the court;[7] though a writ so served cannot be set aside for irregularity.[8]

[1] Magnay *v.* Burt, 1843, as reported 5 Q. B. 395 (Tindal, C.J.).
[2] Cameron *v.* Lightfoot, 1777-8; Vandevelde *v.* Lluellin, 1661; Magnay *v.* Burt, 1843 (Tindal, C.J.).
[3] Com. *v.* Feely, 1789—1826 (Am.).
[4] Shaw *v.* Shaw, 1862.
[5] R. *v.* Onslow and Whalley, 1873.
[6] R. *v.* Loughrun, 1839 (Ir.) (Burton, J.). See, also, 27 G. 3, c. 15, § 8, Ir.
[7] Cole *v.* Hawkins, 1738; commented on in Poole *v.* Gould, 1856. See, also, Blight *v.* Fisher, 1809 (Am.); Miles *v.* M'Cullough, 1803 (Am.).
[8] Poole *v.* Gould, 1856.

CHAPTER II.

THE COMPETENCY OF WITNESSES.

§§ 1342—3. The rule as to the Incompetency of witnesses which existed by the common law of England regarded all persons who stood convicted of serious crime as not to be trusted to speak the truth, and also held all persons who were interested in the result of a civil or criminal trial, either as parties or as the husbands or wives of parties, to be incompetent to give evidence on such trial,[1] presuming that such persons were more likely to commit perjury than to tell the truth to their own disadvantage. In civil cases this common law rule of Incompetency has been, as we shall see, long ago removed by statute. The great majority of lawyers long ago came to the conclusion that it ought also to be removed in criminal cases, even if its removal should result in the conviction of some guilty persons who otherwise might escape being convicted because their own mouths were closed,—since the ascertainment of truth ought to be the great object aimed at in all courts of justice. The dread felt by some political organizations lest the examination of prisoners upon oath should lead to inconvenient revelations both as to their objects and as to the means by which they sometimes seek to attain them, was also the origin of some opposition to any alteration in the criminal law as to the competency of prisoners and their husbands and wives to give evidence.

§§ 1344—6. Jeremy Bentham, in the reign of George IV., urged[2] that if the discovery of truth were the ends of the rules of evidence, the incompetency of witnesses ought to be removed. In 1833 effect was so far given to his views that it was in that year cautiously enacted[3] that no witness should be incompetent to

[1] The arguments for and against the exclusion of witnesses are very fairly stated in 1 Ph. Ev. 42—44. Those in support of admitting the evidence of such witnesses (which the author strongly favoured) were set forth in former editions of this work.

[2] See 1 Benth. Ev. 6.

[3] 3 & 4 W. 4, c. 42 ("The Law Amendment Act, 1833"), extended

testify in any action, because the judgment therein might subsequently be evidence for or against himself; that if he were examined the judgment should not be so used; and that his name should always be endorsed on the record as having given evidence.

§ 1347. Ten years later—viz., in 1843—Lord Denman carried an Act[1] which, after stating in the preamble that "the inquiry

to Ireland by 3 & 4 V. c. 105 ("The Debtors (Ireland) Act, 1840"), §§ 51, 52, Ir., repealed by 16 & 17 V. c. 113, § 3, and Sched. A., and by 38 & 39 V. c. 66. The above provisions of the principal Act were themselves repealed by 37 & 38 V. c. 35.

[1] 6 & 7 V. c. 85. Progressive changes in the law of Scotland as to the competency of witnesses were made as follows:—In 1840, 3 & 4 V. c. 59 ("The Evidence (Scotland) Act, 1840"), enacted in § 1, that "it shall, by the law of *Scotland*, be no objection to the admissibility of any witness, that he or she is the father or mother, or son or daughter, or brother or sister, by consanguinity or affinity, or uncle or aunt, or nephew or niece, by consanguinity, of any party adducing such witness in any action, cause, prosecution, or other judicial proceeding, civil or criminal; nor shall it be competent to any witness to decline to be examined and give evidence on the ground of any such relationship." In 1852, 15 & 16 V. c. 27, ("The Evidence (Scotland) Act, 1852," as now amended by 16 & 17 V. c. 20), enacted:—§ 1. "No person adduced as a witness in Scotland before any court, or before any person having by law or by consent of parties authority to take evidence, shall be excluded from giving evidence by reason of having been convicted of or having suffered punishment for crime, or by reason of interest, or by reason of agency, or of partial counsel, or by reason of having appeared without citation, or by reason of having been precognosced subsequently to the date of citation; but every person so adduced, who is not otherwise by law disqualified from giving evidence, shall be admissible as a witness, and shall be admitted to give evidence as aforesaid, notwithstanding of any objections offered on the above-mentioned grounds: Provided always, that nothing herein contained shall affect the right of any party in the action or proceeding in which such witness shall be adduced to examine him on any point tending to affect his credibility." [Here followed a proviso making law agents in the suit incompetent witnesses.] In 1853, 16 & 17 V. c. 20, ("The Evidence (Scotland) Act, 1853"), as amended by 37 & 38 V. c. 64, repealed so much of § 1 of "The Evidence (Scotland) Act, 1852," as rendered agents incompetent witnesses, and the whole of § 2, and further enacted:—§ 3. "It shall be competent to adduce and examine as a witness in any action or proceeding in Scotland any party to such action or proceeding, or the husband and wife of any party, whether he or she shall be individually named in the record or proceeding or not; but nothing herein contained shall render any person, or the husband or wife of 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, his wife or her husband, excepting in so far as the same may be at present competent by the law and practice of Scotland; or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any proceeding render any husband competent or compellable to give against his wife evidence of any matter communicated by her to him during the marriage, or any wife competent or compellable to give against her husband evidence of any

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;" enacts (as now amended), 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,[1] 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*

matter communicated by him to her during the marriage." § 4. [Is now repealed.] § 5. "The adducing of any party as a witness in any cause or proceeding by the adverse party shall not have the effect of a reference to the oath of the party so adduced: Provided always, that it shall not be competent to any party, who has called and examined the opposite party as a witness, thereafter to refer the cause or any part of it to his oath, and that in all other respects the right of reference to oath shall remain as at present established by the law and practice of Scotland." (As to when such reference may be had, see Longworth or Yelverton *v.* Yelverton, 1867, H. L.) § 6. "Nothing herein contained shall alter or affect the authority or practice of the courts in Scotland as to judicial examination." In 1874, a further change took place in the law. § 4 of the last-named Act was repealed by 37 & 38 V. c. 64, § 1, and it was enacted by § 2 that "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 already have given evidence in the same proceeding in disproof of his or her alleged adultery."

[1] *Sic* in the printed statute. Qu. "*inquiry*."

any crime[1] *or offence.*" [1] [A proviso here followed in the original Act, which, as to parties themselves, is repealed by 14 & 15 V. c. 99, § 1, set out infra, § 1349; and as to their husbands and wives by 16 & 17 V. c. 83, § 4; see post, § 1352, and also by 37 & 38 V. c. 96.] "Provided also that this Act shall not repeal any provision" [in the Wills Act, 1837]: [2] "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 in 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."

§ 1348. In 1846, the Legislature,—while establishing County Courts,—enacted, that "on the hearing or trial of any action, or on any other proceeding under this Act, the parties thereto, their wives and all other persons, may be examined either on behalf of the plaintiff or defendant, upon oath or solemn affirmation." [3]

§ 1349. After five years' experience of the working in the County Courts of the change by which the parties to an action in it were allowed to give evidence, Lord Brougham induced Parliament to pass the Evidence Act, 1851,[4] the three first sections of which are as follow:—

[1] Lush, J., is reported to have ruled, that, notwithstanding these words, a person under sentence of death is incapable of being a witness: R. *v.* Webb, 1867. Sed qu. In R. *v.* Fitzgerald, 1884, the evidence of a convict was admitted, and R. *v.* Webb not followed (Harrison, J.).

[2] Independently of this Act, witnesses are competent, though not compellable, to testify to their own turpitude; as, for instance, to admit that their former oaths were corruptly false: R. *v.* Teal, 1809; Rands *v.* Thomas, 1816; or to prove that notes, to which they have given credit and currency by their signatures, have been fraudulently concocted by them: Jordaine *v.* Lashbrooke, 1798; overruling Walton *v.* Shelley, 1786. In fact, the maxim of the civil law, "nemo allegans suam turpitudinem est audiendus," is not recognised in English courts of justice; and the decisions of Jefferies, C.J., and Legge, B., who are both reported to have rejected witnesses, when called to prove that they had perjured themselves on some former occasion, are no longer of any authority. See Titus Oates' case, 1685; and Eliz. Canning's case, 1754.

[3] § 83 of 9 & 10 V. c. 95, now repealed. See "The County Courts Act, 1888" (51 & 52 V. c. 43). See, also, 6 & 7 W. 4. c. 75, § 36, and 14 & 15 V. c. 57 ("The Civil Bill Courts (Ireland) Act, 1851"), § 102, which enabled parties to appeal to the oaths of their opponents in the Irish Civil Bill Courts.

[4] 14 & 15 V. c. 99. The author of this work was the draftsman of

"I. So much of § 1 of the Act of 6 & 7 V. c. 85, as provides that the said 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,' is hereby repealed."

"II. 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 persons 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."

"III. But 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,[1] or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or

this Act, and in former editions of this work a characteristic letter of acknowledgment and thanks to him from Lord Brougham was set out at length.

[1] So much of this proviso as says that no witness need criminate himself was introduced into the Act by the House of Lords at the pressing instance of Lord Truro. As Lord Campbell pointed out at the time, it is merely calculated to raise doubts where none should exist. By the general law of the land, *every witness* is protected from answering questions, where the answer would tend either to criminate himself or to expose him to any penalty, forfeiture, or ecclesiastical censure; and as the Act simply makes parties witnesses, it is obvious that, without any special enactment, they might have claimed the same protection as all other persons under examination. But how stands the matter now? the Act states that they cannot be forced to criminate themselves. Good; but can they be compelled to disclose what will render them liable to penalties, forfeitures, or spiritual reprimands? Is the maxim, "*expressum facit cessare tacitum*," to apply, or can the party give the go-by to the statute, and rest on the common law?

any wife competent or compellable to give evidence for or against her husband."

§ 1350. In 1853 the Common Law Commissioners in their second Report[1] expressed an opinion most favourable to the merits of this measure, observing, that "according to the concurrent testimony of the bench, the profession, and the public, the new law is found to work admirably, and to contribute in an eminent degree to the administration of justice;" and these sentiments have been confirmed by a Parliamentary avowal,[2] in which it is declared that "the discovery of truth in courts of justice has been *signally* promoted by the removal of restrictions on the admissibility of witnesses."[2]

§§ 1351—2. The Act already referred to (viz., the Evidence Act, 1851), however, although it rendered husbands and wives admissible witnesses for or against each other, when both were *jointly parties* as plaintiffs or defendants,[3] did not further interfere with the common law rule, which—except in the County Courts,[4] the Barmote Courts of Derbyshire,[5] and the Court of Bankruptcy[6]—precluded either the husband or the wife from giving testimony in a cause in which *the other* was a party.[7] The Evidence Amendment Act, 1853,[8] was accordingly passed, the first four sections of which are as follow:—

"I. 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 husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed, 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."

"II. Nothing herein shall render any husband competent or

[1] P. 11.
[2] Preamble to 32 & 33 V. c. 68 ("The Evidence Further Amendment Act, 1869").
[3] Stokehill and Wife *v.* Pettingell, 1852.
[4] 9 & 10 V. c. 95, § 83, cited ante, § 1348.
[5] 14 & 15 V. c. 94, § 18.
[6] See the repealed Act (12 & 13 V. c. 106, § 118).
[7] Stapleton *v.* Crofts, 1852; Barbat *v.* Allen, 1852.
[8] 16 & 17 V. c. 83.

compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding."[1]

"III. No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

"IV. So much of" § 1, of 6 & 7 V. c. 85, "as provides that the said Act shall not render competent the husband or wife of any party to any suit, action, or proceeding, individually named in the record, or of any lessor of the plaintiff, or of the tenant of premises sought to be recovered in ejectment, or of the landlord or other person in whose right any defendant in replevin may make cognizance, or of any lessor in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, is hereby repealed."

§ 1353. Both the Evidence Act, 1851, and the Evidence Amendment Act, 1853, however, still left the parties to actions for breach of promise to marry incompetent to give evidence, and parties to suits for divorce were in the same position.[2]

§ 1354. In the year 1857, when the law of divorce was amended, doubts were caused, by the obscure language of the amending statute,[3] as to how far the old doctrines of the common law in relation to the competency of witnesses were to be recognised in the Divorce Court then established.

[1] Some words which here originally followed were repealed by 32 & 33 V. c. 68, § 1. See post, § 1355.

[2] See, on this subject, the powerful observations of Lord Denman (then Mr. Denman), in Queen Caroline's trial:—"We have been told," said he, "that Bergami might be produced as a witness in our exculpation, but we know this to be a fiction of lawyers, which common sense and natural feeling would reject. The very call is one of the unparalleled circumstances of this extraordinary case. From the beginning of the world no instance is to be found of a man accused of adultery being called as a witness to disprove it. * * * How shameful an inquisition would the contrary practice engender! Great as is the obligation to veracity, the circumstances might raise a doubt in the most conscientious mind whether it ought to prevail. Mere casuists might dispute with plausible arguments on either side, but the natural feelings of mankind would be likely to triumph over their moral doctrines. Supposing the existence of guilt, perjury itself would be thought venial in comparison with the exposure of a confiding woman. It follows that no such question ought in any case to be administered, nor such temptation given to tamper with the sanctity of oaths." Quoted in 1 Ld. Brougham's Speech, 248.

[3] See, and compare, 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), §§ 41, 43, and 46.

§ 1355. In 1869, however, Mr. Denman (afterwards Mr. Justice Denman) carried through Parliament the Evidence Further Amendment Act, 1869,[1] which altered the law in both these respects. As to the first point it enacted[2] that "the parties to any action for breach of promise of marriage shall be competent[3] to give evidence in such action,"—but provides, that no plaintiff in any such action "shall recover a verdict, unless his or her testimony shall be *corroborated* by some other *material* evidence in support of such promise."[4]

§ 1355A. The Act also, as regards the second point (after repealing the 4th section of the Evidence Act, 1851, and so much of the 2nd section of the Evidence Amendment Act, 1853, "as is contained in the words 'or in any proceeding instituted in consequence of adultery'"), enacts[5] that:—"The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent[6] 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."[7] The language used in this proviso, though not free from ambiguity, will not protect a party, who tenders himself as a witness for the purpose of disproving one act of adultery, from being cross-examined respecting other acts, provided that these last be duly charged in the pleadings.[8] Neither does the statute render inadmissible the evidence of a witness that he or she has committed adultery, but it simply protects the witness from being questioned on the subject in the event of the protection being claimed.[9] No one but the witness has any right to interfere.[10]

[1] Viz., 32 & 33 V. c. 68.

[2] In § 2.

[3] By Ld. Brougham's Act, they are also "compellable" to give evidence. See ante, § 1349.

[4] 32 & 33 V. c. 68, § 2. See Hickey *v.* Campion, 1872 (Ir.); Bessela *v.* Stern, 1877, C. A., which latter case shows that no sufficient corroboration is, for example, afforded by the defendant's merely omitting to answer letters: Wiedemann *v.* Walpole, 1891, C. A.

[5] In § 3.

[6] § 3. By Ld. Brougham's Acts they are also "compellable" to give evidence. See ante, §§ 1349, 1352.

[7] See ante, § 1347, n., ad fin. as to the Scotch law.

[8] Brown *v.* Brown and Paget, 1874.

[9] Hebblethwaite *v.* Hebblethwaite, 1869; and see, also, Babbage *v.* Babbage, 1870.

[10] Hebblethwaite *v.* Hebblethwaite 1869.

§ 1356. In consequence of such of the exceptions contained in the Evidence Act of 1851, and the Evidence Amendment Act, 1853, as are still in force, and of certain other legal rules, which will presently be mentioned, the persons generally *incompetent* to testify may be divided into *four classes;* namely, first,[1] persons charged in any criminal proceeding with the commission of any indictable offence, or any offence punishable on summary conviction, so far at least as relates to their giving evidence on oath either for or against themselves; secondly,[2] the husbands and wives of defendants in any criminal proceeding; thirdly, in cases of high treason and misprision of treason (other than such as consists in injuring or attempting to injure the Queen's person[3]), those persons who are not included, or properly described, in the list of witnesses delivered to the defendant pursuant to statute;[4] and lastly, persons devoid of sufficient understanding to know what they are about.[5] On the first and second of these general rules a few exceptions have been engrafted, which will be noticed in their proper places.

§ 1357. The *first class* of persons who by the common law rule of Incompetency are in general unable to testify in our criminal courts, consists of defendants to indictments and parties charged before magistrates with minor offences. The Evidence Act, 1851,[6] in making parties to the record admissible witnesses, expressly provided[7] that nothing in the Act "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." Three points arise on this proviso. In the first place, the proviso does not say that the persons specified in it shall not be rendered competent or compellable to give evidence *at all*, but merely that they shall not be allowed or forced to testify *for or against themselves*. Consequently, where several persons are jointly indicted, it was for some years considered by

[1] Post, § 1357.
[2] Post, § 1362.
[3] See 39 & 40 G. 3, c. 93 ("The Treason Act, 1800"); 1 & 2 G. 4, c. 24, § 2, Ir.; 5 & 6 V. c. 51 ("The Treason Act, 1842"), § 1; ante, § 955.
[4] 7 A. c. 21 ("The Treason Act, 1708"), § 11; post, § 1373.
[5] Post, § 1375.
[6] Viz., "The Evidence Act, 1851" (14 & 15 V. c. 99).
[7] By § 3, set out ante, § 1349.

many judges,[1] though some doubted,[2] that any one of them might (under § 2) be called as a witness either for or against his co-defendants, excepting only in those few cases where the indictment was so framed as to give him a direct interest in obtaining their discharge. At last, in 1872, the Court of Criminal Appeal, after much discussion, decided that the Evidence Act, 1851, did not alter the ancient law of England, which prohibited any attempt to examine or cross-examine any prisoner on his trial.[3] The indirect effect of that decision was to establish that whenever it is desired to obtain the testimony of a defendant in a criminal trial as against his co-defendants, an end must be put to the proceedings against him, either by his pleading guilty on arraignment,[4] or by the prosecution entering a nolle prosequi,[5] or by an application for a verdict of acquittal being made before the case is opened;[6] though the court, in its discretion, will in ordinary course direct an acquittal either during the progress or at the termination of the inquiry, if no evidence has been given inculpating the party who is sought to be made a witness.[7] Nothing short of a formal judgment or a plea of guilty can, however, be considered, as, for this purpose, an end of the matter.[8] For instance, in general, separate trials being ordered will not suffice.[9] As soon, however, as an end has been legally and effectually put to the case against him, a prisoner always becomes, at common law, and apart from statute, competent to testify, either for the Crown, or for his former co-defendants.[10] Moreover, under very special circumstances (for instance, where the indictments might have been severed and a joint trial might improperly prejudice the case of one of the defendants), some or one of several persons indicted jointly for publishing blasphemous libels may be put separately on his (or their) trial, and allowed to

[1] See R. *v.* Deeley, 1870 (Mellor, J.); R. *v.* Stevenson and Coulter (Ir.) (Ball, J.), on 4th March, 1851. The indictment in this last case was for an aggravated assault, and Coulter was examined as a witness for Stevenson: MS. See, also, Winsor *v.* R., 1866.

[2] See R. *v.* Jackson, 1855.

[3] R. *v.* Payne, 1872 (per 16 judges).

[4] R. *v.* Gallagher, 1875.

[5] R. *v.* Sherman, 1736; R. *v.* Ellis, 1802 (Ir.).

[6] R. *v.* Rowland, 1826 (Abbott, C.J.).

[7] R. *v.* Fraser, 1797 (Ir.); R. *v.* O'Donnell, 1857.

[8] Gr. on Ev. 15th edit. (1892), § 362.

[9] People *v.* Bill, 1813 (Am.).

[10] R. *v.* O'Donnell, 1857 (Monahan, C.J.).

call the other defendants as witnesses, though they still remain liable to be tried for the same offence.[1]

§ 1358. The second point in the proviso now under consideration which calls for notice, is that such proviso merely applies to persons who are charged in any *criminal* proceeding, either with *indictable* offences, or with offences punishable by *summary conviction*.[2] Penal proceedings in the Ecclesiastical Courts do not fall within either of these two categories; and, consequently, on a prosecution there of a clergyman for immoral conduct, the defendant will be competent to testify in his own behalf, and may even be subjected to examination on the part of the prosecution.[3] He cannot, indeed, be compelled to answer any questions tending to expose him to conviction (though this is a point on which, as before observed,[4] some doubt may possibly be entertained), but should he rely on his legal protection and decline to answer, the inference against him raised by such conduct will be strong.[5] Qui tam actions for penalties,—although to a certain extent they partake of a penal character,—are, too, not included in the language of the proviso; and the defendants in such actions may be examined on either side. The rule is the same as to many charges preferred before justices, which (although in one sense they may be regarded as criminal proceedings) do not result in summary convictions, such as applications for orders of affiliation.[6]

§ 1359. Serious doubts were entertained whether an information filed by the Attorney-General for the recovery of penalties consequent on a breach of the revenue laws, was, or was not, such a "criminal proceeding" as to render the defendant an inadmissible witness.[7] The Legislature interposed *five* times to clear the matter up. On the fourth occasion it was enacted[8] affirmatively, that

[1] R. *v.* Bradlaugh, 1883.

[2] These words apply to an information against a party under 1 & 2 W. 4. c. 32 ("The Game Act, 1831"), § 23, for using snares to take game, not having a game certificate; Cattell *v.* Ireson, 1858;—to a summons before petty sessions, to enforce a penalty for keeping a dog without a licence, contrary to "The Dogs Regulation (Ireland) Act, 1865": R. *v.* Sullivan, 1874 (Ir.);—also to a summons to find sureties for good behaviour: R. *v.* Queen's Cy. JJ., Re Feehan, 1882 (Ir.).

[3] Bp. of Norwich *v.* Pearse, 1868 (Sir R. Phillimore); overruling Burder *v.* O'Neill, 1863 (Dr. Lushington). See, also, Berney *v.* Bp. of Norwich, 1867, P. C.

[4] See ante, § 1349, n. [1].

[5] Att.-Gen. *v.* Radloff, 1854 (Martin and Parke, BB.).

[6] R. *v.* Berry, 1859; R. *v.* Lightfoot, 1856.

[7] Att.-Gen. *v.* Radloff, 1854.

[8] 28 & 29 V. c. 104, § 34.

the Evidence Acts, of 1851 and 1853,[1] shall extend to proceedings at law on the Revenue Side of the Queen's Bench Division, and negatively, that such proceedings "shall not be deemed criminal proceedings" within the meaning of the said Acts, and the fifth statute[2] (which is now in force) expressly declares, that where any proceedings are had under the Customs Acts in the Queen's Bench Division on the Revenue Side, "the defendant shall be competent and compellable to give evidence."

§ 1359A. The Law of Libel Amendment Act, 1888,[3] renders persons charged with the offence of libel before any Court of Criminal Jurisdiction, and their husbands and wives, competent but not compellable witnesses.

§ 1359B. The Criminal Law Amendment Act, 1885,[4] created several new offences against women and children, and by § 20 the Act provides that when a person is charged with any offence, either under that Act, or with certain offences under specified sections of 24 & 25 V. c. 100, namely: with rape (§ 48), or with indecent assault or abduction (§§ 52-55), the husband or wife of such person shall be competent but not compellable to give evidence. Evidence given by a prisoner pursuant to this provision may be used to convict him of another charge.[5] "The Prevention of Cruelty to Children Act, 1894" (57 & 58 V. c. 41), by § 12, renders persons accused under the Act, and their husbands and wives, competent but not compellable witnesses.

§ 1360. The tendency of modern legislation has been to add to the number of the cases in which a prisoner and his wife are permitted by statute to give evidence in their own favour or in that of one of them.[6]

[1] 14 & 15 V. c. 99; 16 & 17 V. c. 83.
[2] 39 & 40 V. c. 36, § 259.
[3] 51 & 52 V. c. 64, § 9.
[4] 48 & 49 V. c. 69, § 4, set out post, § 1378A.
[5] R. v. Owen, 1888, C. C. R.
[6] Thus, there is such a right in about twenty-one cases altogether, viz., the three mentioned in the text (§ 1359B) and some eighteen others. Thus, under "*The Army Act*, 1881" (44 & 45 V. c. 58), on a charge against a person of illegally purchasing from a soldier any regimental necessaries and equipments or stores, the accused "and the wife or husband of such person may, if he or she think fit, be sworn and examined as an ordinary witness in the case": Id. § 156, subs. 3. Under "*The Clergy Discipline Act*, 1892" (55 & 56 V. c. 32), the accused clergyman is competent and compellable to give evidence. See Bishop of Norwich v. Pearse, 1868. Under "*The Conspiracy and Protection to Property Act*, 1875" (38 & 39 V. c. 86), the respective parties to a contract of service, their husbands and wives, are to be deemed competent witnesses: Id. § 11. Under "*The Corrupt and Illegal Practices Prevention Act*, 1883" (46 & 47 V. c. 51, continued in force till 31st December, 1895, by 57 & 58 V. c. 48), on a prosecution under the Act, "whether on indictment or summarily, and whether before an Election Court or otherwise, and in any action for a pecuniary penalty under the Act, the person prosecuted or sued, and the husband or wife of such person, may, if he or she think fit, be examined as an ordinary witness in the case": Id. § 53, subs. 2. Under "*The Corrupt and Illegal Practices Prevention Act*, 1895" (58 & 59 V. c. 40), § 2, an accused and his or her husband or wife, are competent to give evidence. On *Courts-martial in the Navy* held to inquire into the cause of the wreck, loss, destruction, or capture of one of H. M. ships of war, on which no specific charge is made against any officer, seaman, &c., § 92 of "The Naval Discipline Act, 1860" (29 & 30 V. c. 109), enables all or any of the crew to give evidence, but they are not obliged to criminate themselves (Captain Thrupp's evidence was given on the court-martial held November, 1871, as to the loss of the *Megæra*). By

§ 1361. A third observation upon the proviso in the Evidence Act, 1851, which we have been discussing, is, that such proviso does not render the persons specified incompetent to testify either for or against themselves,—for the Act in question was in no respect a *disqualifying* statute,—but simply leaves the previous law on the subject untouched. In whatever cases, therefore, previous to the passing of the Act, defendants charged with offences were rendered competent to give evidence, they may still, notwithstanding the proviso, be examined as witnesses. The principal statutes which authorise such an examination will be found to relate to cases in which the defendant is either a nominal party on the record, or is only one of many persons against whom the proceeding is really instituted.

§ 1361A. At a meeting of all the judges liable to try prisoners, held on the 20th day of November, 1881, a resolution was passed by nineteen

§ 57 (3) of "*The Diseases of Animals Act*, 1894" (57 & 58 V. c. 57), a person charged with an offence against the Act may give evidence. *Distress:* under "The Law of Distress Amendment Act, 1895" (58 & 59 V. c. 21), § 5, in any proceeding against any person for an offence under the Act, the accused, and his wife, are competent, but not compellable, to give evidence, although the latter may be required *to attend* to give evidence as an ordinary witness in the case. "*The Explosives Substances Act*, 1883" (46 & 47 V. c. 3), by § 4 (2) enacts that in any proceeding under § 4 the accused person and his wife or husband may give evidence. "*The False Alarms of Fires Act*, 1895" (58 & 59 V. c. 28), contains a provision identical with that contained in "The Law of Distress Amendment Act, 1895." "*The Licensing Act*, 1872" (35 & 36 V. c. 94), provides that "the defendant and his wife shall be competent to give evidence": § 51, subs. 4. "*The Married Women's Property Act Amendment Act*, 1884" (47 V. c. 14), provides, by § 1, that in any criminal proceeding against a husband or a wife, under § 168 of "The Married Women's Property Act, 1882," the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence. "*The Merchandise Marks Act*, 1887" (50 & 51 V. c. 28), enacts, by § 10 (1), that in any prosecution under the Act a defendant and his or her wife and husband may give evidence. Under "*The Merchant Shipping Act*, 1894" (57 & 58 V. c. 60), any person who is charged with either the misdemeanor of sending a ship to sea in an unseaworthy state so as to endanger life, or any other offence, is generally empowered in self-defence to give evidence in the same manner as any other witness: Id. § 697. Under "*The Mines Regulation Acts*, 1872" (35 & 36 V. c. 76, § 63, subs. 4, and c. 77, § 34, subs. 4), on a charge under the Acts against the owner, agent, or manager of any mine, such person "may, if he think fit, be sworn and examined as an ordinary witness in the case where he is charged in respect of any contravention or non-compliance by another person." On *Nuisances to a Public Highway* being proceeded for, in respect of non-repair or otherwise, by way 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": 40 & 41 V. c. 14, § 1. "*The Sale of Food and Drugs Act*, 1875" (38 & 39 V. c. 63), gives (§ 61) a defendant and his wife, on a prosecution under the Act, the same rights of giving evidence as the Licensing Act (which see): and "*The Threshing Machines Accidents Prevention Act*, 1878" (41 & 42 V. c. 12), enables any person prosecuted under it to, "on his own application, be sworn and examined as a witness": § 3, subs. 2. In *Treason* it is a moot point whether husbands and wives are competent witnesses against each other for the prosecution, as to which see post, § 1372. The author suggested for consideration, that in any future Bill dealing generally with this subject a clause should be inserted, somewhat to the following effect: "When any person so charged, or the wife or husband of such person, is a witness, the court, in its discretion, may disallow any question put in cross-examination, which appears to it to be vexatious, irrelevant, or otherwise improper. The discretion of the court under this section shall be final."

votes against two,[1] "That in the opinion of the judges it is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence." The question of the propriety of laying down a rule as to the practice of allowing prisoners to address the jury before the summing-up of the judge, when their counsel have already spoken in their favour, was then considered, and after some discussion was adjourned for further consideration.

§ 1362. The common law rule of Incompetency renders a second class of persons unable to give evidence in criminal cases for or against each other, namely, the husbands and wives of the parties.[2] There are indeed some few exceptions to this principle, which are mentioned elsewhere.[3] But the common law principle is as just stated, and was not interfered with either by the Evidence Act, 1851, or by the Evidence Amendment Act, 1853. Both these statutes contain an express proviso, that nothing therein shall "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, in any criminal proceeding."[4] The object of the proviso in the first-named Act has been much canvassed by the judges.[5] But a reference to the history of the Act in question will suffice to show the original propriety of the proviso, which merely left the law of husband and wife precisely where it found it,—excepting only in those few cases where both of them are either parties to the record, or persons in whose behalf the action is brought or defended. In such a state of things, the wife, as a party, or an interested person, might, under the express terms of the second section of the same Act, give evidence for or against her husband, and the husband, in like manner, might give evidence for or against his wife. But as

[1] The two dissentients were Stephen and Hawkins, JJ.

[2] § 120 of "The Ind. Ev. Act, 1872," enacts, that "in criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness."

[3] See ante, § 1360, and post, §§ 1371, 1371A, 1372.

[4] 14 & 15 V. c. 99 ("The Evidence Act, 1851"), § 3; 16 & 17 V. c. 83, § 2.

[5] See Barbat *v.* Allen, 1852; Stapleton *v.* Crofts, 1852; Kernot *v.* Pittis, 1853.

a man and his wife are sometimes both *parties* to the same indictment or other criminal proceeding, the proviso prohibiting them, under such circumstances, from testifying for or against each other was inserted in the Act to, on this one point, *retain* the old law. The effect of the proviso was to prevent a wife, conjointly indicted with her husband for murder, being called by the prosecutor to establish the man's guilt, or the man being examined by the counsel for the defence to prove the woman's innocence.

§ 1363. The common law rule was framed, however, in such a shape as not only to exclude the husband or wife of a defendant in a criminal proceeding from giving evidence of what occurred during their marriage, but also to prevent such witness from being examined, either as to circumstances that happened *before* the marriage, or even as to the very *fact* of the *marriage* itself. Thus, on a prosecution for bigamy, the first husband or wife is by it rendered incompetent to be called to prove a marriage with the defendant.[1] The rule is also applicable to all cases in which the interests of a married person, who is a defendant in a criminal proceeding, are involved, and therefore renders a wife incapable of being a witness for a *co-defendant* with her husband, as her testimony might tend, at least indirectly, to her husband's acquittal.[2] Accordingly, where the wife of one prisoner was called to prove an alibi in favour of another jointly indicted with her husband for burglary, her testimony was rejected on the ground, that, by shaking the evidence of a witness for the prosecution who had identified both prisoners, it would materially weaken the case against the husband.[3]

§ 1364. Moreover, no distinction is recognized by the rule between admitting the evidence of married persons for or against each other.[4] By reason of it, a husband is an inadmissible witness

[1] Grigg's case, 1672. But the rule often permits the wife, though inadmissible as a witness, to be *produced* in court for the purpose of being *identified*, although the proof thus given may fix a criminal charge upon the husband; for instance, in bigamy, the rule permits it to be common practice to produce the first wife in court, and to have her identified by the witnesses. So, too, she may, consistently with such rule, be pointed out as the person who passed a note which the husband is charged with stealing: See Alison's Pr. p. 403.

[2] R. *v.* Thompson and others, 1872.

[3] R. *v.* Smith, 1826. See, also, R. *v.* Hood, 1830; R. *v.* Frederick, 1738; R. *v.* Glassie, 1854.

[4] R. *v.* Perry, undated (Gibbs, C.J.), cited and approved (Abbott, C.J.) in R. *v.* Serjeant, 1826.

in support of a prosecution, charging his wife and several other persons with conspiring to procure his marriage without the consent of his parents;[1] and where four men were indicted for sheep-stealing, the testimony of the wife of one to prove facts against the others was rejected.[2]

§ 1365. But though the common law rule of exclusion is thus stringent where a married person is criminally accused in conjunction with others, it is clear that where such defendant is no longer in peril either because he has pleaded guilty,[3] or has been convicted or acquitted, it permits his or her husband or wife to testify either for or against any other persons who may be parties to the record.[4] The mere hope that, by giving evidence, a pardon may be procured for a defendant who has been previously convicted of the same or another offence, will by no means affect the competency, though it may, and indeed must, shake the credit of the witness.[5] The wife of a prosecutor in a criminal proceeding is, of course, not excluded by the common law rule from giving evidence either for the Crown or for the defendant.[6]

§ 1366.[7] The common law rule of exclusion extends only to *lawful marriages*. Thus, upon a trial for bigamy, the first marriage being proved and not controverted, it permits the woman, with whom the second marriage was had, to be a competent witness either for or against the prisoner; for the second marriage is void.[8] But if the proof of the first marriage were doubtful, and the fact were controverted, it is conceived that she would not be admitted.[9] On principle, too, and it has been expressly so held in America,[10] cohabitation and acknowledgment, as husband and wife, are conclusive against the parties in all cases except where the facts or the incident of the marriage, such as legitimacy and inheritance, are directly in controversy. But in England, the decisions as to whether, under the common law rule, a man can call as a witness a woman with

[1] R. v. Serjeant, 1826.
[2] R. v. Webb, 1830 (Bolland, B.).
[3] R. v. Thompson and Simpson, 1863 (Keating, J.).
[4] Hawkesworth v. Showler, 1843 (Alderson, B.); R. v. Williams, 1838 (Id., who stated that, in Thurtell's case, undated, Mrs. Probert was examined as the principal witness against Thurtell, after her husband was acquitted).
[5] R. v. Rudd, 1775.
[6] See R. v. Houlton, 1823.
[7] Gr. Ev § 339, in part.
[8] B. N. P. 287; R. v. Serjeant, 1826 (Abbott, C.J.).
[9] Grigg's case, 1672.
[10] Gr. on Ev. 15th edit. (1892), note to § 339; Divell v. Leadbitter, 1826 (Am.).

whom he has long cohabited, whom he has constantly *represented to be his wife*, and by whom he has had children, render the point at least doubtful.[1] Lord Kenyon rejected such a witness, when tendered for the defence in a capital case;[2] but in that case the criminal had, *throughout the trial*, admitted that the witness was his wife, and was thus in a manner estopped from denying the marriage when her competency was questioned. When Lord Kenyon's decision was subsequently discussed,[3] Park and Burrough, JJ., declared that it was founded on this admission, and the whole court determined that a kept mistress was a competent witness for her protector, though she passed by his name and appeared to the world as his wife. So, where the parties had lived together as man and wife, believing themselves lawfully married, but had separated on discovering that a prior husband, supposed to be dead, was still living, the woman was held to be a competent witness against the second husband, even as to facts communicated to her by him during their cohabitation.[4] From this last case, and from several others,[5] it appears that the common law rule permits a supposed husband or wife to be examined on the voire dire to facts showing the invalidity of the marriage; and it is apprehended that such rule affords no valid reason for not admitting their evidence thus far, though the fact that the marriage ceremony has been actually performed may have been previously proved by independent testimony.[6]

§ 1367.[7] Whether such common law rule of Incompetency may be relaxed so as to admit the wife to testify for or against the husband, where the parties *consent* to such a course, is a question on which the authorities are not agreed.[8] Lord Hardwicke was

[1] Campbell *v.* Twemlow, 1814 (Thompson, C.B.).

[2] Anon., 1782, cited (Richards, B.) in Campbell *v.* Twemlow, 1814.

[3] Batthews *v.* Galindo, 1828.

[4] Wells *v.* Fletcher, 1831 (Patteson, J.).

[5] R. *v.* Peat, 1858; R. *v.* Wakefield, 1827.

[6] R. *v.* Bramley, 1795; R. *v.* Bathwick, 1831, where Lord Tenterden observed, that, "it might well be doubted, whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called."

[7] Gr. Ev. § 340, in great part.

[8] Under § 1710, cl. 1, of the New York Civ. Code, "A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, be, without the consent of the other, examined, as to any communication made by one to the other during the marriage. But this exception does not apply to a civil action or proceeding

of opinion that she was not admissible to give evidence against her husband even with his consent;[1] and this opinion has been followed in America,[2] apparently upon the ground that the interest of the husband in preserving the confidence reposed in her is not the sole foundation of the rule, but that the public have also an interest in the preservation of domestic peace, which might be disturbed by her testimony, notwithstanding his consent, and is, it is submitted, the correct view.[3] And, in any event, it has been decided[4] that it is at least discretionary with the judge, whether he will allow an objection to the competency of a witness to be withdrawn by anyone—even the adverse party—and that if he refuses to do so, the court will not interfere.

§ 1368.[5] In the instances before mentioned, the common law rule of Incompetency renders husband and wife inadmissible as witnesses for or against each other. But it, in all other cases, allows husband or wife to give evidence, notwithstanding that the evidence of the one may *tend* (even strongly) to subject the other to a *criminal charge*.[6] Thus, on a question respecting a female pauper's settlement, where a man testified that he was married to the pauper, another woman was admitted to prove her own previous marriage with the same man; for although, if the testimony of both witnesses was true, the husband was chargeable with the crime of bigamy, neither the evidence nor the record in that case would be receivable against him upon such a charge, the point at issue being res inter alios acta, and neither the husband nor the wife having any interest in the decision;[7] and in an action on a bill of exchange by indorsee against acceptor, the wife of the drawer would probably be permitted to prove that her husband

by one against the other, nor to a criminal action or proceeding, for a crime committed by one against the other."

[1] Barker *v.* Dixie, 1736.

[2] Randall's case, 1820 (Am.); Colbern's case, 1823 (Am.).

[3] But see contrà, Pedley *v.* Wellesley, 1829, where, on the husband's consenting, Best, C.J., admitted the evidence, citing a decision which he is reported to have said was one of *Lord* Mansfield's (this is probably a mistake, and the case referred to, Norden *v.* Williamson, 1808, decided by Sir James Mansfield), in which the interest of the husband was apparently supposed to be the sole ground of the wife's exclusion, was (it will be observed) before the passing of 16 & 17 V. c. 83, as to which, see ante, § 1352.

[4] Barlat *v.* Allen, 1852.

[5] Gr. Ev. § 342, in part.

[6] See R. *v.* Halliday, 1860.

[7] R. *v.* Bathwick, 1831; R. *v.* All Saints, Worcester, 1817. These cases overrule R. *v.* Cliviger, 1788, where it was broadly held, that a wife was in every case incompetent to give evidence, *tending* to criminate her husband.

had forged the bill.[1] Two learned judges are, however, reported to have held,[2] that, on an indictment for theft, a woman could not be called on the part of the Crown, to, in effect, directly prove that her husband was a thief—by showing that he was present when the property was taken, and that she saw him deliver it to the prisoner.

§ 1369. But although, by the common law rule of Incompetency, the wife may be *permitted* to give evidence which may indirectly criminate her husband, it by no means follows that she can be *compelled* to do so; and the better opinion is that under it she may throw herself upon the protection of the court, and decline to answer any question which would tend to expose her husband to a criminal charge.[3]

§ 1370. In actions, suits, and other proceedings between third parties, husbands and wives have always been permitted to *contradict*, and even to *discredit*, each other as freely as if the marriage were void.[4] Otherwise the competency of the witness would depend upon the marshalling of the evidence, and the testimony of a husband might be rendered inadmissible for the defendant, from the accidental circumstance that the plaintiff had previously called the wife, though had the defendant been entitled to begin, the husband would have been examined, and the wife's evidence subsequently rejected. In Ireland, even where the husband is the prosecutor of an indictment, the evidence of a wife cannot be rejected on the ground that she is brought to contradict her husband.[5]

§ 1371.[6] Moreover, when a personal injury has been committed by the one against the other, an exception of necessity arises to the general common law rule rendering husbands and wives incompetent to give testimony for or against each other in criminal proceedings—since, but for this exception, the wife would have been left by the common law exposed without remedy to the most brutal treatment from her husband.[7] On the indictment, too, of a man for the forcible abduction of a woman with intent to marry

[1] Henman *v.* Dickinson, 1828. In this case the point was not expressly decided.

[2] R. *v.* Gleed, 1832 (Taunton and Littledale, JJ.).

[3] R. *v.* All Saints, Worcester, 1817 (Bayley, J.); Cartwright *v.* Green, 1803; post, § 1453.

[4] Stapleton *v.* Crofts, 1852 (Ld. Campbell); id., as reported 18 Q. B. 373 (Erle, J.); R. *v.* Darthwick, 1831 (Ld. Tenterden); R. *v.* All Saints, Worcester, 1817 (Ld. Ellenborough); Annesley *v.* Ld. Anglesea, 1743, 11 L.

[5] R. *v.* Hulton, 1823.

[6] Gr. Ev. § 343, in part.

[7] See Bentley *v.* Cooke, 1784.

her.[1] she is (after the marriage) clearly a competent witness against him, if the force were continuing against her till that event. She is also a competent witness to prove the marriage itself; and the better opinion seems to be, that she is still competent, notwithstanding her subsequent assent to it, and her voluntary cohabitation; for, otherwise, the offender would take advantage of his own wrong.[2] Similarly, on an indictment for the *fraudulent* abduction of an heiress, the lady may be a witness.[3] A wife may testify against her husband on an indictment for assisting at a rape committed on her person;[4] or, for an assault and battery upon her;[5] or, for maliciously shooting,[6] or attempting to poison,[7] her; or, it seems, for any other offence against her liberty or person.[8] She may also exhibit articles of the peace against him, in which case her affidavit will not be allowed to be controlled and overthrown by his own.[9] Indeed, East considers that "in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other."[10] But though competent as a witness, it is not indispensable that such party should be called;[11] and Holroyd, J., seems even to have thought[12] that the husband or wife could only be admitted to prove facts, which could not be proved by any other witness, though it may be questioned whether this be not restricting the rule too narrowly. After much doubt upon the subject had been expressed by the courts as to whether a wife be or be not an admissible

[1] Under 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"). § 54.

[2] R. *v.* Wakefield, 1827, trial published by Murray; Brown's case, 1673; Perry's case, cited in R. *v.* Serjeant, 1826; 1 Hawk. c. 41, § 13; 1 Bl. Com. 443; M'Nally, Ev. 179, 180; 3 Chit. Cr. L. 817, n. (*y*).

[3] R. *v.* Yore, 1839. This case was decided on the Irish Act, now repealed, of 10 G. 4, c. 34, § 23. The law is re-enacted in 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 53.

[4] Ld. Audley's case, 1631; R. *v.* Jellyman, 1838.

[5] B. N. P. 287; R. *v.* Azire, 1737-8; Soule's case, 1822 (Am.).

[6] R. *v.* Whitehouse, undated.

[7] R. *v.* Jagger, 1797.

[8] Hullock, B., in R. *v.* Wakefield, 1827, trial published by Murray, 257.

[9] R. *v.* Doherty, 1810; Ld. Vane's case, 1743-4; R. *v.* Ld. Ferrers, 1758. Her affidavit is also admissible, on an application for an information against him for an attempt to take her by force, contrary to articles of separation: Lady Lawley's case, undated; or, on a return to a habeas corpus sued out by him: R. *v.* Mead, 1758.

[10] 1 East, P. C. 455; The People, ex. rel. Ordronaux *v.* Chegaray, 1836 (Am.).

[11] R. *v.* Pearce, 1840.

[12] In R. *v.* Whitehouse, undated.

witness against her husband, in proceedings against him under the Vagrancy Act, 1824,[1] for *deserting* her, and causing her to become chargeable to the parish,[2] it has been decided that she is not.[3]

§ 1371A. The exception to the general rule that a wife may not give evidence against her husband, which has been partially discussed in the last paragraph, was formerly held only to exist upon the hearing of charges brought by the wife against her husband of inflicting *personal* injuries upon her, and consequently, a husband was not permitted to give evidence against his wife or her paramour, where the two offenders were indicted conjointly for stealing his property at the time of their elopement.[4] But this extremely unsatisfactory condition of the law has now for some years been remedied, and by the joint operation of the statutes in force as to the property of married women,[5] it has been for some years provided, that, in any criminal proceeding, whether the same be brought by a wife against her husband "for the protection and security of her own separate property," or be one brought by a husband against his wife with respect to his property, the spouses respectively "shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence."[6]

§ 1372.[7] In cases of *high treason*, the question, whether the wife is admissible as a witness against her husband, has been much discussed, and opinions of great weight have been given on both sides.[8]

5 G. 4, c. 83, § 4; amended by 34 & 35 V. c. 112, § 15; by 47 & 48 V. c. 43; and by 54 & 55 V. c. 70, § 7.

[2] Sweeney *v.* Spooner, 1863.

[3] Reeve *v.* Wood, 1865.

[4] R. *v.* Brittleton and Bates, 1884.

[5] 45 & 46 V. c. 75 ("The Married Women's Property Act, 1882"), §§ 12, 16; amended by "The Married Women's Property Act, 1884," (or 47 & 48 V. c. 14, § 1).

[6] 47 & 48 V. c. 14, § 1.

[7] Gr. Ev. § 345, in great part.

[8] The affirmative of the question is maintained (B. N. P. 286; 1 Gilb. Ev. 252; Grigg's case, 1672) on the ground of the extreme necessity of the case, and the nature of the offence, tending, as it does, to the destruction of many lives, the subversion of government, and the sacrifice of social happiness. But, on the other hand, it is argued, that these political reasons are not sufficient to support an exception to a rule of general utility, and that, as the wife is not bound to discover her husband's treason (1 Brownl. 47), by parity of reason, she is not compellable to testify against him (see 1 Hale, 301; 2 Hawk. c. 46, § 82; Bac. Abr. tit. Ev. A. 1; 1 Chit. Cr. L. 595; M'Nally, Ev. 181). The latter is, perhaps, the better opinion.

§ 1373. The *third class* of persons incompetent to testify consists of witnesses for the Crown in cases of *high treason* or misprision of treason,[1] not included, or not properly described, in a *list* duly delivered to the defendant in compliance with an Act of Queen Anne's[2] reign, by which,[3] "when any person is indicted for high treason, or misprision of treason, a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, profession, and place of abode of the said witnesses and jurors, be also given at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted, ten days before the trial, and in presence of two or more credible witnesses." In strict law, this list should be delivered ten days at least before the arraignment,[4] and in the presence of two or more credible witnesses, *simultaneously* with the jury list and the copy of the indictment. An objection which goes to the array of witnesses, founded on non-compliance with these regulations, must be taken before the jury are sworn, and its effect will be to postpone the trial;[5] but an objection by a defendant that some particular witness is incompetent, as not included in the list, or as misdescribed therein, may, like any other question of competency, be taken upon the voire dire when the witness is called, and before he is sworn, and if it prevails, the witness cannot be examined.[6]

§ 1374. The object in requiring the name, place of abode, and profession, of each witness to be stated in the list, is, to enable the defendant before trial to make due inquiry respecting his character. The list need not specify the particular house or street

[1] Treasons which consist in compassing the assassination, wounding, or injuring the person of the Sovereign, or to the misprisions of such treasons, are not within the Act; because parties accused of such offences are, by statute, liable to be dealt with as if charged with murder. By 39 & 40 G. 3, c. 93 ("The Treason Act, 1800"); 1 & 2 G. 4, c. 24, § 2, Ir.; 5 & 6 V. c. 51 ("The Treason Act, 1842"), § 1; ante, § 958.

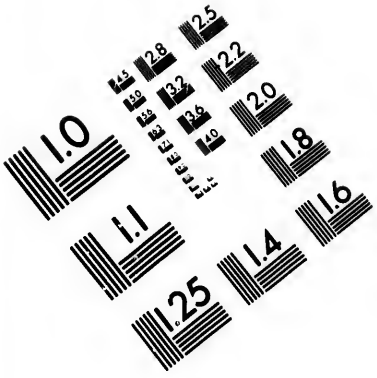
[2] 7 A. c. 21 ("The Treason Act, 1708"), extended to Ireland by 17 & 18 V. c. 26, passed in consequence of the decision on O'Brien *v.* R., 1849, H. L.

[3] § 11.

[4] The word "trial" must bear this interpretation since "The Juries Act, 1825" (6 G. 4, c. 50), § 21: R. *v.* Ld. Geo. Gordon, 1781.

[5] R. *v.* Watson, 1827; R. *v.* Frost, 1840; O'Brien *v.* R., 1849, H. L.

[6] R. *v.* Frost, 1840.



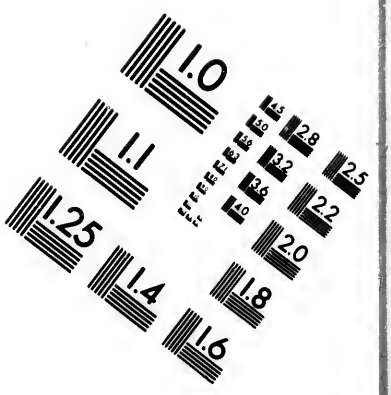
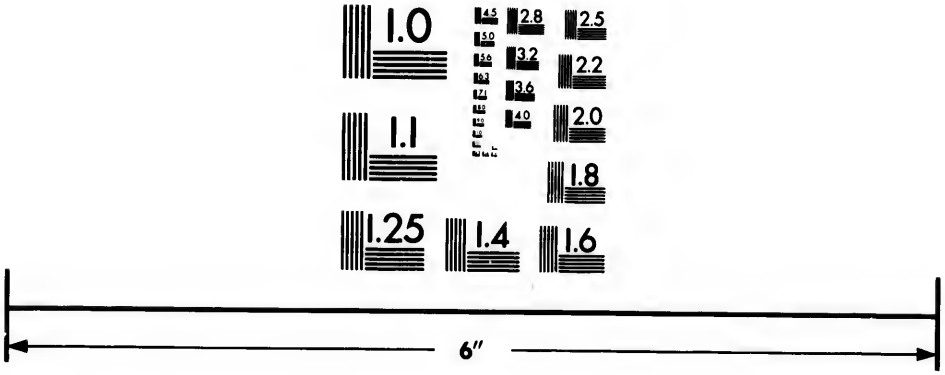
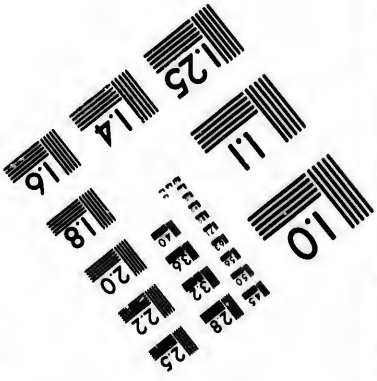


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

where the witness resides, but will suffice if it describes him as living in a certain town or parish,[1] and if a witness has two or more residences, need only specify one; but if it aim at further particularity, and misdescribe any one of the places of abode, this inaccuracy vitiates the whole description.[2] A witness who has recently changed his place of abode, must be described as of his new residence, and it will not suffice to describe him as *lately* abiding at the former one.[3]

§ 1375. The *last class* of witnesses rejected by the law includes all who are mentally incapable of comprehending the nature of an oath or affirmation, or of giving a moderately rational answer to a sensible question—whether this incapacity be due to mere unripeness of understanding, as in the case of a child, or to a congenital want of intellect, or to some temporary obscuration of the reasoning faculties rendering the person an idiot, a lunatic, or drunk.[4] The incapacity is, however, only co-extensive with the defect. Accordingly, a monomaniac, or a person who is afflicted with partial insanity, will be an admissible witness, if the judge finds him upon investigation aware of the nature of an oath or declaration, and capable of understanding the subject, with respect to which he is required to testify.[5] A witness will, too, be rendered competent, in the case of total madness, by the occurrence of a lucid interval,[6]—in the case of intoxication by the return of sobriety.[7] Judges will, indeed, occasionally postpone trials of importance where, without the witness's testimony, the ends of justice will probably be defeated, if they have good cause to believe that he within a reasonable time will be able to testify.[8] In all such cases the application for postponement must be made before the

[1] R. *v.* Frost, 1840.
[2] 9 C. & P. 151—153.
[3] R. *v.* Watson, 1817.
[4] In India, the rule on this subject is as follows:—"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. 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": § 118 of the Indian Evidence Act, 1872.
[5] R. *v.* Hill, 1851. See Spittle *v* Walton, 1851.
[6] Com. Dig., Testmoigne, A. 1.
[7] Hartford *v.* Palmer, 1819 (Am.); Hein. ad Pand., Pars 3, § 14.
[8] R. *v.* White, 1786.

jury is sworn, as the court cannot on this ground discharge the jury after the commencement of the trial.[1]

§ 1376.[2] Persons *deaf and dumb* from birth were formerly in presumption of law idiots.[3] But this presumption is no longer recognised,[4] as persons afflicted with these calamities have been found, by the light of modern science, to be much more intelligent in general, and to be susceptible of far higher culture, than was once supposed. Still, when a deaf mute is adduced as a witness, the court, in the exercise of due caution, will take care to ascertain before he is examined, that he possesses the requisite amount of intelligence, and that he understands the nature of an oath. When the judge is satisfied on these heads, the witness may be sworn and give evidence by means of an interpreter.[5] If he is able to communicate his ideas perfectly by writing, he will be required to adopt that, as the more satisfactory method;[6] but if his knowledge of that method is imperfect, he will be permitted to testify by means of signs.[7]

§ 1377. No *precise age* is fixed by law within which *children* are absolutely excluded from giving evidence, on the presumption that they have not sufficient understanding.[8] Nor can any precise rule be laid down respecting the degree of *intelligence* and *knowledge*, which will render a child a competent witness. In all questions of this kind much must always depend upon the good sense and discretion of the judge.[9] In practice, it is not unusual to receive

[1] R. *v.* Wade, 1825; R. *v.* Kinloch, 1746.

[2] Gr. Ev. § 366, in some part.

[3] R. *v.* Steel, 1787.

[4] Harrod *v.* Harrod, 1854 (Wood, V.-C.). If a deaf mute be put on his trial for felony, and the jury find that he cannot understand the proceedings, he will be detained as a non-sane person during the Queen's pleasure: R. *v.* Berry, 1876.

[5] On one occasion, the author had to decide a cause at the Lambeth County Court on the sole testimony of three deaf and dumb witnesses, viz., the plaintiff and his wife on the one side, and the defendant on the other.

[6] Morrison *v.* Lennard, 1827 (Best, C.J.).

[7] Id.; R. *v.* Ruston, 1786; R. *v.* Steel, 1786; The State *v.* De Wolf, 1830 (Am.); Com. *v.* Hill, 1817 (Am.).

[8] See R. *v.* Perkin, 1840, where Alderson, B., observes:—"It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a judge will allow him to be sworn." See, further, R. *v.* Holmes, 1861, where a child six years old was allowed to testify as to a rape having been committed on her, she having stated to the judge (Wightman, J.) that she said her prayers, and thought it was wrong to tell lies.

[9] By "The Indian Evidence Act, 1855" (Act ii. of 1855, § 14; now re-

the testimony of children of *eight* or *nine years of age* when they appear to possess sufficient understanding. But in one case,[1] on an indictment for assaulting with intent to rape an infant, certainly under seven years of age,[2] and perhaps only five,[3] all the judges held that she might have been examined upon oath, if, on strict examination by the court, she had been found to comprehend the danger and impiety of falsehood.[4] In another case,[5] however, the dying declarations of a child of four years of age were rejected, with the observation that, however precocious her mind might have been, it was quite impossible that she could have had sufficient understanding to render her declarations admissible.

§ 1378. The law further places no reliance on testimony not given on oath or affirmation.[6] Consequently, in general, no person, whatever functions he may have to discharge in relation to the cause in question, or whatever be his rank, age,[7] country,[8] or belief,

pealed by "The Indian Evidence Act, 1872"), it has been wisely provided that "children under seven years of age, who appear incapable of receiving just impressions of the facts" to be deposed to, "or of relating them truly," ought not to be examined. The utter want of discretion in dealing with this subject, sometimes evinced by the inferior legal functionaries, is admirably ridiculed by Dickens in "Bleak House." A little crossing-sweeper being brought up before a coroner, to give evidence, the narrative thus proceeds:—"'Name Jo. Nothing else that he knows on. * * * Knows a broom's a broom, and knows it's wicked to tell a lie. Don't recollect who told him about the broom, or about the lie, but knows both. Can't exactly say what'll be done to him arter he's dead, if he tells a lie to the gentleman, but believes it'll be something wery bad to punish him, and sarve him right—and so he'll tell the truth.' 'This won't do, gentlemen,' says the coroner, with a melancholy shake of the head. 'Don't you think you can receive his evidence, sir?' asks an attentive juryman. 'Out of the question,' says the coroner; 'you have heard the boy; *can't exactly say* won't do, you know. We can't take *that* in a court of justice, gentlemen. It's *terrible depravity*. Put the boy aside.' Boy put aside; to the great edification of the audience; especially of little Swills, the comic vocalist." P. 104.

[1] R. *v.* Brasier, 1779; Jackson *v.* Gridley, 1820 (Am.).

[2] 1 Lea, 199.

[3] 1 East, P. C. 443.

[4] It is not quite clear whether a trial can legally be postponed to allow of religious instruction as to the nature of an oath being in the meanwhile afforded to a child who is offered as a witness. That it can be done, see R. *v.* White, 1786; R. *v.* Wade, 1825. But the better opinion seems to be that this ought not to be done: see R. *v.* Willans, 1835 (Patteson, J.); R. *v.* Nicholas, 1846 (Pollock, C.B.). And the matter is probably one entirely in the discretion of the presiding judge. See Com. *v.* Lynes, 1886 (Am.).

[5] Pike's case, 1829 (Park, J., with concurrence of James Parke, J.).

[6] As to affirmations, see post, §§ 1388-90.

[7] R. *v.* Brasier, 1779, overruling the opinion of Ld. Hale. See 1 Hale, 634.

[8] In some few British colonies,

can give testimony upon any trial, civil or criminal,[1] until he have, in the form prescribed by the law,[2] given an outward pledge that he considers himself responsible for the truth of what he is about to narrate, and rendered himself liable to the temporal penalties of perjury, in the event of his wilfully and corruptly giving false testimony.

§ 1379. To return to the general principle that evidence is usually required to be on oath. In accordance with this principle, although each juryman may apply to the subject before him, the *general* knowledge which every man must be supposed to have, yet if he be personally acquainted with any special and material particular fact, he is not permitted to mention the circumstance privately to his fellows, but must be publicly sworn and examined, though there is no necessity for his leaving the box, or declining to interfere in the verdict.[3] Similarly a judge, before whom a cause is tried, must conceal any fact relating to it which is within his own knowledge, unless he be first sworn;[4] and consequently, if he be the sole judge, it seems that he cannot depose as a witness,[5] though if he be sitting with others he may then be sworn and give evidence.[6] In this last case, the proper course appears to be that the judge, who has thus become a witness, should leave the bench, and take no further judicial part in the trial,[7] because he can hardly be deemed capable of impartially deciding on the admissi-

where the aborigines are "destitute of the knowledge of God and of any religious belief," ordinances have been made for the admission of the testimony of such persons without the previous sanction of an oath, and the legality of such ordinances has been established by the legislature. See 6 & 7 V. c. 22.

[1] This law applies to courts-martial. See 44 & 45 V. c. 58, § 52, subs. 3. A witness who commits perjury before a court-martial may, if subject to military law, be punished by court-martial: § 29; but if not so subject, he must be prosecuted before a civil court: § 126, subs. 2.

[2] See Att.-Gen. *v.* Bradlaugh, 1885, C. A., as to the manner in which an oath is required to be taken.

[3] R. *v.* Rosser, 1836 (Parke, B.); Manley *v.* Shaw, 1840 (Tindal, C.J.); Bennet *v.* Hartford, 1650; Fitz-James *v.* Moys, 1663; R. *v.* Heath, 1744; R. *v.* Sutton, 1816.

[4] R. *v.* Anderson, 1680; Hurpurshad *v.* Sheo Dyal, 1870, P. C.

[5] Ross *v.* Buhler, 1824 (Am.). But see 11 How. St. Tr. 459.

[6] Trial of the Regicides, 1660.

[7] Id. As to when judges are not compellable to testify, see ante, § 938. In addition to authorities there cited, see R. *v.* Gazard, 1838 (Patteson, J.). The present editor once saw Pollock, B., when called as a witness, exercise his privilege of refusing to give evidence of matters which passed before him judicially. A judge may, however, give evidence as to any collateral fact which happened in his presence during the pendency or after the trial: R. *v.* Earl Thanet, 1799.

bility of his own testimony, or of weighing it against that of another.[1] Nevertheless, on several occasions, on trials before the House of Lords, peers, who have been examined as witnesses, have, nevertheless, subsequently taken part in the verdict,[2] since peers are, in trials before the House of Lords, regarded at least as much in the light of jurors as of judges; and a juryman is not disqualified from acting, simply by being called as a witness.

§ 1380. Again, though a peer is privileged, while sitting in judgment, to give his verdict upon his honour,[3] he cannot be examined as a witness in any cause, whether civil or criminal, or in any court of justice, whether it be an inferior court or the House of Lords, or in any manner, whether vivâ voce, or by interrogatories, or by affidavit, unless he be first sworn;[4] for the respect which the law shows to the honour of a peer, does not extend so far as to overturn the settled maxim, that in judicio non creditur nisi juratis.[5] If, therefore, he refuses to take the necessary oath or affirmation, he will, notwithstanding the privileges of peerage or of Parliament, be guilty of a contempt for which he may be committed and fined.[6] On a civil trial in Ireland, where a Lord Lieutenant was examined at a trial on honour, instead of on oath, and examined and cross-examined, without any objection being taken to the reception of his evidence on a subsequent application for a new trial, made on the ground that unsworn testimony had been received, the court, having ascertained that the losing party had from the first been aware of the irregularity, held that the objection had been waived, and was too late,[7] and consequently discharged the rule.[8]

[1] Ross *v.* Buhler, 1824 (Am.). So is the law of Spain: Partid. 3. tit. 16, l. 19; 1 Moreau and Carleton's Tr. p. 200; and of Scotland: Glassf. Ev. 602; Tait, Ev. 432; Stair, Inst. lib. 4, tit. 45, 4; Ersk., Inst. lib. 4, tit. 2, 33.

[2] R. *v.* Earl Powis, &c., 1678–85, as reported 7 How. St. Tr. 1384, 1458, 1552. R. *v.* Earl of Macclesfield, 1725, as reported 16 How. St. Tr. 1252, 1391.

[3] 2 Inst. 49. And formerly, in Chancery had the (then) peculiar privilege of answering upon honour, and without oath. See Mears *v.* Ld. Stourton, 1711; Cons. Ord. Ch. 1860, Ord. XV. r. 6; now annulled by R. S. C. 1883, App. O.

[4] See 2 How. St. Tr. 772 n.; 7 How. St. Tr. 1458; R. *v.* Earl of Macclesfield, 1725; R. *v.* Preston, 1791; Ld. Shaftesbury *v.* Ld. Digby, 1676.

[5] Mears *v.* Lord Stourton, 1711; The Earl of Lincoln's Case, 1626; 1 Bl. Com. 402; 3 Bac. Abr. 202.

[6] 4 Ld. Brougham's Speech, 368.

[7] See Richards *v.* Hough, 1882.

[8] Birch *v.* Somerville, 1852 (Ir.).

§ 1381. Even the Sovereign, it is said, could not now claim exemption from the rule requiring oral testimony to be given upon oath,[1] though, on one occasion, the simple certificate of King James I., as to what had passed in his hearing, was received in the Court of Chancery.[2] The question whether the Sovereign can be examined as a witness at all, seeing that the evidence would be without temporal sanction, admits of doubt. In the reign of Charles I., the Earl of Bristol, who was impeached for high treason, proposed to call the King, for the purpose of proving certain conversations which he had held with him while Prince. The subject was referred to the judges; but they, under His Majesty's direction, forbore from giving any opinion, and the question remains to this day undetermined.[3] In the Berkeley Peerage case, counsel entertained some idea of calling the Prince Regent as a witness; but it ultimately became unnecessary to do so. On the whole, the better opinion seems to be, that the Sovereign, if so pleased, may be examined as a witness in any case, civil or criminal, but not without being sworn.[4]

§ 1382.[5] The wisdom of requiring witnesses to be sworn, excepting under very special circumstances, cannot well be disputed. The ordinary definition of an oath,—viz., "a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven, if he do not speak the truth,"[6]—may, indeed, be open to comment, since the design of the oath is, not to call the attention of God to man, but the attention of man to God; —not to call upon Him to punish the wrong-doer, but on the witness to remember that he will assuredly do so. Still, by laying hold of the conscience of a witness, the law best insures the utterance of truth.[7] The repetition of the words of an oath would, in the case of persons who do not believe in a Supreme Being, be, however, an unmeaning formality. The question remains whether such persons ought to be allowed to give testimony in courts of

[1] 2 Roll. Abr. 686; Omichund *v.* Barker, 1744-5.
[2] Abigaye *v.* Clifton, 1612.
[3] 2 Ld. Campbell's Lives of the Chanc. 510, 511.
[4] Id. in n.
[5] Gr. Ev. § 328, in some part.
[6] R. *v.* White, 1786; The Queen's case, 1820.
[7] Tyler on Oaths, 12, 15. See a definition of an oath by Coleridge, C.J., in Att.-Gen. *v.* Bradlaugh, 1885. See, also, Omichund *v.* Barker, 1744-5.

justice? The common law pronounces that persons who do not acknowledge a moral and religious accountability to such a Being, who will reward or punish, ought not to be sworn, as they must be insensible to the obligations of an oath.[1] But the Legislature, has, in modern times, enacted that their testimony shall be received, for it is by the Oaths Act, 1888,[2] provided:[3] "Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely, and corruptly affirm anything which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury."[4]

§ 1383. Originally, the cases in which a resort to the provisions of this legislation was made were comparatively few,[5] but their number has of late years largely increased. It is the duty of the presiding judge to himself ascertain by questioning any witness who claims to affirm if he be entitled to do so.[6] To give vitality to the enactment contained in the Oaths Act, 1888: first, the

[1] B. N. P. 292; 1 Atk. 40, 45; Maden *v.* Catanach, 1862.

[2] 51 & 52 V. c. 46.

[3] § 1. A very similar enactment with respect to witnesses summoned to give evidence before courts-martial had previously been inserted in the Army Act, 1881 (44 & 45 V. c. 58), § 52, subs. 4. In India, every person who may by law be sworn, or called upon to make a solemn affirmation, in any capacity whatever, may, if he objects to such oath or solemn affirmation, make in place thereof a simple affirmation, omitting the words "So help me God," "In the presence of Almighty God," or other expressions of the same nature: "The Indian Oaths Act, No. 6 of 1872."

[4] § 2 directs that the form of oral declaration shall be as follows:—"I, A. B. do solemnly, sincerely, and truly declare and affirm." [*Then follow the words of the oath, omitting any imprecation or calling to witness.*] The validity of an oath is not to be affected by the person sworn having no religious belief: § 3. The form of affirmation in writing is also given in § 4 (set out infra, § 1389 n.).

[5] Indeed, the author, during thirty-five years, was Judge of County Courts, and heard the oath administered to at least 300,000 witnesses, yet could not recall a single instance of any atheistical objection to being sworn having been raised before him.

[6] Reg. *v.* Moore, 1892.

person called as a witness must object to take an oath on the ground, and in the terms, set out in the Act; and secondly, he must also satisfy the presiding judge that he has no religious belief, or that the taking of an oath is contrary to it. A witness who states that he has a religious belief, but does not say that the taking of an oath is contrary thereto, cannot affirm.[1]

§ 1384. To render competent a witness whose objection to being sworn has not been taken in accordance with the provisions in the Oaths Act, which regulate the mode of taking such an objection, it appears to be still necessary that such witness should be sworn in a manner which will be binding upon his conscience.[2] The Oaths Act, 1888,[3] does not contain, moreover, any provision making the evidence of an Atheist, who does not *himself* object to be sworn, in any way receivable. But it provides,[4] that "where an oath has been duly administered and taken, the fact that the person to whom the same was administered had at the time of taking such oath no religious belief shall not for any purpose affect the validity of such oath."

§ 1385.[5] Defect of religious faith is, however, *never presumed*. Whatever opinions on religious subjects a man is proved to have once entertained, they are,—unless a long interval has elapsed,[6] —presumed to continue unchanged till the contrary is shown.[7] One mode, and perhaps the least objectionable mode, of proving that a witness is incompetent to take an oath, for want of religious belief, is by adducing evidence of atheistical declarations having been previously made by him to others.[8] But the witness may himself be interrogated upon the subject, either before he is sworn at all, or after he has been sworn upon the

[1] Reg. *v.* Moore, 1892.

[2] As to this see infra, § 1188. Before the Oaths Act, in the celebrated case of Omichund *v.* Barker, 1744-5, the proper test of the competency of a witness to be sworn was settled, upon great consideration, to be the belief in a God, and that he will—either in this world or in the next—reward and punish us according to our deserts. This rule was recognised in Butts *v.* Swartwood, 1823 (Am.); The People *v.* Matteson, 1824 (Am.); and by Story, J., in Wakefield *v.* Ross, 1827 (Am.). See, as to the Scottish law, 2 Dickson, Ev. (Sc.) 849.

[3] 51 & 52 V. c. 46.

[4] § 3.

[5] Gr. Ev. § 370, in part.

[6] Att.-Gen. *v.* Bradlaugh (Ld. Coleridge), commenting on the above passage, 30th June, 1884.

[7] Ante, § 197; The State *v.* Stinson, 1844 (Am.).

[8] See Att.-Gen. *v.* Bradlaugh, 1885, C. A.; as to the American law, 1 Law Reporter, pp. 347, 348; and 2 Dickson, Ev. (Sc.) 849, 850, 907, as to the Scottish law.

voire dire;[1] or, even, as it would seem, after having been sworn in the cause.[2]

§ 1386. The Evidence Act, 1851, provides that "Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."[3] R. S. C., 1883, Order XXXVII., R. 19, provides that "any officer of the court, or other person directed to take the examination of any witness or person;" "each chief clerk of the Chancery Division, for the purpose of any proceedings directed to be taken before him;"[4] and "the taxing officers of the Supreme Court, or of any Division thereof, for the purpose of any proceeding before them;"[5] may respectively administer oaths. Order LXI. further provides by R. 5, that, "every master, and every first and second class clerk in the Filing and Record Department, shall, by virtue of his office, have authority to take oaths and affidavits in the Supreme Court." The Bankruptcy Act, 1883, provides first that Official Receivers "may, for the purpose of affidavits verifying proofs, petitions, or other proceedings under this Act, administer oaths;"[6] and secondly, that, "for the purpose of any of his duties in relation to proofs, the trustee may administer oaths and take affidavits."[7]

§ 1387. The oath ought to be administered in a reverent manner. Indeed, the Consolidated General Orders of the Court of Chancery of 1860, contained an express rule to this effect.[8]

§ 1388.[9] Unless he claims a right to affirm under some of the statutory provisions which have been already pointed out, every witness ought (as has been pointed out[10]) to be sworn according to the peculiar ceremonies of his own religion, or in *such manner* as he *deems binding* on his conscience.[11] This doctrine of the civil

[1] R. *v.* White, 1786; Maden *v.* Catanach, 1862.
[2] R. *v.* Taylor, 1790 (Buller, J.); The Queen's case, 1820.
[3] 14 & 15 V. c. 99, § 16.
[4] Ord. LV. r. 16. See, also, r. 17.
[5] Ord. LXV. r. 27, subs. 25.
[6] 46 & 47 V. c. 52, § 68, subs. 2.
[7] Id., Sched. II. r. 26.
[8] Ord. XIX. r. 14; repealed by Appendix O. to R. S. C. 1883.
[9] Gr. Ev. § 371, in part.
[10] Supra, § 1384.
[11] In Morgan's case, 1764, a Mahomedan was sworn thus:—First, he placed his right hand flat upon the Koran, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head: he then looked for some time upon it, and, on being asked what that ceremony

law was, in the great case of Omichund *v.* Barker,[1] settled to also be the common law[2] rule. It has, moreover, been provided by statute,[3] that all persons shall be bound by the oaths which are lawfully administered to them, provided they are administered in such form, and with such ceremonies, as the parties sworn declare to be binding on their consciences. It has been further provided by the Oaths Act, 1888,[4] that if any person to whom an oath is administered *desires* to swear "with uplifted hand," in the form and manner common in Scotland,[5] he shall be entitled to do so. It should be noted (a fact which country administrators of the law occasionally forget) that a witness must "desire" this form of oath before its use becomes lawful—and that he cannot have the form thrust upon him.

1388A. In order to ascertain what form of oath will be binding

was to produce, he answered that he was bound by it to speak the truth. A Jew is sworn on the Pentateuch with his head covered (see note to Omichund *v.* Barker, 1744-5); but if he professes Christianity, he may be sworn on the New Testament, though he has not formally renounced Judaism: R. *v.* Gilham, 1795. A Chinese is sworn by the ceremony of his breaking a saucer previously to the administration of the oath: R. *v.* Entrehman, 1842. The formula of taking an oath, anciently adopted by the Romans, was as follows:—The witness held a flint stone in his right hand, and dropped it as he uttered these words: "Si sciens fallo, tum me Diespiter, salvâ urbe arceque, bonis ejicimt, ut ego hunc lapidem": Adam's Ant. 247; Cic. Fam. Ep. vii. 1, 12. Under the Christian emperors it was taken, invocato Dei Omnipotentis nomine: Cod. lib. 2, tit. 4, l. 41. Sacrosanctis evangeliis tactis: Cod. lib. 3, tit. 1, l. 14. And Constantine adds, in a rescript, "Jurisjurandi religione testes, priusquam perhibeant testimonium, jamdudum arctari præcipimus": Cod. lib. 4, tit. 20, l. 9. Amongst Christians, Roman Catholics are, in England, usually sworn simply by the Evangelists, and upon a Testament, in the ordinary way, but they, in Ireland, are sworn on a Testament, with a crucifix or cross upon it: M'Nally, Ev. (Ir.) 97. "Quumque sit adseveratio religiosa, satis patet, jusjurandum attemperandum esse cujusque religioni": Hein. ad Pand. p. 3, §§ 13, 15. "Quodcunque nomen dederis, id utique constat, omne jusjurandum proficisci ex fide et persuasione juruntis; et inutile esse, nisi quis credat Deum, quem testem advocat, perjurii sui idoneum esse vindicem. Id autem credat, qui jurat per Deum suum, per sacra sua, et ex [illegible]uâ ipsius animi religione," &c.: Bynk. Obs. Jur. Rom. lib. 6, c. 2. See also, Puff. lib. 4, c. 2, § 4. An[illegible]cotland, members of the Kirk a[illegible]n by the form of holding up the [illegible]nd, without touching the book or kissing it, and by saying either, "I, A. B., swear by God himself, as I shall answer to him at the great day of judgment, that the evidence I shall give," &c.; or, "I swear according to the custom of my country and the religion I profess, that the evidence," &c.: Mildrone's case, 1786; Walker's case, 1788; Mee *v.* Reid, 1791.

[1] 1744-5.

[2] Alderson, B., in Miller *v.* Salomons, 1852; and Pollock, C.B., id.

[3] 1 & 2 V. c. 105: see also (as to the effect of its being shown that a witness, when sworn, had no religious belief) § 3 of the Oaths Act, cited supra, § 1384.

[4] 51 & 52 V. c. 46, § 5.

[5] As to the Scotch form of oath, see the fifth preceding note.

on him, the court should inquire this of the witness himself; and the proper time for making this inquiry is before he is sworn. If, however, the witness, without making any objection, takes the oath in the usual form, he may be afterwards asked whether he thinks it binding on his conscience; but if he answers in the affirmative, he cannot then be further asked, if he considers any other form of oath more binding.[1] Neither can a witness, who states that he is a Christian,[2] or who claims to be sworn in Scotch fashion, be asked any further questions before he is sworn. The Oaths Act, 1888, provides that, if a witness be duly sworn, the fact that he has no religious belief shall not affect the validity of the oath,[3] while if a man who is really of a different faith be sworn in the mode usual with the believers in any particular faith—for instance, if, being a Jew, he is sworn on the Gospels—the adverse party cannot for this cause have a new trial, since the witness is still punishable for perjury if he has sworn falsely.[4]

§ 1389. In addition to the recent relaxation of the law, by which persons who either have no religious belief, or with whom the taking of an oath is contrary to that religious belief, are enabled to give their evidence in an open court of law on affirmation,[5] all persons are permitted to make a solemn declaration (in lieu of an oath) on various other occasions,[6] such as on making affidavits, &c.

[1] The Queen's case, 1820.

[2] R. *v.* Serva, 1845 (Platt, B.).

[3] See § 3 of 51 & 52 V. c. 46.

[4] Sells *v.* Hoare, 1822. The State *v.* Whisenhurst, 1823 (Am.). See R. *v.* Wood, 1841 (Ir.). Whether a party will be entitled to a new trial, if a witness on the other side has testified without having been sworn at all, is a question depending upon circumstances. If the omission of the oath was known at the time of the original trial, he will not: Birch *v.* Somerville, 1852 (Ir.), cited ante, § 1380; Lawrence *v.* Houghton, 1809 (Am.); White *v.* Hawn, 1810 (Am.). But if it was not discovered till after the trial, he will: Hawks *v.* Baker, 1829 (Am.). See Richards *v.* Hough, 1882.

[5] See ante, §§ 1382, 1383. The present is a convenient place to mention that, in addition to the provisions already set forth, enabling persons such as are mentioned in the text to give evidence in Court upon affirmation, §§ 1 and 4 of "The Oaths Act, 1888," enable such persons to make statements in writing (otherwise affidavits) on affirmation in a form which commences:—"I, , of , do solemnly and sincerely affirm," and the "jurat" to which runs, "Affirmed, &c., this day of , 18 . Before me, ."

[6] By 5 & 6 W. 4, c. 62 ("The Statutory Declarations Act, 1835"), declarations may be substituted for the oaths, whether *official*, or *extra-judicial*, or *voluntary*, formerly in use; and any person who wilfully and corruptly makes and subscribes any such declaration, knowing it to be untrue in any material particular, is guilty of a misdemeanor.

§ 1389A. Moreover, the members of certain sects[1] are by law permitted, both on giving their evidence in open court, and also on all occasions, to make a solemn affirmation instead of taking an oath. Thus, Quakers and Moravians are allowed to affirm in all cases where an oath is required;[2] and, in consequence of a decision on the original Act conferring this right,[3] the same privilege has been expressly extended[4] to all persons who have been Quakers or Moravians, but have ceased to belong to either of those sects.[5]

§ 1389B. Two important exceptions to the general rule that all evidence must be upon oath or affirmation have been created (I.) By the Criminal Law Amendment Act, 1885;[6] and (II.) By the Prevention of Cruelty to Children Act, 1894.[7]

§ 1389C. By the Criminal Law Amendment Act, 1885,[6] it is made[8] a felony punishable by penal servitude for life, or by imprisonment for two to five years, to have carnal knowledge of a girl under thirteen, and an attempt to do so is made a misdemeanour, punishable by a term of imprisonment not exceeding two years; and the section providing this then proceeds as follows:[8]—"Where, upon the hearing of a charge under this section, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the

[1] Those who interpret literally our Saviour's injunction, "Swear not at all," ignore the fact that Christ himself not only submitted to be sworn before the Sanhedrim, but actually refused to answer until he was put upon his oath by the high priest. See, and compare, 5th Ch. of St. Matt. vv. 34—37, and 26th Ch. of St. Matt. vv. 59—64.

[2] This is the form:—"I, A. B., being one of the people called Quakers, [*or* one of the persuasion of the people called Quakers, *or* of the United Brethren called Moravians, *as the case may be*,] do solemnly, sincerely, and truly declare and affirm," &c.

[3] Doran's case, 1828.

[4] By 1 & 2 V. c. 77.

[5] This is the form:—"I, A. B., having been one of the people called Quakers, [*or* one of the persuasion of the people called Quakers, *or* of the United Brethren called Moravians, *as the case may be*,] and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm," &c.

[6] 48 & 49 V. c. 69.

[7] 57 & 58 V. c. 27.

[8] 48 & 49 V. c. 69, § 4.

reception of the evidence, and understands the duty of speaking the truth: Provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused: Provided also, that any witness whose evidence has been admitted under this section shall be liable to indictment and punishment for perjury in all respects as if he or she had been sworn." And unsworn evidence given against a prisoner on a charge against him under the above section (§ 4) of the Act, in pursuance of that section, may, in pursuance of § 9 of the same Act, be used to convict him of an indecent assault.[1]

§ 1389D. By the Prevention of Cruelty to Children Act, 1894,[1] it is provided[2] that where children are witnesses as to offences which are summarily punishable under such Act, the evidence of any child, in respect of whom the offence is charged to have been committed, or any other child of tender years, may, should one be tendered as a witness and appear not to understand the nature of an oath, be received, though it be not upon oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and to understand the duty of speaking the truth. The section, however, requires that to justify a conviction such evidence be corroborated by some other material evidence in support, implicating the accused.[3] The section also provides that a child who, under this provision, gives evidence which is false shall be liable to punishment.[4]

§ 1390. The practice, though formerly different,[5] now is that debtors and their wives, whether in England[6] or in Ireland,[7] may be examined upon oath by the Courts of Bankruptcy, concerning the debtor, his dealings, or property.

§ 1391. All persons who, at Nisi Prius, being engaged in a cause as counsel, solicitor, or parties, had in that capacity actually addressed the jury on behalf of that side on which they were afterwards called upon to give evidence, were at one time supposed to be

[1] 57 & 58 V. c. 41.
[2] Id. § 15.
[3] Id. subs. 1 (*a*).
[4] Id. subs. 1 (*b*).
[5] 24 & 25 V. c. 134, § 211.
[6] 46 & 47 V. c. 52, § 27.
[7] 20 & 21 V. c. 60, §§ 306, 307, Ir.

incompetent to *give testimony as witnesses* in such cause.[1] But it has since been, on further investigation, judicially acknowledged that no such right to reject such a person as a witness exists,[2] although the obvious inconvenience of permitting one and the same person, first, to state the case as an advocate, and next, to prove that statement as a witness, appears to furnish ample justification for its immediate adoption;[3] and it is not only in all cases a most objectionable and reprehensible practice for the solicitor who is conducting a matter to himself also give evidence as a witness in it, but may even, under special circumstances, afford ground for a new trial.[4] Private prosecutors have no right to address the jury,[5] even though they waive their title to give evidence on oath, and will not, under any circumstances, be permitted to act in the two-fold capacity of advocates and witnesses.[6]

§ 1392. *An objection* to the competency of a witness ought, in general, to be taken before the examination in chief. Indeed, it has been frequently said by judges, and sometimes held, that a party who is aware of the existence of any disqualification, cannot lie by and allow the witness to be examined, and afterwards object to his competency, if he should dislike his testimony.[7] However, this doctrine has been disputed,[8] and it has been held, in conformity with some old decisions,[9] that the objection may be *raised at any time during the trial*, and that, too, whether the objector previously knew of the disqualification or not. Moreover, a judge acts rightly, who, having pronounced a witness competent on the

[1] Stones *v.* Byron, 1846 (Patteson, J.); Deane *v.* Packwood, 1846 (Erle, J.). See Best, Ev. 250—258.

[2] Cobbett *v.* Hudson, 1852.

[3] Id.

[4] Under what circumstances such a thing will be ground for a new trial, see Deane *v.* Packwood, 1846.

[5] R. *v.* Gurney, 1869.

[6] R. *v.* Brice, 1819; R. *v.* Milne, undated; Cobbett *v.* Hudson, 1852 (Ld. Campbell).

[7] Dewdney *v.* Palmer, 1839; R. *v.* Watson, 1817; R. *v.* Frost, 1840; Beeching *v.* Gower, 1816 (Gibbs, C.J.); Howell *v.* Lock, 1809; Doncelson *v.* Taylor, 1829. In Yardley *v.* Arnold, 1842, Parke, B., observed, "I cannot help wishing very much that it were established as the regular practice, that, when once a witness is sworn, no question should be put to him in order to raise objections to his competency; I think all such should be put to him on the voire dire; and that, when once sworn in chief, his competency should be taken for granted; but certainly the practice has been different hitherto." See, also, Hartshorne *v.* Watson, 1839; Wollaston *v.* Hakewill, 1841; and Flagg *v.* Mann, 1837 (Am.).

[8] Jacobs *v.* Layborn, 1843.

[9] Needham *v.* Smith, 1704; Ld. Levat's case, 1746. See, also, Stone *v.* Blackburn, 1793; Yardley *v.* Arnold, 1842 (Parke, B.).

voire dire,[1] afterwards, on discovering during the examination that he was really incompetent, rejects his testimony, though part of it has already been reduced to writing.[2] The rule on this subject is the same in equity as at law,[3] and both in criminal and civil cases.[4] In general, too, if an objection to the competency of a witness be not taken until *after the trial*, it will be too late; and the courts will not grant a new trial for this cause alone,[5] unless the incompetency were known and concealed by the party producing the witness,[6] or there be other evidence of mala praxis on his part.[7]

§ 1393. In strictness, on an objection to his competency being taken, a witness ought to be examined upon the *voire* or *vraie dire;* that is, he should be sworn to answer truly "all such questions as the court shall demand of him." This peculiar form of oath is, however, seldom now administered; and the facts on which the objection rests, if not admitted by the opposite side, are elicited by questions put to the witness after being sworn in chief.[8] Upon such an examination, the witness, if it be necessary, may speak to the contents of written documents without producing them.[9] The objection may perhaps be also supported by evidence aliundè.

[1] As to what this is, see next section.

[2] R. *v.* Whitehead, 1866.

[3] Needham *v.* Smith, 1704; Vaughan *v.* Worrall, 1817; Selway *v.* Chappell, 1841; Swift *v.* Dean, 1810 (Am.); Gresl. Ev. 234—236. See Bousfield *v.* Mould, 1847.

[4] Ld. Lovat's case, 1746; Com. *v.* Green, 1822 (Am.). It has, however, already been pointed out (ante, § 1373) that in trials for high treason an objection under the Act of Anne must be taken before the witness is sworn. Qy. as to other objections in such trials as to the competency of witness, where, perhaps, the old law prevails.

[5] Turner *v.* Pearte, 1787; Jackson *v.* Jackson, 1825 (Am.). But see Jacobs *v.* Layborn, 1843, as reported 11 M. & W. 691. In Barbat *v.* Allen, 1852, Parke, B., referred to the Irish case of Birch *v.* Somerville, 1852 (cited ante, § 1380), in which Ld. Clarendon was examined without being sworn, but the objection not having been insisted on at the time, the court refused to disturb the verdict.

[6] Niles *v.* Brackett, 1819 (Am.).

[7] Wade *v.* Simeon, 1845.

[8] See Jacobs *v.* Layborn, 1843.

[9] See Butler *v.* Carver, 1818; R. *v.* Gisburn, 1812; Lunniss *v.* Row, 1839; Carlisle *v.* Eady, 1824; Quarterman *v.* Cox, 1837; Butchers' Co. *v.* Jones, 1794; Botham *v.* Swingler, 1794; Brockbank *v.* Anderson, 1844.

AMERICAN NOTES.

Competency of Witnesses. — While the competency of witnesses, like the methods of procuring their attendance or written evidence, is usually regulated by the statutes of particular jurisdictions, the statutory regulations regarding competency have, in general, followed, in English speaking communities, such practically similar lines as to admit of convenient classification.

With few and comparatively unimportant exceptions, all persons of sufficient intelligence are at present competent as witnesses. Such exceptions as still exist are established by obvious considerations of public policy. All persons, however, are not regarded as being possessed of sufficient intelligence.

Mental Derangement. — A person whose understanding is defective by reason of insanity, idiocy, lunacy, or other permanent mental derangement is incompetent as a witness. "The exclusion of testimony to prove that a witness offered on the part of the plaintiffs was *non compos*, by reason of his mental derangement, was erroneous. If it could have been shown to the court below that the witness was deranged, or had not the ordinary understanding, he must have been excluded as incompetent. Idiots, lunatics and madmen are not competent witnesses, and this must be shown to the court by proof, like any other charge of incompetency." Livingston *v.* Kiersted, 10 Johns. 362 (1813).

Insanity. — "There can be no doubt that a person should be excluded from giving evidence who is insane at the time he is offered as a witness. The reason of this rule is, that the mind of such a person is not in a fit condition to be properly impressed with the nature and obligation of an oath. But a lunatic or monomaniac may be sworn, and may testify, if at the time he can apprehend and appreciate the religious sanction of the obligation he is required to take." Holcomb *v.* Holcomb, 28 Conn. 177 (1859); Lopez *v.* State, 30 Tex. App. 487 (1891).

"Formerly deaf and dumb people were classed with idiots, and were incapable of crime and incompetent as witnesses; but since the facilities for educating them, the rule is abrogated." State *v.* Edwards, 79 N. C. 648 (1878). "Deaf and dumb 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. A deaf mute may be permitted to express himself in writing, if this be the mode in which he can be better understood, or through a sworn interpreter, by whom his signs can be interpreted. Such interpretation is not hearsay, nor is it excluded by the fact that the witness

can write. See also, 5 Am. & Eng. Enc. Law, 121, where the rule is thus stated: 'Deaf and dumb persons may be witnesses if any person can be found who can interpret their signs to the court and jury upon oath, or if they can write and read writing, so that the questions and answers may be conveyed in writing.' These authors seem to be well sustained by the cases which they cite." State *v.* Weldon, 39 S. C. 318 (1893).

"Doubtless a court has the inherent power to elicit testimony from such a witness by whatsoever means necessary to the end to be attained. The presumption that a person deaf and dumb from birth should be deemed an idiot, does not seem to obtain in modern practice, at least in the United States; and if it did, the circumstances of this case forbid its application. Such unfortunate persons may be witnesses, if able to communicate their ideas by signs through the medium of an interpreter, or by writing, if they write and read writing. And even if the witness can write, this does not prevent his testimony from being communicated by signs; either way may be adopted." State *v.* Howard, 118 Mo. 127, 143 (1893).

While persons insane at the time they are offered as witnesses must be rejected, there is no rule of law which excludes the evidence of a witness, sane at the time of trial, as to matters which occurred during a previous period of insanity. "A man may have many delusions, and yet be capable of narrating facts truly; and the existence of such delusions on his part, at the time of the occurrences which he is called upon to relate, goes to his credit, and not to his competency, when he is of sound mind at the time he is called upon to testify. As there can be neither perfect sanity, nor perfect insanity, so no witness, not incompetent within the statute, is to be absolutely excluded because he has been insane, and is called upon to narrate matters, some of which occurred while he is alleged to have been unconscious." Sarbach *v.* Jones, 20 Kans. 497 (1878).

And even where the witness is under guardianship as insane at the time of testifying, he may be admitted as a witness if, in the opinion of the presiding justice, his evidence on the points which it covers would be valuable for the purposes of the trial. "This is the only rational and just rule that can be adopted. Insanity exists in various degrees. Modern investigations have shown that it exists much more extensively than was formerly supposed, and that persons who are affected to such an extent that it is expedient to place them in insane hospitals or under guardianship often possess sufficient knowledge of the nature of an oath and of events that took place in their presence to make them useful and trustworthy as witnesses. A rigid rule that would exclude the testimony of all such persons as untrustworthy witnesses would not

be conformable to facts, and therefore would not be founded in good sense. Nor would such a rule promote justice. It would leave insane persons needlessly unprotected in hospitals and elsewhere, and would deprive the public and individuals of their testimony in cases where it might be important and valuable." Kendall *v.* May, 10 All. 59 (1865).

The fact that the witness has been committed to an asylum as insane (with "recurrent mania") is still less reason, standing alone, for rejecting the evidence. Clements *v.* McGinn, 33 Pac. Rep. (Cal.) 920 (1893).

Lunacy. — An idiot or lunatic is excluded only when, in the opinion of the presiding judge, he is so far under the influence of his deficiency that his evidence would be of no value in the case. "It will be seen then, that a witness is not excluded by this rule, merely because he is a lunatic. That is not enough *per se* to exclude him; but he must at the time of his examination be so under the influence of his malady as to be deprived of that 'share of understanding' which is necessary to enable him to retain in memory the events of which he has been witness, and gives him a knowledge of right and wrong." If at the time of his examination he has this share of understanding, he is competent. That is the test of competency, and of such competency the court is the judge; whilst the weight of testimony — the credit to be attached to it — is left to the jury." Coleman's Case, 25 Gratt. 865, 875 (1874).

"The question then before this court is not whether the witness, Joseph Mayo, Jr., was or was not a lunatic; whether on two occasions, shortly before his examination, he was not for a few days decidedly insane; whether a few days after his examination he was not in the same condition; or whether at the time of the motion he was not, and is not still, a lunatic; all of which we incline to believe has been established by the proofs and admissions of counsel, before this court in argument. This we say however is not the question before this court; for, as was said by Judge Story, speaking for all the judges of the United States Supreme court in the case of Evans *v.* Hettick, 5 Wheat. R. 470, 'a person being subject to fits of derangement is no objection either to his competency or credibility if he is sane at the time of his giving his testimony.' The real question before us is, whether on Monday and Tuesday, the 23d and 24th of March 1874, when, as a witness in this cause, he was subjected to a protracted and searching examination and cross-examination, without objection to his competency from any quarter, Joseph Mayo, Jr., possessed a sufficient share of understanding to appreciate the nature and obligation of an oath; to distinguish between right and wrong; to remember events, of which he had been a witness; and to answer intelligently the questions propounded to him.

"If he then possessed that degree of intelligence, we think he was

competent. The learned judge who presided at the trial, and whose peculiar province it was to decide that question, was of opinion that he did possess the requisite share of understanding; and it would require very cogent and conclusive proof to the contrary to induce this court to interpose under such circumstances." Coleman's case, 25 Gratt. 865, 876 (1874).

Where a witness was said to be demented, he was, nevertheless, admitted after an examination on *voir dire* and the ruling was sustained. "In this we but followed the tendencies of modern judicial determination — namely, not to exclude a witness on account of mental incapacity to testify, if he have sufficient capacity to understand an oath, and to narrate the transaction in what appears to be an intelligent, rational manner." Walker *v.* State, 97 Ala. 85 (1892).

Understanding Defective by Reason of Youth. — "It was at one time considered, that an infant, under the age of nine years could not be permitted to testify." State *v.* Whittier, 21 Me. 341 (1842), citing Rex *v.* Travers, Stra. 700; Com. *v.* Hutchinson, 10 Mass. 225 (1813).

"And that between the ages of nine and fourteen years it was within the discretion of the Court to admit or not, as it should or should not be satisfied of the infant's understanding and moral sense. R. *v.* Dunnell, East's P. C. 442." State *v.* Whittier, 21 Me. 341 (1842); Blackwell *v.* State, 11 Ind. 196 (1858); State *v.* Edwards, 79 N. C. 648 (1878).

In Vermont and other states it has been held that above the age of fourteen a person is competent to testify; that under that age he is subject to the decision of the court's discretion. Robinson *v.* Dana, 16 Vt. 474 (1844); State *v.* Michael, 37 W. Va. 565 (1893). "At fourteen years of age a witness is presumed to be competent. Under that age, no such presumption arises. Under the age of six, presumption of incompetency would arise, and at the age of five the utmost limit would be ordinarily reached unless extraordinary development of the mental and religious faculties should be shown, to take the case out of the ordinary course of nature.

Children of this age usually have not sufficient development to understand the nature and effect of an oath, and more especially if their parents have been neglectful of their care and education in religious and moral truths. They may have some knowledge that it is wrong to tell a lie, yet this may be so slight as to produce no decided or lasting impression on their minds, but leave them in a decidedly chaotic state, in which they may easily be led to believe that the things that others in authority over them instruct them to say are the indistinct thing called 'truth,' and therefore they must repeat just what they are told to say, or what has often been repeated in their presence. Not being amenable to the law for

false swearing, and having no knowledge of moral responsibility, designing and wicked people may easily use them to further intrigues of their own, without fear of punishment for subornation of perjury. They are as clay in the potter's hand, to be moulded, some to honor and some to dishonor. Lacking conscientiousness, they repeat with phonographic precision the things that have been told them to say, be they true or false." State *v.* Michael, 37 W. Va. 565 (1893); People *v.* Linzey, 79 Hun, 23 (1894).

The general rule, however, is that there is no time limit of absolute exclusion because of youth.

It is for the court to decide, whether, under all the circumstances, the child is of sufficient capacity to testify with advantage to the cause of justice. "As to children, there is no precise age within which they are absolutely excluded, on the presumption that they have not sufficient understanding. At the age of fourteen all persons are presumed to have common discretion and understanding, until the contrary appears; but under that age it is not presumed; hence, inquiry should be made as to the degree of understanding which the child, offered as a witness, possesses; and if he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he should be admitted to testify, no matter what his age may be." Flanagin *v.* State, 25 Ark. 92 (1867); Vincent *v.* State, 3 Heisk. (Tenn.) 120 (1871); Wade *v.* State, 50 Ala. 164 (1873); People *v.* Linzey, 79 Hun, 23 (1894); Freeny *v.* Freeny, 80 Md. 406 (1895).

"It was finally determined in Brazier's Case, East's P. C., 444, on consultation between all the Judges, that a child of any age, capable of distinguishing between good and evil, might be examined on oath." State *v.* Whitvier, 21 Me. 341 (1842.) "Intelligence, and not age, must govern in permitting persons of tender years to give testimony." Draper *v.* Draper, 68 Ill. 17 (1873).

Thus where a child, in a criminal case, after stating his age as 13, was refused further examination, the supreme court of Arkansas held that error had been committed. Flanagin *v.* State, 25 Ark. 92 (1867); State *v.* Whittier, 21 Me. 341 (1842); Partin *v.* State, (Tex. Cr. App.) 30 S. W. 1067 (1895).

So of a child between thirteen and fourteen. Vincent *v.* State, 3 Heisk. (Tenn.) 120 (1871); Com. *v.* Lynes, 142 Mass. 577 (1886); McAmore *v.* Wiley, 49 Ill. App. 615 (1893). Or aged twelve. Parker *v.* State (Tex.) 21 S. W. 604 (1893.) White *v.* Com. (Ky.) 28 S. W. 340 (1894). Or of the age of ten. Gardner *v.* Kellogg, 23 Minn. 463 (1877); Davidson *v.* State, 39 Tex. 129 (1873).

On an indictment for murder the evidence of a child nine years and eleven months old was admitted against the objection of the prisoner. Warner *v.* State, 25 Ark. 447 (1869). So of a child nine years of age; the victim of a criminal assault. Carter *v.* State, 63

Ala. 52 (1879); Blackwell *v.* State, 11 Ind. 196 (1858); State *v.* Douglas, 53 Kans. 669 (1894). Or in a civil case, Draper *v.* Draper, 68 Ill. 17 (1873). A child between eight and nine has been admitted as a witness. Com. *v.* Hutchinson, 10 Mass. 224 (1813). So a child of eight has been deemed competent. Com. *v.* Carey, 2 Brews. 404 (1868); Wade *v.* State, 50 Ala. 164 (1873). One of seven. Johnson *v.* State, 61 Ga. 35 (1878); People *v.* Smith, 86 Hun, 485 (1895). And one six and a half years of age. State *v.* Edwards, 79 N. C. 648 (1878); McGuire *v.* People, 44 Mich. 286 (1880).

In a Canadian case, a child of six was received as a witness. R. *v.* Bérubé, 3 Décis. des Tribuneaux, 212 (1852). The evidence of a child of five was received in State *v.* Juneau, 88 Wis. 180 (1894).

Moral Perception Essential. — In case of a young child, it has been almost universally felt by the courts that the intellectual capacity for observation and statement is more apt to be well developed than any suitable appreciation of the nature, consequences and sanctity of the oath under which, as a witness, the child is to testify.

"The admissibility of children as witnesses depends, not merely upon their possessing a competent degree of understanding, but also, in part, upon their having received such a degree of religious instruction as not to be ignorant of the nature of an oath, or of the consequences of falsehood." Carter *v.* State, 63 Ala. 52 (1879).

"It is now said to be the established rule, as well in criminal as civil cases, that children of any age may be examined upon oath, if capable of distinguishing between good and evil, and possessing sufficient knowledge of the nature and consequences of an oath." Wade *v.* State, 50 Ala. 164 (1873); R. *v.* Bérubé, 3 Décis. des Tribuneaux, 212 (1852). The moral requirement may be removed by statute and intelligence remain the sole requirement. State *v.* Douglas, 53 Kans. 669 (1894); McAmore *v.* Wiley, 49 Ill. App. 615 (1893).

On the contrary, in Kentucky, it has been held that the intellectual test is the only one. "The intelligence of the witness is the true test of competency, and that must be determined by the court, while the weight to be given to the evidence is for the jury. A child may be ignorant of God, and of the evil of lying, and of the punishment prescribed therefor, both here and hereafter, and yet have sufficient intelligence to truthfully narrate facts to which its attention is directed." White *v.* Com., 28 S. W. (Ky.) 340 (1894).

The requisite degree of clearness as to the spiritual consequences of perjury is not one easy to state in the form of a precise rule.

Where a colored girl between thirteen and fourteen stated that "if she swore to a lie, she would go to the bad world" it was held sufficient. Vincent *v.* State, 3 Heisk. (Tenn.) 120 (1871). A child of eight who replied "If I do not tell the truth I will go to the big

fires of hell" was deemed competent even though she did not know what the Bible was; — even after receiving the instructions of the court crier. Com. *v.* Carey 2 Brews. (Pa.) 404 (1868); State *v.* Langford, 45 La. Ann. 1177 (1893); McAmore *v.* Wiley, 49 Ill. App. 615 (1893). So of a child of nine who made a similar reply. Draper *v.* Draper, 68 Ill. 17 (1873). And in Texas one of that age, who testified on *voir dire* "that she would go to jail if she told a lie and to hell when she died," was judged competent, the court of criminal appeal agreeing "with the trial court that there is no better test as to apprehended results of falsehood." Comer *v.* State, 20 S. W. (Tex.) 547 (1892). Where a girl of the same age was able to state that it was wrong to lie, and that she would be punished, but did not know how, the witness was deemed competent. Blackwell *v.* State, 11 Ind. 196 (1858). A child of ten who, when asked on *voir dire* "what would become of her if she swore to a lie," replied that "she did not know what God or the laws of the country would do to her if she swore falsely, but that she would tell the truth," was deemed competent, the court remarking that "Older and wiser persons might have answered these questions in the same manner without impeaching their intelligence." Davidson *v.* State, 39 Tex. 129 (1873). So of a child who said, that it was wrong to lie; that if he lied he would be punished by law but did not know how. Parker *v.* State, 21 S. W. (Tex.) 604 (1893).

On the contrary, in Massachusetts, where a girl of thirteen testified "that she understood that the oath was to tell the truth, and that she would be punished if she did not tell the truth after taking it, but that she did not know how or by whom she would be punished," the judge, with the assent of the district attorney, postponed the further examination of the witness for the purpose of having her "instructed by a Christian minister." Com. *v.* Lynes, 142 Mass. 577 (1886).

Where a child of six did not know what an oath was but knew what it was to tell the truth and that those who do not tell the truth are punished in hell and might also be punished in this world, she was adjudged competent even if the fact of the existence of a God had only been known to her "for five days." R. *v.* Bérubé, 3 Décis. des Trib. 212 (1852).

But a child of six who said it was bad to tell "stories" that "the bad man gets" those who do and the court "puts them in jail" was rejected as answers which "reveal no religious feelings of a permanent nature."

"Unless we throw open the doors to any child, however young, who can talk and answer questions of simple form, and leading, and assume that every child, from birth, knows the sanctity of an oath, we must draw the line of incompetency somewhere, and that line, as indicated by the wisdom of many decisions founded upon

reason and justice, is that, where a child is of such tender years and feeble intelligence as to have no conception of the religious or moral significance of an oath, it is not competent to testify." State *v.* Michael, 37 W. Va. 565, 571 (1893).

"It appears that the witness was about ten years of age, and before he was permitted to testify was examined in reference to his qualification, and stated t[illegible]had been to Sunday school; had been taught that it was wi[illegible]steal or to tell a lie; said that he knew it was wrong not to tell the truth, and knew there was some punishment to be administered when a witness swears to tell the truth and does not, and that he understood that to tell a lie under oath was wrong, and that he might be punished for it.

We think that the trial court, in the exercise of the discretion vested in it, properly permitted the witness to testify. The law fixes no precise age within which children are excluded as witnesses. Their competency depends upon their intelligence, judgment, understanding and ability to comprehend the nature and effect of an oath. If a witness is over fourteen years of age the law presumes him to possess the requisite discretion and understanding. If under that age, the duty devolves upon the trial court, in the exercise of a sound discretion, to determine whether the witness has the requisite capacity and intelligence, and this discretion will not be interfered with upon appeal except upon a clear showing of its abuse." People *v.* Linzey, 79 Hun, 23 (1894).

On an indictment for rape upon a child under ten, whom both the trial and appellate courts regarded as competent from her reply that she would go to hell if she lied and "did bad" and to heaven if she "swore the truth and did right," the defendant's counsel further insisted that the witness should be examined touching her knowledge of punishments and rewards in a future state; the defendant insisting that the witness was incompetent to testify unless she showed some knowledge of the nature of an oath, and the consequences of a false oath. The court stated that the witness knew nothing about a future state; that that was a question of theology, with which courts have nothing to do. The court stated further that the court knew nothing about a future state, and that the solicitor and attorney for the defendant knew nothing about a future state; neither did anybody else know anything about such matters. To these remarks by the court the defendant duly and legally excepted. Grimes *v.* State, Ala. 17 So. 184 (1895).

Child May be Instructed. — Where a witness of tender years does not satisfy the court as to its comprehension of the nature and sanctity of an oath such witness may be instructed on the subject under the direction of the court.

"If, after the event of which he is to testify, a child, previously ignorant, is by instruction made to understand the nature of the

obligation to speak the truth which is imposed by an oath, he is then a competent witness. And it has been held, that the trial of a criminal cause may be postponed, when an important witness for the prosecution is a child, that he or she may in the meantime receive such instruction." Carter *v.* State, 63 Ala. 52 (1879).

In Com. *v.* Carey, 2 Brews. (Pa.) 404 (1868), "The court directed the crier to instruct the child as to the nature of an oath."

The court itself may instruct the witness. McAmore *v.* Wiley, 49 Ill. App. 615 (1893).

In a criminal case where the mother of a witness gave the latter religious instruction during the session of the court upon an intimation by the presiding judge to the prosecuting solicitor that he did not deem the previous religious training sufficient, the supreme court of North Carolina say: "In the case of infants where there was sufficient capacity to understand the transaction and to communicate it, but not sufficient moral and religious impression to comprehend the obligation of an oath, time has been allowed to make the impression and to cultivate the conscience. 1 Leach. 199, 430." State *v.* Edwards, 79 N. C. 648 (1878).

In Com. *v.* Lynes, 142 Mass. 577 (1886) the witness, a girl of thirteen, having stated ignorance of the nature and source of punishment in case of false swearing, the presiding justice, with the consent of the prosecuting officer, postponed the examination of the witness. "The next day she was offered again as a witness, and, upon examination, was found competent, and was permitted to testify, against the objection and exception of the defendant, on the ground that it appeared, as it did in her examination, that she had been instructed by a Christian minister since the last adjournment of the court. On cross-examination, she testified that the minister told her that God would punish her, if, after taking the oath, she testified what was not true, and that she did not know that before." After a careful review of the English practice, this course was approved, on exceptions, the court, however, apparently assuming that a trial court will exercise such a power only in case of important witnesses. "It is left discretionary with the court, when a principal witness offered is not yet sufficiently instructed in the nature of an oath, to put off the trial that this may be done." Com. *v.* Lynes, 142 Mass. 577 (1886).

INTOXICATION. — If at the time a person is offered as a witness, he is so far under the influence of spirituous liquors as to be, in the opinion of the court, incapable of understanding the obligation of an oath, such person is incompetent as a witness. "There is certainly no error in the court, refusing to administer an oath to a person, tendered as a witness, who is so drunk as not to understand its obligation, and to postpone swearing him until he may become sober enough for that purpose." State *v.* Underwood, 6 Ired. 96 (1845).

"Peake lays down this general proposition, which cannot fail to command the assent of all mankind, 'that all persons who are examined as witnesses, must be fully possessed of their understanding, that is, such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong; that, therefore, idiots and lunatics, while under the influence of their malady, not possessing this share of understanding, are excluded.' This principle, necessarily, excludes persons from testifying, who are besotted with intoxication, at the time they are offered as witnesses; for it is a temporary derangement of the mind; and it is impossible for such men to have such a memory of events, of which they may have had a knowledge, as to be able to present them, fairly and faithfully, to those who are to decide upon contested facts." Hartford *v.* Palmer, 16 Johns. 143 (1819). If the mental condition of an intoxicated witness is a surprise to a party to whom his evidence is material, the trial court may, in its discretion, suspend the trial. State *v.* Underwood, 6 Ired. Law, 96 (1845); Gould *v.* Crawford, 2 Barr, 89 (1845). Or even grant a new trial. State *v.* Underwood, 6 Ired. Law, 96 (1845). Or the court may permit the examination to proceed, leaving the credibility of the evidence to the jury. Gould *v.* Crawford, 2 Barr, 89 (1845).

If a proposed witness is sufficiently sober, when offered, to appreciate the obligation of the oath which he is about to take, his habitual drunkenness, even though it may have warranted placing him under guardianship, does not render him incompetent. "To render the witness incompetent, it must be shown that at the time of his examination, he was *non compos mentis*, deranged in mind, from some cause, the effect of liquor, or any other cause. No drunken man should be permitted to give evidence. But this never can apply to drinking men, even though incapable of managing their estates. Men of the brightest intellect have fallen victims to this vice, who, when the effect of hard drinking has subsided, possess in their sober moments, their understanding, if not in its full vigor, yet sufficiently unimpaired, to recollect, and to state the facts, where they do recollect, with clearness and intelligence. It was the policy of the law, to prevent habitual drunkards from wasting their estates, but it does not give them the protection granted to lunatics, as to exemption from punishment, nor deprive them of any of the other rights of citizens. If this was the case, instead of operating as a means of reformation, it would dispose them to drink. The point of inquiry at the moment of examination is: Is the witness then offered, so besotted in his understanding, as to be deprived of his intelligence? If he is exclude him; if he be a hard drinker, an habitual drunkard, yet, if at that time, he is sober, and possessed of a sound mind, he is to be received. At

the time this witness was offered, we are to take it for granted, he was in that state of mind." Gebhart *v.* Shindle, 15 S. & R. 235 (1824). The testimony of an opium eater, while unreliable, is competent, but juries should be cautioned as to the credence to be given to it. State *v.* White, 10 Wash. 611 (1895).

Even where the witness was under guardianship as an insane person at the time of the happening of the events covered by his evidence, the credit to be given this evidence is for the jury. "While it is true, great doubt must necessarily attach itself to the evidence of persons who having recovered from a state of insanity, seek to testify to facts occurring during its existence, it is proper to admit the testimony, and it is for the jury to judge of the credit that is to be given to it." Sarbach *v.* Jones, 20 Kans. 497 (1878).

To show that a witness was in the habit of taking laudanum is incompetent unless the evidence goes further and shows that the mind of the witness was impaired by it or was under its influence at the time the evidence itself was given. McDowell *v.* Preston, 26 Ga. 528 (1858).

Atheism. — While the common law did not adopt the biblical proposition that lack of belief in God is conclusive evidence of deficient intellect (Psalms, xiv. 1), it still recognized such resemblance between the two, as lies in the fact that each tends, though for different reasons, to lessen the obligation of an oath. "The truth is, such a person is wanting in one of the most essential qualifications of a witness, which could no more be dispensed with or supplied by the court, or by substitution, than we could supply sanity to an insane witness, or maturity to an infant. So long as the law requires that a witness shall be sworn, it is impossible that an atheist should be received to testify." Arnold *v.* Arnold, 13 Vt. 362 (1841). "It would indeed seem absurd, to administer to a witness an oath, containing a solemn appeal for the truth of his testimony, to a being in whose existence he has no belief." Thurston *v.* Whitney, 2 Cush. 104 (1848); People *v.* M'Garren, 17 Wend. 460 (1837); U. S. *v.* Kennedy, 3 McLean, 175 (1843); Brock *v.* Milligan, 10 Ohio 121 (1840); Blair *v.* Seaver, 26 Pa. St. 274 (1856); Smith *v.* Coffin, 18 Me. 157 (1841); Norton *v.* Ladd, 4 N. H. 444 (1828); Tuttle *v.* Gridley, 18 Johns. 98 (1820); Curtiss *v.* Strong, 4 Day 51 (1809); Wakefield *v.* Ross, 5 Mason, 16 (1827). "He, who openly and deliberately avows that he has no belief in the existence of a God, furnishes clear and satisfactory evidence against himself, that he is incapable of being bound, by any religious tie, to speak the truth, and is unworthy of any credit in a court of justice." Norton *v.* Ladd, 4 N. H. 444 (1828).

If the witness challenged on the ground of lack of religious belief be himself a party to the case, the rule is the same. Arnold *v.* Arnold, 13 Vt. 362 (1841).

The objection must be taken before the witness is sworn. People *v.* M'Garren, 17 Wend. 460 (1837).

The lack of belief in a Supreme Being may be most appropriately shown by declarations of the proposed witness to that effect made out of court. Smith *v.* Coffin, 18 Me. 157 (1841). Norton *v.* Ladd 4 N. H. 444 (1828); Tuttle *v.* Gridley, 18 Johns. 98 (1820); Curtis *v.* Strong, 4 Day, 51 (1809); Wakefield *v.* Ross, 5 Mason, 16 (1827); Blair *v.* Seaver, 26 Pa. St. 274 (1856); Thurston *v.* Whitney, 2 Cush. 104 (1848); Brock *v.* Milligan, 10 Ohio, 121 (1840). "But the evidence of such declarations should be received cautiously. Remarks and avowals of belief or disbelief, may be made in the heat of argument, and for the purpose of discussion, which may be no sure indication of the real belief or disbelief of the party." Thurston *v.* Whitney, 2 Cush. 104 (1848).

But witnesses can be summoned to show a change of mind on the part of the alleged atheist and thereupon he "may be restored to his competency." Tuttle *v.* Gridley, 18 Johns. 98 (1820); Smith *v.* Coffin, 18 Me. 157 (1841). See also to the effect that a witness challenged for atheism could himself testify on *voir dire* to a change of opinion. Thurston *v.* Whitney, 2 Cush. 104 (1848); Jackson *v.* Gridley, 18 Johns. 98 (1820). See also Ewing *v.* Bailey, 36 Ill. App. 191 (1889).

Whether an atheist, when offered as a witness, had, at common law, a chance to testify concerning his own religious belief as a witness on *voir dire* is in dispute.

In Maine such evidence has been rejected. Smith *v.* Coffin, 18 Me. 157 (1841).

In Massachusetts an atheist could apparently have been examined on *voir dire* if he so desired. Thurston *v.* Whitney, 2 Cush. 104 (1848); Jackson *v.* Gridley, 18 Johns. 98 (1820).

But a witness cannot be cross-examined in the case itself as to his religious belief. "If he is to be set aside for want of such religious belief, the fact is to be shown by other witnesses, and by evidence of his previously expressed opinions, voluntarily made known to others." Com. *v.* Smith, 2 Gray, 516 (1854).

It is settled in Massachusetts that a witness cannot be examined as to his religious belief; either upon the *voir dire* or upon cross-examination. Com. *v.* Smith, 2 Gray, 516 (1854); Com. *v.* Burke, 16 Gray, 33 (1860).

The same result is reached by statute in California. People *v.* Copsey, 71 Cal. 548 (1887).

If there exist a belief in a Supreme Being who will punish false swearing, the witness is competent though he believes that the punishment is inflicted during the life of the offender. Easterday *v.* Kilborn, Wright, 345 (1833); U. S. *v.* Kennedy, 3 McLean, 175 (1843); Hunscom *v.* Hunscom, 15 Mass. 184 (1818); Brock *v.* Milli-

gan, 10 Ohio 121 (1840); Blair *v.* Seaver, 26 Pa. St. 274 (1856); Blocker *v.* Burness, 2 Ala. 354 (1841); State *v.* Belton, 24 S. C. 185 (1885); Ewing *v.* Bailey, 36 Ill. App. 191 (1889).

It follows that Christians of the sect known as "Universalists" even at common law, were competent witnesses. The test of competency laid down by Walworth J. in People *v.* Matteson, 2 Cowen, 433 (1823) is as follows: If the witness "believes that he will be punished by his God even in this world, if he swears falsely, there is a binding tie upon the conscience of the witness and he must be sworn; and the strength or weakness of that tie is only proper to be taken into consideration in deciding upon the degree of credit which is to be given to his testimony. It is a question as to his credibility and not as to his competency." Butts *v.* Smartwood, 2 Cowen, 431 (1823). "A belief in a future state of reward and punishment is not essential to the competency of a witness, nor is it cause of exclusion that one does not believe in the inspired character of the Bible. The test of competency is, whether the witness believes in the existence of a God, who will punish him if he swears falsely." Blair *v.* Seaver, 26 Pa. St. 274 (1856).

Apparently at common law pantheism, implying belief in a Supreme Being, was not a ground of disqualification. In an Ohio case "it was shewn by third persons, that the witness' creed, so far as collectable from his conversations, was as follows: he said, he did not believe in the existence of a God; but added, that he saw God in trees, bushes, herbage, and everything he saw; that a man would be punished for falsehood by his conscience, and in this life only; that a man is bound to speak true at all times, and an oath imposes no additional obligation. The Court held that it was unnecessary to inquire, whether in Ohio, the same rule should prevail as in England, for if it should, the witness was competent. Wright J. said, 'The Court thought his declarations equivalent to an avowal of belief in the existence of a God. He sees him in all created nature.' Easterday *v.* Kilborn, Wright, 345-6." Smith *v.* Coffin, 18 Me. 157, 163 (1841).

It must not be inferred that it is necessary that a witness should be a Christian. It is sufficient if he believes in a supreme being, whatever his name or attributes, who will punish false testimony under oath.

"It is obvious that a sincere deist, a Mahometan, or a pagan of any name, if he believe in the existence of God, as above defined ('as a Supreme moral Governor of the Universe, who was personal in his existence and retributive in his government'), may feel the sanction of an oath as binding upon his conscience, as the most devout Christian. And all that is now required is, that the oath should bind the conscience of the witness." Arnold *v.* Arnold, 13 Vt. 362

(1841). In a case in court of Queen's Bench in Upper Canada the witness, who was an Indian of the Pottawattomie nation, a pagan, "believed in a Supreme Being, who created all things, and in a future state of rewards or punishments, a life after this in which those who have died here will be more or less happy, according to their conduct on earth.

He evinced a strong sense of the obligation to speak truth, and in taking the oath, which was explained to him, he invoked in the usual terms the Supreme Being so to aid him as he should speak the truth." The witness was held competent. R. *v.* Pah-Mah-Gay, 20 Q. B. U. C., 195 (1860).

"A Jew is competent at common law." Donkle *v.* Kohn, 44 Ga. 266 (1871).

Where a witness is admitted to testify, lack of religious belief can be shown to affect his credibility. People *v.* M'Garren, 17 Wend. 460 (1837).

The lack of belief in a future state on the part of a witness can be shown to impeach the weight of his evidence. U. S. *v.* Kennedy, 3 McLean, 175 (1843); Hunscom *v.* Hunscom, 15 Mass. 184 (1818). And such is a frequent statutory provision. Donkle *v.* Kohn, 44 Ga. 266 (1871); Bush *v.* Com., 80 Ky. 244 (1882).

In a majority of the states the rule excluding atheists from testifying has been held not to be in conflict with constitutional provisions preventing the restriction of civil rights on account of religious belief.

The contrary position has apparently been taken in Kentucky, where, however, the court seem to feel that as the legislature had forbidden the exclusion in civil cases, a reasonable ground existed for extending the same rule to criminal cases. Bush *v.* Com., 80 Ky. 244 (1882). To the same effect see Ewing *v.* Bailey, 36 Ill. App. 191 (1889).

It is lack of affirmative belief in a God rather than an affirmative disbelief in the existence of a supreme being which is a disqualification. Mere ignorance on the subject is sufficient to exclude a witness. Thus "a boy of twelve years who could repeat the Lord's prayer, and had heard that the bad man caught those who lied, cursed, &c., but had never heard of a God, or the devil, or of heaven or hell, or of the Bible, and had never heard, and had no idea, what became of the good or of the bad after death, is not a competent witness." State *v.* Belton, 24 S. C. 185 (1885).

Policy of Law. — The few survivals of once numerous exclusions of intelligent witnesses rest, as a rule, as has been previously stated, upon such grounds of public policy as promptly commend them to endorsement.

Judges Incompetent as Witnesses. — An instance of an exclusion from public policy is found where a judge proposed as a wit-

ness is a necessary member of the court before which a trial is held. In such cases to allow him to testify as a witness in the case would "lead to unseemly and embarrassing results to the hindering of justice and to the scandal of the courts." People *v.* Dohring, 59 N. Y. 374 (1874). "If a judge is put upon the stand as a witness, he has all the rights of a witness, and he is subject to all the duties and liabilities of a witness. It may chance, that he may for reasons sufficient for himself, but not sufficient for another of equal authority in the court, decline to answer a question put to him, or in some other way bring himself in conflict with the court. Who shall decide what course shall be taken with him? Shall he return to the bench and take part in disposing of the interlocutory question thus arising, and upon the decision being made, go back to the stand, or go into custody for contempt? The first would be unseemly, if not unlawful, for it would be passing judicially upon his own case. The last would disorganize the court and suspend its proceedings." People *v.* Dohring, 59 N. Y. 374, 379 (1874).

To the same effect is People *v.* Miller, 2 Parker, C. R. 197 (1854), where a party claimed the right to put upon the stand, as a witness, the county judge who was a necessary member of the court before whom the trial was being held. An objection to the witness being sustained by the court, the ruling was held proper, upon exceptions. "We think this decision was correct. The court could not be held without the county judge, and it would have broken up the court for the time being for him to take his stand as a witness. He could not act in the double capacity at one and the same time of judge and witness. To make this apparent, it is only necessary to suppose a claim of privilege by the witness in regard to answering a question put to him, or his refusal to answer a question which his associates of the court decide he is bound to answer, with a motion for his commitment, as being in contempt, until he should answer, or of evidence introduced to contradict or impeach him. Such things are possible in the nature of the case." People *v.* Miller, 2 Parker, C. R. 197 (1854).

So where a judge is a member of the court before whom a trial is being held, he is incompetent as a witness if his abandoning the bench leaves the court without a legally sufficient number of judges. People *v.* Dohring, 59 N. Y. 374 (1874).

The situation is of course merely intensified where the judge whose evidence is requested is the sole judge before whom the case is heard. A judge is therefore incompetent to testify in a matter being heard before himself alone. Morss *v.* Morss, 11 Barb. 510 (1851); Rogers *v.* State, 60 Ark. 76 (1894). For example, where the evidence submitted to a probate judge was in the form of *ex parte* affidavits, the judge cannot receive his own affidavit among the number though executed before a competent officer. "Though, in

this case, the affidavit of the presiding judge was taken before an officer having authority to take and certify affidavits, and he was not under the necessity, as judge, of administering to himself an oath as a witness, there remained duties he was bound to discharge, and which he alone could discharge, inconsistent with the relation of an affiant, or witness. If his competency as a witness was assailed, that question he must as judge have decided. If his credibility was impeached, as judge he must have decided whether his credit was impaired, or destroyed, or sustained. His own testimony, he must have compared with that of the other witnesses; and such a comparison, it is not to be supposed, could have been made impartially. We are of opinion, the judge properly ruled that his affidavit was inadmissible." Dabney *v.* Mitchell, 66 Ala. 495, 503 (1880).

The sole presiding magistrate in a justice's court cannot testify as a witness before a jury trying a case on appeal in the court over which he presides. The law makes no provision for administering an oath to him as a witness; he cannot be sworn before himself. Baker *v.* Thompson, 89 Ga. 486 (1892).

In an early Louisiana case, both parties prayed the judge before whom the trial was being held to testify as a witness in the case. The judge, being of opinion that he could not do so, declined. Held, on exceptions, that the refusal was proper. "If the judge, when he tries the facts, must weigh the evidence, he must do so impartially. This perhaps he cannot be easily supposed to do, when he is to weigh his testimony against that of another. When, however, not he, but a jury, is to try an issue of facts, it would seem the reason in some degree fails. Yet cogent ones present themselves; in a court composed of one judge only, who is to administer the oath? It cannot be done by any but a member of the court, and he is the only one. He is to determine on his competency — to determine on the absence of evidence, if a nonsuit be prayed." Ross *v.* Buhler, 2 Mart. N. S. 312 (1824).

When a member of the court is needed as a judge, he cannot be called from the bench as a witness "but when his action as a judge is not required, because there is a sufficient court without him, he may become a witness, though it is then decent that he do not return to the bench." People *v.* Dohring, 59 N. Y. 374 (1874).

The reasons which exclude the judge before whom a trial is going on from giving evidence before himself obviously do not apply to the case where the trial judge is offered as a witness in a court over which he is not presiding. So on an action in the circuit court for malicious prosecution before a justice of the peace for perjury alleged to have been committed in an action of trespass before another justice of the peace, the plaintiff is entitled to require the justice of the peace who tried the trespass case, to pro-

duce his memoranda of the evidence given before himself. Spalding *v.* Lowe, 56 Mich. 366 (1885).

To the suggestion that a party may be deprived of valuable evidence if the trial judge be not permitted to testify, the answer has been made that the facts might be considered good ground for a continuance until another judge could hear the case. People *v.* Miller, 2 Parker, C. R. 197 (1854).

Attorney Taking the Stand. — Though much of the embarrassment caused by permitting a judge to leave the bench for the purpose of testifying in the case arises when a member of the court, actively engaged as an attorney in trying a cause, takes the stand as a witness in that cause, there is no rule of law which prevents such a course. Potter *v.* Inhabitants of Ware, 1 Cush. 519 (1848); Morgan *v.* Roberts, 38 Ill. 65, 85 (1865); State *v.* Cook, 23 La. Ann. 347 (1871); State *v.* Woodside, 9 Ired. Law, 496 (1849); Morrow *v.* Parkman, 14 Ala. 769 (1848); Succession of Grant, 14 La. Ann. 795 (1859); Carrington *v.* Holabird, 17 Conn. 530 (1846); Bank of North America *v.* McElroy, 2 Pugsley, 462 (1875); Davis *v.* Canada Farmers Mut. Ins. Co., 39 Q. B. U. C. 452, 477 (1876). Even if the attorney drew the writ, opened the case and tried it. Potter *v.* Inhabitants of Ware, 1 Cush. 519 (1848); Follansbee *v.* Walker, 72 Pa. St. 228 (1872); Morgan *v.* Roberts, 38 Ill. 65, 85 (1865).

In Alabama an attorney was excluded where his fee was contingent upon his success. This, however, on the ground of interest. Quarles *v.* Waldron, 20 Ala. 217 (1852).

In Texas, the court of criminal appeals say: "The ground upon which the court excluded the offered testimony was certainly erroneous, to wit, that the witness was the counsel in both trials, and it was bad practice for a counsel in a case to testify therein. However correct as a moral proposition, it is not a legal objection." Mealer *v.* State, 32 Tex. Cr. R. 102 (1893).

Judicial Criticism. — It could scarcely have been expected that a proceeding so anomalous and so fraught with danger to the administration of justice and the proper standing of a learned profession should escape the severe animadversion of the courts.

"It is a highly indecent practice for an attorney to cross-examine witnesses, address the jury, and give evidence himself to contradict the witness." Frear *v.* Drinker, 8 Pa. St. 520 (1848).

"However indecent it may be in practice for an attorney retained in a case and managing it, to be a witness also, we cannot say he is incompetent, and must leave him to his own convictions of what is right and proper under such circumstances." Morgan *v.* Roberts, 38 Ill. 65, 86 (1865). "It is the privilege of the party to offer the counsel as a witness; but that it is an indecent proceeding and should be discouraged, no one can deny.

"I have always discountenanced the practice, and think the circumstances must be very exceptional to warrant counsel in offering their evidence." Ritchie C. J. in Bank of British North America *v.* McElroy, 2 Pugsley (New Bruns.) 462 (1875) — cited with approval in Davis *v.* Canada Farmers Mut Ins. Co. 39 Q. B. U. C. 452, 477 (1876).

"It is a practice not to be encouraged and in most cases has, we believe, been accompanied by a surrender, on the part of the attorney of his brief in the case." State *v.* Woodside, 9 Ired. Law, 496 (1849).

A fair statement of the opposing consideration is probably that made by the court in the supreme judicial court of Massachusetts in Potter *v.* Inhabitants of Ware, 1 Cush. 519 (1848). "In most cases, counsel cannot testify for their clients without subjecting themselves to just reprehension. But there may be cases in which they can do it, not only without dishonor, but in which it is their duty to do it. Such cases, however, are rare; and whenever they occur, they necessarily cause great pain to counsel of the right spirit."

An attorney is a competent witness against his client as to all matters not privileged. State *v.* Hedgepeth, 125 Mo. 14 (1894).

The opportunity for attacking the credit of evidence given by an attorney is obvious. Succession of Grant, 14 La. Ann. 795 (1859).

Husband and Wife. — At common law the relation of husband and wife rendered each incompetent to testify for or against the other. Rose *v.* Brown, 11 W. Va. 122 (1877); Kusch *v.* Kusch, 143 Ill. 353 (1892); Taulman *v.* State, 37 Ind. 353 (1871); Johnson *v.* Watson, 157 Pa. St. 454 (1893); Skinner *v.* Skinner, 38 Neb. 756 (1894); Barclay *v.* Waring, 58 Ga. 86 (1877); Haerle *v.* Kreihn, 65 Mo. 202 (1877). "In the case before us, the objection to the admissibility of the wife does not rest solely upon her interest as a party to the proceedings. Its foundation is in the public good. It strikes deeper than mere questions of interest, and is based upon reasons of public policy. The rule of the common law is, that 'husband and wife cannot be witnesses for each other, because their interests are identical, nor against each other, on grounds of public policy, for fear of creating distrust and sowing dissensions between them and occasioning perjury.' 2 Starkie's Ev., (4th Amer. ed.,) part 4, p. 706." Dwelly *v.* Dwelly, 46 Me. 377 (1859). The wife could not even testify in the husband's favor. Seargent *v.* Seward, 31 Vt. 509 (1859); Haller *v.* Clark, 21 D. C. 128 (1892); Wollf *v.* Van Housen, 55 Ill. App. 295 (1894); Woolverton *v.* Sumner, 53 Ill. App. 115 (1893). The rule is the same where the husband sues as administrator. Sun Accident Association *v.* King, 53 Ill. App. 182 (1893). Or as executor. Bradley *v.* Kent, 7 Houst. 372 (1886). So where the wife was interested, the husband was excluded, "not on the score of his interest, for he may preclude

himself from any by a release, or may have done so by a settlement to her separate use, but entirely on the ground of public policy. It is necessary to preserve family peace and maintain that full confidence which ought to subsist between husband and wife." Pringle *v.* Pringle, 59 Pa. St. 281, 288 (1868). Such disability may be removed by statute. Jones *v.* R. R., 47 La. Ann. 383 (1895). But where a husband, though joined as a party defendant with his wife, has no real interest in the litigation, he can testify as a witness in support of his wife's title. Evans *v.* Evans, 155 Pa. St. 572 (1893); Breton *v.* H. B. Claflin Co., 45 La. Ann. 117 (1893). The rule is the same when the positions of the husband and wife are reversed. Ratliff *v.* Vandikes, 89 Va. 307 (1892).

Where a husband feels a strong bias of feeling in a lawsuit but has no legal interest therein, these facts affect the credibility rather than the competency of the wife as a witness. Gunning Co. *v.* Cusack, 50 Ill. App. 290 (1893).

Where husband and wife are joined in a suit regarding the property of the wife and the husband has only a nominal interest, the wife is a competent witness on her own behalf. Buckingham *v.* Roar, 45 Neb. 244 (1895).

Or on behalf of her daughter for whom the husband appears as next friend. St Louis &c. R. R. *v.* Rexroad, (Ark.) 26 S. W. 1037 (1894).

"This rule is said to be so important that the law will not allow it to be violated, even by agreement; and the wife cannot be examined against the husband, although he consent." Dwelly *v.* Dwelly, 46 Me. 377 (1859).

Where a wife is incompetent to testify for her husband, she is equally incompetent to testify for the defendants in a suit brought against a firm of which her husband is a member. McEwen *v.* Shannon, 64 Vt. 583 (1892). Or in his favor when indicted jointly with others. Holley *v.* State, (Ala.) 17 So. 102 (1895). In criminal cases, in Florida, a wife is competent to testify for or against her husband. Walker *v.* State, 34 Fla. 167 (1894). A wife cannot prove a claim against her deceased husband's estate. Swann *v.* Housman, 90 Va. 816 (1894). But may prove a claim against his estate in insolvency. Purdy *v.* Purdy, (Vt.) 30 Atl. 695 (1894).

In criminal proceedings for personal violence by husband or wife against the other the injured party is a necessary witness. People *v.* Fitzpatrick, 5 Parker C. R. 26 (1857). So of threatened and attempted violence. State *v.* Pennington, 124 Mo. 388 (1894).

The husband's adultery is not an offence against the wife within the meaning of this rule. McLean *v.* State, 32 Tex. Cr. Rep. 521 (1894). Even though the adultery goes as far as bigamy. People *v.* Quanstrom, 93 Mich. 254 (1892).

Neither is an indecent assault upon a minor daughter an offence

against the wife within the rule. People *v.* Westbrook, 94 Mich. 629 (1893).

The contrary has been held of incest. State *v.* Chambers, 87 Ia. 1 (1893).

A wife's dying declarations are admissible against the prisoner though the declarant's husband was an accomplice in the homicide. State *v.* Pearce, 56 Minn. 226 (1894).

So on a complaint for an assault by a husband on his wife, she is a competent witness in his favor. Com. *v.* Murphy, 4 All. 491 (1862); State *v.* Neill, 6 Ala. 685 (1844); People *v.* Fitzpatrick, 5 Parker C. R. 26 (1857).

But the husband of an alleged adulteress is not competent to testify against the alleged paramour. Howard *v.* State, 94 Ga. 587 (1894).

At common law, a husband, even after divorce, was not competent to testify against his wife on an indictment for her adultery. State *v.* Jolly, 3 Dev. & B. (N. C.) 110 (1838).

The rule may be changed by the equity of a statute. State *v.* Vollander, 57 Minn. 225 (1894).

Or to testify against her on an action for *crim. con.* Hanselman *v.* Dovel, 102 Mich. 505 (1894).

So of a wife; — either in an indictment against her former husband, State *v.* Phelps, 2 Tyler (Vt.) 374 (1803), or in a civil action of *crim. con.* Mathews *v.* Yerex, 48 Mich. 361 (1882); Reynolds *v.* Schaffer, 91 Mich. 494 (1892).

But in Texas a divorced wife can testify as to the dying declarations of her daughter in an indictment for a homicide of the daughter committed during coverture. Williams *v.* State, Tex. Cr. App. 31 S. W. 405 (1895).

A wife may testify to the duress and compulsion on the part of a husband which induced her to execute a disposition of certain of her property. Vicknair *v.* Trosclair, 45 La. Ann. 373 (1893).

Where a husband is jointly indicted with others, but not as a principal or as a conspirator, his wife is competent to testify in favor of the other defendant or defendants "unless her testimony will tend directly to the acquittal of her husband, as in conspiracy or other joint offense, where the interests of the defendants are inseparable." Gill *v.* State, 59 Ark. 422 (1894). But see Holley *v.* State (Ala.) 17 So. 102 (1895).

So where her husband was separately indicted for an offence committed with one A., the wife is competent in favor of A., though the result is to implicate her husband. "No witness is said to be examined for or against any one not a party to the action or proceeding in which such witness is called to testify." People *v.* Langtree, 64 Cal. 256 (1883).

Infamous Crime. — While conviction of an infamous crime may

still be shown to affect the credibility of a witness, the common law rule excluding persons convicted of such offences from acting as witnesses has been modified by the action both of the legislature and of the courts. "The tendency of the judicial mind is against objections to competency." Woodward, J., in Bickel *v.* Fasig, 9 Casey, 463 (1859).

Thus one not guilty of a strictly infamous crime — "treason, felony, and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, and offences affecting the public administration of justice; such as bribing a witness, to absent himself and not to give evidence, and conspiracies to obstruct the administration of justice, or falsely to accuse one of an indictable crime" — Schuylkill Co. *v.* Copley, 67 Pa. St. 386 (1871) — but suffering the same punishment (for the offense of embezzlement) is still competent as a witness. Schuylkill Co. *v.* Copley, 67 Pa. St. 386 (1871).

Under a statute making persons convicted of felony incompetent as witnesses, a conviction of burglary, the punishment for which makes it a felony, disqualifies a witness, though on account of his youth a different punishment is imposed. People *v.* Park, 41 N. Y. 21 (1869).

Conviction is a question of fact, not of legality. A conviction of larceny before a justice of the peace within his jurisdiction makes a witness incompetent, although the complaint upon which the justice proceeded was so defective that judgment might have been arrested, or reversed on error. Com. *v.* Keith, 8 Metc. 531 (1844).

A mere confession of perjury committed in a former trial does not, in the absence of a legal conviction for the offence, render a witness incompetent. Brown *v.* State, 18 Oh. St. 496 (1869).

For infamy must be a matter of record and so proved. Boyd *v.* State, 94 Tenn. 505 (1894).

Except so far as modified by statute, or legal decisions, the rule of exclusion still remains. State *v.* Howard, 19 Kans. 507 (1878).

The right to testify is restored by a full pardon. U. S. *v.* Hall, 53 Fed. Rep. 352 (1892); Diehl *v.* Rodgers, 169 Pa. St. 316 (1895).

Testamentary Witnesses. — A survival of the almost universally abolished rules, rendering witnesses incompetent by reason of interest, is that which makes a legatee incompetent to act as an attesting witness in support of the will itself. Sparhawk *v.* Sparhawk, 10 All. 155 (1865).

The rule applies to the wife of a legatee. Sullivan *v.* Sullivan, 106 Mass. 474 (1871).

A Question for the Court. — Incapacity to testify is a preliminary question of fact for the determination of the court.

So of mental capacity. Livingston *v.* Kiersted, 10 Johns. 362 (1813); Holcomb *v.* Holcomb, 28 Conn. 177 (1859); Kendall *v.* May, 10 All. 59 (1865); Colman *v.* Com. 25 Gratt. 865 (1874).

Or of the immaturity of youth. Flanagin *v.* State, 25 Ark. 92 (1867); Vincent *v.* State, 3 Heisk. 120 (1871); Blackwell *v.* State, 11 Ind. 196 (1858); State *v.* Edwards, 79 N. C. 648 (1878); Davidson *v.* State, 39 Tex. 129 (1873); Johnson *v.* State, 61 Ga. 35 (1878); Com. *v.* Lynes, R. 142 Mass. 577 (1886); R. *v.* Bérubé, 3 Decis. des Tribuneaux, 212 (1852); McGuire *v.* People, 44 Mich. 286 (1880); State *v.* Whittier, 21 Me. 341 (1842); State *v.* Michael, 37 W. Va. 565 (1893).

"The question of competency is for the Court, and must be settled before the witness is sworn." Holcomb *v.* Holcomb, 28 Conn. 177 (1859); Kendall *v.* May, 10 All. 59 (1865).

In other jurisdictions it is not necessarily fatal to the objection to competency that the witness has been examined in chief, there being no evidence of bad faith to the court. Hill *v.* Postley, 90 Va. 200 (1893).

But the objection comes too late on a motion for a new trial. State *v.* Crab, 121 Mo. 554 (1894).

Whether this determination should be reached from inspection of the witness, or by evidence *aliunde*, is in dispute.

In Vermont, it has been held that where the witness is under the age of fourteen, the witness should be examined by the court, as "the facts could not be elicited so satisfactorily from any other source," and that while the examination of the witness by counsel is permitted it is not required, "and when the Court is satisfied of the competency of the witness, that is conclusive." But that, on the other hand, where the witness is over fourteen, the question of competency, "except in case of being interested, should be established by testimony *aliunde*." Robinson *v.* Dana, 16 Vt. 474 (1844).

In Alabama, the rule is the same, except that the limit of fourteen years of age is not given the same determining effect. "When, however, a child of tender years is produced as a witness, it is the duty of the presiding judge to examine him or her, without the interference of counsel further than the judge may choose to allow, in regard to the obligation of the witness' oath; and, in proper cases, to explain the same to one intelligent enough to comprehend what he says; and then to determine whether or not such child shall be sworn and permitted to testify." Carter *v.* State, 63 Ala. 52 (1879).

In an early Alabama case, to show mental derangement on the part of a witness, the court examined numerous extracts from a newspaper edited by the witness. Campbell *v.* State, 23 Ala. 44, 75 (1853).

While the party against whom a witness of tender years is offered cannot insist upon the privilege of examining him as to his understanding of the nature of an oath, he can insist upon the

court's doing so in his presence. People *v.* McNair, 21 Wend. 608 (1839).

If there is more than one judge, the examination must be by all, and the report of one justice to his associates is not sufficient. People *v.* McNair, 21 Wend. 608 (1839).

In McGuire *v.* People, 44 Mich. 286 (1880), the court, in case of a child a little over six years of age, "took the lad into his own room and had a long conference with him, in addition to what appeared in court, and he finally came to the conclusion that the child was sufficiently conscious of the duty of speaking the truth that he might be received as a witness, subject to such cautions to the jury as were proper concerning his statements."

In speaking of a witness against whom objection was made on the ground of temporary insanity at the time of transactions testified to, the supreme court of Connecticut permit the court full discretion as to the method of examination. "The state of a person's mind in this respect may be ascertained by an examination of witnesses acquainted with him, or by a personal examination of him by the court, or by counsel in the presence and under the direction of the court, or by all these modes at the discretion of the court." Holcomb *v.* Holcomb, 28 Conn. 177 (1859).

In case of intoxication, as of other cases of incompetency for deficiency of mental equipment, the court is entitled to judge from inspection.

"Every court must necessarily have the power to decide, from their own view of the situation of the witness offered, whether he be intoxicated to such a degree, as that he ought not to be heard." Hartford *v.* Palmer, 16 Johns. 143 (1819). "Although the court will not suffer a person to be examined as a witness, who is in such a state that he cannot understand the obligation of an oath, nor, ordinarily, when in such a situation that he may be tempted to disregard it, yet, the counsel have failed to convince us that this is cause of error. Such cases must depend on the sound discretion of the court that hears the cause. They will not, if they can avoid it, deprive a party of the benefit of testimony, which may be essential to his case, merely from the indiscretion, call it by no harsher name, of the witness. His intoxication may be caused by the artifices and management of the other party, for there are persons so base and wicked as to resort to such means to rid themselves of the force of testimony they are not prepared to rebut, and the temptation to such stratagem would be greatly increased, were we to decide that it amounts to an absolute disqualification. There are degrees of intoxication, of which the court alone can judge. They may postpone the cause, to give the witness a chance to recover from his degraded situation, or they may suffer him to be examined, leaving his credit to be weighed by the jury. We know

of but one safe rule, and that is to leave it to the sound discretion of the tribunal before which the cause is tried." Gould *v.* Crawford, 2 Pa. St. 89 (1845).

The court can, if so disposed, where the competency of a witness depends upon a contested proposition of fact, e. g. whether A. is the attorney of B., leave the entire question to the jury with appropriate instructions. Hartford Fire Ins. Co. *v.* Reynolds, 36 Mich. 502 (1877). But the competency of a witness "ought not to be left to the determination of the jury, because it is a question of legal ascertainment, requiring wisdom, knowledge, and experience." State *v.* Michael, 37 W. Va. 565 (1893).

"It devolves upon the party making the objection to show the alleged incompetency of a witness." Gill *v.* State, 59 Ark. 422 (1894).

In the courts of the United States, meaning the federal courts, questions of competency are determined "as prescribed by act of Congress." A party lawfully removing from a state into a federal court a case in which certain evidence is inadmissible under state law because from incompetent witnesses, may still have the benefit of such evidence if admissible according to the congressional statutes. King *v.* Worthington, 104 U. S. 44 (1881).

Is this Discretion reviewable? — The discretion of the court in admitting the testimony of a witness of tender years is, it has been held, subject to review. Carter *v.* State, 63 Ala. 52 (1879); State *v.* Michael, 37 W. Va. 565 (1893).

In Missouri, however, the right of review is denied. "I can find no case in which it is held proper for an appellate court to review the finding of fact. The contrary rule is declared by all respectable authorities. No hardship necessarily results; for, if the judge should chance to err in his conclusion, the jury hold a powerful corrective in their right to pass upon the credibility of the witness, as tested on the stand by the usual appliances." State *v.* Scanlan, 58 Mo. 204 (1874).

The judge's "finding is conclusive upon such fact, if there is proper evidence to be considered." Hyde Park *v.* Canton, 130 Mass. 505 (1881).

In North Carolina the right of review is claimed by no means strongly by the court of last resort. "There being now no arbitrary rule as to age, and it being a question of capacity, and of moral and religious sensibility in any given case whether the witness is competent, it must of necessity be left mainly if not entirely, to the discretion of the presiding Judge." State *v.* Edwards, 79 N. C. 648 (1878).

In the case of Parker *v.* State in the Texas court of criminal appeals, reported 21 S. W. 604 (1893), it is said that the determination of the trial judge on the competency of a witness "will not

ordinarily be disturbed on appeal, in the absence of any showing of abuse of the discretion." To same effect, see Dickson *v.* Waldron, 135 Ind. 507 (1893); People *v.* Linzey, 79 Hun, 23 (1894).

In Georgia, the trial court was sustained in an opinion where the supreme court declare, speaking of the justice presiding at the trial, "we cannot say that he abused his discretion." Johnson *v.* State, 61 Ga. 35 (1878).

Where the presiding justice admitted the evidence of a lunatic after an extended examination, the court of appeals of Virginia say, "It would require very cogent and conclusive proof to the contrary to induce this court to interpose under such circumstances." Coleman *v.* Com., 25 Gratt. 865 (1874).

To be reviewed in the upper court, a ruling of the trial court, on the question of competency, must have been properly excepted to in the course of the trial. Walker *v.* State, 34 Fla. 167 (1894).

Weight for the Jury. — That the court is satisfied that a questionable witness is of sufficient capacity to testify merely admits the evidence of the witness. The same considerations on which it was sought to exclude the evidence itself may be urged as reasons why the jury should practically disregard it. "The credit due to the statements of such a witness is submitted to the consideration of the jury, who should regard the age, the understanding, and the sense of accountability for moral conduct, in coming to their conclusion. In this case the witness was thirteen years of age, and the counsel for the accused was permitted, on the cross-examination, to introduce for the consideration of the jury the necessary information on these points. And it could not be material to the accused, whether such information was elicited before the examination in chief or afterward. The examination before was only necessary for the information of the Judge, who appears to have been fully satisfied of the propriety of admitting the witness." State *v.* Whittier, 21 Me. 341, 347 (1842); State *v.* Scanlon, 58 Mo. 204 (1874). "Some authorities have said that the preliminary question in such cases is, 'Is the witness capable when sworn of understanding the nature of an oath?' To this some authorities add that he must be able to understand the subject with respect to which he is required to testify. When this preliminary question is passed, and the court has determined that the witness is competent to testify, the entire controversy is then transferred to the jury. The court may not say to the jury that the witness is or is not entitled to credence. The jury may reject the testimony entirely or may attach whatever weight to it they choose." Bowdle *v.* Railway Co., 103 Mich. 272 (1894).

But in an early Alabama case the court refuse to admit evidence of previous insanity to affect the credit of the witness. "It is no objection either to the competency or credibility of a witness, that

he may be subject to fits of derangement, if at the time he is offered it appears that he is sane." Campbell *v.* State, 23 Ala. 44, 74 (1853).

"A person being subject to fits of derangement, is no objection either to his competency or credibility, if he is sane at the time of giving his testimony." Evans *v.* Hettich, 7 Wheat. 453, 470 (1822).

Where relevant evidence bearing on the question of whether a witness was mentally unsound at the time of the happening of the events testified to by him was withheld from the jury, the ruling was held to be erroneous. "It was for the judge to say whether the witness was competent to testify, and was for the jury to decide, under all the circumstances, upon the weight of his evidence." Holcomb *v.* Holcomb, 28 Conn. 177 (1859). "The question of the girl's intelligence went more to her credibility than to her competency as a witness. The jury might take the fact of her intelligence, or want of it, into consideration in determining the weight to be given to her evidence. Many intelligent persons would probably fail, upon examination, to give a correct definition of the nature of an oath, as defined by Webster, and yet those persons be perfectly competent witnesses. We therefore think the proposed witness should have been permitted to testify." McAmore *v.* Wiley, 49 Ill. App. 615 (1893).

CHAPTER III.

EXAMINATION OF WITNESSES.

§ 1394. HAVING treated of the means of procuring the attendance of witnesses, and of their competency and credibility, the next subject to be considered is their examination. Generally, "in the absence of any *agreement in writing* between the solicitors of all parties, and subject to the Rules of 1883, the witnesses at the *trial of any action*, or *at any assessment of damages*, shall be examined *viva voce and in open court*."[1] The agreement to dispense with vivâ voce testimony must be in writing, and, in strictness, is required to be made "between the solicitors of all parties." But if one of the parties has no solicitor, the stringency of the rule would probably be relaxed in his favour; and a similar relaxation would doubtless be allowed to a party under disability appearing by next friend or a guardian.[2] It also seems that, unless the agreement states that affidavits *alone* shall be used, either party may supplement the documentary proof by oral testimony.[3] Moreover, notwithstanding the agreement, the court, where it is necessary for the interests of justice—for instance, if the rights of infants be involved in the inquiry—may, ex meri motu, altogether exclude affidavits, though duly taken and regularly filed, and direct that the witnesses shall themselves attend, and be orally examined in open court.[4]

§ 1395. In some cases, indeed, the R. S. C. of 1883 interfere with the general proposition stated in the last section. R. S. C.,

[1] R. S. C. 1883, Ord. XXXVII. r. 1. See Att.-Gen. *v.* M. D. Rail. Co., 1880, C. A.

[2] See Knatchbull *v.* Fowle, 1876 (Jessel, M.R.); Fryer *v.* Wiseman, 1876.

[3] Glossop *v.* Heston, &c. Local Bd., 1878.

[4] Lovell *v.* Wallis, 1884 (Kay, J.). And see next note.

O. XXXVII., R. 1, provides, that "the court or a judge may, at any time for *sufficient reason*,[1] 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 conditions as the court or judge may think reasonable;[2] 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 authorising the evidence of such witness to be given by affidavit." In accordance with this last proviso, the court has refused to allow affidavits already used on an interlocutory application, to be read at the hearing, though it was proposed to supplement them by the oral evidence of the deponents and by their cross-examination.[3]

§ 1396. Moreover, R. S. C., O. XXXVIII., R. 1, provides, that, "upon any motion, petition, or summons, evidence may be given by affidavit; but the court or a judge may,[4] on the application of either party, order the attendance for cross-examination of the person making any such affidavit."[5] Under the latter portion of this rule, the right to cross-examine the deponent would, probably, continue, though the affidavit be withdrawn by the party who filed it.[6] Moreover, it appears that an affidavit can be read, though the cross-examination is not concluded.[7]

[1] The Probate Division has declined to order the execution and attestation of a will to be proved in solemn form by affidavit, though none of the parties cited had appeared: Cook *v.* Tomlinson, 1876.

[2] Accordingly, an affidavit which was not included in the chief clerk's certificate, may, by leave, be read on the further consideration of an action of which there has been no trial: Dessau *v.* Lewin, 1887. On the hearing, however, of a summons adjourned into court from chambers, affidavits cannot be read unless filed within the period allowed by the chief clerk: Chifferiel *v.* Watson, 1889.

[3] Blackburn Guard. *v.* Brooks, 1877.

[4] The making of an order or not is discretionary. See Le Trinidad *v.* Browne, 1887.

[5] As to cross-examination in cases commenced by an originating summons, see Alexander *v.* Calder, 1885. Qy. whether deponents out of the jurisdiction, whose affidavits have been filed, can be required to be produced for cross examination: Concha *v.* Concha, 1886, H. L.

[6] See Keogh *v.* Leonard, 1877 (Ir.); Re Quartz Hill Co., Ex parte Young, 1882, C. A.

[7] Lewis *v.* Janes, 1886, C. A.

§ 1396A. By R. S. C., O. XXXVII., R. 2, "in default actions in rem, and in references in Admiralty actions, evidence may be given by affidavit." This rule differs from the last by omitting the proviso for the cross-examination of the deponents. R. S. C., O. XXXVIII., R. 28, however, provides that, "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 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 or a judge.[1] 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."[2] The party receiving notice under the above rule, is, by Rule 29, "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."[3]

§ 1396B. Whenever affidavits are used they must 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."[4]

[1] This is not the exclusive penalty. See Cornell *v.* Baker, infra.

[2] This provision applies to a cross-examination before an examiner or a chief clerk as well as one at the trial: Backhouse *v.* Alcock, 1885. Cf., however, Knight *v.* Gardner, 1883, C. A. Its effect is that the person producing the witness for cross-examination must bear the expense in the first instance: See Mansel *v.* Clanricarde, 1885. And this even though the witness be a party to the cause: Cornell *v.* Baker, 1885. But it will not apply to a case where the deponent is cross-examined before the chief clerk at chambers, or before a special examiner, being confined to cross-examination before the court at the trial: In re Knight, Knight *v.* Gardner, 1883, C. A.

[3] As to the practice in Chancery, where a cross-examination should be taken, see Issard *v.* Lambert, In re Davies, 1890; In re Doré Gallery, 1890; and as to subsequently filing further evidence, Issard *v.* Lambert, In re Davies, supra.

[4] R. S. C., Ord. XXXVIII. r. 3. The exception does not apply to a proceeding, which, though interlocutory in form, finally decides the rights of the parties; and if, in any such proceeding, an affidavit founded on information and belief be used, the party against whom it is adduced is

§ 1396c. To check prolixity or scurrility in affidavits, it is provided, first, that "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;"[1] and next, that "the court or a judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client."[2] In addition to these powers, the court has an inherent power to take an unduly prolix or scandalous affidavit off the file.[3]

§ 1396d. To as far as possible protect the court from being deceived either by intentional and direct falsehood in affidavits, or by statements therein either designedly coloured, or accidentally mis-recited,[4] the following rules have been made:—

"Every affidavit shall state the description[5] and true place of abode of the deponent."[6] The object of this is to enable the party against whom the affidavit is used, to make inquiries about the deponent.

"No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure, shall without leave of the court or a judge be read or made use of in any matter depending in court, unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the Central Office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures, appearing at the time of taking the affidavit

not bound to contradict it, but may treat it as evidence which is not admissible: Gilbert *v.* Endean, 1878, C. A. In the event, however, of his not taking that course in the court below, he may be precluded from raising the objection before the Court of Appeal: Id. See Bidder *v.* Bridges, 1884, C. A., as to what affidavits will not satisfy the requirements of this rule.

[1] R. S. C., Ord. XXXVIII. r. 3; Walker *v.* Poole, 1882; Hill *v.* Hart-Davis, 1884, C. A.

[2] R. S. C., Ord. XXXVIII. r. 11.

[3] Hill *v.* Hart-Davis, 1884, C. A.

[4] See D. of Northumberland *v.* Todd, 1878 (Hall, V.-C.).

[5] In giving the "description" of a deponent, in many cases "gentleman" is not sufficient (see In re Horwood, 1886, C. A.), as *e.g.*, if deponent has a trade or profession: Spaddacini *v.* Keary, 1889 (Ir.). But it may be sufficient for filing purposes: Spence *v.* Dodsworth, 1891.

[6] R. S. C., Ord. XXXVIII., r. 8. If this be omitted or illusory only, the affidavit will not be read: Hyde *v.* Hyde, 1889. "Stock Exchange, Stockbroker" is not sufficient for a stockbroker: Levin *v.* Levin, 1889.

to be written on the erasure, are rewritten and signed or initialled in the margin of the affidavit by the officer taking it."[1]

"Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the court or a judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent."[2]

§ 1396E. All affidavits must be properly entitled in the court and cause. On the Crown side of the Queen's Bench Division they must be entitled "In the High Court of Justice, Queen's Bench Division."[3] If sworn in England[4] for the purpose of proceedings in the High Court, they must be sworn either before a judge, or a district registrar[5] or a master, or the first or second clerk in the Filing or Record Department of the Central Office,[6] or a chief clerk in the Chancery Division,[7] or a Commissioner to examine witnesses,[8] or a Commissioner to administer oaths.[9] These last-named commissioners must also, in the jurat, "express the time when, and the place where," each affidavit has been taken, for "otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled, without the leave of the court or a judge."[10] Still, the rules do not require that the person administering the oath should, in addition to signing his name, add, in the jurat, his title as commissioner.[11]

§ 1396F. By other Rules of the Supreme Court[12] no affidavit

[1] Ord. XXXVIII. r. 12. A master has no jurisdiction to authenticate alterations by initialing them: In re Cloake, 1891.

[2] Ord. XXXVIII. r. 13. As to what ought to satisfy a court or judge, see Blenkarn *v.* Longstaffe, 1885.

[3] R. *v.* Plymouth, &c. Ry., 1889.

[4] As to affidavits sworn out of England, see Ord. XXXVIII. r. 6, cited ante, § 12.

[5] Ord. XXXVIII. r. 4.

[6] Ord. LXI. r. 5.

[7] Ord. LV. r. 16.

[8] Ord. XXXVII. r. 19.

[9] Ord. XXXVIII. r. 4. As to their duty on taking an affidavit, see Bourke *v.* Davis, 1890. There is no power to take off the file an affidavit sworn before a commissioner whose commission has not been superseded, though he has been struck off the roll of solicitors: Ward *v.* Gamgee, 1891.

[10] Id. r. 5; Eddowes *v.* Argentine Land Co., 1890.

[11] Ex parte Johnson, Re Chapman, 1884, C. A.; Cheney *v.* Courtois, 1863.

[12] Viz., Ord. XXXVIII. rr. 16, 17.

shall be sufficient, if sworn before the solicitor acting for the party on whose behalf it is to be used, or before such solicitor's clerk, or partner, or agent, or correspondent, or before the party himself.

By yet another rule,[1] original affidavits, before being used, must be delivered to the proper officer for the purpose of being stamped and filed; but after an affidavit has been filed, an office copy of it, if duly authenticated with the seal of the office, "may in all cases be used." Notwithstanding, however, this general language, an affidavit that has been filed "before issue joined in any cause or matter," cannot, without leave of the court or a judge, be received at the hearing or trial, unless, within a month after issue joined, or further time specially allowed, notice in writing of its intended use be given by the one party to the other.[2]

§ 1396G. Rules relating to affidavits, and corresponding in substance though not in words with those referred to in the last six sections, exist in the Bankruptcy Courts,[3] and in divorce and matrimonial cases.[4]

§ 1397. The County Court Rules as to viva voce testimony and affidavit evidence are substantially the same as those of the High Court, though expressed in different language. The C. C. Rules, 1889,[5] provide, that "except where otherwise provided by these Rules, the evidence of witnesses on the trial of any action or hearing of any matter shall be taken orally *on oath*, and where by these Rules evidence is required or permitted to be taken by affidavit, such evidence shall nevertheless be taken orally on oath, if the judge or registrar shall, on any application at or before the trial, so direct." It is also provided,[6] that "where a party desires to use at the trial an affidavit by any particular witness, or an affidavit as to particular facts, he may, not less than four clear days before the trial, give a notice, with a copy of such affidavit annexed, to the party against whom such affidavit is to be used; and unless such last-mentioned party shall within two clear days before the trial give notice to the other party that he objects to the use of such affidavit, he shall be taken to have consented to the

[1] Viz., Ord. XXXVIII. r. 15.
[2] Ord. XXXVII. r. 24.
[3] Bankruptcy Rules, 1883, rr. 39—50.
[4] Rules in Div. & Mat. Causes, rr. 138—146, 188. See, also, rr. 52—55.
[5] Ord. XVIII. r. 3.
[6] Ord. XVIII. r. 10.

use thereof, unless the judge shall otherwise order, and the judge may make such order as he thinks fit as to the costs of, or incidental to, any such objection."[1]

§ 1398. Many tribunals,[2] besides the High Courts of England and Ireland, and the County Courts, have power to examine witnesses vivâ voce.

§ 1399. The tendency at present unquestionably is to discountenance written evidence, and to substitute for it in all important inquiries testimony by word of mouth. When vivâ voce evidence is required, the *manner* in which witnesses ought to be *examined* lies chiefly in the discretion of the judge before whom the action is tried.[3] Very few positive rules have been laid down on the subject, save that the great object is to elicit the truth. The character, intelligence, courage, interest, bias, memory, and other circumstances of witnesses are, however, so various, as to require almost equal variety in the mode of interrogation, and the degree of its intensity.

§ 1400.[4] If the judge deem it essential to discovering the truth that the witnesses should be *examined out of the hearing of each other*, he will order them all on both sides to withdraw, excepting the one under examination.[5] Such an order is, upon the application of either party at any period of the trial,[6] rarely withheld, but it cannot be demanded of strict right.[7] The parties will not usually

[1] See as to form and requisites of affidavits used in the county courts, C. C. Ord. XIX. rr. 1—9.

[2] Inter alia, the Jud. Comm. of the Privy Council, 3 & 4 W. 4, c. 41 ("The Judicial Committee Act, 1833"), § 7; the Eccles. Cts., 17 & 18 V. c. 47; the Ct. of Adm. for Irel., 30 & 31 V. c. 114, § 50, Ir.; the Cts. of Bankr. in Engl., 46 & 47 V. c. 52, § 105, subs. 5; and in Irel., 20 & 21 V. c. 60, § 369, Ir. See, too, Reg. Gen. of 1877 for Consist. Ct. of Lond., Ord. IX. r. 1, cited 2 P. D. 378.

[3] Bastin *v.* Carew, 1824 (Abbott, C.J.).

[4] Gr. Ev. § 432, in part.

[5] This order may, it seems, be made by an examiner. See In re West of Canada Oil Land and Work's Co., 1877 (Jessel, M.R.).

[6] Southey *v.* Nash, 1837.

[7] See R. *v.* Cook, 1696 (Treby, C.J.); R. *v.* Vaughan, 1696 (Ld. Holt); R. *v.* Goodere, 1741 (Sir M. Foster). In R. *v.* Murphy, 1837, Coleridge, J., observed, that it was *almost* a matter of right for the opposite party to have a witness out of court, while any legal argument was going on respecting his evidence. The ruling in Southey *v.* Nash, 1837 (Alderson, B.), that either party had a right to require that the unexamined witnesses should be out of court, would seem not to be law, even in civil cases. See Selfe *v.* Isaacson, 1858 (Byles, J.). A witness will not be ordered out of court during the reading of affidavits which he has had an opportunity of previously perusing himself: Penniman *v.* Hall, 1875 (Hall; V.-C.).

be included in the order to withdraw, but they may be,[1] as may also the prosecutor in a criminal proceeding, in which it is proposed to examine him as a witness.[2] Where the solicitor in the cause is about to give testimony, an exception in his favour is usually allowed upon a statement by counsel that his personal attendance in court is necessary.[3] Medical and other professional witnesses, summoned to give scientific opinions upon the circumstances of the case, as established by other testimony, will be permitted to remain in court, until this particular class of evidence commences; but then, like ordinary witnesses, they will have to withdraw, and to come in one by one so as to undergo a separate examination.[4]

§ 1401.[5] If a witness remains in court in contravention of an order to withdraw, he renders himself liable to fine and imprisonment for the *contempt*.[6] At one time it was considered that the judge, in the exercise of his discretion, might even exclude his testimony.[7] But it is now settled that the judge has *no right to reject the witness* on this ground, however much his wilful disobedience of the order may lessen the value of his evidence.[8] On the trial of *revenue cases*, a stricter rule is said to prevail; and to prevent any imputation of unfairness, the testimony of any witness who has remained in court, whether contumaciously or not, after an order to withdraw, has hitherto been inflexibly rejected.[9] This

[1] In Charnock *v.* Dewings, 1853, Talfourd, J., is reported to have held that he had no power to order the parties to leave the court so long as they behaved with propriety. See, also, Selfe *v.* Isaacson, 1858 (Byles, J.). Sed qu. as to this ruling.

[2] R. *v.* Newman, 1852 (Ld. Campbell).

[3] Everett *v.* Lowdham, 1831 (Bosanquet, J.); Pomeroy *v.* Baddeley, 1826 (Littledale, J.). But a special application must be made to except him: R. *v.* Webb, 1819 (Best, J.).

[4] And by Scotch law, even these are examined separately on matters of mere medical opinion. See Alison, Pract. Cr. L. (Sc.) 489, 542—545; Tait, Ev. 420.

[5] Gr. Ev. § 432, in part.

[6] Chandler *v.* Horne, 1842.

[7] Parker *v.* M'William, 1830; Thomas *v.* David, 1836; R. *v.* Colley, 1827; Beamon *v.* Ellice, 1831; R. *v.* Wylde, 1834; R. *v.* Lavin, 1843 (Ir.) (Perrin, J. and Richards, B.). The American decisions on the subject are not uniform, but appear substantially to agree with the English. See Greenleaf on Ev. 15th edit. (1892), at p. 567.

[8] Chandler *v.* Horne, 1842 (Erskine, J., who stated that it was so settled by all the judges). See, also, Cook *v.* Nethercote, 1835 (Alderson, B.); Doe *v.* Cox, 1790; Cobbett *v.* Hudson, 1852.

[9] Att.-Gen. *v.* Bulpit, 1821; Parker *v.* M'William, 1830; Thomas *v.* David, 1836 (Coleridge, J.).

rule does not prevail in Ireland, at least, in all its strictness,[1] and possibly would not now be rigidly enforced, even in England.

§ 1402. The practice of ordering witnesses out of court is noticed with approbation by Fortescue in his De Laudibus Legum Angliæ.[2] The story of Susannah and the Elders in the Apocrypha,[3] affords evidence of its utility. To render it properly efficient, it is not enough to order the witnesses simply to withdraw out of hearing, but they should be kept separate, and witnesses should be excluded from any opportunity, before they are themselves called, of conversing or communicating with those who have already been examined. In Scotland,[4] all the witnesses on either side are usually shut up in an apartment by themselves, whence they are successively and separately called into court to be examined.[5] The system of separate examination prevails theoretically, if not practically, in both Houses of Parliament.[6]

§ 1403. When the competency of a witness, if objected to, is settled, he is sworn in the cause by the crier[7] or other officer of the court. If he improperly decline either to take the proper oath,[8] or

[1] Att.-Gen. *v.* Sullivan, 1342 (Ir.) (Brady, C.B.).

[2] His words are :—"Et si necessitas exegerit, dividantur testes hujusmodi, donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit aut concitabit eorum alium ad consimiliter testificandum": C. 26. See, also, Williams *v.* Hulie, 1663; Swift, Ev. 512.

[3] Where Daniel detected the perjury of the two old judges, who, as eye-witnesses, had accused the wife of Joacim of adultery; but who, on being examined apart, differed as to the place where the crime was committed, the one swearing it was under a mastick tree, the other under a holm tree.

[4] Formerly in Scotland, if a witness was objected to as having remained in court without permission, his evidence could not be heard; but 3 & 4 V. c. 59 ("The Evidence (Scotland) Act, 1840"), § 3, enacts, that "in any trial before any judge of the court of session or court of justiciary, or before any sheriff or steward of *Scotland*, it shall not be imperative on the court to reject any witness against whom it is objected that he or she has, without the permission of the court, and without the consent of the party objecting, been present in court during all or any part of the proceedings; but it shall be competent for the court, in its discretion, to admit the witness, where it shall appear to the court that the presence of the witness was not the consequence of culpable negligence or criminal intent, and that the witness has not been unduly instructed or influenced by what took place during his or her presence, or that injustice will not be done by his or her examination."

[5] Alison, Pract. of Cr. L. (Sc.), 542—545; Tait, Ev. (Sc.), 420; 2 Hume, Com. 189; 19 How. St. Tr. 331, n.

[6] Taylor *v.* Lawson, 1828 (Best, C.J., regretting that it is not universally followed).

[7] R. *v.* Tew, 1855.

[8] If in an administration suit an accounting party be subpœnaed for examination, he cannot refuse to be sworn on the ground that he has not

to make the proper affirmation, or if, after having been sworn, he refuse to give evidence, or to answer any question which the court holds that he is bound by law to answer, he is guilty of contempt of court, and may be punished accordingly. When such an offence is committed before any Division of the High Court,[1] the refractory witness may be punished instanter by fine and imprisonment, and it is not necessary that the cause of commitment should be set out at length in the warrant.[2] When it is committed before an inferior tribunal, the mode of dealing with the refractory witness in general depends upon the statutable powers with which the particular court is clothed.[3] In all cases a refusal to discharge the duties of a witness is regarded as a grave offence, since it has a tendency to obstruct the course of public justice.

§ 1404.[4] As soon as a witness has been duly sworn, the party by whom he is produced usually examines him.[5] During this examination, called the witness's "direct examination," or "examination in chief," *leading questions* are not in general allowed to be put.[6] A "leading question" is one which suggests to the witness the answer desired,[7] or which, embodying a material fact, admit of a

received sufficient notice of the points on which he is to be examined, but after being sworn he may,—according to what would seem to be an absurd rule,—object to answer for that reason: Meyrick *v.* James, 1877. See R. S. C. 1883, Ord. XXXIII. r. 5.

[1] See Ex parte Fernandez, 1861; Ex parte Clement, 1822.

[2] See Ex parte Fernandez, 1861, where the witness was fined 500*l.*, and sentenced to six months' imprisonment.

[3] See as to the County Courts, § 111 of "The County Courts Act, 1888," (51 & 52 V. c. 43) enabling the judge to impose on the witness a fine not exceeding 10*l.*

[4] Gr. Ev. §§ 432, 433.

[5] Formerly in Scotch courts, as soon as a witness was sworn, it was necessary for the judge to examine him *in initialibus*, that is, to ask him whether he had been instructed what to say, or had received or had been promised any good deed for what he was to say, or whether he bore any ill-will to the adverse party, or had any interest in the cause, or concern in conducting it; together with his age, and whether he was married or not, and the degree of his relationship to the party adducing him: Tait, Ev. (Sc.) 424; but now this course is no longer *necessary*, though it is still *competent* for the judge, or for the party against whom the witness shall be called, to examine him *in initialibus*, as heretofore: 3 & 4 V. c. 59 ("The Evidence (Scotland) Act, 1840"), § 2.

[6] See Greenleaf on Ev. 15th edit. (1892) p. 569. As to what will be regarded as leading interrogatories, see Gregory *v.* Marychurch, 1850; Lincoln *v.* Wright, 1841. For an early instance of discussion as to whether a question was leading, see R. *v.* Rosewell, 1684.

[7] 1 St. Ev. 169; 2 Ph. Ev. 460; Alison, Pract. of Cr. L. (Sc.) 545; Tait, Ev. (Sc.) 427; 24 How. St. Tr. 659, 660, n.

conclusive answer by a simple negative or affirmative.[1] This, however, must be understood in a reasonable sense. It therefore does not apply to the part of the examination which is introductory to that which is material.[2] If, indeed, it were not allowed to approach the points at issue by such questions, examinations would be most inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, the counsel may lead him on to that point, and may recapitulate to him the acknowledged facts of the case, which have been already established. The judge may, too, in his discretion, allow leading questions to be put in a direct examination, and he will do so where, for instance, the witness, by his conduct in the box, obviously appears to be hostile to the party producing him, or interested for the other party, or unwilling to give evidence,[3] or where special circumstances render the witness rather the witness of the court than of the party.[4] Questions which assume facts to have been proved which have not been proved, or that particular answers have been given which have not been given,[5] will not, however, at any time be permitted.

§ 1405. For the purpose of identification, too, a witness may be directed to look at a particular person, and say whether he is the man.[6] Indeed, wherever,[7] from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, questions may be put in a leading form. Accordingly, a witness called to contradict another respecting the contents of a lost letter, who cannot, off-hand, recollect all its contents, may have the particular passage suggested to him, at

[1] Nicholls *v.* Dowding, 1815 (Ld. Ellenborough).

[2] Id.

[3] Price *v.* Manning, 1889, C. A.; R. *v.* Chapman, 1838 (Ld. Abinger); R. *v.* Ball, 1839; R. *v.* Murphy, 1837 (Coleridge, J.); Clarke *v.* Saffery, 1824 (Best, C.J.); Parkin *v.* Moon, 1836 (Alderson, B.). See, also, 17 & 18 V. c. 125, § 22, post, § 1426. The mere fact that the interest of the witness is necessarily adverse to that of the party calling him does not, in England, make such a course a matter of right: Price *v.* Manning, 1889, supra; disapproving Clarke *v.* Saffery, 1824, contrà. But it would appear to be otherwise in America: Gr. Ev. § 435.

[4] See, for instance, Bowman *v.* Bowman, 1843 (Cresswell, J.).

[5] See Hill *v.* Coombe, 1818; Handley *v.* Ward, 1818; Gr. Ev. § 434.

[6] R. *v.* Watson, 1817 (Ld. Ellenborough); R. *v.* Berenger, 1817 (id.).

[7] Gr. Ev. § 435, in part.

least after his unaided memory has been exhausted.[1] A witness who stated that he could not recollect the names of the members of a firm, so as to repeat them without suggestion, but that he might possibly recognise them if suggested, has been permitted to have this done;[2] and a witness called to contradict another, who has denied having used certain expressions, may sometimes, by permission, be asked by counsel whether the particular words denied were not in fact uttered by the former witness.[3] This permission will, however, it seems, only be given as to expressions which are not in themselves evidence in the cause; the object of relaxing the general rule being simply to exclude the other parts of the conversation, which would not be admissible.[4] The court will, too, sometimes, allow a pointed or leading question to be put to a witness of tender years, whose attention cannot otherwise be called to the matter under investigation.[5] Indeed, the judge has a discretionary power,—not controllable by the Court of Appeal,[6]—of relaxing the general rule, whenever, and under whatever circumstances, and to whatever extent, he may think fit, though the power should only be exercised so far as the purposes of justice plainly require.[7]

§ 1406.[8] A witness is sometimes permitted to *refresh* and assist his *memory, by the use of a written instrument*, memorandum, or entry in a book.[9] This can, however,—except in the case of

[1] Courteen *v.* Touse, 1807 (Ld. Ellenborough).

[2] Acerro *v.* Petroni, 1815 (Ld. Ellenborough).

[3] Edmonds *v.* Walter, 1820 (Abbott, C.J.).

[4] Hallett *v.* Cousens, 1839 (Erskine, J.).

[5] Moody *v.* Rowell, 1835 (Am.).

[6] See Lawdon *v.* Lawdon, 1855 (Ir.).

[7] Ohlsen *v.* Terrero, 1874, C. A.; Moody *v.* Rowell, 1835 (Am.).

[8] Gr. Ev. §§ 436, 438, in part.

[9] In America, it has been held that he can be *compelled* to do this. See Greenleaf on Ev. 15th edit. (1892), § 436, and notes. By the New York Civil Code, § 1843:—"A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such writing, though he retain no recollection of the particular facts; but such evidence must be received with caution." By § 159 of the Ind. Ev. Act, 1872, "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

scientific witnesses referring to professional books as the foundation of their opinion,[1]—be adopted only where the writing has been made, or its accuracy recognised, at the time of the fact in question, or, at furthest, so recently afterwards, as to render it probable that the memory of the witness had not then become defective.[2] Accordingly, in a Scotch case, a witness was not allowed to consult notes, prepared by him *some weeks* after the transaction had occurred, and when he had reason to believe that he should be called to give evidence.[3]

§ 1407. Its own peculiar circumstances must govern each case raising this question. Usually, however, if the witness swears positively, that the notes, though made *ex post facto*, were taken down at a time when he had a distinct recollection of the facts there narrated, he will be allowed to use them, though drawn up a considerable time after the transactions had occurred.[4] If, however, the memoranda were prepared subsequently to the event at the instance of the party calling the witness, or of his solicitor, they can in no case be permitted to be used, since a door might thus be opened to the grossest fraud. Accordingly, a witness who had drawn up a paper for the party calling him, after the cause was set down for trial, though eighteen months before the trial was actually heard, was not allowed to refer to it;[5] and the deposition of a witness who had to refresh her memory, resorted to certain minutes drawn up at her request by the solicitor for the party she supported, as a digest, in the form of notes, at the time they took place, of certain transactions, though she had herself afterwards revised and transcribed such minutes, is said[6] to have been suppressed by Lord Chancellor Hardwicke.

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."

[1] As to this practice, see post, §§ 1422, 1423.

[2] R. *v.* Horne Tooke, 1794; Burrough *v.* Martin, 1809; Smith *v.* Morgan, 1839; Wood *v.* Cooper, 1845.

[3] R. *v.* Sir A. Gordon Kinloch, 1795 (as held by the majority of the courts); Jones *v.* Stroud, 1825.

[4] R. *v.* Sir A. Gordon Kinloch, 1795 (Sc.); Wood *v.* Cooper, 1845 (Pollock, C.B.). See, also, Jones *v.* Stroud, 1825; § 1408.

[5] Steinkeller *v.* Newton, 1838 (Tindal, C.J.).

[6] In Anon., 1753 (Ld. Hardwicke as reported by Ld. Ashburton); cited by Ld. Kenyon in Doe *v.* Perkins, 1790. See Sayer *v.* Wagstaff, 1842.

§ 1408. Whether, indeed, a witness can ever refresh his memory by referring to a mere *copy* of his original memorandum is a question of doubt.[1] In several cases he has been allowed to do so, where, having looked at the copy, he was enabled to swear positively to the facts from *his own recollection*.[2] Here, however, it must be presumed (though some of the reports are silent on the subject), that the copy from the notes of the witness was made either by himself, or by some person in his presence, or at least in such a manner as to enable the witness to swear to its accuracy.[3] Even then, it may be questionable whether the copy should be used, so long as the original is in existence, and its absence unexplained; and there is much weight in the remark of Patteson, J., that the rule requiring the production of the best evidence is equally applicable, whether a paper be produced as evidence in itself, or be merely used to refresh the memory.[4] And in a case at Nisi Prius, a witness was not permitted to refresh his memory with the copy of a paper taken by himself *six months* after he made the original, though the original was proved to have become illegible; the judge observing, that the witness could only look at the original memorandum made *near* the time.[5]

§ 1409. Be this general question as it may, it is clear, that if the copy be an imperfect extract, or be not proved to be a correct copy, or if the witness have no *independent* recollection of the facts narrated therein, the original must be used.[6]

[1] By § 159 of "The Indian Evidence Act, 1872:"—"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."

[2] Tanner *v.* Taylor, 1756 (Legge, B.); cited by Buller, J., in Doe *v.* Perkins, 1790; Anon., 1827 (Bayley, J.); Duch. of Kingston's case, 1776; R. *v.* Hedges, 1767.

[3] Ld. Talbot *v.* Cusack, 1864 (Ir.).

[4] Burton *v.* Plummer, 1834. See, also, Jones *v.* Stroud, 1825.

[5] Jones *v.* Stroud, 1825 (Best, C.J.).

[6] Doe *v.* Perkins, 1790; explained (Patteson, J.) in R. *v.* St. Martin's, Leicester, 1834, as reported 2 A. & E. 215; R. *v.* Hedges, 1767 (Ld. Ellenborough); Solomons *v.* Campbell, 1822, cited St. Ev. 183, n. (Abbott, C.J.); Beech *v.* Jones, 1848; Alcock *v.* The Roy. Exch. Ins. Co., 1849. In Burton *v.* Plummer, 1834, the plaintiff's clerk, being called to prove the order and delivery of certain goods, sought to refresh his memory by some entries in a ledger, recording transactions in trade which had been noted by the clerk in a waste-book as they occurred, and day by day copied by the plaintiff into the ledger, each entry being at the time checked by the clerk. The ledger was regarded as an original, and the witness allowed to refresh his memory thereby, without accounting for the absence of the waste-book. In Horne

§ 1410. But, apart from the question as to any distinction between originals and copies, to entitle a witness to refresh his memory by any memoranda, it is necessary that they should have been made, either *by the witness* himself, or *by some person in his presence*,[1] or, at least, that he should have examined them while the facts were fresh in his memory, and should then have known that the particulars therein mentioned were correctly stated.[2] Under the last part of this rule, a seaman has been allowed to refer to a log-book, which, though not written by himself, had, from time to time, and while the occurrences were recent, been examined by him;[3] a pay-clerk to look at a workman's time-book, which he has acted upon in paying the weekly wages;[4] to prove the date of an act of bankruptcy, the court has several times permitted witnesses to refer to their depositions, taken shortly after the bankruptcy, though such depositions were of course not written by themselves, but merely signed by them;[5] where a witness called on behalf of a prosecution makes a statement in his examination in chief inconsistent with what he has previously sworn before the magistrates or the coroner, the counsel for the Crown may show him his deposition, for the purpose of refreshing his memory, and may then repeat the question in a leading form;[6] and a witness will always be allowed to look at the document

v. Mackenzie, 1839, II. L., a surveyor was permitted to refresh his memory by a printed copy of a report furnished by him to his employers, and compiled from his original notes, of which it was substantially, though not verbally, a transcript, the report seems to have been treated in the light of an original document; and although it contained some marginal notes, made only two days before, it was still allowed to be used, these notes consisting of mere calculations, which the witness, if time were given him, could repeat without their aid. In Topham *v.* Macgregor, 1844, the writer of a newspaper article was allowed to refresh his memory by the paper, his MS. being proved to be lost. See, also, Ld. Talbot *v.* Cusack, 1886 (Ir.).

[1] Duch. of Kingston's case, 1776.

[2] Compare the provisions of the New York Code, set out ante, § 1406, n.

[3] Burrough *v.* Martin, 1809 (Ld. Ellenborough); Anderson *v.* Whalley, 1852.

[4] R. *v.* Langton, 1877, C. C. R.

[5] Smith *v.* Morgan, 1839 (Tindal C.J.); Wood *v.* Cooper, 1845 (Pollock, C.B.); Vaughan *v.* Martin, 1796 (Ld. Kenyon).

[6] R. *v.* Williams, 1853 (Williams, J.). But counsel for the defence, in cross-examining a witness, may not place his deposition in his hand to refresh his memory without putting it in evidence: R. *v.* Ford, 1851. Under the old law, a witness, having denied on cross-examination that he was ever sentenced to imprisonment, was not permitted to have his memory refreshed by a copy of his conviction: Mengoe *v.* Simmons, 1827. As to the present law, see 28 & 29 V. c. 18, § 6, cited post, § 1437.

itself if he has checked an entry made by another person;[1] or has actually seen money paid and a receipt given;[2] or has read a memorandum to a party who had assented to its terms.[3] If the witness has become *blind*, the paper may be read over to him for the purpose of exciting his recollection.[4]

§ 1411. A writing, used to refresh the memory, does not thereby become evidence of itself.[5] Consequently, it is *not necessary* that it should even be *admissible*, and a document which cannot be read for want of a stamp, may be referred to by the witness in giving his evidence.[6] Neither is it essential that notes used by a witness, who is called to prove a conversation, a speech, or the like, should contain a verbatim account of all that was uttered. Thus, a short-hand writer who had taken a verbatim note of such parts of an address as he deemed material, but was merely able to swear to the substantial correctness of the remainder, was permitted to read the whole.[7]

§ 1412. In order that a document may be used to refresh the memory, it is *not necessary* that the witness, after having seen it, should have any *independent recollection* of the facts mentioned therein, or connected therewith; but it will suffice if he remembers that he has seen the paper before, and that, when he saw it, he knew its contents to be correct; or even if, entirely forgetting the circumstances themselves, and the fact of his having seen the paper, he can still, in consequence of recognising his signature or writing upon it, vouch for the accuracy of the memorandum, or

[1] Burton *v.* Plummer, 1834.

[2] Rambert *v.* Cohen, 1803 (Ld. Ellenborough).

[3] Ld. Bolton *v.* Tomlin, 1836; Jacob *v.* Lindsay, 1801; R. *v.* St. Martin's, Leicester, 1834. Witnesses are even reported to have been allowed to refresh their memories from the brief notes of counsel taken at a former trial, provided they could afterwards speak from recollection, and not merely from the notes; Lawes *v.* Reed, 1835 (Alderson. B., citing Balme *v.* Hutton, undated, as similar; and see, also, Henry *v.* Lee, 1814). These cases, however, can scarcely be regarded as authorities, being certainly inconsistent with that first cited, as well as with principle.

[4] Catt *v.* Howard, 1820 (Abbott, C.J.); Vaughan *v.* Martin, 1796 (Ld. Kenyon).

[5] Alcock *v.* The Roy. Exch. Ins. Co., 1849; Payne *v.* Ibbotson, 1858.

[6] Maughan *v.* Hubbard, 1828; Jacob *v.* Lindsay, 1801; Rambert *v.* Cohen, 1803 (Ld. Ellenborough); Catt *v.* Howard, 1820 (Abbott, C.J.).

[7] R. *v.* O'Connell, 1843 (Ir.). In this case, it was strongly urged that, as by the witness's own showing the note was a *partial* one, the fulness and consequent accuracy of which rested on his private opinion of the materiality of what was spoken, he was not entitled to use it at all, but was bound to depend on his memory alone.

swear to the particular fact in question. Accordingly, it is enough if the agent, who made a parol lease, and entered a memorandum of the terms in a book, states that he has no memory of the transaction save from the book, but that on reading the entry he entertains no doubt that the fact really happened;[1] if a barrister, called to prove that a witness had materially varied his account since the last trial, though he has no independent recollection of what took place on the former occasion, vouch the notes on his brief to which he refers to refresh his memory as accurate;[2] if a banker's clerk, on being shown a bill of exchange, which has his own writing upon it, knows from this, and is able to swear positively that it has passed through his hands;[3] or if a witness, from seeing his own signature to the attestation of a deed, says that, though he has no recollection of the fact, he is sure that he saw the party execute it.[4]

§ 1413. In all cases where documents are used for the purpose of refreshing the memory of a witness, it is usual and reasonable,[5] —and if the witness has no independent recollection of the fact, necessary,—that they should be produced at the trial,[6] and that the *opposite counsel* should have an *opportunity of inspecting* them, in order that on cross- or re-examination, he may have the benefit of the witness's refreshing his memory by every part.[7] But it is not necessary for the adverse party to put in the document as part of his evidence, merely because he has looked at it, or has cross-examined the witness respecting entries which have been previously referred to.[8] If, however, he goes further, and cross-examines as

[1] R. *v.* St. Martin's, Leicester, 1834. See, also, Haig *v.* Newton, 1817; Sharpe *v.* Bingley, 1817; Maugham *v.* Hubbard, 1828.

[2] R. *v.* Guinea, 1841 (Ir.) (Crampton, J.).

[3] Gr. Ev. § 437, in great part, for seven lines.

[4] Maugham *v.* Hubbard, 1828 (Bayley, J.); R. *v.* St. Martin's, Leicester, 1834 (Taunton, J.); Russell *v.* Coffin, 1829 (Am.); Jackson *v.* Christman, 1830 (Am.); Pigott *v.* Holloway, 1808 (Am.); Smith *v.* Lane, 1824 (Am.) (Gibson, J.); Clark *v.* Vorce, 1836 (Am.).

[5] R. *v.* Hardy, 1794 (Eyre, C.J.). But it does not appear to be strictly necessary: Kensington *v.* Inglis, 1807; Burton *v.* Plummer, 1834.

[6] Beech *v.* Jones, 1848.

[7] Howard *v.* Canfield, 1836 (Coleridge, J.); R. *v.* St. Martin's, Leicester, 1834 (Patteson, J.); Sinclair *v.* Stevenson, 1824 (Best, C.J.); Loyd *v.* Freshfield, 1826; Dupuy *v.* Truman, 1843; Lord *v.* Colvin, 1854.

[8] R. *v.* Ramsden, 1827 (Ld. Tenterden); Gregory *v.* Tavernor, 1833 (Gurney, B.); Payne *v.* Ibbotson, 1858.

to other parts of the memorandum, it seems that he thereby makes it his own evidence.[1] If a paper be put into the hand of a witness, merely to prove handwriting, and not to refresh his memory,[2] or if, being given to the witness for the purpose of

[1] Gregory *v.* Tavernor, 1833. See Stephens *v.* Foster, 1833.

[2] Russell *v.* Rider, 1834 (Bosanquet, J.); Sinclair *v.* Stevenson, 1824; Lord *v.* Colvin, 1854. As to Scotch law, Alison, in his Treatise on the Practice of the Criminal Law, with reference to the law of Scotland, observes, "The rule is, that notes or memoranda made up by the witness at the moment, or recently after the fact, may be looked to in order to refresh his memory; but if they were made up at the distance of weeks or months thereafter, and still more, if done at the recommendation of one of the parties, they are not admissible. It is accordingly usual to allow a witness to look to memoranda made at the time, of dates, distances, appearances on dead bodies, lists of stolen goods, or the like, before omitting his testimony, or even to read such notes to the jury as his evidence, he having first sworn that they were made at the time and faithfully done. In regard to lists of stolen goods in particular, it is now the usual practice to have inventories of them made up at the time from the information of the witness in precognition, signed by him, and libelled on as a production at the trial, and he is then desired to read them, or they are read to him, and he swears that they contain a correct list of the stolen articles. In this way much time is saved at the trial, and much more correctness and accuracy is obtained than could possibly have been expected, if the witness were required to state from memory all the particulars of the stolen articles, at the distance perhaps of months from the time when they were lost. With the exception, however, of such memoranda, notes, or inventories, made up at the time or shortly after the occasion libelled, a witness is not permitted to refer to a written paper as containing his deposition; for that would annihilate the whole advantages of parol evidence and vivâ voce examination, and convert a jury trial into a mere consideration of written instruments. There is one exception, however, properly introduced into this rule; in the case of medical or other scientific reports or certificates, which are lodged in process before the trial, and libelled on as productions in the indictment, and which the witness is allowed to read as his deposition to the jury, confirming it at its close by a declaration on his oath, that it is a true report. The reason of this exception is founded in the consideration, that the medical or other scientific facts or appearances which are the subject of such a report, are generally so minute and detailed that they cannot with safety be intrusted to the memory of the witness, but much more reliance may be placed on a report made out by him at the time when the facts or appearances are fresh in his recollection; while, on the other hand, such witnesses have generally no personal interest in the matter, and from their situation and rank in life, are much less liable to suspicion than those of an inferior class, or more intimately connected with the transaction in question. Although, therefore, the scientific witness is always called on to read his report, as affording the best evidence of the appearances he was called on to examine, yet he may be, and generally is, subject to a further examination by the prosecutor, or a cross-examination on the prisoner's part; and if he is called on to state any facts in the case, unconnected with his scientific report, as conversations with the deceased, confessions heard by him from the panel, or the like, utitur jure communi, he stands in the situation of an ordinary witness, and must give his evidence verbally in answer to the questions put to him, and can only refer to jottings or

refreshing his memory, the questions founded upon it utterly fail, the opposite party is not entitled to see it, except sufficiently to enable him to recognise it if it be subsequently offered in evidence, or to re-examine upon it, and may not comment upon its contents.[1] Indeed, if under these circumstances he read it or comment on it, he may be required by his adversary to put it in.[2]

§ 1414. In general, and unless the case be one in which evidence of reputation is admissible,[3] witnesses must speak only to *facts* within their own knowledge; and will not be permitted,—except under circumstances to be presently mentioned,[4]—to express their *belief* or *opinion*. For instance, in an action for the price of goods supplied to a firm, where the question is, whether defendant held himself out to plaintiff as the only person composing the firm, a witness, who proves the giving of the order by the defendant, may not be asked with whom he dealt, since such a question was only a skilful mode of ascertaining the witness's opinion (which may be founded on hearsay evidence), but the only proper inquiry is as to the acts done;[5] and in an action for slander, if the words used are alleged to have been spoken in a sense different from their ordinary meaning, a bystander cannot be asked, in the first instance, what he understood by them,[6] but the proper course is to ask the witness whether there was anything to prevent the words from conveying the meaning which they ordinarily would convey to him, and then, if he states any facts which lead to the inference that they were used in a peculiar sense, a foundation will have been laid for the question, "What did you understand by those words?"[7]

§ 1415.[8] But the law does not require a witness to speak even as to facts which are within his own knowledge[9] with such *certainty* as to exclude all doubt; and if he has *any* personal

memoranda of dates, &c., made up at the time to refresh his memory, like any other person put into the box"; pp. 540—542.

[1] Holland *v.* Reeves, 1835 (Alderson, B.); Cope *v.* Thames Haven Dock Co., 1848; Peck *v.* Peck, 1870; R. *v.* Duncombe, 1838 (Ld. Denman); Lord *v.* Colvin, 1854.

[2] Palmer *v.* Maclear, 1858.

[3] Ante, § 607.

[4] Post, §§ 1416—1425.

[5] Bonfield *v.* Smith, 1844.

[6] D. of Brunswick *v.* Harmer, 1850.

[7] Daines *v.* Hartley, 1848. See Simmons *v.* Mitchell, 1881.

[8] Gr. Ev. § 440, in part.

[9] As to evidence of reputation, see ante, § 607.

recollection of the fact under investigation, he may state what he remembers, and leave the jury to judge of the weight of his testimony.[1] If, however, the impression on his mind be so slight as to justify a belief that it may have been derived from others, or may be some unwarrantable deduction of his own dull understanding or lively imagination, it will be rejected.[2]

§ 1416.[3] On some particular subjects, positive and direct testimony is often unattainable. In such cases, a witness is allowed to testify as to his *belief* or *opinion*, or even to draw *inferences* respecting the fact in question from other facts which are within his personal knowledge. And a man who swears positively to a belief or a fact which he knows to be untrue, is liable to be convicted of perjury.[4] Accordingly, it is common for witnesses to express their belief respecting the *identity* of persons and things, as also respecting the genuineness of disputed *handwriting*;[5] on a question whether a house agent was entitled to his commission, as on the sale of a house through his intervention, the purchaser may say whether he thought he should have bought the property if he had not obtained a card to view it from that agent;[6] and on a claim for damages in a suit for adultery,[7] or in an action for breach of promise of marriage, any person who has been in a position to observe the mutual deportment of the parties, may give evidence as to his opinion, whether or not they were attached to each other.[8] In America it has been determined, upon grave consideration (a decision which is in conformity with a doctrine which has always prevailed in our ecclesiastical courts),[9] not only that a witness who has had opportunities of knowing and observing the conversation, conduct, and manners of a person whose sanity is in question, may depose as to his opinion or belief as to the sanity of the

[1] Miller's case, 1772-3 (De Grey, C.J.); Carmalt *v.* Post, 1837 (Gibson, C.J.); R. *v.* Stafford, 1680 (Ld. H. St. Finch).

[2] Clark *v.* Bigelow, 1839 (Am.).

[3] Gr. Ev. § 440, in part.

[4] R. *v.* Pedley, 1784 (Ld. Mansfield); Miller's case, 1772-3 (De Grey, C.J.); Folkes *v.* Chadd, 1782 (Ld. Mansfield); R. *v.* Schlesinger, 1847. The only difference is, that proof of the commission of the crime is more difficult in the one case than in the other.

[5] As to proof of handwriting, see post, §§ 1862 et seq.; Folkes *v.* Chadd, 1782 (Ld. Mansfield).

[6] Mansell *v.* Clements, 1874.

[7] See 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 33.

[8] Trelawney *v.* Colman, 1817 (Holroyd, J.); M'Kee *v.* Nelson, 1825 (Am.).

[9] Wheeler *v.* Alderson, 1831.

party, formed from such actual observation;[1] but also that the subscribing witnesses to a will, being placed about a testator to ascertain and judge of his capacity, may testify their opinions, with respect to his sanity at the time of executing the will.[2]

§ 1417.[3] It is chiefly on questions of *science or trade* (where there often is a difficulty, and occasionally an impossibility, of obtaining more direct and positive evidence), that persons of peculiar skill on the subject (sometimes called *experts*),[4] are allowed to give their opinions in evidence, as well as testify to facts. Thus, the opinions of medical men are constantly admitted, as to the cause of disease or death, or the consequences of wounds, or the treatment of sickness; and as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other subjects of professional skill.[5] The opinions of persons who have made the peculiarities of handwriting their special study are receivable as to their belief, whether the writing of an instrument was in a feigned hand, or as to whether two documents, supposed to have been written in a disguised hand, were written by the same person;[6] antiquaries have been called to fix, by conjecture, the date of ancient handwriting;[7] practical surveyors may express their opinions, whether certain marks on trees, piles of stone, &c., were intended as monuments of boundaries;[8] an accountant, who, although not an actuary, is acquainted with the business of life insurance, may give evidence as to the average and probable duration of lives, and the value of annuities;[9] the

[1] Clary *v.* Clary, 1841 (Am.).

[2] Chase *v.* Lincoln, 1807 (Am.); Poole *v.* Richardson, 1807 (Am.); Rambler *v.* Tryson, 1821 (Am.); Buckminster *v.* Perry, 1808 (Am.); Grant *v.* Thompson, 1822 (Am.); Wogan *v.* Small, 1824 (Am.).

[3] Gr. Ev. § 440, in part.

[4] Substantially, the above description represents the definition of an "expert" given in note to Carter *v.* Boehm, 1766, contained in 1 Smith's Leading Cases, at p. 544 of 9th edit. One who has studied a subject carefully falls within this definition, though he has never practised it: Greenleaf on Ev. 15th edit. (1892), notes (*r*) and (*d*). on p. 577. The question whether a person is an expert or not is usually one for the decision of the judge: Id. note (*b*). As to what matters are properly the subject of expert evidence, see text, and, also, Greenleaf on Ev. 15th edit. (1892), p. 578. An expert may be cross-examined as to statements in scientific treatises with regard to the subjects as to which he is giving evidence. See Darby *v.* Ouseley, 1856.

[5] 1 St. Ev. 175; Tait. Ev. 433; R. *v.* Wright, 1821; Hathorn *v.* King, 1811 (Am.); Collett *v.* Collett, 1838.

[6] Goodtitle *v.* Braham, 1792.

[7] Tracy Peer., 1843, H. L.

[8] Davis *v.* Mason, 1826 (Am.).

[9] Rowley *v.* Lond. & N. W. Rail. Co., 1873.

secretary of a fire insurance company, accustomed to examine buildings with reference to the insurance of them, and who, as a county commissioner, has frequently estimated damages occasioned by the laying out of railroads and highways, may testify his opinion, as to the effect of laying a railroad within a certain distance of a building, upon the value of the rent, and the increase of the rate of insurance against fire;[1] on a question whether a paper had contained certain pencil-marks, which were alleged to have been rubbed out, the opinion of an engraver, who has examined the paper with a mirror, is admissible, valeat quantum;[2] seal-engravers may be called to give their opinions upon an impression whether it was made from an original seal, or from another impression;[3] the opinion of an artist in painting is evidence respecting the genuineness of a picture;[4] and probably a post-mark may be proved by the opinion of a clerk of the post-office, or of any one who has been in the habit of receiving letters with that mark.[5]

§ 1418.[6] Again, on a question whether a bank, erected to prevent the overflowing of the sea, has caused the choking up of a harbour, the opinions of scientific engineers, as to the effect of such an embankment upon the harbour, are admissible;[7] naturalists, who have observed the habits of certain fish, may state their opinions, as to the ability of the fish to overcome particular obstructions in the rivers which they are accustomed to ascend;[8] and the opinion of experienced officers is admissible respecting a question of military practice,[9] though no great weight is of

[1] Webber *v.* East. Rail. Co., 1840 (Am.). Where a point, involving questions of practical science, is in dispute before a court unaided by a jury or assessors, the court will advise a reference to an expert in that science for his opinion, and his report will be adopted by it: Webb *v.* Manch. & Leeds Rail. Co., 1839. And there is now in the High Court a power to refer such a case compulsorily: R. S. C. Ord. XXXVI. r. 5. In the County Court, a matter can only be referred by consent: "The County Courts Act, 1888" (51 & 52 V. c. 43), § 104.

[2] R. *v.* Williams, 1838 (Parke, B., and Tindal, C.J.).

[3] Per Ld. Mansfield, in Folkes *v.* Chadd, 1782.

[4] In Belt *v.* Lawes, 1883, Huddleston, B., allowed many R. A.'s to be called to express decided opinions hostile to the plaintiff's artistic claims.

[5] Abbey *v.* Lill, 1829 (Gaselee, J.); Fletcher *v.* Braddyll, 1821; Woodcock *v.* Houldsworth, 1846.

[6] Gr. Ev. § 440, in part.

[7] Folkes *v.* Chadd, 1782.

[8] Cottrill *v.* Myrick, 1835 (Am.).

[9] Bradley *v.* Arthur, 1825. See, also, Barnes *v.* Kettle, 1766.

necessity given to it. It is, in short, a general rule, that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance;[1] in other words, when it so far partakes of the character of a science or art, as to require a course of previous habit or study, in order to obtain a competent knowledge of its nature.[2]

§ 1419. The opinions of skilled witnesses cannot, on the other hand, be received on a subject which does not require any peculiar habits or course of study in order to qualify a man to understand it.[3] Accordingly,[4] witnesses are not permitted to state *their views on matters of moral or legal obligation*, or on the manner in which other persons would *probably have been influenced*, had the parties acted in one way rather than another.[5] For instance, the opinions of medical practitioners as to whether a physician has honourably and faithfully discharged his duty to his medical brethren, cannot be admitted, since a jury are, on such a point, as capable of forming an opinion as the witnesses.[6] To put it briefly, a witness may not, on other than scientific subjects, be asked to state his opinion upon a question of fact which is the very issue for the jury, as, for instance, whether a driver is *careful;* a road *dangerous*, or an assault or homicide *justifiable*.[7]

§ 1420. In some cases it is difficult to determine whether a particular question be one of a scientific nature or not, and, consequently, whether skilled witnesses may or may not pass their opinions upon it.[8] Thus, in an action on a policy of insurance, can persons conversant with the business of insurance be asked their opinions whether facts withheld from the underwriter were material? In an action against an insurance broker for negligence, in not drawing, or in not altering, a policy according to

[1] M'Fadden *v.* Murdock, 1867 (Ir.).
[2] 1 Sm. L. C. 544, note to Carter *v.* Boehm, 1766. For numerous other instances of the reception of expert evidence, see Greenleaf on Ev. 15th edit. (1892), § 440, and note thereto, on p. 483.
[3] Id.
[4] Gr. Ev. § 441, in part.
[5] Campbell *v.* Rickards, 1833 (Ld. Denman).
[6] Ramadge *v.* Ryan, 1832.
[7] See Greenleaf on Ev. (15th edit.) § 441, and American cases there cited.
[8] See generally on this question, Greenleaf on Ev. 15th edit. (1892), p. 578.

instructions, can other brokers be called to state their opinions as to what the conduct of persons similarly situated ought to have been? The old Court of Queen's Bench said that in these cases such evidence cannot be received,[1] but the old Court of Common Pleas that it can.[2] In an action for a libel,[3] however, imputing to plaintiff dishonourable conduct in withdrawing a horse which he had entered for a race, and against which he had betted, a witness for him having on cross-examination stated, that by the rules of the Jockey Club a man might bet against his own horse, and then withdraw him without assigning any reason, and that, in such a case, he would be entitled to receive the amount of the wager, it was held that he might, on re-examination, be asked his opinion respecting the morality of such conduct, with a view of arriving at the real meaning of the rules.

§ 1421. The opinions of scientific witnesses are admissible in evidence, not only where they rest on the personal observation of the witness himself, and on facts within his own knowledge, but even where merely *founded on the case as proved by other witnesses* at the trial.[4] But a witness cannot be asked his opinion respecting the very point which the jury are to determine. For instance, on a question whether a particular act, for which a prisoner is on his trial, were an act of insanity, a medical man, conversant with that disease, who knows nothing of the facts, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; because such a question involves the determination of the truth of the facts deposed to, as well as the scientific inference from those facts.[5] Where, indeed, the facts are admitted, or not disputed, and the question thus becomes substantially one of science only, it may be convenient to allow the question to be put in the general form

[1] Campbell *v.* Rickards, 1833, relying on Carter *v.* Boehm, 1766; and Durrell *v.* Bederley, 1816 (Gibbs, J.). See, also, Jefferson Ins. Co. *v.* Cotheal, 1831 (Am.).

[2] Chapman *v.* Walton, 1833, relying on Rickards *v.* Murdock, 1830; and Berthon *v.* Loughman, 1817 (Holroyd, J.). See, further, 1 Sm. L. C. 539—545; Lindenau *v.* Desborough, 1828.

[3] Greville *v.* Chapman, 1844. It is not probable that the courts would sanction any extension of the doctrine here propounded.

[4] R. *v.* Wright, 1821; R. *v.* Searle, 1831 (Park, J.); Fenwick *v.* Bell, 1844; Beckwith *v.* Sydebotham, 1807; Collett *v.* Collett, 1838.

[5] M'Naghten's case, 1843, H. L.

first mentioned, though it cannot be insisted on as a matter of right.[1] The proper and usual form of question is to ask him whether, *assuming* such and such facts, the prisoner was sane or insane? The jury are then left to say whether the assumed facts exist or not.[2] In the same way, on a question of navigation, a Master of the Trinity House, or other nautical witness, cannot in strictness be asked whether, after having heard the evidence, he thinks the ship was properly or improperly navigated;[3] but he may be asked his opinion on the subject, assuming the facts stated in evidence to be true.[4] Upon a question of seaworthiness, too, experienced shipwrights may give an opinion as to whether, assuming a ship to be in the state in which the one in question was sworn to be on a certain day, she could have been seaworthy when the policy was effected.[5]

§ 1422. In cases where skilled witnesses are called to pronounce their opinions on some scientific question, they may refresh their memory by referring to professional treatises,[6] tables, calculations, lists of prices, and the like. For instance, an actuary may refer to "the Carlisle Tables," when called upon to give evidence respecting the value of an annuity on joint lives;[7] an architect might, it is presumed, refresh his memory with any price list of generally acknowledged correctness. A physician may strengthen his recollection by referring to books which he considers to be works of authority; or may be asked, after such a reference, whether his judgment was or was not thereby confirmed—and this though medical books are not directly admissible in evidence.[8] It does not, however, appear that this latter course has ever been directly sanctioned; though a medical witness has been asked whether, in

[1] M'Naghten's case, 1843, II. L.

[2] R. *v.* Wright, 1821.

[3] Sills *v.* Brown, 1840 (Coleridge, J.). See, also, Jamoson *v.* Drinkald, 1826, P. C.

[4] Fenwick *v.* Bell, 1844 (Coltman, J.); Malton *v.* Nesbit, 1824 (Abbott, C.J.). In appeals from an investigation ordered by the Board of Trade under "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60, §§ 475, 479), as to a shipping casualty, the Court of Appeal, being advised by nautical assessors, will not permit experts to be called to give evidence on questions of nautical knowledge or skill: The Kestrel, 1881.

[5] Beckwith *v.* Sydebotham, 1807 (Ld. Ellenborough); Thornton *v.* Roy. Ex. Ass. Co., 1791 (Ld. Kenyon).

[6] See post, § 1423, ad fin. By § 159 of "The Ind. Ev. Act, 1872," "An expert may refresh his memory by reference to professional treatises."

[7] Rowley *v.* Loud. & N. W. Rail. Co., 1873.

[8] Collier *v.* Simpson, 1831 (Tindal, C.J.).

the course of his reading, he has not found a certain mode of treatment prescribed; and has also been permitted, in explanation of the grounds of his opinion, to state that his judgment was in part founded on the writings of his professional brethren.[1]

§ 1423. Law being a science, the existence and meaning of *the laws*, both written and unwritten, and of the usages and customs of *Foreign States*, may, and indeed *must*, be proved by calling professional or official persons to give their opinions on the subject.[2] Scotch Marriage Law has been so proved.[3] An opinion was at one time entertained that all foreign *written* law must be proved by a copy properly authenticated;[4] but this doctrine is now distinctly exploded;[5] the House of Lords,[6] adopting a previous decision of the Court of Queen's Bench,[7] having determined that whenever foreign written law is to be proved, that proof cannot be taken from a book, but must be derived from some skilled witness. For instance, on a question respecting the existence or meaning of a French law arising in a British court, it would not suffice to produce the Code Napoléon, because the court would not have organs to deal with and construe its provisions; but the assistance of foreign lawyers, who knew how to interpret it, must of necessity be prayed in aid.[8] But a witness may, nevertheless, refresh and confirm his recollection of the law, or assist his own knowledge, by referring to text-books, decisions, statutes, codes, or other legal documents, or authorities; and if he describes these works as truly stating the law, they may be read, not as evidence per se, but as part and parcel of his testimony.[9] When an expert, however,

[1] Collier *v.* Simpson, 1831 (Tindal, C.J.).

[2] See ante. §§ 5, 9, 48.

[3] In the great case of Dalrymple *v.* Dalrymple, 1811, Sir W. Scott, in his judgment, examines and sifts the depositions of eminent Scottish lawyers made in the case. See, also, R. *v.* Povey, 1853.

[4] R. *v.* Picton, 1806 (Ld. Ellenborough); Clegg *v.* Levy, 1812 (id.); Millar *v.* Heinrick, 1815 (Gibbs, C.J.); Freemoult *v.* Dedire, 1718; Boehtlinck *v.* Schneider, 1799 (Ld. Kenyon).

[5] See, on this subject, Ld. Brougham's sketch of Ld. Stowell, "Statesmen of the Time of G. 3," 2nd ser. 76.

[6] Sussex Peer., 1844, H. L.

[7] Baron de Bode's case, 1845.

[8] Sussex Peer., 1844, H. L. (Ld. Brougham). See, also, Ld. Nelson *v.* Ld. Bridport, 1845, H. L. (Ld. Langdale, M.R.). See, too, Cocks *v.* Purday, 1846; and Bremer *v.* Freeman, 1857, P. C.

[9] Sussex Peer., 1844, H. L.; Ld. Nelson *v.* Ld. Bridport, 1845, H. L.

vouches a foreign code, an English court may construe it for itself.[1]

§ 1424. Before the judge can discover and declare the meaning of a foreign document, he must obtain, through the medium of skilled witnesses, first, a translation of the document; secondly, an explanation of any terms of art used in it; and thirdly, information on any special law, or on any peculiar rule of construction, of the foreign State affecting it. Aided by these lights, the court then proceeds to put a judicial construction upon the instrument.[2]

§ 1425. To render a witness competent to give evidence on a point of foreign law, he must either be a *professional man* belonging to the country whose laws are in question, or at least he must hold *some official situation*, which presumes, because it requires, sufficient knowledge.[3] Accordingly, a judge, an advocate, a barrister, or a solicitor, will be an admissible witness to prove the laws of his own country; an attorney-general, though not a barrister, as is occasionally the case in some of our colonies, may be examined as a person *peritus virtute officii*;[4] a Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in this country, has, in virtue of that office, been considered as a person skilled in the matrimonial law of Rome, and therefore an admissible witness to prove that law; and on one occasion the testimony of a French *vice-consul* here was admitted at Nisi Prius[5] to prove the law of France, as being the evidence of a person officially skilled,[6] while on another the Probate Division allowed Persian law to be proved by a Persian ambassador.[7] But a Roman Catholic priest is not competent to prove the Scottish law of marriage, even where he has celebrated a marriage in that country, the validity of which has to be proved at the trial.[8] Moreover, the law of a foreign country cannot be proved even by a jurisconsult, if his knowledge of it be derived solely from his having studied it at a university in another

[1] Concha *v.* Murrietta, 1889, C. A.; Bremer *v.* Freeman, supra.

[2] See Duchess di Sora *v.* Phillips, 1864, H. L. See, also, The Stearine, &c. Co. *v.* Heintzmann, 1864.

[3] Sussex Peer., 1844, H. L. Qy. whether a woman can be accepted as *peritus*: Reg. *v.* Povey, 1855. The competency of a witness on this subject is for the court. Greenleaf on Ev. 15th edit. (1892), p. 637, n. (*b*).

[4] Sussex Peer., 1844, H. L. (Ld. Brougham); R. *v.* Picton, 1805; Ward *v.* Dey, 1849.

[5] Lacon *v.* Higgins, 1822 (Ld. Tenterden).

[6] Sussex Peer., 1844, H. L.

[7] In goods of Dost Aly Khan, 1880.

[8] R. *v.* Savage, 1876 (Lush, J.).

country.[1] Neither can a barrister practising in the Privy Council prove the law of Canada, though an appeal lies from that country to the Privy Council.[2] And neither, as it seems, can a merchant or other person, who holds no official situation, and who is unconnected with the legal profession, be heard to expound the law, though the judge may be satisfied that he really possesses ample knowledge on the subject.[3] A foreign *custom* or *usage* is, however, a matter of fact (just as the existence of a custom or usage in this country), and therefore can be proved by any witness who is acquainted with the fact.[4] Therefore, a London hotel-keeper, who was formerly a merchant and stockbroker at Brussels, can prove the mercantile usage in Belgium, with respect to the presentment of a promissory note made payable in a particular place.[5]

§ 1426. The question how far a party is at liberty to discredit his own witness was agitated for many years. But in 1854 an enactment was contained in the C. L. P. Act of that year,[6] which is extended to Ireland by the Irish C. L. P. Act, 1856,[7] and has been repeated in an Act of Parliament[8] which is still in force, and applies "to all courts of judicature as well criminal[9] as all others, and to all persons having by law or by consent of parties authority to hear, receive, and examine evidence,"[10] whether in England or in Ireland. This enactment is to the effect following:—"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,[11] contradict him

[1] Bristow *v.* Sequeville, 1850; Re Bonelli, 1875.

[2] Cartwright *v.* Cartwright, 1878.

[3] Ld. Lyndhurst, C., stating unanimous opinion of judges and peers in Sussex Peer., 1844, H. L., and overruling R. *v.* Dent, 1843.

[4] Ganer *v.* Lanesborough, 1790; explained by Ld. Lyndhurst, C., in Sussex Peer., 1844, H. L. See Mostyn *v.* Fabrigas, 1774 (Ld. Mansfield); Feaubert *v.* Turst, 1702.

[5] Vander Donckt *v.* Thellusson, 1849.

[6] 17 & 18 V. c. 125, § 22, an ill-drawn provision (Cockburn, C.J., 5 C. B. N. S.), repealed by "The Statute Law Revision Act, 1892" (55 & 56 V. c. 19), Sched.

[7] 19 & 20 V. c. 102, § 98.

[8] Viz., 28 & 29 V. c. 18, § 3.

[9] See R. *v.* Little, 1883.

[10] § 1 of 28 & 29 V. c. 18.

[11] That is, "hostile" as distinguished from merely unfavourable. See Greenough *v.* Eccles, 1859 (Williams and Willes, JJ.; dubit. Cockburn, C.J.). In Dear *v.* Knight, 1859, Erle, J., apparently regarded a witness as "adverse" simply because he made a statement contrary to what he was called to prove. See, also, Pound *v.* Wilson, 1865 (id.). A hostile witness has been defined as "one who from the manner in which he gives his evidence shows that he

by other evidence, or, by leave of the judge,[1] prove[2] that he has made at other times a statement inconsistent with his present testimony;[3] 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."[4]

§ 1427. In civil cases, by R. S. C., Ord. XXXVI., r. 38, "The judge may, in all cases, disallow any question put in cross-examination of any party or other witness which may appear to him vexatious and not relevant to any matter proper to be inquired into in the cause or matter."[5] Moreover, the enactment[6] set out in § 1426, being, as there stated, of general application, applies both to all the Divisions of the High Court in either England or Ireland, and to examinations before an examiner of them; since, however, an examiner has no power to determine questions as to the relevancy or adverse nature of the evidence of a witness, or, in other

is not desirous of telling the truth to the court" (Wilde, J.O., in Coles *v.* Coles, 1866). A party who calls his opponent cannot as a right treat him as hostile, the matter being solely in the discretion of the court. Price *v.* Manning, 1889, C. A.

[1] The judge's discretion under this section is absolute, and not the subject of appeal. Rice *v.* Howard, 1886. See, also, Faulkner *v.* Brine, 1858.

[2] Nevertheless, a party may, without the judge's opinion or leave, indirectly discredit his own witness by calling other relevant evidence which contradicts such witness. Stephen, Dig. Ev. note xlvii. See the point fully discussed, Greenleaf on Ev. 15th edit. (1892), § 444; and Melluish *v.* Collier, 1850.

[3] See Reed *v.* King, 1858; Jackson *v.* Thomason, 1862; Coles *v.* Coles, 1866. In Ryberg *v.* Ryberg, 1863, both Sir C. Cresswell and counsel on both sides apparently forget the existence of this enactment.

[4] Similarly, by the N. Y. Civ. Code, "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present; and he must be asked whether he has made such statements, and if so, allowed to explain them. If the statements be in writing they must be shown to the witness before any question is put to him concerning them." 15 & 16 V. c. 27, defines the Scotch law by enacting that "it shall be competent to examine any witness who may be adduced in any action or proceeding, as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding; and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified."

[5] As to cross-examination, see infra, § 1430, and also Lever *v.* Goodwin, 1887.

[6] 28 & 29 V. c. 18.

respects, to act as a judge, he cannot himself give leave under the Act to produce counter evidence; but a special application for that purpose must be made to the court.[1] When an examiner has reason to believe that a party will seek to avail himself of the statutory power of discrediting his own witness, he should take down the particular questions, as well as the answers upon which counter evidence may be required.[2]

§ 1428. As soon as the examination in chief of a witness, who has been called by either party, is closed, the other party has a right to *cross-examine* him. The exercise of this right[3] is one of the most efficacious tests for the discovery of truth. By it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing his demeanour, and of determining the just value of his testimony. It is not easy for a witness, subjected to this test, to impose on a court or jury; for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances, to which a cross-examination may be extended.[4]

[1] Buckley *v.* Cooke, 1854 (Wood, V.-C.).

[2] Id.

[3] Greenl. on Ev. 15th edit. (1892), § 446.

[4] St. Ev. 186. On the subject of examining and cross-examining witnesses viva voce, Quintilian gives the following instructions:—"Primum est, nō-se testem. Nam timidus terreri, stultus decipi, iracundus concitari, ambitiosus inflari, longus protrahi potest: prudens vero et constans, vel tanquam inimicus et pervicax, dimittendus statim, vel non interrogatione, sed brevi interlocutione patroni, refutandus est; aut aliquo, si continget, urbane dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamiâ criminum destruendus. Probos quosdam et verecundos non aspere incessere profuit; nam sæpe, qui adversus insectantem pugnâssent, molestiâ intigantur. Omnis autem interrogatio, *aut in causâ est, aut extra causam*. *In causâ* (sicut accusatori præcepimus.) patronus quoque altius, unde nihil suspecti sit, repetitâ percontatione, priora sequentibus applicando, sæpe eo perducit homines, ut invitis, quod prosit, extorqueat. Ejus rei, sine dubio, nec disciplina ulla in scholis, nec exercitatio traditur; et naturali magis ingenio, aut usu contingit hæc virtus. • • • *Extra causam* quoque multa, quæ prosint, rogari solent, de vitâ testium aliorum, de suâ quisque, si turpitudo, si humilitas, si amicitia accusatoris, si ini-

§ 1429. The importance of cross-examination being so great, it is not surprising that questions should occasionally arise as to

micitiæ cum reo, in quibus aut dicant aliquid, quod prosit, aut in mendacio vel cupiditate lædendi deprehendantur. Sed in primis *interrogatio debet esse circumspecta*; quia multa contra patronos venuste testis sæpe respondet, eique præcipue vulgo favetur; tum verbis quam maxime ex medio sumptis; ut qui rogatur (is autem sæpius imperitus) intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est": Quintil. Inst. Orat. lib. 5, c. 7. Alison (Sc.) observes:—"It is often a convenient way of examining, to ask a witness, whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that stage of the proceeding on which it is desired that he should dilate. But this is not always fair; and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also, if the witness is at all intelligent, a more consistent and intelligible statement will generally be got, than by putting separate questions; for the witnesses generally think over the subjects on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel. Where a witness is evidently prevaricating, or concealing the truth, it is seldom by intimidation or sternness of manner, that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradictions may be reconciled. The most effectual method is to examine rapidly and minutely, as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony, which it is desired to overturn. It frequently happens that, in the course of such a rapid examination, facts most material to the cause are elicited, which were either denied, or but partially admitted before. In such cases, there is no good ground, on which the facts thus reluctantly extorted, or which have escaped the witness in an unguarded moment, can be laid aside by the jury. Without doubt they come tainted from the polluted channel through which they are adduced; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens, that in this way the most important testimony in a case is extracted from the most unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal." Alison, Pract. of Cr. L. (Sc.), 546, 547. See, also, Evans on Cross-exon. in his Append. to Poth. Obl., No. 16, Vol. 2, pp. 233, 234. Lord Bacon, in his Essay on Cunning, shrewdly observes,—"A sudden, bold, and unexpected question doth many times surprise a man, and lay him open. Like to him that, having changed his name, and walking in Paul's, another suddenly came behind him and called him by his true name, whereat straightways he looked back." This "dodge" has been successfully practised on a deserter, who, —after solemnly asserting that he had never been a soldier,—betrayed his falsehood by obeying a sudden word of command to "stand at ease!" The late Ld. Abinger, whose powers as a cross-examining counsel were

whether a witness has been so called by the one party as to entitle the other party to exercise this right. If a witness be called under a subpœna duces tecum, merely for the *purpose of producing a document*, which either requires no proof, or is to be identified by another witness, he need not be sworn, and if unsworn, cannot be cross-examined.[1] If, too, a witness be sworn under a mistake, whether on the part of counsel or of the officer of the court, and that mistake be discovered before the examination in chief has substantially begun, no cross-examination will be allowed.[2] Neither has the adverse party any right to cross-examine a witness, whose examination in chief has been stopped by the judge, after his having answered a merely immaterial question.[3] On the other hand, to confer the right to cross-examine him, it is not necessary that a witness should have been actually examined in chief; for if he is a competent witness, intentionally called and sworn, the opposite party has, in strictness, a right of cross-examination, though the party calling him has declined to ask a single question.[4] Again, it is not *usual*, except under special circumstances,[5] to cross-examine witnesses simply called to speak to the character of a prisoner; but no rule of law expressly forbids it. Any person, whether a party to the proceedings or not, who has made an affidavit, which has been filed for the purpose of being used before the court, becomes liable to cross-examination, and cannot be exempted from such liability by the subsequent withdrawal of the affidavit.[6]

§ 1430. In criminal cases the prosecutor *usually* calls every witness whose name is on the back of the indictment. But he is not *bound* to do so.[7] Even if he declines to call any such witness,

unrivalled, was fond of giving his juniors this advice,—"Never drive out two tacks by trying to hammer in a nail."

[1] Summers *v.* Moseley, 1834; Perry *v.* Gibson, 1834; Rush *v.* Smith, 1834; Davis *v.* Dale, 1830; R. *v.* Murlis, 1829; Simpson *v.* Smith, 1822; Griffith *v.* Ricketts, 1849.

[2] Wood *v.* Mackinson, 1840 (Coleridge, J.); Clifford *v.* Hunter, 1827 (Ld. Tenterden); Rush *v.* Smith, 1834; Reed *v.* James, 1815 (Ld. Ellenborough).

[3] Creevy *v.* Carr, 1835 (Gurney, B.).

[4] R. *v.* Brooke, 1819 (Ld. Tenterden); Phillips *v.* Eamer, 1795 (Ld. Kenyon); Reed *v.* James, 1815; Wood *v.* Mackinson, 1840. The same rule prevails in the Eccles. Courts: Newton *v.* Ricketts, 1818.

[5] R. *v.* Hodgkiss, 1836 (Alderson, B.).

[6] Re Quartz Hill Co., Ex parte Young, 1882, C. A.; R. S. C. 1883, Ord. XXXVIII. r. 28, cited ante, § 1396A.

[7] R. *v.* Woodhead, 1847 (by all the Judges); R. *v.* Flatley, 1842 (Ir.) (Pennefather, B.).

he ought, however, to at least have him in court, so that he may be called for the defence, if wanted for that purpose.[1] The judge, moreover, will, in his discretion, sometimes call any witnesses that have been omitted by the prosecution, in order to give the prisoner's counsel an opportunity to cross-examine them;[2] and this in misdemeanors as well as in felonies,[3] and in the case of every witness who has been sworn with the view of going before the grand jury, though he may not have been actually examined by that body.[4] Indeed, in serious cases, the court will sometimes even direct persons, whose names do not appear on the back of the indictment, to be called as witnesses, if there is reason to believe that they are acquainted with the circumstances of the case, and are consequently capable of giving material evidence.[5] A witness who is thus called by the judge at the instance of the prisoner, and has no question put to him by the prosecution, becomes the prisoner's witness,[6] and the prisoner's counsel, though permitted to put questions in the nature of a cross-examination, cannot call witnesses to contradict his statement.[7] Neither, in such a case, can the counsel for the prosecution ask any question on re-examination, which does not arise out of the cross-examination;[8] and, perhaps, if he has refused to call the witness, he will not be allowed to re-examine him at all.[9] When two or more persons are tried on the same indictment and are separately defended, any witness called by one of them may be cross-examined on behalf of the others, if he gives any testimony tending to criminate them.[10] The counsel, too, for the other prisoners are entitled in such a case to reply upon his evidence.[11]

§ 1431. In cross-examination, it is admitted on all hands, that

[1] R. *v.* Woodhead, 1847; R. *v.* Cassidy, 1858.

[2] R. *v.* Simmonds, 1823 (Hullock, B.); R. *v.* Whittread, 1823; R. *v.* Taylor, 1823; R. *v.* Beezley, 1830; R. *v.* Bull, 1839.

[3] R. *v.* Vincent, 1839 (Alderson, B.).

[4] R. *v.* Bodle, 1833 (Gaselee, J., and Vaughan, B.).

[5] R. *v.* Holden, 1838 (Patteson, J.). See, also, R. *v.* Chapman, 1838; and R. *v.* Orchard, 1838; R. *v.* Stroner, 1845 (Pollock, C.B.).

[6] R. *v.* Woodhead, 1847.

[7] R. *v.* Bodle, 1833 (Gaselee, J.).

[8] R. *v.* Beezley, 1830 (Littledale, J.).

[9] R. *v.* Harris, 1836.

[10] R. *v.* Burdett, 1855. So, in Lord *v.* Colvin, 1855 (Kindersley, V.-C.), after consulting all the equity judges, held that, before an examiner in chancery, one defendant might cross-examine another defendant's witness.

[11] R. *v.* Burdett, 1855.

leading questions may in general *be asked*;[1] but this does not mean that the counsel may go the length of putting the very words into the mouth of the witness, which he is to echo back again;[2] neither does it sanction the putting of a question, assuming that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact.[3] It has been laid down, that leading questions may always be put in cross-examination, whether a witness be unwilling or not.[4] But the rule that leading questions may always be put to a witness in cross-examination ought, it is submitted, to be also in some way qualified where the witness is evidently friendly to the party who is to cross-examine him, and hostile to the party calling him. It is no answer to this suggestion to say that the party, who originally called the witness, has brought the evil on his own head; for such an answer loses sight of the fact that a fraudulent witness may purposely conceal his bias in favour of one party, and thus induce the other to call him; or that the witness called may be an attesting witness, or other person whom it was necessary to examine in order to establish some technical part of the case. To allow such a witness to have the most favourable answers suggested to him through the medium of leading questions, is obviously unjust; though, no doubt, the evil is now mitigated, both at Nisi Prius,[5] and in the criminal courts,[6] by the rule which entitles the counsel, who opens the case on either side, to sum up the evidence, and to point out the unsatisfactory nature of any

[1] In Scotland leading questions used not to be allowed in the cross-examination, any more than in the examination in chief: Burnet, Cr. L., c. 18, p. 465 (Sc.); 24 How. St. Tr. 660, n. But the modern practice of the Scottish courts on this point is similar to our own: 2 Dickson, Ev. 988 (Sc.).

[2] R. *v.* Hardy, 1794.

[3] Hill *v.* Coombe (Abbott, J.), and Handley *v.* Ward (Abbott, C.J.), both cited St. Ev. 4th edit. p. 197, n. *d.*, as decided Spring Assizes, 1818.

[4] Parkin *v.* Moon, 1836 (Alderson, B.).

[5] Ord. XXXVI. r. 36, of R. S. C. 1883, is:—"Upon a trial with a jury, the addresses to the jury shall be regulated as follows: the party who begins, or his counsel, shall be allowed at the close of his case, if his opponent does not announce any intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence, and the opposite party, or his counsel, shall be allowed to open his case, and also to sum up the evidence, if any, and the right to reply shall be the same as heretofore." The law in Ireland is somewhat similar: see 19 & 20 V. c. 102, § 21. See, also, Hodges *v.* Anerum, 1855. This practice does not apply to the County Courts: Dymoch *v.* Watkins, 1883.

[6] 28 & 29 V. c. 18, § 2.

testimony thus procured. In America, the judge may, in his discretion, prohibit leading questions from being put in cross-examination to an adversary's witness, who shows a strong interest or bias in favour of the cross-examining party, and needs only an intimation to say whatever is most favourable to his cause.[1]

§ 1432. Moreover, both in England and in Ireland the cross-examination is not limited to the matters upon which the witness has already been examined in chief, but extends to the whole case.[2] Consequently, if a plaintiff calls a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish, if he can, his entire defence;[3] and this doctrine has been carried so far that even a person who is the substantial party in the cause, called by his adversary for the sake of formal proof only, is thereby made a witness for all purposes, and may be cross-examined as to the whole case.[4] In America, however, a party has no right to cross-examine any witness, except as to circumstances connected with matters stated in his direct examination; and if he wishes to examine him respecting other matters, must do so by making him his own witness, and by calling him, as such, in the subsequent progress of the cause.[5]

§ 1433. At least one English case[6] may be cited to support the view that when a person is once entitled to cross-examine a witness, *this right continues through all the subsequent stages of the cause*, so that if he afterwards *recalls* the same witness to prove a part of his own case, he may interrogate him by leading questions, and

[1] Moody *v.* Rowell, 1835 (Am.).

[2] May. and Corp. of Berwick-on-Tweed *v.* Murray, 1850. So, now in Scotland, "in any action, cause, prosecution, or other judicial proceeding, civil or criminal, where proof shall be taken, whether by the judge or a person acting as commissioner, it shall be competent for the party, against whom a witness is produced, and sworn *in causâ*, to examine such witness, not in cross only, but *in causâ*," 3 & 4 V. c. 59 ("The Evidence (Scotland) Act, 1840"), § 4.

[3] In Re Woodfine, 1878, Fry, J., would not allow the defendant in an action for a legacy to cross-examine the plaintiff respecting an independent counterclaim, but directed him to recall the plaintiff as his own witness. Sed qu.

[4] Morgan *v.* Brydges, 1818 (Abbott, J.); R. *v.* Murphy, 1841 (Ir.) (Pennefather, C.J.).

[5] Philadelphia and Trenton Rail. Co. *v.* Stimpson, 1840 (Am.) (Supreme Court). See, also, Harrison *v.* Rowan, 1820 (Am.); Ellmaker *v.* Buckley, 1827 (Am.). Contrà, Moody *v.* Rowell, 1835 (Am.).

[6] Dickinson *v.* Shee, 1801 (Ld. Kenyon).

treat him as the witness of the party who first adduced him. But this subject is nevertheless one upon which different opinions have been entertained. The general principle on which this course of examination is permitted, namely, that every witness is supposed to be inclined most favourably towards the party calling him, is scarcely applicable to a case where a person is equally the witness of both sides; and each party should, in common fairness, alternately have the right of cross-examining such a witness as to his adversary's case, while both should be precluded, in the course of the respective examinations in chief, from putting leading questions with regard to their own.[1] In accordance with the views last expressed, in Ireland a plaintiff is allowed to cross-examine any of his own witnesses, on their being afterwards called on behalf of the defendant;[2] while in America[3] (and this is probably the best rule) it is established that the question is one for the discretion of the judge at the trial, and that in general his ruling upon it is not subject to review.

§ 1434.[4] The rule which confines evidence to the points in issue, and excludes all proof of such collateral facts as afford no reasonable inference with respect to the principal matters in dispute,[5] is not usually applied in cross-examinations with the same strictness as in examinations in chief; but great latitude of interrogation is sometimes permitted, when, from the temper or conduct of the witness, or from other circumstances, such course seems essential to the discovery of truth; or where the cross-examiner will undertake to show, at some subsequent stage of the trial, by other evidence, the relevancy of the question put.[6] On this head it is difficult to lay down, or rather to apply, any precise general rule.[7] Still, one or two subsidiary rules have been clearly established, and a due attention to these will enable the practitioner to define with tolerable certainty the limits within which questions on cross-examination must be confined.

[1] 1 St. Ev. 187; 2 Ph. Ev. 471, 472.

[2] Malone *v.* Spillessy, 1842 (Ir.) (Lefroy, B.). See, too, Lord *v.* Colvin, 1855, where S. P. ruled by Kindersley, V.-C.

[3] See Greenleaf on Ev. 15th edit. (1892), § 447, and notes thereto.

[4] Gr. Ev. § 449, in part.

[5] Ante, § 316 et seq.

[6] Haigh *v.* Belcher, 1830 (Coleridge, J.).

[7] Lawrence *v.* Baker, 1830 (Am.).

§ 1434A. First, by a rule which has been set out in a previous section, the judge of the High Court may now disallow any questions put in cross-examination which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter.[1]

§ 1435. Next, the answer of a witness respecting any fact *irrelevant to the issue*, will be conclusive, and no such question can be put to a witness on cross-examination, for the mere purpose of *impeaching his credit by contradicting him*.[2] Thus in a penal action for usury, previously to the repeal of the usury laws,[3] when a witness was called to establish the offence alleged to have been committed in a contract made with himself, defendant's counsel, if the witness stated that such other contracts were not usurious, was not allowed to cross-examine such witness as to other contracts made by him with other persons about the same time, in order to draw an inference that the contracts were all of the same nature, and then contradict his statements as to them by extrinsic proof;[4] and on the trial of an issue, whether the defendant's manufactory emitted smoke prejudicial to the plaintiff's garden, where both parties had examined witnesses as to the effect of the works on neighbouring grounds, a witness, called by the defendant, who described several gardens in the neighbourhood as uninjured, having been asked in cross-examination whether he knew Glasgow field, and having answered that he did, but that "he never knew of any damage done there," could not then be asked, "Whether he had known of any sum having been paid by the defendant to the proprietors of Glasgow field for alleged damage occasioned by the works?"[5]

§ 1436. Thirdly, with the view of *impeaching* his *character*, a witness may always be asked in cross-examination,[6]—though, as will be presently seen, he is not always compelled to answer,[7]—

[1] R. S. C. Ord. XXXVI. r. 38, set out ante, § 1426

[2] See Baker *v.* Bakor, 1863.

[3] By 17 & 18 V. c. 90.

[4] Spenceley *v.* De Willott, 1806.

[5] Tennant *v.* Hamilton, 1839, H. L.; affirming Lord Jeffrey's ruling at trial.

[6] Harris *v.* Tippett, 1811 (Lawrence, J.); R. *v.* Yewin, 1811 (id.); R. *v.* Edwards, 1791; R. *v.* Barnard and R. *v.* James, 1823, cited in n., 1 C. & P. 86, 87; R. *v.* Watson, 1817. The cases of R. *v.* Lewis, 1802, Macbride *v.* Macbride, 1802, and R. *v.* Pitcher, 1817, where questions tending to degrade the witness were not allowed to be put, cannot now be regarded as authorities.

[7] Post, §§ 1453 et seq.

questions with regard to alleged *crimes* or other improper conduct on his part. Indeed, in this case, if the fact inquired into be relevant to the issue, it may be proved by other evidence although denied by the witness. If, however, it be irrelevant at common law, the answer of the witness, if he make any, must be regarded as conclusive; and whether he answers or not, no independent proof can be given to establish the truth of the imputation.[1]

§ 1437. But by a statute applying to "all Courts of Judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive and examine evidence,"[2] whether in England or Ireland, it has been enacted that "a witness may be questioned as to whether he has been *convicted* of any *felony* or *misdemeanor*, and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction."[3] The statute applies, although the fact of such conviction be altogether irrelevant to the matter in issue in the cause.[4] The Act just cited also provides that "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."

§ 1438. Fourthly, it may be broadly laid down that where questions, put to a witness on cross-examination for the purpose of directly testing his credit, relate to *relevant* facts, his answers may be contradicted by independent evidence; if, however, questions

[1] R. *v.* Watson, 1817; R. *v.* Rudge, 1805 (Lawrence, J.); Goddard *v.* Parr, 1855 (Kindersley, V.-C.).

[2] 28 & 29 V. c. 18, § 1.

[3] Id. § 6. The reasons for such an enactment are stated by the Com. Law Commiss., in their 2nd Rep., pp. 21, 22. In New York, "a witness must answer as to the fact of his previous *conviction* for felony." See Civ. Code, § 1854.

[4] Ward *v.* Sinfield, 1880, which was a decision on 17 & 18 V. c. 125 ("The Common Law Procedure Act, 1854"), § 25 (now repealed), the language of which was almost identical with that of the section cited.

are put with this object upon *irrelevant* matters, the answers given by the witness cannot be contradicted. The question, what matters connected with the witness are or are not *relevant*, has been discussed on a former page.[1] In addition to what is stated there, it should be observed, that inquiries respecting the previous conduct of a witness will almost invariably be regarded as irrelevant, if not connected with the cause or the parties. Therefore, if a witness be questioned on cross-examination respecting the commission of crimes by him on some former occasion, his answers must (except in the case of an actual conviction),[2] be taken as conclusive.[3] This rule extends to parties to the record, when giving testimony, as well as to other witnesses; and therefore, where in an action (and it is submitted that the same rule would extend to the trial of an indictment on which the defendant was a witness) for indecent assault, defendant is examined as a witness on his own behalf, and denies the charge, although he may be cross-examined with respect to alleged improprieties committed by him towards other persons, these collateral imputations can neither be disproved on the one hand, nor supported on the other, by independent evidence.[4]

§ 1439. The rule is founded on two reasons: first, that a witness cannot be expected to come prepared to defend, by independent proof, all the actions of his life; and next, that to admit contradictory evidence on such points would of necessity lead to inextricable confusion, by raising an almost endless series of collateral issues.[5] The rejection of the contradictory testimony may indeed sometimes exclude the truth; but this evil, acknowledged though it be, is as nothing compared with the inconveniences that must arise were a contrary rule to prevail.[6]

[1] Ante, §§ 335 et seq.

[2] As to which, see supra, § 1437.

[3] Goddard *v.* Parr, 1855.

[4] Tolman and Ux. *v.* Johnstone, 1860 (Cockburn, C.J., after consulting the other judges). See, also, Baker *v.* Baker, 1863.

[5] Att.-Gen. *v.* Hitchcock, 1847 (Parke and Alderson, BB.).

[6] Att.-Gen. *v.* Hitchcock, 1847 (Rolfe, B.). The case of Alcock *v.* The Royal Exchange Insurance Co., 1849, forms no real exception to the above rule. There, in an action by a shipowner against underwriters on a policy of insurance, the plaintiff's claim to recover as for a total loss rested on the abandonment of the vessel by the captain. The captain was called as a witness for the plaintiff, and, on cross-examination, denied that previous to the voyage insured against he had been an habitual drunkard. The evidence of witnesses to establish that fact was, however, held clearly admissible, as

§ 1440. Whether questions respecting the *motives*, *interest*, *or conduct* of a witness, as connected with the cause, or with either of the parties, are irrelevant, is a point on which the authorities are not consistent. On the one hand, it has been held to be relevant to the guilt or innocence of a person charged with a crime, to inquire of the witness for the prosecution, in cross-examination, whether he had not expressed feelings of hostility towards the prisoner;[1] that the like inquiry may be made in a civil action;[2] that in an action upon a promissory note, the execution of which is disputed, it is material to ask the subscribing witness, whether she was not plaintiff's kept mistress;[3] and that on an indictment for rape, or for an attempt to commit that crime, the prosecutrix may, on cross-examination, be asked whether she had not on former occasions consented to the *prisoner's* embraces.[4] In all these cases, if the witness under cross-examination deny the fact imputed, he is exposed to contradiction by other witnesses. On similar principles, there exists authority for contending that if, on cross-examination, witnesses for a prosecution deny having attempted to suborn several persons to give false evidence against a prisoner, proof that they have done so may be given.[5]

§ 1441. On the other hand, it has been ruled in several modern cases that, if a witness deny that he has tampered with the other witnesses, evidence to contradict him cannot be received;[6] that on a prosecution where a witness called to character denies having ever said that the prisoner should be acquitted if it cost him 20*l.*, the prosecution must be satisfied with the answer;[7] that in a civil action, the defendants who sought to disparage the testimony of a witness of the plaintiff, by proving some circumstances indicating

tending to show that the captain was not likely to have exercised a sound judgment in reference to the abandonment, and that, consequently, the judgment actually exercised by him was not entitled to any respect from the jury.

[1] R. *v.* Yewin, 1811 (Lawrence, J.).

[2] Attwood *v.* Welton, 1828 (Am.).

[3] Thomas *v.* David, 1836 (Coleridge, J.).

[4] R. *v.* Riley, 1887, C. C. R.; R. *v.* Martin, 1834 (Williams, J.); recognised by Kelly, C.B., and Byles, J., in R. *v.* Holmes and Furness, 1871. Secus, as to intercourse with *other* men, infra, § 1441.

[5] Ld. Stafford's case, 1680; The Queen's case, 1820. H. L. Recognised by Parke, B., in Att.-Gen. *v.* Hitchcock, 1847.

[6] R. *v.* Lee, 1838 (Coleridge, J.); Harris *v.* Tippett, 1811 (Lawrence, J.).

[7] R. *v.* Lee, 1838 (Coleridge, J.).

a hostile spirit towards themselves, could not do it;[1] that where the principal witness against a man indicted for theft, was his apprentice, who, in cross-examination, denied that he had been charged with robbing his master, prisoner's counsel could not prove that the answer was false;[2] and on indictments for rape, or for an attempt to commit rape, or for indecent assault, that though the principal female witness may be cross-examined with the view of showing that she has previously been guilty of incontinence with *other* men, yet her answers to such questions must be taken as conclusive, and her supposed paramours cannot be called as witnesses for the purpose of contradiction.[3] The law would seem to be the same in actions for seduction, and on summonses for affiliation, unless, of course, the evidence would directly tend to show that the defendant was not in point of fact the father of the child.[4]

§ 1442. Such, then, being the state of the authorities, it is not easy to say with precision what rule would apply to a new combination of facts. A sensible lawyer, really anxious to promote the interests of truth and justice, would probably, on most occasions feel inclined to follow the former, rather than the latter, class of cases. For, while no doubt it is of great importance to confine the attention of the jury as much as possible to the specific issues, it is highly essential to the discovery of truth, that those, who are to determine the respective value of conflicting testimony, should be enabled to discriminate between the interested and disinterested witnesses; and no test of interest can be more sure than that which is afforded by the conduct of the witness himself. The argument that a witness cannot come prepared to defend himself against particular charges without notice, may be a very

[1] Harrison *v.* Gordon, 1838 (Alderson, B.).

[2] R. *v.* Yewin, 1811 (Lawrence, J.).

[3] R. *v.* Holmes and Furness, 1871, C. C. R.; affirming R. *v.* Hodgson, 1812, and overruling R. *v.* Robins, 1843. Secus, as to previous intercourse with prisoner himself, supra, § 1440. See, also, R. *v.* Cockcroft, 1870; ante, § 363.

[4] Garbutt *v.* Simpson, 1863. In Verry *v.* Watkins, 1836, Alderson, B., in an action of seduction, allowed witnesses, irrespective of the question of paternity, to give evidence of their having had connection with the plaintiff's daughter. Sed qu., since the last decisions. See, also, on this subject, and attempt to reconcile, Andrews *v.* Askey, 1837 (Tindal, C.J.); and Dodd *v.* Norris, 1814 (Ld. Ellenborough).

good reason why evidence that he has been guilty of a specific crime, *unconnected with the cause or parties*, should not be adduced;—and, moreover, such a fact, even if proved, would raise, in the absence of interest, only a very faint presumption that he had been guilty of perjury. But the argument should not be allowed to extend to a case, where the charge, if true, would show that the witness either had a motive to swear falsely, or was not very scrupulous in the selection of means to attain his end. A charge, too, of this nature would, almost of necessity, apply to some act of recent date, and as such might be easily explained or rebutted by the witness, if it were made without foundation. Moreover, this inquiry would seem to be all the more necessary, now that witnesses are no longer incompetent to testify on the ground of interest or crime. Indeed, this view is confirmed by a case where the judges intimated an opinion, that a witness might be asked any *questions* tending to *impeach his impartiality*, and that his answers might be contradicted by other witnesses.[1]

§ 1443. Assuming, however, that a witness may in all cases be cross-examined, and, if necessary, contradicted, for the purpose of showing that his mind is not in a state of impartiality as between the two contending parties, it must, nevertheless, clearly appear, before the contradictory evidence can be admitted, that the questions answered had a direct tendency to prove that the witness was under the influence of an undue bias. The case just referred to[1] established this doctrine. In that case, on the trial of an information under the revenue laws, a witness, who had given material evidence for the Crown, was asked, on cross-examination, whether he had not *said* that the officers of the Crown had *offered* him 20*l.* to give that evidence. He denied that he had ever said so, and evidence to contradict him was held to be inadmissible; since, as the mere offer of a bribe, if unaccepted, could not in fairness prejudice the character of the party to whom it was made, it was obviously immaterial what the witness might have *said* upon the subject. Had he been asked whether he had said that he had *received* a bribe, and denied that he had ever made such a statement, the decision might have been different.

[1] Att.-Gen. *v.* Hitchcock, 1847, which deserves attentive perusal.

§ 1444. Since the case last cited, the rule of law supposed to have been laid down by it has been elaborately discussed in the Irish Court of Criminal Appeal.[1] On the trial of a prisoner for rape, a witness called on his behalf professed his inability to speak English, and was accordingly sworn in Irish, and enjoyed the advantage,—to a dishonest witness no slight one,—of giving his evidence through an interpreter;[2] but being in cross-examination pressed as to his knowledge of the English language, and pointedly asked whether he had not very recently spoken English to two persons who were present in court, denied that he had done so. The evidence of these two persons to contradict him on this latter point, was held by seven judges not to be admissible, while three were of opinion that it was admissible.[3] The arguments of the minority appear, however, entitled to grave consideration, and might possibly be upheld should the same point arise in England.

§ 1445. It is in any case certainly relevant to put to a witness any question, which, if answered in the affirmative, would qualify or contradict some previous part of his testimony given on the trial of the issue; and if such question be put, and be answered in the negative, the opposite party may then contradict the witness, and for this simple reason, that the contradiction would qualify or contradict the previous part of the witness's testimony, and so neutralise its effect.[4] Accordingly a witness may be cross-examined as to a *former statement* made by him *relative to the subject-matter of the cause*, and inconsistent with his present testimony; and if he either denies, or does not distinctly admit, that he has made such statement, proof may be given that he did in fact make it. As before pointed out,[5] the judge has now in civil cases an absolute discretion to disallow any questions put in cross-examination which he may deem improper. However, in the exercise of this discretion he is, both in civil and criminal cases,[6]

[1] R. *v.* Burke, 1858 (Ir.).

[2] See ante, § 56.

[3] The three dissenting judges were O'Brien, J., Pigot, C.B., and that profound lawyer, Pennefather, B.

[4] Att.-Gen. *v.* Hitchcock, 1847 (Alderson, B.).

[5] By R. S. C. Ord. XXXVI. r. 38, set out in full, ante, § 1427.

[6] For by 28 & 29 V. c. 18, § 1, such provision is extended to "all courts of judicature, as well criminal as all others, and to all persons having by law or by consent of

bound by the provision which requires that before proof of such statement can be given,[1] 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 had made such statement.[2] A witness may also be asked in cross-examination if he has not said that, though on a former occasion he testified for one party, he thought that he should, if called as a witness again, testify for the other, and if he profess not to recollect or deny such statement proof of it may be given.[3] On the principle just pointed out, if a case be such as to render evidence of opinion admissible and material (as, for instance, it is if a witness has been examined as to his *belief* respecting the identity, or the handwriting, or the sanity, of any person, or if he be a skilled witness called to state his opinion on a matter of science), he may on cross-examination be asked whether he has not on some particular occasion expressed a different opinion upon the same subject; and if he deny the fact, it may be proved by other evidence. But[4] the previous *opinion*, as to the *merits of the cause*, of a witness who has simply testified to a fact cannot be regarded as relevant to the issue;[5] so that, for instance, in an action upon a marine policy, the denial of a broker called as a witness to prove a fact is conclusive, and evidence to contradict him as to this must be rejected.[6]

parties authority to hear, receive, and examine evidence," whether in England or Ireland.

[1] This rule prevails in equity: Hemming *v.* Maddick, 1872.

[2] See Angus *v.* Smith, 1829; Crowley *v.* Page, 1837 (Ir.); Andrews *v.* Askey, 1837; Magrath *v.* Browne, 1841 (Ir.); The Queen's case, 1820, H. L. The provision referred to in the text was originally contained in "The Common Law Procedure Act, 1854" (17 & 18 V. c. 125, § 23), but this is repealed, and the terms of the existing enactment (which are substantially identical with those of the repealed § 23 of "The Common Law Procedure Act, 1854") are as follow:—"If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, 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." The enactment in effect overrules Pain *v.* Beeston, 1830; and Long *v.* Hitchcock, 1840. See R. *v.* Whelan, 1881 (Ir.) (May, C.J.).

[3] Chapman *v.* Coffin, 1860 (Am.).

[4] Gr. Ev. § 449, almost verbatim.

[5] Daniels *v.* Conrad, 1833 (Am.).

[6] Elton *v.* Larkins, 1832 (Tindal, C.J.).

§ 1446. If, however, a witness has made a previous statement *in writing* as to the facts of a case, he has been, since 1854,[1] and is now, under a provision in the Act of Parliament [2] extending to all courts,[3] liable to be cross-examined upon such statement without its previous production.[4]

§ 1447.[5] If it appear either from the cross-examination of the witness, or from any antecedent evidence, that the writing in question has been *lost* or *destroyed*, the provision that the judge may require its production of course becomes inoperative. It is apprehended that in such a case the witness might be cross-examined as to the contents of the paper, notwithstanding its non-production; and that, if it were material to the issue, he might be afterwards contradicted by secondary evidence. The question, however, remains whether in such a case the cross-examining party may *interpose evidence out of his turn*, to prove the loss or destruction of the document, or to show that it is in the hands of the opponent, who has had notice to produce it, and has refused to do so; and then cross-examine the witness as to its contents.[6] Such a course

[1] Under §§ 24 and 103 of "The Common Law Procedure Act, 1854" (17 & 18 V. c. 125), which are now repealed, and in Ireland under §§ 27 and 98 of "The Common Law Procedure Amendment Act (Ireland), 1856" (19 & 20 V. c. 102). The law is the same in India: see "Ind. Evid. Act of 1855," § 34. The common law rule was that the cross-examining party was obliged, when it was in writing, to show his contradictory statement to the witness, and afterwards put it in as his own evidence: see the Queen's case, 1820, and Macdonald *v.* Evans, 1852. This rule excluded one of the best tests by which a witness's memory and integrity could be tried: see article by Ld. Brougham in Ed. Rev. Vol. 69, p. 22, and his speech on Law Reform, Vol. 2, Ld. Brougham's Speeches, p. 447. See, also, the general reasons for changing the law, ably stated in Second Report of Common Law Commissioners, at pp. 19—21. See, also, 1st edit. of this Work, § 1057.

[2] Under "The Law of Evidence and Practice on Criminal Trials Amendment Act, 1865" (28 & 29 V. c. 18), §§ 1, 5.

[3] Id. § 1.

[4] The words of this enactment (28 & 29 V. c. 18, § 5), are as follow:—"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 indictment, or proceeding, 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 may think fit."

[5] Gr. Ev. § 464, slightly, as to first eight lines.

[6] See 1 St. Ev. 205, n. *d*.

was in former times deemed irregular,[1] but modern authorities tend to show that it may now be allowed. Thus, if the paper in question be not in the actual possession of the cross-examining party, he may, before commencing his cross-examination, or during its progress, direct any person, whom he has served with a subpœna duces tecum, to produce the writing,[2] or may call upon the adversary to do so, if such paper be in his hands, and he has had notice to produce it.[3] A prisoner's counsel has also been allowed to interpose proof of the loss of the original depositions, and of the correctness of a copy, and then to cross-examine the witness, the copy being first duly read;[4] and a witness has also been permitted to be cross-examined upon an office copy of an affidavit by her, (such affidavit itself being filed,) on the cross-examining counsel putting in an order to admit such office copy to be a true copy.[5] If,[6] in any particular case the above course of proceeding would be likely to occasion inconvenience, by disturbing the regular progress of the cause and distracting the attention of the jury, the judge would have power to postpone the examination as to this point to a later stage in the trial.[7]

§ 1448. It is perhaps doubtful whether the provision[8] enabling the judge to call for the production of a document upon which it is proposed to cross-examine a witness "for his inspection," renders it necessary that the *original* should be forthcoming, or whether an office[9] or examined copy will suffice. For it is reported to have been held at Nisi Prius,[10] that a plaintiff's counsel had no right, under the old law, to cross-examine one of the defendant's witnesses on the contents of his own affidavit, without putting the *original* into his hand to refresh his memory. But the grounds for the decision cited are not stated in the report; and the case is certainly both opposed to a variety of decisions,[11] and, moreover,

[1] Graham *v.* Dyster, 1816 (Ld. Ellenborough); Sideways *v.* Dyson, 1817 (id.).

[2] Att.-Gen. *v.* Bond, 1839 (Ld. Abinger).

[3] Calvert *v.* Flower, 1836 (Ld. Denman).

[4] R. *v.* Shellard, 1840 (Patteson, J.).

[5] Davies *v.* Davies, 1840. No order in such a case would now be necessary. See R. S. C. 1883, Ord. XXXVII. r. 4, cited post, § 1538; also, Ord. XXXVIII. r. 15.

[6] Gr. Ev. § 464, in part.

[7] 2 Ph. Ev. 512; McDonnell *v.* Evans, 1852.

[8] Set out supra, § 1446.

[9] See n. [5], supra.

[10] Bastard *v.* Smith, 1839 (Tindal, C.J.).

[11] Ewer *v.* Ambrose, 1825; High

contravenes the rule which protects from removal the records of courts of justice. When an office or examined copy is used, some difficulty may indeed sometimes arise in identifying the witness with the person who swore to the truth of the original document, and to obviate this inconvenience, it may occasionally be prudent to produce the record itself;[1] but this is very different from holding that the record *must* be produced.

§ 1449. The enactment under discussion being applicable to courts of criminal jurisdiction,[2] as well as to civil courts, the rules laid down by the judges in 1836, as to the *mode of cross-examining witnesses* for the Crown, *with respect to what they have previously sworn before the magistrate*, would appear to be no longer in force. Still, as doubts[3] may possibly be entertained on this subject, (seeing that the statute in question contains a proviso expressly empowering the judge "to require the production of the writing," and "to use it for the purposes of the trial,") it may be desirable to set out the rules hitherto existing. These are as follow:—

"1. Where a witness for the Crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and such deposition must be read as part of the evidence of the cross-examining counsel.

"2. After such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the

field *v.* Peake, 1827 Davies *v.* Davies, 1840 (Gurney, B.); Saint-hill *v.* Bound, 1802; Garvin *v.* Carroll, 1847 (Ir.).

[1] See Garvin *v.* Carroll, 1847 (Ir.) (Crampton, J., commenting on Rees *v.* Bowen, 1825).

[2] 28 & 29 Vict. c. 18, §§ 1, .

[3] It is hoped that the judges may ere long resolve these doubts, either by rescinding the Rules of 1836, or by announcing that they are still in force, or some other judicial announcement.

court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

"3. The witness cannot, in cross-examination, be compelled to answer, whether he did or did not make such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination;[1] and if the witness admits such statement to have been made, he may comment upon such admission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply."[2]

§ 1450. Under these rules, a witness for the prosecution cannot be directed by the prisoner's counsel to look at his deposition and then say whether he still adheres to the statement he has just made, but the deposition must first be read as evidence for the prisoner, and the witness afterwards cross-examined respecting its contents.[3] Neither can a witness for the Crown be asked generally, on cross-examination, whether he has always told the same story, but the question has to be qualified by adding, "except when you were before the magistrates or coroner."[4] The application of the rules is, however, confined to cases in which the depositions have been duly taken and returned, and would, consequently, furnish the best evidence of what took place at the prior examination.[5] Neither have they the effect of protecting a witness from cross-examination as to what he said in the presence of the prisoner prior to his giving his testimony before the magistrate, although his words may have been officiously taken down by the magistrate's clerk, and afterwards verified on oath by himself when

[1] R. *v.* Curtis, 1848.

[2] See above the rules laid down by the judges in 1836, after the passing of the first Act (6 & 7 W. 4, c. 114), allowing prisoners to make a full defence by counsel, set out as a memorandum in 7 C. & P. 675.

[3] R. *v.* Ford, 1851; R. *v.* Palmer, 1851; R. *v.* Stokes, 1850; R. *v.* Brewer, 1863.

[4] R. *v.* Holden, 1838 (Patteson, J.); R. *v.* Shellard, 1840 (id.). See R. *v.* Price, 1857.

[5] R. *v.* Griffiths, 1841 (Coleridge, J., and Gurney, B.).

examined by the justice, so that they actually appear in the deposition as formally returned.[1] Such rules, too, being merely intended to check the licence of the bar, cannot bind the judges themselves, or deprive them of their discretionary power of questioning the witness as to any discrepancy between his evidence in court and his former statement, without first putting in the depositions; but it may be questionable whether in such a case, if new facts were introduced in evidence, the council for the prosecution would not be entitled to reply.[2]

§ 1450A. But, while the strict legal *rights* of the parties under the above-cited rules would be as stated above, the judge has, in criminal cases (in which such questions usually arise), a discretionary power to himself put the deposition into a witness's hands, and cross-examine, or allow the witness to be cross-examined, upon it without giving the prosecution a right of reply.[3] And the modern practice is to make a liberal use of this discretionary power.

§ 1451. The rule requiring the attention of a witness to be specially drawn to the circumstances, about which it is proposed to impeach his credit by independent evidence, is not confined to cases where a witness is alleged to have made contradictory statements, but extends to all cases where proof of declarations made or acts done by a witness is tendered, with a view either of contradicting his testimony in chief, or of proving that he is a corrupt witness, or that he has been guilty of attempting to corrupt others.[4] "I like the broad rule," said Patteson, J., "that when you mean to give evidence of a witness's declarations *for any purpose*, you should ask him whether he ever used such expressions."[5]

§ 1452. The decisions on the question, whether or not a party is entitled to see a document, which has been shown to one of his

[1] R. *v.* Christopher, 1850.

[2] R. *v.* Edwards, 1837; R. *v.* Peel, 1860 (Willes, J.).

[3] See R. *v.* Quin, 1863; Roscoe, Crim. Ev. p. 134; R. *v.* Remnant, 1807; R. *v.* Watson, 1834.

[4] The Queen's case, 1820, H. L.

[5] Carpenter *v.* Wall, 1840. In this case the court (though it did not decide the point) apparently thought that in an action for seduction proof of light and unbecoming language by the woman seduced might be admissible in reduction of damages, even if such expressions had not been previously put to her in cross-examination. It is, however, submitted that, even in such cases, the defence must, under such circumstances, be restricted to general evidence of her lightness of conduct.

witnesses while under cross-examination by his opponent, are somewhat conflicting. On the whole, however, the practice seems to be, that if the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity,[1] his adversary will have no right to see the document; but that if the paper be used for the purpose of refreshing the memory of the witness,[2] or if any questions be put respecting its contents,[3] or as to the handwriting in which it is written,[4] a sight of it may then be demanded by the opposite counsel. But such opposing counsel has no right to read such a document through, or to comment upon its contents, till so used or put in by the cross-examining counsel. If it be not put in, its absence may be remarked upon by the counsel on the other side.[5] The counsel on the other side will, moreover, have a right (even where it is not put in) to ask questions upon it in re-examination, without himself putting it in.[6]

§ 1453. It has already been casually observed, that there are some questions which a witness is *not compellable to answer*. First this is the case where the answers would have a *tendency* to expose the witness,[7] or, as it seems, the husband or wife of the witness,[8] to any kind of *criminal charge*, whether in the common law or ecclesiastical[9] courts, or to a *penalty* or *forfeiture*[10] of any nature whatsoever.[11] This rule is of great antiquity, and was even acted upon by Chief Justice Jefferies when it told *against* the prisoner.[12] It applies equally to parties and to witnesses, and it is now uniformly recognised by all British tribunals, whether civil or criminal. Thus no *party* can be compelled to *discover* that, which, if answered,

[1] Collier *v.* Nokes, 1849 (Wilde, C.J.); Cope *v.* Thames Haven Dock Co., 1848 (Erle, J.); Sinclair *v.* Stevenson, 1824 (Best, C.J.); Russell *v.* Rider, 1834 (Bosanquet, J.).

[2] Ante, § 1413.

[3] Cope *v.* Thames Haven Dock Co., 1848.

[4] Peck *v.* Peck, 1870.

[5] Id.

[6] R. *v.* Ramsden, 1827.

[7] R. *v.* Garbett, 1847.

[8] Cartwright *v.* Green, 1800; R. *v.* All Saints, Worcester, 1817 (Bayley, J.): ante, § 1369.

[9] Parkhurst *v.* Lowten, 1816, as to simony; Brownsword *v.* Edwards, 1751, as to incest; Chetwynd *v.* Lindon, 1752, and Finch *v.* Finch, 1752, as to concubinage.

[10] Qu. as to the meaning of this word, Pye *v.* Butterfield, 1865.

[11] R. *v.* Freind, 1696; R. *v.* Ld. G. Gordon, 1781; R. *v.* Ld. Macclesfield, 1725; R. *v.* Slaney, 1832 Ld. Tenterden); R. *v.* Pegler, 1833 (Littledale and Park, JJ.); Maloney *v.* Bartley, 1842 (Wood, B.); Dandridge *v.* Corden, 1827 (Ld. Tenterden); Chester *v.* Wortley, 1856. But see R. *v.* Boyes, 1861, cited post, § 1458.

[12] R. *v.* Rosewell, 1684.

would tend to subject him to any punishment,[1] penalty,[2] forfeiture,[3] or ecclesiastical censure,[4] however material the answer may be to his adversary's case.[5] Accordingly, as late as 1781, we find witnesses protected from answering the question whether they were protestants or papists.[6] On like grounds, too, a witness will not be forced to answer questions or interrogatories of a criminating tendency;[7] although, if any such interrogatories be administered, they will not, on that account be struck out by the court.[8] The same doctrine prevails in the spiritual courts,[9] and it is also part and parcel of the law of Scotland.[10]

§ 1454. Some cases, however, justify a doubt, whether the protection has not been carried beyond the bounds which the necessities of the case substantially require.[11] Thus, in an action for a libel, contained in a voluntary affidavit, sworn extra-judicially before a magistrate, the magistrate's clerk was held not bound to answer whether he wrote the affidavit by defendant's orders, and delivered it to the magistrate;[12] and in Ireland it has been decided that, upon a trial for the murder of a person killed in a duel, any person who was present, and in any way countenanced the proceeding, may refuse to answer any question relating thereto.[13] It is not intended to insinuate that these decisions are

[1] Macallum *v.* Turton, 1828; Paxton *v.* Douglas, 1812; Thorpe *v.* Macaulay, 1820; Claridge *v.* Hoare, 1807; McIntyre *v.* Mancius, 1819.

[2] See cases cited in last note.

[3] Parkhurst *v.* Lowten, 1816; Ld. Uxbridge *v.* Staveland, 1747; Bp. of Cork *v.* Porter, 1877 (Ir.). As to the distinction between a forfeiture and a conditional limitation respecting which no protection is allowed, see Hambrook *v.* Smith, 1852.

[4] See cases cited, n. [2], supra, to this section.

[5] Wigr. Disc. 80, 81, 192, 193, and cases there cited; Story, Eq. Pl. §§ 524, 576, 577, 592—598. See Chadwick *v.* Chadwick, 1853 (Turner, V.-C.).

[6] R. *v.* Freind, 1696; R. *v.* Ld. G. Gordon, 1781.

[7] Paxton *v.* Douglas, 1812; Lamb *v.* Munster, 1882.

[8] Fisher *v.* Owen, 1878, C. A. This case overrules Atherley *v.* Harvey, 1877. See Bp. of Cork *v.* Porter, 1877 (Ir.).

[9] Swift *v.* Swift, 1832; King *v.* King, 1850.

[10] Alison, Pract. of Cr. L. (Sc.) 527.

[11] In New York the protection is far more limited than in England. See Civ. Code, § 1854, which enacts, that a witness "need not give an answer, which will have a tendency to subject him to punishment for a *felony*." This seems to be a sound rule.

[12] Maloney *v.* Bartley, 1812 (Wood, B.).

[13] R. *v.* Handcock, 1841 (Ir.) (Brady, C.B.). For other instances of injustice occasioned by the stringency of this rule, see Brownsword *v.* Edwards, 1751; Sharp *v.* Carter, 1735; Claridge *v.* Hoare, 1807. See, also, some very sensible observations on this subject in the Law Rev., No. xiii. pp. 19—30.

wrong in point of law; for numerous authorities might be cited, which clearly establish that if the fact to which the witness is interrogated forms but a *single remote link* in the chain of testimony, which *may* implicate him in a crime or misdemeanor, or expose him to a penalty or forfeiture, he is not bound to answer.[1] But it may be suggested that it would be a better rule if, *where the question is material to the issue*, it were left to the discretion of the judge, whether or not he will enforce an answer, having due regard to the general interests of justice; but that whenever an answer is enforced, this should either have the effect of indemnifying the witness from any punishment, penalty, or forfeiture, with respect to the subject to which the answer relates, or should, at least, render such answer not admissible evidence in any subsequent criminal proceedings instituted against the witness.[2] The existing rule is based upon the view that, as the answer, if enforced, may possibly put persons upon a line of enquiry which they would otherwise have never thought of or pursued, the witness himself must be the sole judge of the effect of his own answer.

§ 1455. The Legislature has, however, often recognised and acted on the principle that answers which have been forced from a witness shall not afterwards be evidence against such witness.[3]

[1] Cates *v.* Hardacre, 1811; Macallum *v.* Turton, 1828; Parkhurst *v.* Lowten, 1819; Paxton *v.* Douglas, 1812; Harrison *v.* Southcote, 1751; Swift *v.* Swift, 1832; King *v.* King, 1850; M'Mahon *v.* Ellis, 1859 (Ir.); The People *v.* Mather, 1830 (Am.); Southard *v.* Rexford, 1826 (Am.); Bellinger *v.* The People, 1832 (Am.).

[2] See Law Rev. No. xiii. pp. 28—30.

[3] The following are instances of such principle being acted upon:—*Acts of indemnity* are occasionally passed (see 7 & 8 V. c. 7; and 14 & 15 V. c. 106) to absolve from punishment or penalty any witness who makes a faithful discovery of what he knows in relation to the matters under investigation. The cases in which this is done are usually where parliamentary inquiries are about to take place, or prosecutions about to be instituted, for gaming, riot, conspiracy, or other offences as to which the testimony of a large number of persons who were implicated as guilty parties will probably be needed. Moreover, indemnity clauses, somewhat similar to those presently set out as contained in "The Larceny Act," will be found in "*The Corrupt Practices Prevention Acts*, 1854 *to* 1883" (see as to these, 17 & 18 V. c. 102, § 35; 31 & 32 V. c. 125, § 56, continued to 31st December, 1895, by 57 & 58 V. c. 48, § 1; and 46 & 47 V. c. 51; R. *v.* Charlesworth, 1860; R. *v.* Battle, 1870; R. *v.* Slator, 1881; Ex parte Fernandez, 1861; R. *v.* Leatham, 1861; R. *v.* Hulme, 1870; R. *v.* Holl, 1881, C. A.); and indemnity clauses are also contained in "*The Election Commissioners Act*, 1852" (15 & 16 V. c. 57), § 8; "*The Exhibition Medals Act*, 1863" (26 & 27 V. c. 119), § 5; "*The Gaming Act*, 1845" (8 & 9 V. c. 109), § 9, amended by 55 V. c. 9; and "*The Gaming Houses Act*, 1854" (17 & 18 V. c. 38), §§ 5 and 6. "*The Larceny Act*, 1861" (24 & 25 V. c. 96), §§ 75

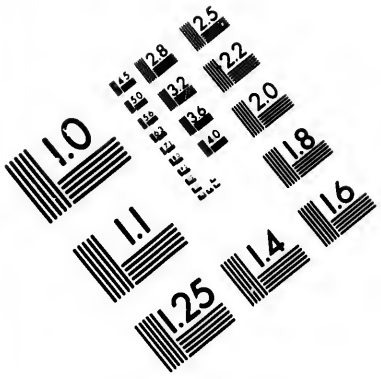
§ 1456. The protection formerly afforded to a person by the rule that no one can be compelled to criminate himself has been taken away by statute from the "printer, publisher or proprietor" of a newspaper in which a libel appears. Every such person, whether in England or Ireland, was, in the reign of W. 4, made compellable[1] to answer a bill of discovery as to his connection with any such newspaper, which answer is not to be used in any proceeding other than that for which it is obtained. And the substance of this enactment is still in force,[2] the High Court now exercising all the powers formerly possessed by Courts of Equity,[3] and an

—84, enacts that, nothing therein which relates to frauds committed by bankers, factors, trustees, directors, solicitors, or other agents (and, by §§ 28 & 29 of the same statute, a similar rule is to prevail with respect to persons charged with stealing, or fraudulently destroying or concealing, any title-deed or will), "shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors" in that Act mentioned relative to such frauds, "*by any evidence whatever* in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first *disclosed*" (which word means the discovery of that which was before unknown, and not the statement of that which was before known: R. *v.* Skeen and Freeman, 1859,) "such act *on oath*, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding, bonâ fide instituted by any party aggrieved, or in any compulsory examination or deposition upon the hearing of any matter in bankruptcy or insolvency" (see R. *v.* Strahan, 1855). The same statute, in § 86, further enacts that nothing therein shall prevent, lessen, or impeach any remedy which any person aggrieved by any such fraud may have; but no conviction of any such offender shall be received in evidence in any action against him.

[1] By 6 & 7 W. 4, c. 76.

[2] The history of the legislation on the subject is very intricate. The original enactment was contained in a Stamp Act, viz., 6 & 7 W. 4, c. 76, § 19. By 32 & 33 V. c. 24, § 1, and Sched. 1, this Act was repealed; but by the same section, those provisions of it (among which was a copy of § 19) which were contained in Sched. 2 of such Act, were re-enacted. By 33 & 34 V. c. 99 ("An Act for the repeal of certain enactments relating to the Inland Revenue"), the original Stamp Act of 6 & 7 W. 4, c. 76, was again repealed, but 32 & 33 V. c. 24, was not noticed, and is consequently unaffected. The provisions of 32 & 33 V. c. 24 (copied, it is true, from 6 & 7 W. 4, c. 76), which are thus left in force, are treated in the Revised Edition of the Statutes as if they had been repealed. Now the enactment 6 & 7 W. 4, c. 76, § 19, certainly is (as first cited) repealed. But similar provisions will be found in Sched. 2, to 32 & 33 V. c. 24, and this latter enactment cannot be found to have been ever in fact repealed. Such provisions were accordingly acted upon in Carter *v.* Leeds Daily News (W. N. for 1876, at p. 11), where a useful form of interrogatories will be found, though the words "edito · or," and "what position does he occupy in respect of the said newspaper," as also the whole of pars. 4 and 5, were struck out by the judge; and recent decisions make Nos. 3 and 6 of them improper. See, also, Fisher and Strahan's Law of the Press, pp. 152, 153.

[3] See "The Judicature Act, 1873" (36 & 37 V. c. 66), § 3.



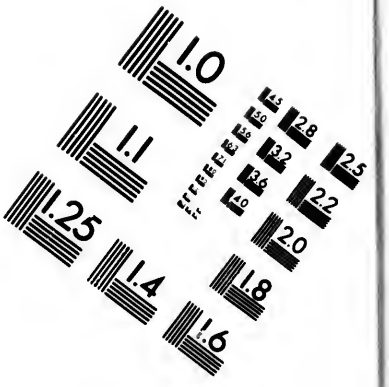
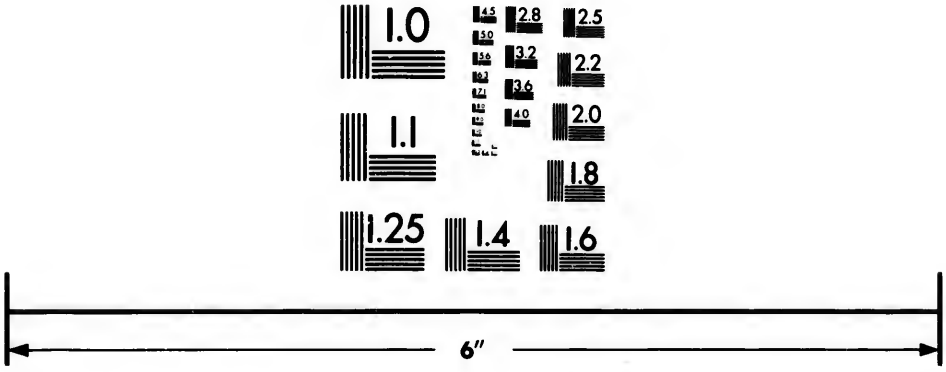
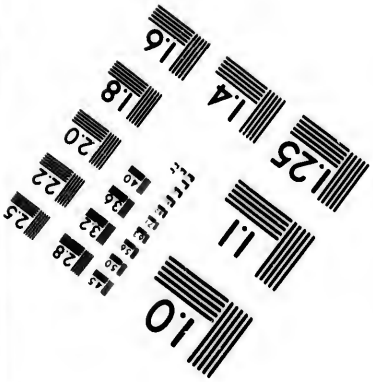


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

order for an answer to interrogatories[1] would appear to correspond to a decree upon a bill of discovery under the old practice.

§ 1457. Whether the answer may tend to criminate the witness, or expose him to a penalty or forfeiture, will, as soon as the protection is claimed, be determined by the light of all the circumstances, without, however, requiring the witness to fully explain how the effect would be produced, since this would annihilate the protection which the rule is designed to afford.[2] A declaration on *oath* by a witness that he *believes* that the answer will tend to criminate him, will, if it appear to the presiding judge that it is, under all the circumstances, likely to be well founded,[3] protect him from answering either when in the witness box or in reply to written interrogatories.[4] The objection, however, must be taken by way of answer, and not by way of objection to the question.[5] But the person interrogated must, whether he be in the witness box or called on to answer interrogatories, actually pledge his oath to such a belief.[6] Accordingly, when in an action against Cardinal Wiseman for alleged libel, to which he had pleaded not guilty, plaintiff having failed to prove the publication, as a last resource proposed to examine the defendant himself, and the Cardinal, having through his counsel declined to be sworn, the learned judge ruled that he need not be sworn, a new trial was granted;[7] and when, in an action of trover[8] against a dock company for certain pipes of port wine, the defendants alleged that the wine deposited with them was "sour wine," the produce of "rummage sales," and that the wine claimed was "sound port," their theory being that the sour wine had been by some means fraudulently and dishonestly abstracted, and the empty pipes refilled by tapping other stores in the dock, interrogatories to establish this case were

[1] Under R. S. C. 1883, Ord. XXXI. r. 1.

[2] The People *v.* Mather, 1830 (Am.).

[3] Ex parte Reynolds, re Reynolds, 1882, C. A.; following, with approval, R. *v.* Boyes, 1861; Osborn *v.* London Dock Co., 1855 (Parke, B.); Sidebottom *v.* Adkins, 1858 (Stuart, V.-C.); Ex parte Fernandez, 1861 (Willes, J.). See The Mary or Alexandra, 1868.

[4] Webb *v.* East, 1880, C. A.; Lamb *v.* Munster, 1882. As to former opinions upon this subject, see R. *v.* Garbett, 1847; Fisher *v.* Ronalds, 1852 (Jervis, C.J., and Maule, J.); Adams *v.* Lloyd, 1858 (Pollock, C.B.); and In re Mexican & S. Amer. Co., Ex parte Aston, 1859, C. A.

[5] Fisher *v.* Owen, 1878, C. A.; Sammons *v.* Bailey, 1890.

[6] Webb *v.* East, 1880, C. A.

[7] Boyle *v.* Wiseman, 1855. On the new trial then granted, 1,000*l.* damages were awarded.

[8] Osborn *v.* The London Dock Co., 1855. But see Tupling *v.* Ward, 1861.

allowed (and they would also be admissible under the present practice) since plaintiff's oath might show either that the answers to them would tend to criminate him, or else entirely negative the defence set up, but in either view defendants were entitled to have plaintiff's oath. An actual oath to the facts being required, a person will not be protected by merely "*submitting*" in his affidavit in answer to interrogatories,[1] "that he is not bound to discover" certain matters, because the discovery would expose him to penalties.[2]

§ 1458. In all cases where an objection to answer is taken on the ground that the answer will tend to criminate the deponent, the court, as has just been hinted, requires to see, from the surrounding circumstances, and from the nature of the evidence sought to be obtained from the witness, that reasonable ground exists for apprehending danger to him from being compelled to answer.[3] When, however, the fact of such danger is once made to appear, considerable latitude should be allowed to the witness in judging for himself of the effect of any particular question; for it is obvious that a question, though at first sight apparently innocent, may, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering.[4] Yet, as Lord Hardwicke once observed, "these objections to answering should be held to very strict rules;"[5] and the court ought at least to have the sanction of an oath as the foundation of the objection that the answer *will* criminate.

§ 1458A. If any prosecution or penalty or forfeiture, which the witness fears, be barred by lapse of time;[6] or if the offence has been pardoned,[7] or the penalty or forfeiture waived; or if, in any other way, the reason for the privilege has ceased, the privilege itself will cease also, and the witness will be bound to answer.[8] A witness, too, who has received a pardon under the great seal, has

[1] See R. S. C. 1883, Ord. XXXI. r. 6, cited ante, § 527.

[2] Scott *v.* Miller, 1859 (Am.).

[3] In re Genese, Ex parte Gilbert, 1885, C. A.; R. *v.* Boyes, 1861 (Cockburn, C.J.). See Bunn *v.* Bunn, 1864 (Lds. JJ.).

[4] R. *v.* Boyes, 1861 (Cockburn, C.J.).

[5] Vaillant *v.* Dodemead, 1742; cited (Ld. Eldon) in Parkhurst *v.* Lowten, 1818.

[6] Roberts *v.* Allatt, 1828 (Ld. Tenterden); Parkhurst *v.* Lowten, 1819 (Ld. Eldon); The People *v.* Mather, 1830 (Am.); Williams *v.* Farrington, 1789; Davis *v.* Reid, 1832.

[7] R. *v.* Boyes, 1860. This decision overrules two old cases, viz., R. *v.* Reading, 1679; and R. *v.* Shaftesbury, 1681.

[8] R. *v.* Charlesworth, 1860; Wigr. Disc. 83, 84, and cases there cited.

thereby lost his privilege of protection against criminating himself, even though he, under these circumstances, is still (by the Act of Settlement),[1] exposed to the remote contingency of an impeachment by the House of Commons.[2] Moreover, a witness cannot object to answer a question on the ground that he is a foreigner, and that his answer will render him liable to be prosecuted in his own country.[3] This protection, too, has not been imported, at least in all its strictness, into the *bankrupt law;*[4] for although a mere witness[5] is certainly not bound to answer criminative questions,[6] the debtor himself may, as it seems, be compelled to do so,[7] and the answers thus elicited will be admissible against him in any subsequent criminal prosecution.[8] But it is provided[9] that "a statement or admission made by any person in any compulsory examination or deposition, before any court on the hearing of any matter in bankruptcy, shall not be admissible as evidence against that person in respect of any of the misdemeanors" referred to in certain sections of the Larceny Act,[10] relating to frauds by "agents, bankers, or factors."[9]

§ 1459. The law, after much debate, is still somewhat unsettled

[1] 12 & 13 W. 3, c. 2, § 3.

[2] R. *v.* Boyes, 1861.

[3] King of the Two Sicilies *v.* Willcox, 1851 (Ld. Cranworth). But see U. S. *v.* M'Rae, 1867, where Ld. Chelmsford, C., held, that a plea of penalties to which the defendant's answer may expose him in a foreign country, is a good plea to discovery, if the law of the foreign country clearly appears.

[4] See In re Genese, Ex parte Gilbert, 1885, C. A. See as to the old law, R. *v.* Scott, 1856, recognised by Ld. Campbell in Goode *v.* Job, 1851; R. *v.* Cross, 1856; R. *v.* Robinson, 1867; 12 & 13 V. c. 106, §§ 117, 260; 20 & 21 V. c. 60, §§ 306, 385, Ir.; 24 & 25 V. c. 134, §§ 102, 189.

[5] Summoned under § 27 of "The Bankruptcy Act, 1883" (46 & 47 V. c. 52).

[6] Ex parte Schofield, In re Firth, 1877, C. A.

[7] 46 & 47 V. c. 52, § 17,—after empowering the court to examine upon oath the debtor as to his conduct, dealings, and property,—goes on to provide in subs. 8, that the debtor must "answer all such questions as the court may put or allow to be put to him. Such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times." Under § 24, the debtor must also, at the first meeting of creditors, submit, among other things, to "such examination in respect of his property or his creditors," "as may be reasonably required by the official receiver, special manager, or trustee, or may be prescribed by general rules, or be directed by the court by any special order."

[8] R. *v.* Hillam, 1872 (Quain, J.); R. *v.* Cherry, 1871.

[9] "The Bankruptcy Act, 1890" (53 & 54 V. c. 71), § 27, subs. 2, repealing § 85 of Act referred to in next note.

[10] 24 & 25 V. c. 96.

as to whether a witness is bound to answer any question, the direct and immediate effect of answering which might be *to degrade his character*. It, however, seems clear that where the transaction, as to which the witness is interrogated, forms *any material part of the issue*, he will be obliged to give evidence, however strongly it may reflect on his own conduct.[1] Indeed, it would be alike unjust and impolitic to protect a witness from answering a question, merely because it would have the effect of degrading him, when his testimony is required either for the due administration of public justice, or to protect the property, the reputation, the liberty, or the life of a fellow-subject. Were such a protection to prevail, a man already convicted and punished for a crime, would, if called as a witness against an accomplice, be excused from testifying to any of the transactions in which he had participated with the accused, and thus the guilty might escape.

§ 1460. Where, however, the question is not directly material to the issue, but is only put for the purpose of testing the *character*, and consequent *credit*, of the witness, there is much more room for doubt. Several of the older dicta and authorities tend to show, that in such case the witness is not bound to answer;[2] but this privilege, if it still exists, is certainly much discountenanced in the practice of modern times.[3] No doubt cases may arise, where the judge, in the exercise of his discretion, would properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date, might, in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a

[1] See ante, §§ 1436, 1440.

[2] R. *v.* Cook, 1696 (Treby, C.J.); R. *v.* Freind, 1696 (id.); R. *v.* Layer, 1722 (Pratt, C.J.); R. *v.* O'Coigly, 1798; Macbride *v.* Macbride, 1805 (Ld. Alvanley); Dodd *v.* Norris, 1814; R. *v.* Hodgson, 1812.

[3] Parkhurst *v.* Lowten, 1819 (Ld. Eldon); Cundell *v.* Pratt, 1827 (Best, C.J.); Roberts *v.* Allatt, 1828 (Ld. Tenterden); R. *v.* Edwards, 1791. See, also, *Harris* v. *Tippett*, and other cases cited ante in note to § 1436, and *R.* v. *Holmes*, and other cases cited ante, in note to § 1441. Even Ld. Ellenborough,—who is reported to have once held (Millman *v.* Tucker, 1803), that a witness was not bound to state whether he had not been sentenced to imprisonment, and on another, that the question could not so much as be put to him (R. *v.* Lewis, 1803),—seems, in a later case, to have disregarded the rules previously enunciated by himself (Frost *v.* Holloway, 1818, cited St. Ev. 212, n. *n*; and 2 Ph. Ev. 500); for, on a witness declining to say whether or not he had been confined for theft in gaol, he observed, "If you do not answer the question, I will send you there."

man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So, questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked.

§ 1461. But no protection of this sort should be extended to cases where the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness, and his present character for veracity. In such cases as these, a person ought not to be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation;[1] but, on the other hand, it is obviously most important, that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause.[2]

§ 1462. Wherever the answer, which the witness may give, will not immediately and certainly show his infamy, but will only *indirectly tend* to disgrace him, he may certainly be compelled to reply.[3] Questions, however, asked with a view to degrade a witness by showing his previous bankruptcy or insolvency, may be successfully objected to on the technical ground that such a fact can only in strictness be proved by the production of the record.[4] Still, in practice, questions are very frequently permitted in cross-examination as to whether the witness has not been insolvent, or has taken the benefit of the Bankrupt Act.[5]

§ 1463.[6] It was at one time considered doubtful whether a witness could be compelled to answer, where by so doing he would *subject himself to a civil action or pecuniary loss*, or would *charge*

[1] 1 St. Ev. 193.
[2] Id.
[3] Macbride *v.* Macbride, 1805 (Ld. Alvanley); Parkhurst *v.* Lowten, 1816 (Ld. Eldon); The People *v.* Mather, 1830 (Massey, J.); Cundell *v.* Pratt, 1827 (Best, C.J.).
[4] Macdonnell *v.* Evans, 1852 (Cresswell, J.). But see Henman *v.* Lester, 1862.
[5] Macdonnell *v.* Evans, 1852 (Williams, J.).
[6] Gr. Ev. § 452, in part.

himself with a debt.[1] But to remove such doubts it has been by statute[2] declared, that "a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of the Crown, or of any other person or persons."

§ 1464. The statute just set out does not in terms refer to the *production of documents*. Yet its spirit plainly seems strictly applicable to such a case. Accordingly a witness will not be excused from producing papers in his possession, merely because their production may subject him to a civil action, or be otherwise prejudicial to his pecuniary interests,[3] or may render him liable to punishment, or expose him to penalty or forfeiture,[4] unless (not otherwise) they be of a public nature, or such as are directed by statute to be kept and produced.[5] If, indeed, the documents called for be the title deeds of the witness, or, perhaps, if they be instruments in the nature of title deeds, their production will not be enforced.[6]

§§ 1465—6. In all the cases hitherto put of the witness not being compellable to answer, or to produce documents, the *privilege is his*, and *not that of the party*;[7] and, consequently, counsel in the cause will not be permitted to make the objection.[8] Neither will

[1] In Ld. Melville's case, 1806, this question was much discussed. Being there finally submitted to the judges, eight of them, with the Chancellor and Ld. Eldon, were of opinion that a witness in such case was bound to answer, while four thought that he was not.

[2] 46 G. 3, c. 37. The law in New York is the same: Civ. Code, § 1854. In America the English Act just cited is generally considered as declaratory of the true doctrine of the common law. See Bull *v.* Loveland, 1830 (Am.); Baird *v.* Cochran, 1818 (Am.); Naylor *v.* Semmes, 1829 (Am.); Stoddart *v.* Manning, 1828 (Am.); Copp *v.* Upham, 1825 (Am.).

[3] Doe *v.* Date, 1842 (Patteson, J.); Doe *v.* Ld. Egremont, 1841 (Rolfe, B.). These cases appear to overrule Miles *v.* Dawson, 1796; and Laing *v.* Barclay, 1821.

[4] Parkhurst *v.* Lowten, 1816; Whitaker *v.* Izod, 1809; R. *v.* Dixon, 1765. But see R. *v.* Leatham, 1861 (Blackburn, J.), et qu. See, also, R. *v.* Leatham, 1861.

[5] Bradshaw *v.* Murphy, 1836.

[6] Doe *v.* Date, 1842; Pickering *v.* Noyes, 1823; 1 St. Ev. 88.

[7] R. *v.* Kinglake, 1870.

[8] Thomas *v.* Newton, 1826 (Ld. Tenterden); R. *v.* Adey, 1831 (id.). See Marston *v.* Downes, 1834 (Ld. Denman); and Doe *v.* Date, 1842.

the witness be allowed to employ counsel of his own to support his claim to protection.[1] Nor even is the judge *bound*, as it would seem, to warn the witness of his right to demur to the question,[2] though, in the exercise of his discretion, he may deem it proper to do so.[3] A witness may, however, claim his protection after he has been sworn, and *at any stage of the inquiry*, and if he do so, he cannot be forced to answer any additional questions tending to criminate him; in short, he cannot be carried further than he chooses voluntarily to go himself.[4]

§ 1467. If a witness decline to answer, it has, in more than one case, been stated that no inference of the truth of the fact can be drawn from this.[5] But the wisdom of this rule is open to question.[6] It would be going too far to say that the guilt of the witness *must* be implied from his silence, but it would accord with justice and reason that the jury should be at full liberty to consider that circumstance, as well as every other, when deciding on the credit due to the witness.[7] A perfectly honourable but excitable man may occasionally repudiate a question, which he regards as an insult; and to then infer dishonour would be unjust.[8] But an honest witness when asked it in the witness box will generally be eager to rescue his character from suspicion, and at once deny the imputation, rather than rely on his legal rights, and refuse to answer an offensive question.[9]

§ 1468. The cases in which on grounds of *public* policy witnesses

[1] Doe *v.* Ld. Egremont, 1841; Doe *v.* Date, 1842 (Coleridge, J., citing a decision of Park, J.).

[2] Att.-Gen. *v.* Radloff, 1854 (Parke, B.).

[3] Paxton *v.* Douglas, 1809; Fisher *v.* Ronalds, 1852 (Maule, J.); R. *v.* Boyes, 1860 (Martin, B.).

[4] R. *v.* Garbett, 1847 (decided by nine judges against six); King of the Two Sicilies *v.* Willcox, 1851 (Ld Cranworth); overruling an idea, which at one time prevailed, that a witness who chose to reply in part might be compelled to state everything that he knew about a transaction, and was held in Dixon *v.* Vale, 1821 (Best, C.J.); East *v.* Chapman, 1827 (Abbott, C.J.); and Ewing *v.* Osbaldiston, 1834; and confirming Ex parte Cossens, Re Warrall, 1820 (Ld. Eldon). See, however, Chadwick *v.* Chadwick, 1853 (Turner, V.-C.).

[5] Rose *v.* Blakemore, 1826 (Abbott, C.J.); R. *v.* Watson, 1817 (Holroyd, J.); Lloyd *v.* Passingham, 1809 (Ld. Eldon); Millman *v.* Tucker, 1803 (Ld. Ellenborough).

[6] As it is forcibly put, a rule or statute that, upon proof that the sun was shining, no inference that it was light was to be drawn, would in practice be nugatory.

[7] See R. *v.* Watson, 1817 (Bailey, J.).

[8] 2 Ph. Ev. 501.

[9] 1 St. Ev. 197.

cannot be *compelled*, or will not be *allowed*, to answer questions put to them have already been discussed.[1] But, as a general rule, a witness cannot object to answer any question, merely because it relates to *private* matters, or because it is *immaterial*, unless the answer can be withheld on some specific ground of privilege.[2]

§ 1469. In the event of the death or serious illness of a witness between his examination in chief and his cross-examination, in Ireland the majority of the judges have in a criminal case,[3] and in England both a late Master of the Rolls and a late V.-C. have in a civil case,[4] held that the evidence previously given by him is admissible, though the degree of weight to be attached to it is of course a question of fact.

§ 1470.[5] After a witness has been examined in chief, his *credit may be impeached*, not only by means of cross-examination, but in various other modes. First, witnesses may be called to disprove such of the facts stated by him, whether in his direct or cross-examination, as are material to the issue.[6] Next, proof may be given, under certain restrictions before pointed out,[7] of statements made by the witness inconsistent with his testimony at the trial. Thirdly, evidence may be adduced reflecting on his *character for veracity*.[8]

§ 1470A. But evidence of the latter class must be confined to proof of the *general* reputation of the witness, and will not be permitted as to particular facts; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared, without notice, to answer the other.[9] Besides, the mischief of raising collateral issues would itself be a sufficient reason for the adoption of this rule.[10] The regular mode of examining into the character of the person in question, is to ask the witness whether he knows his general reputation among his neighbours, and what that reputation is. In England the witness

[1] Ante, Part IV., Chap. II.
[2] Tippins *v.* Coates, 1847.
[3] In R. *v.* Doolin, 1832 (Ir.).
[4] Davies *v.* Otty, 1865 (Ld. Romilly); Elias *v.* Griffith, 1877 (Hall, V.-C.). But see Dunne *v.* English, 1874 (Jessel, M.R.).
[5] Gr. Ev. § 461, in part.
[6] As to what are material, see ante, §§ 316 et seq., and §§ 1434 et seq.
[7] Ante, §§ 1426, 1445, 1446.
[8] See ante, §§ 349 et seq.
[9] B. N. P. 296, 297; R. *v.* Rookwood, 1696 (Trevor, Att.-Gen., argu.); R. *v.* Layer, 1722 (Pratt, C.J.). See Carlos *v.* Brook, 1804; Penny *v.* Watts, 1848-50.
[10] R. *v.* Rookwood, 1696 (Ld. Holt).

may also be asked whether, from such knowledge, he would believe the person whose veracity is impeached upon his oath.[1] The propriety of this last question is also sustained by no inconsiderable weight of authority in the United States.[2] But in some American courts, a witness will not be permitted to state his own opinion that another witness is not worthy of belief.[3]

§ 1471. Whether the inquiry into the general reputation of a witness must be restricted to his reputation for veracity, or may be made in general terms, *involving his entire moral character* and estimation in society, is not yet definitely settled. When it is considered how intimate is the connexion between one crime and another, and moreover, how difficult it may be to find a witness, who can, in strictness, testify as to the bad character for veracity even of one who having, in the language of Sir Charles Wetherell,[4] been notoriously "guilty of crimes under every letter of the alphabet," is consequently undeserving of the slightest credit, it certainly appears reasonable that the question as to reputation should be put in the most general form, the opposite party being at liberty to inquire whether, notwithstanding the bad character of the witness in other respects, he has not preserved his reputation

[1] R. *v.* Brown, 1867; R. *v.* Watson, 1817; R. *v.* De la Motte, 1781 (Buller, J.); Mawson *v.* Hartsink, 1802 (Ld. Ellenborough); The People *v.* Mather, 1830 (Am.); The State *v.* Boswell, 1829 (Am.); Anon., 1833 (Am.).

[2] See American cases cited in last note. See ante, § 350.

[3] Gass *v.* Stinson, 1837 (Am.) (Story, J.); Kimmel *v.* Kimmel, 1817 (Am.); Wike *v.* Lightner, 1824 (Am.); Swift, Ev. (Am.) 143; Phillips *v.* Kingfield, 1841 (Am.). In this last case, Shepley, J., ably observed: —"The opinions of a witness are not legal testimony except in special cases; such, for example, as experts in some profession or art, those of the witnesses to a will, and in our practice, opinions on the value of property. In other cases, the witness is not to substitute his opinion for that of the jury; nor are they to rely on any such opinion instead of exercising their own judgment, taking into consideration the whole testimony. To permit the opinion of a witness, that another witness should not be believed, to be received and acted on by a jury, is to allow the prejudices, passions, and feelings of the witness to form, in part, at least, the elements of their judgment. To authorise the question to be put, whether the witness would believe another witness on oath, although sustained by no inconsiderable weight of authority, is to depart from sound principles and established rules of law respecting the kind of testimony to be admitted for the consideration of a jury, and their duties in deciding upon it. It moreover would permit the introduction and indulgence in courts of justice of personal and party hostilities, and of every unworthy motive by which man can be actuated, to form the basis of an opinion to be expressed to a jury to influence their decision."

[4] R. *v.* Watson, 1817.

for truth. Indeed, one or two English authorities, apparently, sanction this course;[1] and in several of the United States[2] the general range of inquiry which is here recommended is distinctly allowed, although a stricter rule is said to prevail in some others of them.

§ 1472.[3] It is not, however, enough that the impeaching witness should profess merely to state what he has heard "others" say; for those others may be but few. He must be able to state what is *generally said* of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only which constitutes his general reputation.[4] Usually, therefore, the witness should himself come from the same neighbourhood as the individual whose character is in question; for a stranger, sent thither by the adverse party purposely to learn the character of such witness, will

[1] R. *v.* Rookwood, 1696; Carpenter *v.* Wall, 1840; Ld. Stafford's case, 1680; Sharp *v.* Scoging, 1817 (Gibbs, C.J.).

[2] As, for instance, North and South Carolina and Kentucky. See Anon., 1833 (Am.); The State *v.* Boswell, 1829 (Am.); Hume *v.* Scott, 1821 (Am.). In this last case, Mills, J., observes:—"Every person, conversant with human nature, must be sensible of the kindred nature of the vices to which it is addicted. So true is this, that, to ascertain the existence of one vice of a particular character, is frequently to prove the existence of more at the same time, in the same individual. Add to this, that persons of infamous character may and do frequently exist, who have formed no character as to their lack of truth; and society may have never had the opportunity of ascertaining, that they are false in their words or oaths. At the same time they may be so notoriously guilty of acting falsehood, in frauds, forgeries, and other crimes, as would leave no doubt of their being capable of speaking and swearing it, especially as they may frequently depose falsehood with greater security against detection, than practise those other vices. In such cases, and with such characters, ought the jury to be precluded from drawing inferences unfavourable to their truth as witnesses by excluding their general turpitude? By the character of every individual, that is, by the estimation in which he is held by the society or neighbourhood where he is conversant, his word and his oath is estimated. If that is free from imputation, his testimony weighs well. If it is sullied, in the same proportion his word will be doubted. We conceive it perfectly safe, and most conducive to the purposes of justice, to trust the jury with a full knowledge of the standing of a witness, into whose character an inquiry is made. It will not thence follow, that from minor vices they will draw the conclusion, in every instance, that his oath must be discredited, but only be put on their guard to scrutinise his statements more strictly; while in cases of vile reputation in other respects, they would be warranted in disbelieving him, though he had never been called so often to the book as to fix upon him the reputation of a liar, when on oath."

[3] Gr. Ev. § 461, in part.

[4] Boynton *v.* Kellogg, 1807 (Am.) (Parsons, C.J.); Wike *v.* Lightner, 1824 (Am.); Kimmel *v.* Kimmel, 1817 (Am.).

not be allowed to testify as to the result of such inquiries.[1] The impeaching witness may, however, be asked on cross-examination the names of the persons whom he has heard speak against the character for veracity of the witness impeached.[2]

§ 1473. The impeaching witnesses may also be cross-examined as to their means of knowledge and the grounds of their opinion,[3] or as to their hostile feelings towards the person whose testimony they have discredited,[4] or as to their own character and conduct. Moreover, the credit of the witness who has been attacked may be rehabilitated by calling other witnesses, either to support the character of the first witness,[5] or to attack in their turn the general reputation of the impeaching witnesses.[6] How far this plan of recrimination may be carried, is not yet formally determined; though some lawyers say that the practice is in conformity with the doggerel rule of the civil law, "In testem testes, et in hos, sed non datur ultra:" that is, a discrediting witness may himself be discredited by other witnesses, but no further witnesses are allowed to be called to attack the characters of these last.[7]

§ 1474.[8] After a witness has been cross-examined, the party who called him has a *right to re-examine him*. The proper office of re-examination (which is often inartistically used as a sort of summary of all the things adverse to the cross-examining counsel which may have been said by a witness during cross-examination) is by asking such questions as may be proper for that purpose, so as to draw forth an *explanation* of the meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive, or provocation, which induced the witness to use those expressions; but a re-examination may not go further, and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.[9] For instance, proof, on cross-examination, of a detached statement made by or to a witness at a former time,

[1] Mawson *v.* Hartsink, 1802 (Ld. Ellenborough); Douglass *v.* Tousey, 1829 (Am.).
[2] Bates *v.* Barber, 1849 (Am.).
[3] Mawson *v.* Hartsink, 1802.
[4] Long *v.* Lamkin, 1852 (Am.).
[5] R. *v.* Murphy, 1753.
[6] 2 Ph. Ev. 432.
[7] Lord Stafford's trial, 1680.
[8] Gr. Ev. § 467, in great part.
[9] The opinion of seven out of eight judges in the Queen's case, 1820; R. *v.* St. George, 1840 (Parke, B.).

does not authorise proof by the party calling that witness of all that was said at the same time, but only of so much as can be in some way connected with the statement proved.[1] Accordingly, a witness who has been cross-examined as to what plaintiff said in a particular conversation, cannot be re-examined as to other assertions, made by the plaintiff in the same conversation, not connected with the assertions to which the cross-examination related, although connected with the subject-matter of the suit.[2] But if a witness admits, on cross-examination, that he has formerly made statements inconsistent with his present testimony, or if that fact be proved by independent evidence, he may be asked, on re-examination, to explain his motives for making such inconsistent statements.[3] If, too, upon cross-examination of a witness, counsel, by referring to what such witness has deposed when on a previous occasion giving an account or no account of a transaction, suggests as a reason for disbelieving the witness's present evidence that on the previous occasion he omitted the name of the prisoner at present on his trial, the witness thus impeached may, without the deposition taken on the previous occasion being put in, state that when giving evidence on the previous occasion just referred to, he did give the same account of the transaction as he has just given, and did mention the name of the prisoner at present upon his trial.[4]

§ 1475.[5] If counsel cross-examines a witness as to *facts which were not* originally and during the examination in chief *admissible in evidence*, the other party has a right to re-examine him as to such facts. For instance, a witness is not allowed in his examination in chief to "corroborate" himself by vouching a statement previously made by him on oath, but when his veracity is impeached by reference to what he said in such former statement he may, as just mentioned, show by any legal evidence what was really said by him on making such former statement;[6] and on an issue upon a defence of a prescription which justified a trespass in G., plaintiff's witnesses

[1] The Queen's case, 1820, H. L.; Prince *v.* Samo, 1838; recognised in Sturge *v.* Buchanan, 1839.

[2] Prince *v.* Samo, 1838. In this case, Ld. Tenterden's opinion in the Queen's case, 1820, H. L., that evidence of the whole conversation was admissible if connected with the suit, though it related to matters not touched in the cross-examination, was considered and overruled.

[3] R. *v.* Woods, 1840 (Ir.) (Burton, J.).

[4] R. *v.* Coll, 1889 (Ir.).

[5] Gr. Ev. § 468, almost verbatim.

[6] R. *v.* Coll, 1889 (Ir.).

having been asked, in cross-examination, questions respecting the user in other places than G., plaintiff was allowed, in re-examination, to show an interruption in the user in such other places.[1] An adverse witness ought not, however, to be permitted to obtrude irrelevant matter in answer to a question in no way relating to such matter; and if he do so, the party cross-examining may apply to have the answer struck out of the judge's notes, after which the witness cannot be re-examined on the subject.[2] If the cross-examining counsel omit to take this course, the re-examination on the matter ought, however, to be allowed.[3]

§ 1476.[4] Where evidence of contradictory statements, or of other improper conduct on his part, has been either elicited from a witness on cross-examination, or obtained from other witnesses, with the view of impeaching his veracity,—his *general character* for truth being thus, in some sort, *put in issue*,—general evidence that he is a man of strict integrity and scrupulous regard for truth will be admitted.[5] But evidence that he has on other occasions made statements similar to what he has testified in the cause, is not admissible,[6] unless, indeed, he has been charged with a design to misrepresent, in consequence of his relation to the party or to the cause, in which case it will be proper to show that he made a similar statement before that relation existed.[7] If, too, the character of a deceased attesting witness to a deed or will be impeached on the ground of fraud, evidence of his general good character is admissible.[8] Mere contradiction among witnesses examined in

[1] Blewett *v.* Tregonning, 1835.

[2] Id. Incompetent tribunals often sadly err on this subject, first by regarding it as "smart" on the part of an insolent witness to—during his cross-examination—"put upon" the cross-examining counsel something as to which, or in connection with which, no question at all was ever asked him, and then by telling the counsel that the matter thus obtruded was "elicited in cross-examination." Chairmen of Quarter Sessions and other amateur lawyers, are especially apt to fall into this blunder.

[3] Blewett *v.* Tregonning, 1835.

[4] Gr. Ev. § 469, almost verbatim.

[5] R. *v.* Clarke, 1817; Annesley *v.* Ld. Anglesea, 1743 (Ir.). If, however, it be merely brought out by the cross-examination that the witness has been accused of a certain crime, and tried *and acquitted*, the American cases show that general evidence of his truthfulness is not admissible. See Greenleaf on Ev. 15th edit. (1892), notes to § 469.

[6] B. N. P. 294; R. *v.* Parker, 1783 (Buller, J.); Anon., undated (Eyre, C.J), cited 2 Ph. Ev. 523; Berkeley Peer., 1811 (Ld. Redesdale), cited id. These cases overrule Lutterell *v.* Reynell, 1677.

[7] 2 Ph. Ev. 523, 524; 2 Poth. Obl. 251.

[8] Doe *v.* Stephenson, 1801; cited and approved (Ld. Ellenborough, in Bishop of Durham *v.* Beaumont,

court affords, however, no ground for admitting general evidence as to their character;[1] though if fraud, or other improper conduct, be imputed to any of them, such evidence will be received.[2]

§ 1477. The judge has a discretionary power,[3] with which the court above is always very unwilling to interfere,[4] of *recalling witnesses* at any stage of the trial, and of putting to them such legal questions as he thinks that justice requires.[4] He will seldom, however, except under special circumstances, permit a plaintiff, after his case is closed, to recall a witness to prove a material fact;[5] though the application will in general be entertained, if made before the closing of the plaintiff's case.[6] If, too, after a witness has been cross-examined, it be discovered that his testimony at the trial as to the subject-matter of the cause differs from some other statement formerly made by him, the court will allow him, if still within reach, to be recalled and to be further cross-examined, in order to lay a foundation for impeaching his credit by producing witnesses to contradict him.[7] If, however, he cannot be found, proof of the other statements must be rejected.[8] If a question has been omitted in the examination in chief, it cannot, in strictness, be asked on re-examination, as it does not arise out of the cross-examination, but it is usual for the counsel to request the judge to make inquiry; and for such a request to be granted.[9]

§ 1478. Formerly, when the evidence of witnesses on opposite sides was directly conflicting, the court would often direct that such witnesses should be *confronted*.[10] This practice is still recog-

1808; and in Provis *v.* Reed, 1829); Doe *v.* Wood, about 1828; cited (Burrough, J.) 5 Bing. 439.

[1] Bp. of Durham *v.* Beaumont, 1808.

[2] Annesley *v.* Ld. Anglesea, 1743 (Ir.).

[3] R. *v.* Watson, 1834. In Scotland, 15 & 16 V. c. 27 ("The Evidence (Scotland) Act, 1852"), § 4, expressly enacts, that "it shall be competent to the presiding judge or other person before whom any trial or proof shall proceed, on the motion of either party, to permit any witness, who shall have been examined in the course of such trial or proof, to be recalled."

[4] Middleton *v.* Barned, 1849 (Parke, B.).

[5] Murray *v.* Sheriffs of Dublin, 1841 (Ir.) (Brady, C.B.); Johnston *v.* Clinton, 1841 (Ir.) (id.); Kelly *v.* Smith, 1841 (Ir.) (Crampton, J.); Bell *v.* Stewart, 1842 (Ir.) (Brady, C.B.). See Bevan *v.* M'Mahon, 1859.

[6] White *v.* Smith, 1841 (Ir.) (Brady, C.B.); Casson *v.* O'Brien, 1842 (Ir.) (Pennefather, C.J.).

[7] The Queen's case, 1820, II. L.

[8] Id.

[9] 2 Ph. Ev. 475.

[10] On one remarkable occasion, no less than four witnesses were for this purpose placed together in the box: Annesley *v.* Ld. Anglesea, 1743 (Ir.).

nised in the Ecclesiastical Courts and in the Probate Division of the High Court,[1] and prevails largely in the County Courts (where it is often productive of highly useful results), but has (for some unexplained reason) grown into comparative disuse at Nisi Prius. This is to be regretted; for it certainly affords an excellent opportunity of contrasting the demeanour of the opposing witnesses, and of thus testing the credit due to each, and of explaining away an apparent contradiction or mistake which may have accidentally arisen.[2]

[1] Enticknap *v.* Rice, 1865 (Wilde, J. O.).

[2] Mr. Justice Cowen, in his note to the American edition of Ph. Ev. Vol. II. p. 774, illustrates the utility of this practice by a case, "in which a highly respectable witness, sought to be impeached through an out-of-door conversation, by another witness, who seemed very willing to bring him into a contradiction, upon both being placed upon the stand, furnished such a distinction to the latter as corrected his memory, and led him in half a minute to acknowledge that he was wrong. The difference lay only in one word. The first witness had now sworn that he did not rely on a certain firm as being in good credit. It turned out that, in his former conversation, he spoke of a partnership, from which one name was soon afterwards withdrawn, leaving him now to speak of the latter firm thus weakened by the withdrawal. In regard to the credit of the first firm, he had, in truth, been fully informed by letters. With respect to the last, he had no information. The sound in the title of the two firms was so nearly alike, that the ear would easily confound them, and had it not been for the colloquium thus brought on, an apparent contradiction would, doubtless, have been kept on foot, for various purposes, through a long trial. It involved an inquiry into a credit, which had been given to another on the fraudulent representations of the defendant."

AMERICAN NOTES.

Memoranda refreshing Memory. PRIMARY RECOLLECTION. — A witness is entitled to consult and refresh his memory by any contemporaneous memoranda made by him, which give him a present recollection of the facts stated in the memorandum. Cobb *v.* Boston, 109 Mass. 438 (1872); George *v.* Joy, 19 N. H. 544 (1849); Bank *v.* Zorn, 14 S. C. 444 (1880); Fritz *v.* Burriss, 41 S. C. 149 (1893); First National Bank of Du Bois City *v.* First National Bank of Williamsport, 114 Pa. St. 1 (1886); Houston, &c. R. R. *v.* Burke, 55 Tex. 323 (1881); Davenport *v.* McKee, 94 N. C. 325 (1886); Cooper *v.* State, 59 Miss. 267 (1881); Marcly *v.* Shults, 29 N. Y. 346 (1864); Peck *v.* Valentine, 94 N. Y. 569 (1884); Paige *v.* Carter, 64 Cal. 489 (1884); Bonnet *v.* Glattfeldt, 120 Ill. 166 (1887); Sanders *v.* Wakefield, 41 Kans. 11 (1889); McNeely *v.* Duff, 50 Kans. 488 (1893); Finch *v.* Barclay, 87 Ga. 393 (1891); Rusch *v.* Rock Island, 97 U. S. 693 (1878); McKivett *v.* Cone, 30 Ia. 455 (1870); Bergman *v.* Shoudy, 9 Wash. 331 (1894); People *v.* Kennedy, 63 N. W. 405 (1895); Williams *v.* Wager, 64 Vt. 326 (1892); Billingslea *v.* Smith, 77 Md. 504 (1893); Kunder *v.* Smith, 45 Ill. App. 368 (1892); Morris *v.* Columbian, &c. Dock Co., 76 Md. 354 (1892); Atchison, &c. R. R. *v.* Lawler, 40 Neb. 356 (1894).

The rule permitting a witness to refresh his recollection is not one of indulgence alone. It is also one of requirement. A witness may be compelled, at the instance of the party who is examining him, to inspect a writing which is present in court either if it is in his own handwriting; or if it otherwise appear that by referring to it he can refresh his memory concerning the transaction to which it relates. He may even be compelled to state a secondary recollection of the truth of the document. State *v.* Staton, 114 N. C. 813 (1894).

The supreme court of Alabama state the rule as follows: "The law recognizes the right of a witness to consult memoranda in aid of his recollection, under two conditions: First, when, after examining a memorandum made by himself, or known and recognized by him as stating the facts truly, his memory is thereby so refreshed that he can testify, as matter of independent recollection, to facts pertinent to the issue. In cases of this class, the witness testifies to what he asserts are facts within his own knowledge; and the only distinguishing difference between testimony thus given, and ordinary evidence of facts, is that the witness, by invoking the assistance of the memorandum, admits that, without such assistance, his recollection of the transaction he testifies to, had become more or less obscured. In cases falling within this class, the memorandum is not thereby made evidence in the cause, and its contents are not

made known to the jury, unless opposing counsel call out the same on cross-examination. This he may do, for the purpose of testing its sufficiency to revive a faded or fading recollection, if for no other reason.

In the second class are embraced cases in which the witness, after examining the memorandum, can not testify to an existing knowledge of the fact, independent of the memorandum. In other words, cases in which the memorandum fails to refresh and revive the recollection, and thus constitute it present knowledge. If the evidence of knowledge proceed no further than this, neither the memorandum, nor the testimony of the witness, can go before the jury. If, however, the witness go further, and testify that, at or about the time the memorandum was made, he knew its contents, and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. The two are the equivalent of a present, positive statement of the witness, affirming the truth of the contents of the memorandum." Acklen *v.* Hickman, 63 Ala. 494 (1879).

A witness, after being refused permission by the trial judge (for what cause the appellate court "are unable to see") to refresh his memory from memoranda made by himself as to the evidence of another witness at a former trial, may use the memoranda to refresh his recollection off the witness stand, and to exclude his evidence from a primary recollection is error. "And when afterwards, in the further progress of the trial, the same witness was again introduced, and he then stated that he could recollect and testify as to all that was sworn by the defendant McKee on the former occasion as to the receipt referred to, he ought to have been allowed to testify, because he said that he could do so, and if he could, the relator was entitled to have the benefit of his testimony. The plain inference was, that he had reflected about the matter, and had recollection of the facts, or had refreshed his memory by reference to the memoranda mentioned by him in his first examination. He had the right to do so, and it was not necessary that he should refer to the memoranda in the presence of the Court, or produce the same in Court, certainly not, unless the Court so required. When the witness stated that he had knowledge of the facts, that was sufficient, — he was then prepared to testify, and any question as to the accuracy of his knowledge and recollection, would not go to his competency, but to his credibility." Davenport *v.* McKee, 94 No. C. 325, 331 (1886).

Where a present recollection is awakened by the memorandum, it is not error to permit the witness to read from the document. "We do not understand that the memorandum was offered as being of itself evidence, but that the witness testified to his present recollection of the truth and correctness of a valuation, which he made six months previous to the taking. The fact that he made a record at

the time ought not to prevent him from testifying to the matters which he had so recorded, if at the time of testifying he knew them to be true. Under such circumstances, the commissioners might in their discretion, permit him to read from his memorandum." Cobb *v.* Boston, 109 Mass. 438 (1872); Solomon &c. R. R. *v.* Jones, 34 Kans. 443 (1885); Bonnet *v.* Glattfeldt, 120 Ill. 166 (1887).

So by statute, Burbank *v.* Dennis, 101 Cal. 90 (1894).

To the contrary effect, that in case of objection, the memorandum cannot be read to the jury, see First National Bank of Du Bois City *v.* First National Bank of Williamsport, 114 Pa. St. 1, 8 (1886). "It is not a valid objection to a deposition, that the witness in his testimony refers to a contemporaneous paper, book, or memorandum, made by himself and not in evidence, if the reference be made as a means of refreshing his memory, or as enabling him to speak with accuracy on the subject matter under investigation. A witness, in fixing the date of a given transaction, may refer to a book or diary to refresh his recollection; he may state that the entries of events were made therein at the time of their occurrence, respectively, and that he is enabled thereby to fix with accuracy the date in question; but if objected to, he would not be permitted to read the entry in evidence, excepting perhaps upon cross-examination. It follows, of course, that the book or diary need not be produced for the inspection of the jury." First Nat. Bank o. Du Bois City *v.* First Nat. Bank of Williamsport, 114 Pa. St. 1, 8 (1886); Bonnet *v.* Glattfeldt, 120 Ill. 166 (1887).

On an action to recover for personal injury inflicted on the female plaintiff through the defendant's negligence, a physician who attended her immediately after the accident is not allowed to annex to his deposition in the action his written report to the husband of the female plaintiff. "It does not appear here, but that at the time the witness testified he had, without even looking at his written statement, a clear, distinct recollection of every essential fact stated in it. If he had such present recollection, there was no necessity whatever for reading that paper to the jury." Vicksburg, &c. R. R. *v.* O'Brien, 119 U. S. 99 (1886); Kelsea *v.* Fletcher, 48 N. H. 282 (1869); Pinkham *v.* Benton, 62 N. H. 687 (1883); National Ulster Co. Bank *v.* Madden, 114 N. Y. 280 (1889).

See also Kunder *v.* Smith, 45 Ill. App. 368 (1892).

ORIGINAL MEMORANDUM REQUIRED. — Only the original memoranda are regarded as satisfactorily refreshing the secondary memory of a witness. "It must be remembered, that the original memorandum is itself not an original, but a transcript and copy of the witness's own contemporaneous knowledge, which in its oral form would be the strictly primary and original evidence. Therefore, if the copy of a memorandum were admissible to refresh a witness' memory, there would be no reason why the examined copy of an

examined copy of an original document should be, as it clearly is, inadmissible." Green *v.* Caulk, 16 Md. 556, 575 (1860); Merrill *v.* Ithaca, &c. R.R. 16 Wend. 586 (1837); Shove *v.* Wiley, 18 Pick. 558 (1836).

So a witness, who has no primary recollection, will not be permitted to dictate to his counsel a memorandum from "old letters, memoranda and receipts," and use it to refresh his memory. "The original documents might have been used to refresh the witness' memory, but certainly not the notes made up from them. The opposite side had the right to see the originals and test the witness' memory from each entire instrument." Watson *v.* Miller, 82 Tex. 279 (1891).

A copy of a copy is *a fortiori* inadmissible. Where the witness, "a measurer of different kinds of mechanical work," made entries of certain measurements made by him of carpenters' work in a "Dimension Book" which were transferred, as summarized by the results of many calculations by witness and his son, to an "Abstract Book", either by the witness or his son under witness' superintendence, a substantial copy of the Abstract Book is not competent. Green *v.* Caulk, 16 Md. 556, 574 (1860).

In Alabama it is apparently held that a copy properly attested as being accurate by the oath of the copyist may be used to refresh the memory of the original maker of the memorandum. Birmingham *v.* McPoland, 96 Ala. 363 (1892).

Where a memorandum brings back primary recollection, the rule forbidding the use of a copy has been relaxed. George *v.* Joy, 19 N. H. 544 (1849); Houston, &c. R.R. *v.* Burke, 55 Tex. 325 (1881); Lawson *v.* Glass, 6 Col. 134 (1881); Bonnet *v.* Glattfeldt, 120 Ill. 166 (1887); Finch *v.* Barclay, 87 Ga. 393 (1891).

For example, in Massachusetts where a newspaper reporter heard the evidence of another witness at a former trial, and made a written report (which had been destroyed), of the same to his paper it was held on exceptions, reversing the action of the lower court, that the reporter, in testifying, was entitled to refresh his recollection by using the copy of his report as printed in the paper, when properly identified as accurate. "We are of opinion that this ruling was erroneous; and that the witness should have been allowed, for the purpose of refreshing his memory, to look at the printed report, which he stated, as of his own knowledge, was printed substantially as made by him. It was not contended that the written or printed report, or any portion of its contents, could be put in evidence. It was clearly incompetent, in any aspect of the case, as presented. The rule, therefore, that, to prove by oral testimony the contents of a paper, relied on as evidence, it is necessary first to show that it has been lost or destroyed, or that upon diligent search it cannot be found, has no application to this case." Com. *v.* Ford, 130 Mass. 64 (1881); Hawes *v.* State, 88 Ala. 37, 67 (1889).

And a witness may testify to a list and the value of certain articles alleged to have been lost by a common carrier from a memory refreshed by the use of a "bill of particulars known by her to be a copy of a correct memorandum of articles and values made by herself." Houston, &c. R.R. *v.* Burke, 55 Tex. 323 (1881).

A witness "may use an entry made by himself or by any other person, or a copy of an entry, if on reading it, he can testify that he then recollects the fact to which the entry relates." Marcly *v.* Shults, 29 N. Y. 346 (1864); Bowden *v.* Spellman, 59 Ark. 251 (1894).

Memoranda Made by Another. — It is not essential, where the use of the memorandum arouses a present recollection, that it should have been made by the witness, if it has been made under such circumstances as to secure to the witness a knowledge of its accuracy. Paige *v.* Carter, 64 Cal. 489 (1884); Johnston *v.* Farmers' Fire Ins. Co. (Mich.) 64 N. W. 5 (1895); Davis *v.* Field, 56 Vt. 426 (1884); Culver *v.* Scot., &c. Lumber Co. 53 Minn. 360 (1093); Crystal Ice Mfg. Co. *v.* San Antonio Assoc'n (Tex.) 27 S. W. 210 (1894).

"The rule upon this subject, in its broadest outline, embraces two classes of cases: first, where the witness, after referring to the paper, speaks from his own memory, and depends upon his own recollection as to the facts testified to; second, where he relies upon the paper and testifies only because he finds the facts contained therein. In the first class the paper is always permitted to be used by the witness without regard to when or by whom made. In the second class this rule of admission is much more stringent. In fact, it cannot be used unless it be an original paper made by the witness himself, and contemporaneously with the transaction referred to. Admitted under any other circumstances, it would be obnoxious to the doctrine of hearsay and other important principles regulating the admission of evidence, and would render the administration of justice uncertain and doubtful." Bank *v.* Zorn, 14 S. C. 444, 450 (1880).

On an indictment for larceny of certain treasury notes the witness "read the numbers of the notes to the other person, who wrote them down" and identified the memorandum when produced. According to the bill of exceptions "the witness testified to the description of the treasury notes from the memorandum, although she had no recollection of the description without the aid of the memorandum." This was held properly received. Hill *v.* State, 17 Wis. 675 (1864).

"It is claimed by the prisoner's counsel that the witness could not be allowed to refresh her recollection by a memorandum not made by herself. But however this may be in cases where it is designed to use or read the memorandum in connection with the testimony of the witness, the latter not being able, even after refresh-

ing his memory, to retain any present recollection of the facts stated, but only to say generally that he knew at the time that they were correctly stated, such clearly is not the rule where the witness, after seeing the memorandum, is able, by its aid, to recall the facts and testify to them as a matter of recollection. In such cases it matters not whether the memorandum was made by the witness or another, 'for it is his recollection and not the memorandum which is the evidence.'" Hill *v.* State, 17 Wis. 675 (1864).

So where the witness had the assistance of his son who wrote the memoranda "under his superintendence." Green *v.* Caulk, 16 Md. 556, 572 (1860).

So if A. has given a deposition, he may refresh his memory by examining a copy of it. George *v.* Joy, 19 N. H. 544 (1849).

"In order to refresh the recollection of a witness, it is not important that the paper, book, or memorandum should have been written or printed by the witness himself, or that it should be an original writing. It is sufficient if he saw it while the facts stated therein were fresh in his memory, and he knows that they are correctly transcribed or printed. Upon inspecting it, he can state the facts if thereby called to his recollection. 1 Greenl. Ev. §§ 436–439; Chapin *v.* Lapham 20 Pick. 467." Com. *v.* Ford, 130 Mass. 64 (1881).

On an indictment for larceny, the prosecuting witness may refresh his memory by referring to a list of articles from a schedule made by his clerk in his presence and under his direction and inspection. State *v.* Lull, 37 Me. 246 (1854). "It does not seem to be necessary that the writing used should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak of the facts from his own recollection. Here the witness had no knowledge, and consequently no recollection, of the number of logs unloaded at the landing, except as he had been told or informed by his foreman, who also was unable to speak of his own knowledge or recollection. The testimony of the witness, so far as it was founded upon the copy made by him, or so far as it would have had a foundation if he had used the book kept by his foreman, was but hearsay, and a witness can no more be permitted to give evidence of his inference from what a third person has written than from what a third person has said." Douglas *v.* Leighton, 57 Minn. 81 (1894).

But a memorandum made by another must be "an original source of information" to the witness, "otherwise he cannot be allowed to refresh his recollection by reference to it." Green *v.* Caulk, 16 Md. 556, 572 (1860).

A. made a memorandum of moneys received by B. from sales of C.'s lumber, and gave the memorandum to C., the common employer of A. and B. In an action against B., C. testified that he had lost

the memorandum, but had copied it correctly. It was held to be error to admit the copy: "This would be mere hearsay, and the fact that the statement [of A.], instead of being oral, was written does not alter the character of the evidence." Peck *v.* Valentine, 94 N. Y. 569 (1884); Lewis · Kramer, 3 Md. 265 (1852); Shove *v.* Wiley, 18 Pick. 558 (1836).

When the memorandum is made by another, in order that the witness should testify to a secondary recollection, it is necessary that he should "recognize it as containing the truth of which he is still convinced at the time of the trial." Green *v.* Caulk, 16 Md. 556, 572 (1860); Solomon &c. R. R. *v.* Jones, 34 Kans. 443 (1885).

It is sufficient if the witness' knowledge of the accuracy of a memorandum made by another is due to its having been made, as a book-entry or filling in of a cheque stub, in the usual course of a business with which the witness "was familiar by having charge of the books" where the entries "had been by him examined after they were made, and before he testified and found to be correct." Third Nat. Bank *v.* Owen, 101 Mo. 558, 585 (1890).

Must be Contemporaneous. — The entry, to refresh the memory, must have been made while the memory of the witness was then fresh on the point. It is not necessary, however, that the memorandum should be "made at the very time." In a case where the contrary contention was made, it was held that a witness who testified that "he has a book, in which he makes entries of facts as they occur, as soon after as convenient," was properly permitted to testify from a memory as refreshed by the book, although the only reason he gives for his belief that he made the entry on the next day after the occurrence was that "this was his habit." Fraser *v.* Fraser, 14 U. C. C. P. 70 (1864); Maxwell *v.* Wilkinson, 113 U. S. 656 (1885).

Even when made by another it is requisite that the memorandum should be "made at the time or about the time of the occurrence of the fact recorded in it." Green *v.* Caulk, 16 Md. 556 (1860).

Or as stated in a California case, "at any time when the fact was fresh in his memory." Paige *v.* Carter, 64 Cal. 489 (1884).

So a memorandum of the contents of a car made soon after its being burned, "when he knew it to be a correct test," is competent. Atchison &c. R. R. *v.* Lawler, 40 Neb. 356 (1894).

So of the contents of a drug-store. Johnston *v.* Farmers' Fire Insurance Co. (Mich.) 64 N. W. 5 (1895).

Much must be left to the discretion of the court; — to be exercised in view of the facts of each particular case. The supreme court of Colorado have stated the rule with sufficient clearness: "As to the time when a writing thus used should have been made, no precise rule can be stated." Lawson *v.* Glass, 6 Col. 134 (1881).

A memorandum made twenty months after the transaction, from a

pencil memorandum and other memoranda presumably destroyed, cannot be introduced in evidence where no primary recollection is awakened. "The reasons for limiting the time within which the memorandum must have been made are, to say the least, quite as strong when the witness, after reading it, has no recollection of the facts stated in it, but testifies to the truth of those facts only because of his confidence that he must have known them to be true when he signed the memorandum." Maxwell v. Atkinson, 113 U. S. 656 (1884).

The supreme court of the state of Washington have declined to allow a witness to refresh her recollection as to the contents of a trunk deposited with a warehouseman from a memorandum made seven months after the bailment. Bergman *v.* Shoudy, 9 Wash. 331 (1894).

Form of Memorandum. — Memoranda may be in any form. For example, a stenographer may refresh his recollection as to a witness' evidence on a former trial by the use of his shorthand notes taken at the time. State *v.* George, 60 Minn. 503 (1895).

Loose sheets of paper. Green *v.* Caulk, 16 Md. 556 (1860).

A printed newspaper copy of a written report. Com. *v.* Ford, 130 Mass. 64 (1881).

A witness may refresh his memory as to the contents of a written notice by referring to the printed legal form from which he made it up. Coffin *v.* Vincent, 12 Cush. 98 (1853).

An attorney testifying to the evidence of a deceased witness at a former trial may refresh his recollection from a bill of exceptions if he assisted in the preparation of the bill of exceptions, heard the evidence at the trial, and knows that the exceptions state the evidence of the witness correctly. Solomon &c. R. R. *v.* Jones, 34 Kans. 443 (1885). "We think he had the right to rely upon the bill of exceptions, which he assisted in preparing, the same as if it were the minutes of the testimony of the deceased witness taken by him upon the former trial." *Ibid.*

So a witness may read from his own evidence given at a former trial as contained in the record, being cautioned "that he must testify from his memory as refreshed, and not otherwise." Hubby *v.* State, 8 Tex. App. 597, 607 (1880).

A bill of exceptions may be referred to for this purpose by a counsel who assisted in settling it. Solomon &c. R. R. *v.* Jones, 34 Kans. 443 (1885).

An entry in a book kept for the purpose of minuting facts is competent. Fraser *v.* Fraser, 14 C. P. U. C. 70 (1864).

A notarial protest may be used to refresh the memory of the notary who made it. Sasscer *v.* Farmers' Bank, 4 Md. 409 (1853).

A witness' evidence on a former trial may be read to him by his counsel to refresh his memory on the subject. Ehrisman *v.* Scott, 5 Ind. App. 596 (1892).

So a deposition may be used to refresh the memory of a witness who is asked on cross-examination as to what he testified in such deposition. "He was asked to state what he had testified before, and if his recollection is merely refreshed, by examining the deposition, and if, after being thus refreshed, he remembers the facts therein stated, independent of the deposition, the court, in permitting this, merely follow a practice sanctioned by usage and authority." George *v.* Joy, 19 N. H. 544 (1849).

The endorsement on a promissory note may refresh the memory of a witness as to a date. "The rule is well settled that notes or memoranda, made up by the witness at the moment or recently after the fact, may be looked to in order to refresh his memory. It is accordingly usual to allow a witness to look at memoranda made at the time, of dates, distances, &c., before giving his testimony, he having first sworn that they were made at the time, and faithfully done." Sanders *v.* Wakefield, 41 Kans. 11 (1889).

So an "account current" between the defendant and A., who was defendant's factor, made up and furnished by A., may be used by defendant to refresh his recollection in testifying as to the amount of money in A.'s hands at a certain date. Bank *v.* Zorn, 14 S. C. 444 (1880).

So an entry in a book of account may be used to refresh a plaintiff's memory. Friendly *v.* Lee, 20 Ore. 202 (1890). The court emphasize a salient distinction, frequently lost sight of, between the use of an entry in an account book to refresh memory and to prove the fact stated in the entry itself. "While, however, books of account kept by a party, or known by him to be correct, may be used by him as memoranda for the purpose of refreshing his memory, this question must be kept distinct from the question under what circumstances books of account, shown to have been correctly kept, are admissible as original evidence. In the case of shop books, or books of accounts, the entries made therein are admitted to prove the sale and delivery of the goods, or the payment of money, or the performance of work, as the case may be. In the case at bar, no such purpose was contemplated. The entry in the cash-book was not offered to prove the payment of the sum borrowed, for that had already been made, but to prove the date when the money was received, so as to ascertain whether there had not been two years' interest paid more than the transaction authorized. As evidence *ipso facto*, the entry was excluded, but as a memorandum made contemporaneous with the transaction, the witness was permitted to refresh his memory by an examination of it, and when his memory was thus refreshed, to testify to the fact of the date of his own knowledge." Friendly *v.* Lee, 20 Ore. 202 (1890).

Subject of Memorandum. — The subject matter of a memorandum to refresh memory presents a variety nearly as great as that

which would be presented by an enumeration of the subjects of evidence itself.

The measurements of the carpenter work in the construction of a building. Green *v.* Caulk, 16 Md. 556 (1860).

A valuation placed upon a piece of land by a real estate expert. Cobb *v.* Boston, 109 Mass. 438 (1872).

The testimony of a witness at a former trial. Com. *v.* Ford, 130 Mass. 64 (1881); Ruch *v.* Rock Island, 97 U. S. 693 (1878); Halsey *v.* Sinsebaugh, 15 N. Y. 485 (1857).

The testimony of a witness may be proved by the evidence of the judge before whom it was given, and the latter is entitled to use his minutes to refresh his recollection even though the recollection is only secondary. Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64 (1859).

Production of Memoranda. — Where the witness testifies from a primary recollection the refreshing memorandum need not be produced in evidence. Bank *v.* Bank, 114 Pa. St. 1, 8 (1886); Cooper *v.* State, 59 Miss. 267 (1881); Denver, &c. R. R. *v.* Wilson, 4 Col. App. 355 (1894).

"Certainly not, unless the Court so required." Davenport *v.* McKee, 94 N. C. 325 (1886).

And cannot be submitted to the jury. It is "unnecessary as evidence for the jury, and incompetent." Kelsea *v.* Fletcher, 48 N. H. 282 (1869).

Certain courts rule that where the party uses a memorandum to refresh his memory on the stand the opposing counsel is entitled to an examination of it and to cross-examine on it. McKivitt *v.* Cone, 30 Ia. 455 (1870); Cortland Mfg. Co. *v.* Platt, 83 Mich. 419 (1890).

That a memorandum awakening a primary recollection cannot be called for on cross-examination, has been decided by the supreme judicial court of Massachusetts: — "We are not aware of any case where it has been held that the memorandum could be put in evidence simply because it refreshed the memory of the witness." Com. *v.* Jeffs, 132 Mass. 5 (1882).

Where only a secondary recollection comes from inspection of the memorandum, the statements of the memorandum itself become the evidence of the witness and are admissible as his statement. Acklen *v.* Hickman, 63 Ala. 494 (1879).

In the case of Jenkins *v.* State, 31 Fla. 196 (1893), where a witness used a memorandum book kept by him giving the weights, marks, and owners of certain baled cotton stored in a certain burned warehouse, it is difficult to ascertain from the report whether the recollection of the witness, as refreshed, was primary or secondary. The court say: "We, therefore, think that the memorandum book was properly admitted, as it seems from the record to have been, for the purpose of refreshing its owner's memory as a witness as to pertinent and material facts at issue. No other use appears to have

been made of such memorandum book at the trial but to refresh the memory of the witness to whom it belonged in giving his testimony." Jenkins *v.* State, 31 Fla. 196 (1893).

And in Texas, where a secondary recollection is awakened, the court say, in rejecting a memorandum in the nature of a summary, that "the opposite side had the right to see the originals and test the witness' memory from each entire instrument." Watson *v.* Miller, 82 Tex. 279 (1891); Peck *v.* Valentine, 94 N. Y. 569 (1884).

Secondary Recollection. — Upon examination of the memorandum in question, the witness may be unable to testify to a present recollection of the facts stated in the memorandum. In such case, he is permitted to testify that he has a present recollection, not of the truth of the facts stated in the memorandum, but that the memorandum when made was an accurate statement. Green *v.* Caulk, 16 Md. 556 (1860); Downer *v.* Rowell, 24 Vt. 343 (1852); State *v.* Rawls, 2 Nott. & M'C. 331 (1820); Mims *v.* Sturdevant, 36 Ala. 636 (1860); Briggs *v.* Rafferty, 14 Gray, 525 (1860); State *v.* Colwell, 3 R. I. 132 (1855); Marcly *v.* Shults, 29 N. Y. 346 (1864); Peck *v.* Valentine, 94 N. Y. 569 (1884); Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64 (1859); Rueh *v.* Rock Island, 97 U. S. 693 (1878); Merrill *v.* Ithaca, &c. R. R. 16 Wend. 586 (1837); Halsey *v.* Sinsebaugh, 15 N. Y. 485 (1857); Pinkham *v.* Benton, 62 N. H. 687 (1883).

"The propriety of the rule . . . may be inferred from its necessity. And the occurrences of every day furnish abundant proof that the ordinary transactions of life could not be carried on upon any other principle. The subscribing witnesses to deeds can seldom prove their execution, except by barely recognizing their own signatures accompanied with the further fact, that they never do attest any writing which they have not seen executed. There are but few instances where they retain a distinct recollection of the fact of execution. The same may be said of the proof of merchants' books. It seldom happens, that the person making the entry can recollect the delivery of the articles." State *v.* Rawls, 2 N. & M'C. 331 (1820). In North Carolina the supreme court, in admitting the minutes of a committing magistrate on his secondary recollection of its accuracy, say: "If it was taken truly, it was safer, stronger, more reliable than the unaided memory of any witness." State *v.* Jordan, 110 N. C. 491 (1892).

"The rule of personal knowledge is relaxed in all cases of accounts involving, as in this case, numerous entries and dates. In such cases it is sufficient that the witness is certain the charges are correct." Lawson *v.* Glass, 6 Col. 134 (1881). See also Smith *v.* Lane, 12 S. & R. 80 (1824).

In an early case, the supreme court of Vermont lay down the rule in terms much too strong to be an entirely correct statement; — "The

consideration, that the witness could not swear from memory, is not, at present, regarded as important. All that is required is, that the witness shall be able to state, that the memorandum is correct. He may then read it, as well as repeat it. The certainty of its contents being the truth is not affected by that, either way. Where a transaction is remote, out of mind, or consists of a multiplicity of facts, a detail of dates, sums, &c., or a long narrative, like the testimony of a witness, where certainty is desirable, nothing could be satisfactory but minutes made at the time. Hence the old rule, that the witness must be able to swear from memory, is now pretty much exploded." Downer *v.* Rowell, 24 Vt. 343 (1852).

To the apparent effect that such secondary recollection is not permissible in criminal cases, see People *v.* Elyea, 14 Cal. 144 (1859).

The rules under consideration impose no limitation upon the right of a party to "refresh the memory" of a witness by calling his attention to a particular fact.

Thus a government witness favorable to the prisoner may be asked, with a view to refreshing his recollection, whether he did not testify differently at another trial. People *v.* Kelly, 113 N. Y. 647 (1889); Thompson *v.* State, 99 Ala. 173 (1892); People *v.* Palmer, (Mich.) 63 N. W. 656 (1895).

So in a civil case. Louisville, &c. R. R. *v.* Hurt, 101 Ala. 34 (1892); Ehrisman *v.* Scott, 5 Ind. App. 596 (1892); Radley *v.* Seider, 99 Mich. 431 (1894).

Or a witness may be asked, with a view to refreshing his recollection, whether he did not make a certain statement before a coroner's jury. Stone *v.* Ins. Co. 71 Mich. 81 (1888).

Closely analogous to the rule under consideration are cases where a witness amplifies and supplements his evidence by the production of a written document.

For example, on an indictment against certain election judges for a false return of votes, where witnesses checked off persons as they voted by marks made by them on a copy of the official list of voters, the government may put the copy of the official list in evidence, though each witness is unable to remember what names were checked by himself individually or even to identify on the list itself the check marks made by him.

"This, as we have seen from the facts stated, is not the case of the use of a book or entry for the mere purpose of refreshing the faded recollection of a witness. But it is the case of a witness who does not profess to be able to repeat from memory all the details of the transaction in question, but testifies that he made correct entries at the time of the transaction as it progressed, and that he knows that such entries were made in accordance with the truth, and that they faithfully represent the whole transaction as it occurred; and the question is, whether in reason, or upon any well settled doctrine of

law, such entries ought to be excluded as evidence, when offered in connection with the testimony of the witness? We certainly know of no decision in this State that would require the exclusion of such evidence; nor are we aware of any established principle that requires it. On the contrary, we think both decision and principle fully justify its admission." Owens *v.* State, 67 Md. 307, 312 (1887).

So an absence from the appropriate record of a license to the defendant is circumstantial evidence of the fact that he is unlicensed. Briggs *v.* Rafferty, 14 Gray, 525 (1860).

Separation of Witnesses. — The presiding judge may order that all witnesses, except parties, those witnesses who have testified, and the witness on the stand for the time being, withdraw from the court room, whenever in his opinion the interests of justice seem to require such a course.

"There is no doubt that it is a matter entirely within the discretion of the judge, whether the witnesses shall be excluded or not, while the other witnesses on the same side are giving in their testimony." Benaway *v.* Conyne, 3 Chandler (Wis.) 214 (1851); Erissman *v.* Erissman, 25 Ill. 136 (1860); Wilson *v.* State, 52 Ala. 299 (1875).

So in criminal cases. "It is a matter in the discretion of the court whether the witnesses shall be separated or not during their examination." State *v.* Fitzsimmons, 30 Mo. 236 (1860); Wilson *v.* State, 52 Ala. 299 (1875); Porter *v.* State, 2 Ind. 435 (1850); People *v.* Green, 1 Parker's Cr. Rep. 11 (1845); Zoldoske *v.* State, 82 Wis. 580 (1892); Com. *v.* Follansbee, 155 Mass. 274 (1892); Com. *v.* Thompson, 159 Mass. 56 (1893); Kelly *v.* People, 17 Colo. 130 (1891); State *v.* Hagan, 45 La. Ann. 839 (1893); Holder *v.* U. S., 150 U. S. 91 (1893); People *v.* Machen, 101 Mich. 400 (1894); Murphey *v.* State, 43 Neb. 34 (1894).

Both sides may join in the motion. State *v.* Sparrow, 3 Murph. 487 (1819).

Such a request is usually granted, as but a slight inconvenience can be suffered by granting it, while its refusal may be a severe injury to a meritorious suitor.

"Though a matter in the discretion of the court, such a request from either party is usually allowed." State *v.* Fitzsimmons, 30 Mo. 236 (1860).

"Upon the motion or suggestion of either party, such a direction as that in question is usually given." Holder *v.* U. S., 150 U. S. 91 (1893).

"The order for such an examination may be made by the court of its own motion, if deemed essential to the discovery of the truth, and should rarely, if ever, be withheld when moved for by either party." Wilson *v.* State, 52 Ala. 299 (1875).

"The separation of witnesses is not a matter of right but of favor —a favor, it is true, rarely refused." Porter *v.* State, 2 Ind. 435 (1850).

"The order to separate witnesses should be rarely withheld, but the accused is not entitled to it as a matter of right." State *v.* Hagan, 45 La. Ann. 839 (1893).

In certain states the practice allows no discretion to a trial court to refuse a separation of the witnesses, if seasonably requested. Thus in Tennessee, the exclusion of witnesses from the court room while their associates are testifying is spoken of as a "right," and only the details are left to the discretion of the trial court. "The practice of examining the witnesses separate and apart from each other, at the request of either party, is invaluable in many cases for the ascertainment of truth, and the detection of falsehood. Such has been the experience of wise men in all ages, from the days of Daniel, that divinely-inspired Judge, down to the present time. By our practice, it is the right of parties to demand of the court an order that the witnesses shall not hear each other examined, or shall be kept together, which is called 'a rule,' or 'putting the witnesses under a rule.' But whether they shall be locked up and not permitted to disperse under any circumstances, or be ordered to keep out of the court house, we think depends entirely upon the sound discretion of the judge, governed and regulated by the circumstances of each particular case. It would be a very oppressive exercise of this discretion to keep them confined and not permit them to eat or disperse for any purpose, during a long trial, without some very strong cause appearing in some tangible form. On the other hand, this discretion should not give too loose a rein to the witnesses, against the consent of the parties, so as to defeat the great object of the rule. But all this we think, from the necessity of the case, must be left to the discretion of the circuit judge, and it would be very dangerous for this court to undertake to regulate him in such matters of practice, unless some plain rule was prescribed in the authorities, or laid down by the legislature on the subject." Nelson *v.* State, 2 Swan (Tenn.), 237, 257 (1852).

So in West Virginia. "I think it pretty well settled at this day in this country, that in all cases, whether civil or criminal, it is the duty of the courts to separate the witnesses if asked by either party." Gregg *v.* State, 3 W. Va. 705 (1869).

In North Carolina, a majority of the court in an early case apparently speak of the granting of a motion for exclusion as being a matter of right. State *v.* Sparrow, 3 Murph. 487 (1819). "Whatever may be the origin of the practice of sending out the witnesses for the prosecution, I am of opinion that usage has, here at least, matured it into a right, which ought to be preserved with equal care for the State and the accused. The object of it is the ascertainment

of truth, and the detection of a previous concert among witnesses, to impute guilt to an innocent man, or to screen a guilty one from the penalty of the law. The interests of public justice will be best consulted by allowing no advantage to the State which is not enjoyed by the accused, whom the law regards as innocent until he be convicted. I can perceive no safe medium between receiving it as a right, or abolishing it altogether. If it be understood that it is accorded to the prisoner as a matter of indulgence, and, therefore, that a mutual observance of it shall, in the event of his conviction, be dispensed with, a temptation to abuse will be offered to witnesses and prosecutors, the effect of which cannot always be counteracted by the utmost vigilance of the law officers of the State." State *v.* Sparrow, 3 Murphy, 487 (1819). To the same effect: Rainwater *v.* Elmore, 1 Heisk. 363 (1870); Smith *v.* State, 4 Lea, 428 (1880); Johnson *v.* State, 14 Ga. 55 (1853); State *v.* Zellers, 7 N. J. Law, 220 (1824).

It is not disobedience of an order of separation for a witness to listen to the reading of the pleadings. Of such a witness, the supreme court of Alabama say: "He was not, however, within the rule. He had not heard any of the evidence introduced on the trial, and the rule does not contemplate the exclusion of a witness because he may have heard the reading of the indictment or other pleading in the cause." Wilson *v.* State, 52 Ala. 299 (1875); Roberts *v.* Com. 94 Ky. 499 (1893).

"The rule does not apply to attorneys or officers of the courts." Gregg *v.* State, 3 W. Va. 705 (1869).

So of court officers. Kelly *v.* People, 17 Colo. 130 (1891). And of an attorney not engaged in the case. State *v.* Ward, 61 Vt. 153 (1888). See also, Webb *v.* State, 100 Ala. 47 (1893).

"The rule is provided merely to prevent the testimony of one witness from influencing the testimony of another." Cook *v.* State, 30 Tex. App. 607 (1892).

Not only the granting of the order of separation but its details are discretionary with the court and this discretion will be so exercised as to effectuate the object of the rule. For instance, a limitation may be placed upon the right of attorneys in the case to confer with witnesses under the rule. "From the above authorities it will be perceived that the order of placing witnesses under the rule and the terms of the order are confided, in a great measure, to the sound discretion of the judge. But, whilst this is so, we apprehend that discretion in no case should be exercised in such a manner as would likely defeat the very object and purposes for which it is invoked; and a rule or 'a uniform practice' which is likely to produce such results, it seems to us, would be 'more honored in the breach than the observance.' There are rare exceptional cases where it might be proper to permit attorneys to converse with their own witnesses who

are under the rule, but this privilege, it seems to us, should be limited upon condition that the conversation be had and held in the presence and hearing of some officer of the court; in this way, we apprehend, the security of the rule may be protected and no injustice done." Brown *v.* State, 3 Tex. App. 294, 312 (1877).

And the court may permit a witness to testify who was not named as a witness at the time of an excluding order and who has heard the evidence of preceding witnesses. State *v.* Sparrow, 3 Murph. 487 (1819). And, in general, the court may permit a particular witness to testify as an exception to the order of separation. Cook *v.* State, 30 Tex. App. 607 (1892); Hinkle *v.* State, 94 Ga. 595 (1894); State *v.* Whitworth, 29 S. W. (Mo.) 595 (1895). So the court can permit a party to remain in court while other witnesses are "put under the rule." "The fourth error assigned is that the court below erred in permitting the prosecuting witness Walker, to remain in the court-room, having excluded the other witnesses. The matter of the exclusion of any and all witnesses from the court-room during the progress of the trial is wholly in the discretion of the court, and will not be reviewed, except for gross abuse. No such abuse has been shown here." Haines *v.* Territory, 3 Wy. 168 (1887).

"It was also held, when the case was here before, that after ordering the sequestration of the witnesses, the court should not, in permitting one of them, who was a brother of the accused, to remain in the court-room to assist in the defence, have granted this permission on condition that he would not be introduced as a witness. At the last trial the witnesses were again sequestered, and the court applied the order of sequestration to this brother of the accused, as well as to the other witnesses in the case, and required him to retire from the court-room, during the trial. We thought, when the case was here before, and we still think, that the court might, with propriety, have allowed the brother to remain and assist in the defence; but we shall not undertake to control the discretion of the trial judge in a matter of this kind, no reason appearing in the record which would justify this court in so doing." May *v.* State, 94 Ga. 76 (1894).

But the court's power is limited. Where the defendant's counsel moved "not only to exclude the plaintiff's witnesses, while his other witnesses were testifying, but also during the opening of the case upon the part of the plaintiff, and the reading of the declaration," the trial court ruled that it had no power to grant such a motion. Held, no error. Benaway *v.* Conyne, 3 Chand. 214 (1851).

Consequences of Disobedience.—Precisely what follows when witnesses disobey the court's order requiring them to be absent from the court-room while their fellows are testifying is not entirely settled. It is not questioned that the order separating the witnesses is one which the court is legally entitled to make. And that refusal

to comply with it is a contempt of court which may be punished as such. The mooted point is as to whether the offending witness should be refused the right to testify. "If the witness disregarded the order of the court in the premises, he was guilty of a contempt for which he might be punished, but the act would not render him incompetent to testify." Grimes *v.* Martin, 10 Ia. 347 (1860); People *v.* Boscovitch, 20 Cal. 436 (1862); State *v.* Salge, 2 Nev. 321 (1866); Holder *v.* U. S. 150 U. S. 91 (1893); Com. *v.* Brown, 90 Va. 671 (1894); Bulliner *v.* People, 95 Ill. 394 (1880); Hubbard *v.* Hubbard, 7 Ore. 42 (1879).

"The witness may be punished, as for a contempt, by fine and imprisonment for violating the order of the court. So also may any party or person who procures or abets such violation. And if the party who wishes to examine the witness abets the violation of the order of the court, he may be punished by excluding the evidence of the witness; or at least this seems to be the weight of authority up to the present time. But all this is punishment for a supposed contempt of the court; and the guilt of the party punished must either come under the personal and judicial cognizance of the court, or it must be proved to the satisfaction of the court by evidence." Davenport *v.* Ogg, 15 Kans. 363 (1875).

The course of the offending witnesses is also obviously matter of comment to the jury as to the credibility of the witness. State *v.* Sparrow, 3 Murph. 487 (1819); State *v.* Brookshire, 2 Ala. 303 (1841); Grimes *v.* Martin, 10 Ia. 347 (1860); Davenport *v.* Ogg, 15 Kans. 363 (1875); Keith *v.* Wilson, 6 Mo. 435 (1840); State *v.* Salge, 2 Neb. 321 (1866); Laughlin *v.* State, 18 Ohio, 99 (1849); Taylor *v.* State, 130 Ind. 66 (1891); Holder *v.* U. S. 150 U. S. 91 (1893); State *v.* Lee Doon, 7 Wash. 308 (1893); Com. *v.* Brown, 90 Va. 671 (1894).

Where it is proposed that the punishment take the form of a refusal to allow the offending witness or witnesses to testify in the cause, the obvious consideration is not lost sight of that such a punishment usually falls, not upon the offender himself but upon the person to whom his evidence is of importance, and who may be entirely innocent in the matter. State *v.* Sparrow, 3 Murph. 487 (1819). "The disposition to be made of a witness and his testimony, when he disobeys the order excluding him from the court-room during the examination, is obliged to rest greatly in the discretion of the court. Whether his testimony should be excluded or not, must depend on circumstances. In some cases, to do so would be the just deserts of the party calling him. In others, it would be a great hardship. The better course would be to punish him for contempt, and admit his evidence." Bell *v.* State, 44 Ala. 393 (1870).

"Where the order of the Court has been made for the witnesses to retire, and be examined out of the hearing of each other, if a

witness remains in violation of the order, it furnishes strong ground of suspicion, that the witness is not fairly disposed in the cause, and that he wishes to avail himself of the testimony of the other witnesses, in order to make his statements as potent as possible, by making them correspond with theirs.

Where, too, a party in interest in the cause, after the order has been made, should procure his witnesses to be present in violation of such order, it is equally suspicious that he intends a similar degree of wrong and unfairness. On the other hand, when we consider the little control that a party can have over his witnesses; the little attention he is likely to be able to give to their movements; the crowds and the confusion that generally exist during exciting trials, rendering it impossible, to note who are present; the questions that may arise on the trial, that could not be anticipated, and which may require bystanders to be called in as witnesses, who have been present and heard the other witnesses testify, — these and other considerations which might be presented, render it difficult, and we think impossible, to establish any general rule of exclusion that would not in many cases deprive parties of important and necessary testimony, for the fair presentation of their cause. Nor do we find that any such rule has been established in the United States." Laughlin *v.* State, 18 Oh. 99 (1849).

So in Indiana. "The question here presented received a careful consideration in the cases of Davis *v.* Byrd, 94 Ind. 525; Burk *v.* Andis, 98 Ind. 59; and State, *ex rel.*, *v.* Thomas, 111 Ind. 515.

The rule to be deduced from these cases is that, where a party is without fault and a witness disobeys an order directing a separation of the witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility. We are not called upon in this case to inquire what the rule would be in a case where the party had connived at the presence of a witness in violation of the order of the court, or where he had knowingly permitted him to remain, as, in this case, it does not appear that the appellant had any knowledge of the witness' presence in the court-room." Taylor *v.* State, 130 Ind. 66 (1891).

And it has been further considered that it is hardly advantageous to permit a witness, who perhaps testifies unwillingly for the side that called him, to avoid an unpleasant legal obligation by the simple expedient of disobeying the order of the court. "A hostile witness should not have the power, by violating an order of the court, to deprive an innocent party of his testimony. Nor should the ignorance, mistake, misapprehension, or inadvertence on the part of the witness, have the effect to deprive an innocent party of his testimony. The testimony of the witness should be received, and should go to the jury; but the conduct of the witness may also

be shown to the jury, for the purpose of affecting his credibility." Davenport *v.* Ogg, 15 Kans. 363 (1875).

In exercising its discretion, an important consideration with the court has been as to what may be assumed to have been the effect upon the evidence in the case itself of the refusal to obey the decree.

Where this disobedience to the court's order is committed by witnesses who testify to a fact which is of but slight probative force or strongly proved in other ways, much less reason exists for refusing to hear the offending witnesses. So the supreme court of Missouri, in declining to exclude from the witness stand certain of the plaintiff's witnesses who had disobeyed the order of the court, say: "It is apparent that the witnesses were not in such a situation from hearing the testimony that the exercise of a sound discretion required their exclusion. The matter about which they testified in common was the spuriousness of the notes, a point on which the cause did not turn, and a matter capable of being placed beyond all doubt or cavil by testimony, had it been deemed important." State *v.* Fitzsimmons, 30 Mo. 236 (1860).

So where the testimony of the offending witness is on a subject-matter different from that covered by the witnesses whose evidence he had heard, the reason for excluding the witness does not apply. "The rule is provided merely to prevent the testimony of one witness from influencing the testimony of another. Willson's Crim. Stats., sec. 2318. In this instance we do not believe the trial judge has abused his discretion, nor that the defendant's rights have been in any manner prejudiced by the admission of the testimony of McCaskill. As stated above by the learned trial judge, the witness McCaskill's testimony was with regard to matter not testified to by any other witness in the case, and it is not shown that his testimony was or could in any manner have been influenced by the other witnesses whose testimony he had heard before giving his own." Cook *v.* State, 30 Tex. App. 607, 612 (1892).

These considerations and others have influenced the promulgation of a rule that, as in other cases of contempt, it is entirely discretionary with the court whether the offending witness shall be allowed to testify. "If an order is made that the witnesses be separated and it is disobeyed, it is a matter of discretion with the court whether the disobedient witness shall be examined or not." State *v.* Fitzsimmons, 30 Mo. 236 (1860); Porter *v.* State, 2 Ind. 435 (1850); Jackson *v.* State, 14 Ind. 327 (1860); Grant *v.* State, 89 Ga. 393 (1892); State *v.* Hagan, 45 La. Ann. 839 (1893); Bulliner *v.* People, 95 Ill. 394 (1880); King *v.* State (Tex.), 29 S. W. 1086 (1895).

The same rule applies where the secluded witness, before testifying, has "mingled with persons who had heard the testimony of certain of the witnesses." Porter *v.* State, 2 Ind. 435 (1850).

Or has remained in the court room after giving his direct examination. Sartorius *v.* State, 24 Miss. 602 (1852).

And so if a witness in a criminal case, where the parties were ordered to have their witnesses placed under the rule, is not called and is not put under the rule, it has been held that such witness might be refused "in the absence of any offer to show either — First, any reason or excuse for not having complied with the order of the court placing the witness under the rule; or, second, the materiality of the testimony." Trujillo *v.* Terr. (New Mex.) 30 Pac. 870 (1892).

"The propriety of excluding the witness who had disobeyed the order of the court, is the only question remaining to be disposed of. This rule, it appears from all the authorities, is not an inflexible rule, but the exclusion of a witness under it must depend somewhat on the discretion of the court. The circumstances which must control this discretion are well settled. If it appears that the witness has disobeyed, by the consent or procurement of the party, the court may very properly exclude him. Dyer *v.* Morris, 4 Mo. 214 (1835). In some cases, where the witness has been contumacious and purposely transgressed the order, this circumstance has been held sufficient to justify the court in excluding him. But I have seen no case in which it appeared that the disobedience of the witness was owing to his misapprehension of the object or nature of the order, and where neither the party or his counsel were privy to such disobedience, in which the court has been held warranted in excluding the witness. Indeed, if such an inflexible rule did exist in any of the courts of this country, it might well be questioned whether it would not be sounder policy to sacrifice the practice altogether, rather than endanger more vital principles than can be involved in the blind adhesion to a rule of court, however reasonable and right in ordinary cases." Keith *v.* Wilson, 6 Mo. 435, 441 (1840); State *v.* Gesell, 124 Mo. 531 (1894).

As witnesses to the character of a witness usually are called for a special purpose and are not within the mischief sought to be remedied by the separation of witnesses, such witnesses are frequently made an exception to the operation of such an order.

But it is within the discretion of the court to apply the rule to a witness to character. Trujillo *v.* Terr. (New Mex.) 30 Pac. 870 (1892).

The same reason apparently applies also in the case of experts.

Many courts have gone so far as to deny the right of a trial court, especially in criminal cases, to exclude evidence offered by a party who has not contributed to the disobedience of the witness.

The highest court of Nevada adopts this view.

"During the trial some of the defendant's witnesses came in and heard a part of the testimony for defense, and for this reason were

afterwards excluded from testifying. The record does not show how much of the evidence they heard, whether their presence was accidental, and a mere oversight in the witnesses, or whether it was a deliberate disobedience of the order of the Court. Nor does the record show that the defendant himself was at all blamable for their presence. Being a prisoner at the bar, on trial, it is hardly presumable the defendant could have controlled the witnesses. No misconduct on their part (in which the defendant did not participate) could deprive the prisoner of his right to have the testimony. If the witnesses wilfully disobeyed the orders of the Court, they laid themselves liable to punishment for contempt, and threw suspicion on their testimony, but did not affect the defendant's right to have the benefit of their testimony as far as it was worth anything." State *v.* Salge, 2 Nev. 321 (1866).

So in Washington.

"The third assignment, namely, that the court erred in not allowing appellant's witness to testify is, in our judgment, more serious, and involves a substantial right of the defendant, a right which goes to the life of the defence, namely, a right to have witnesses examined in his behalf. It appears from the record that the court had made an order for the exclusion of the witnesses during the progress of the trial. Lee Chu had been subpœnaed on the part of the defendant, and appeared in the court room at the opening of court on the third day of the trial. He had no knowledge of the order of the court made for the exclusion of witnesses during the progress of the trial, and remained in the court room during part of the examination of the defendant, and, when called as a witness, responded from his seat. The state objected to his being allowed to testify for the reason that he had disobeyed the order of the court, which objection was sustained.

"On this question also there is some conflict of opinion, some of the old authorities holding that under such circumstances the witness should be excluded; but this rigid rule is not now sustained by any of the modern appellate courts, excepting in special cases under the revenue laws, where collusion is the main obstacle with which the government has to contend. The courts are, however, divided on the question as to whether it is a matter that can be left to the discretion of the trial court, or whether the exclusion of the witness under any circumstance is reversible error; but an investigation of the authorities convinces us that the great weight of modern authority is to the effect that the judge has no right to deprive a defendant of the right to have his witnesses examined on his behalf on account of the mistake of the witnesses. This rule, we believe, is founded on sensible and equitable principles, and does not leave the rights of a defendant dependent upon either the caution or carelessness of the witnesses, or subject them to the collusion of an

unfriendly witness with his enemies. The punishment of a witness for violation of the court's order will practically secure the enforcement of the order without depriving the defendant, who is in no way in fault, of the means to obtain his rights." State *v.* Lee Doon, 7 Wash. 308 (1893).

And Virginia. Com. *v.* Brown, 90 Va. 671 (1894).

And Oregon. "It is also claimed that the county court committed error in refusing to allow John Hamilton, a witness for appellants, to testify, on the ground that he was present in the court-room, in violation of the order of the court excluding the witnesses from the court-room during the trial. This was error in the court unless appellants were in complicity with the witness. The witness might have been punished for contempt in disobeying the order of the court, but an innocent party should not be deprived of the evidence on that account." Hubbard *v.* Hubbard, 7 Ore. 42 (1879).

In California, also, the violation of the order of separation is no ground for excluding the evidence.

"The Attorney General very properly confesses error in the present case. If the witnesses offered disregarded the rule of the Court excluding their presence, until called, during the progress of the trial, the court might have punished them as for a contempt. The fact constituted no ground for the exclusion of their testimony. The defendant could not enforce the rule, and to deprive him of the benefit of their testimony for its disobedience, without fault on his part, was manifestly unjust and illegal." People *v.* Boscovitch, 20 Cal. 436 (1862).

So in New Mexico. "The better rule seems to be that while the trial judge has the discretion to refuse to allow such witness to be examined, and that on satisfactory proof that such witness had been purposely retained in the court room in violation of the rule he should refuse such permission, yet, if it should appear that the witness had violated the rule without the knowledge or procurement of the accused, it would be the duty of the court to allow him to be examined 'subject to observation as to his conduct in disobeying the order.'" Trujillo *v.* Territory (N. M.), 30 Pac. 870 (1892).

So in a criminal case in Maryland where the trial court refused to hear a witness for the defendant who had violated an order of separation, the court of appeals reversed the ruling. "Since such great care has been taken to secure the right of an accused person to prove the truth relating to the accusation against him, it would be very strange, if he should forfeit this most precious privilege by the misbehaviour of a witness. Authorities were cited at the bar for the purpose of showing that in some jurisdictions it was within the discretion of the Judge to refuse to permit a witness to testify under the circumstances stated in the second exception. If the evidence of such witness would show the innocence of a prisoner on trial for

his life, then the discretion of the Judge to admit or reject the testimony amounts to a discretion to take the prisoner's life, or to spare it. The wise, just and merciful provisions of our criminal law do not place human life on such an uncertain tenure. A man's life and liberty are protected by fixed rules prescribed by the law of the land, and are not enjoyed at the discretionary forbearance of any tribunal. All suggestions of this kind are alien to the spirit and genius of our jurisprudence." Parker *v.* State, 67 Md. 329 (1887).

A conservative view, intermediate between the extremes, is announced in State *v.* Hagan, 45 La. Ann. 839 (1893). "The right of excluding witnesses for disobedience to the order, though well established, is seldom exercised in America, but the witness is punishable for contempt." State *v.* Hagan, 45 La. Ann. 839 (1893). "If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court." Holder *v.* U. S. 150 U. S. 91 (1893).

The party who desires to exclude the evidence of such a disobedient witness must, in general, establish to the court the connection of the party offering him with the disobedience itself. Presumably the party is innocent. "No innocent person can be punished in any manner; and no person is to be presumed without proof to be guilty; but on the contrary, every person, in the absence of anything showing the contrary, is presumed to be innocent." Davenport *v.* Ogg, 15 Kans. 363 (1875).

Is this Discretion Reviewable? — Apparently this discretion as to the separation of witnesses, being on a matter relating as it were to the police power of the court, will not be reviewed in an appellate court.

Thus the supreme court of Illinois say: — "It was matter of discretion with the Circuit Court, whether the complainant's witnesses should be separated during their examination, and we will not inquire whether that discretion was judiciously exercised or not." Erissman *v.* Erissman, 25 Ill. 136 (1860).

In several states it is said that the exercise of the court's discretion in admitting or excluding the evidence of an offending witness is not subject to review. "If the rule is made, and a witness remains in court in violation of it, intentionally or by mistake, it is discretionary with the court to permit or refuse his examination, and the exercise of the discretion is not revisable, 1 Green. Ev. § 432; State *v.* Brookshire, 2 Ala. 303. If the witness Calhoun had

been within the rule, we could not revise the action of the court in permitting his examination." Wilson *v.* State, 52 Ala. 299 (1875).

"It was matter in the discretion of the Court. It was for the Court to hear, or refuse to hear, the witness, as seemed best justified by all the circumstances, and no error could be assigned on its ruling upon the point." Jackson *v.* State, 14 Ind. 327 (1860).

In Kansas, on the contrary, where a witness was, in the opinion of the appellate court, improperly rejected, the action of the trial court was reversed as error. "There is no pretense that the witness was not a competent witness in every respect, except that she had violated said order. And there is no pretense that her testimony would not have been relevant and competent, if it had been admitted. Her testimony was excluded simply and solely because she violated said order of the court. This was probably no punishment to the witness, but was rather a severe punishment to the plaintiff, who, as we must presume from the circumstances of the case, was an innocent party." Davenport *v.* Ogg, 15 Kans. 363 (1875).

So in an early Missouri case, the action of the trial court in excluding a witness was reversed. Keith *v.* Wilson, 6 Mo. 435 (1840).

The rule is the same in California. People *v.* Boscoviteh, 20 Cal. 436 (1862).

In Texas, it is said that "The trial judge is invested with a wide discretion with regard to this feature of the trial, and such discretion will not be revised on appeal unless it has been abused." Cook *v.* State, 30 Tex. App. 607 (1892); Murphey *v.* State, 43 Neb. 34 (1894); Webb *v.* State, 100 Ala. 47 (1893).

In Wyoming the discretion of the trial court "will not be reviewed except for gross abuse." Haines *v.* Territory, 3 Wyo. 168 (1887).

In states where the party has a legal right to demand the separation of the witnesses, it follows as a necessary corollary that a refusal or what is tantamount to a refusal to comply with the request is error for which a new trial may be granted. "If the circuit judge were to deny the rule altogether, or so practice upon it as to make it inoperative in the face of an express objection of a party, then it would probably amount to error sufficient to authorize the granting of a new trial, because it would be the denial of a right to the party demanding it, that might be very fatal to his cause." Nelson *v.* State, 2 Swan (Tenn.), 237, 258 (1852).

Examination of Witnesses. — A subject so sweeping and statutory as the examination of witnesses, can hardly be satisfactorily treated within the limitations of a note. The more salient rules may, however, be conveniently summarized.

DIRECT EXAMINATION. — A party, under ordinary circumstances, by presenting a witness to a tribunal in support of his case, en-

dorses him as being worthy of belief. Good faith to the court, whose favorable consideration is invoked, demands at least so much.

"The defendant may not now say that Halpin is untruthful and unworthy of belief, she has presented her as a credible witness." Pollock *v.* Pollock, 71 N. Y. 137, 152 (1877); Young *v.* Wood, 11 B. Monr. 123, 134 (1850). "It is certainly well settled, that when a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief, and the law will not permit him afterwards to impeach the general character of the witness for truth, or to impugn his credibility by general evidence tending to show him to be unworthy of belief." Warren *v.* Gabriel, 51 Ala. 235 (1874). "It seems to be pretty generally conceded that a party cannot impeach his own witness by general evidence of his bad character for truth; and the reasons given for the rule are, that by offering a witness in proof of his case, a party thereby represents him as worthy of belief, and that thereafter to attack his general character for truth, would be not only bad faith toward the court, but in the language of Buller, 'would enable the party to destroy the witness if he spoke against him, and to make him a good witness if he speaks for him, with the means in his hands of destroying his credit if he speaks against him.'" Cox *v.* Eayres, 55 Vt. 24 (1883).

So a party is not at liberty to prove that his own previous testimony is false. "A party is not permitted to assert or present evidence showing one state of facts to be true, and afterwards to assert or prove to the court that his prior evidence is untrue, or not to be relied on. This rule applies to prevent bad faith in presenting a cause. A different rule might be interpreted as lending countenance to perjury." People *v.* Skeehan, 49 Barb. 217 (1867).

It naturally follows from the fact that the party offering a witness endorses his veracity, that the party cannot corroborate his witness by asking him, before he is attacked, whether he has not stated to others the same facts to which he now testifies. Deshon *v.* Merchants' Ins. Co., 11 Metc. 199 (1846); Com. *v.* James, 99 Mass. 438 (1868).

So a witness who has testified for the government, that he forged a certain written instrument at the prisoner's direction, cannot be permitted to corroborate himself by writing in the presence of the jury. "It would open too wide a door for fraud, if a witness was allowed to corroborate his own testimony, by a preparation of specimens of his writing for the purposes of comparison." Williams *v.* State, 61 Ala. 33 (1878).

Leading Questions. — As the witness is presumably friendly to the party calling him, such a person is not permitted to ask him leading questions on material points. People *v.* Mather, 4 Wend. 229, 247 (1830); Snyder *v.* Snyder, 6 Binn. 483 (1814); Lee *v.*

Tinges, 7 Md. 215 (1854); Osborne *v.* Forshee, 22 Mich. 209 (1871); State *v.* Benner, 64 Me. 267, 274 (1874); Stringfellow *v.* State, 26 Miss. 157 (1853); De Haven *v.* De Haven, 77 Ind. 236 (1881); Trammell *v.* McDade, 29 Tex. 360 (1867); Ducker *v.* Whitson, 112 N. C. 44 (1893).

A form of question which simply brings the mind of the witness to the subject-matter of the inquiry is not objectionable as leading. State *v.* Walsh, 44 La. Ann. 1122 (1892); Born *v.* Rosenow, 84 Wisc. 620 (1893).

The court may permit leading questions to be put for the purpose of refreshing the memory of the witness. Coon *v.* People, 99 Ill. 368 (1881); Herring *v.* Skaggs, 73 Ala. 446 (1882); Huckins *v.* Ins. Co., 31 N. H. 238 (1855); Lowe *v.* Lowe, 40 Ia. 220 (1875); Moody *v.* Rowell, 17 Pick. 490, 498 (1835); Cheeny *v.* Arnold, 18 Barb. 434 (1854); Hartsfield *v.* State, (Tex.) 29 S. W. 777 (1895).

Or for any other reason. Carder *v.* Primm, 52 Mo. App. 102 (1892); Funk *v.* Babbitt, 55 Ill. App. 124 (1893); Northern Pacific R. R. *v.* Urlin, 158 U. S. 271 (1895); St. Paul &c. Ins. Co. *v.* Gotthelf, 35 Neb. 351 (1892).

A party cannot testify for his witness by asking a question which assumes the existence of a fact which the party is desirous of proving. Turney *v.* State, 8 Sm. & M. 104 (1847); Davis *v.* Cook, 14 Nev. 265, 287 (1879); Hewitt *v.* Clark, 91 Ill. 605 (1879); Baltimore, &c. R. R. *v.* Thompson, 10 Md. 76 (1856); People *v.* Graham, 21 Cal. 261 (1862); People *v.* Mather, 4 Wend. 229, 248 (1830); Page *v.* Parker, 40 N. H. 47, 63 (1860); Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401 (1891).

The rule forbidding impeachment of one's own witnesses applies equally to the government in a criminal case. Quinn *v.* State, 14 Ind. 589 (1860); Stearns *v.* Merchants' Bank, 53 Pa. St. 490 (1866).

"But it is a well settled rule, that a person shall not be permitted to introduce general evidence for the purpose of discrediting his own witness." Fairly *v.* Fairly, 38 Miss. 280 (1859); Stearns *v.* Merchants' Bank, 53 Pa. St. 490 (1866). "A party may doubtless introduce evidence of any competent and material fact, although that fact has been denied by one of his own witnesses, and although the evidence may have the effect of discrediting that witness; but he cannot be allowed to introduce evidence for the mere purpose of impeaching the credit of a witness whom he has himself produced." Adams *v.* Wheeler, 97 Mass. 67 (1867); Shelton *v.* Hampton, 6 Ired. Law, 216 (1845); Brown *v.* Wood, 19 Mo. 475 (1854); Cox *v.* Eayres, 55 Vt. 24 (1883).

And it is beyond the discretion of the court to admit such evidence. Cox *v.* Eayres, 55 Vt. 24 (1883).

But where the party does not voluntarily produce a witness, but is required by the law to produce him, general evidence of bad character may be given.

So of an attesting witness. "It is a familiar maxim, that where the reason ceases, the rule is inapplicable. No man should be permitted to attack a witness whom he has himself adduced to sustain his cause. But in a case like that under consideration, he may well be regarded as a witness of the law, rather than of the party." Williams *v.* Walker, 2 Rich. Eq. 291 (1846); Whitman *v.* Morey, 63 N. H. 448, 456 (1885).

To the contrary, see Whitaker *v.* Salisbury, 15 Pick. 534 (1834).

So a party cannot discredit his own witness by showing that he has testified differently at another time. "It could only be to disparage the witness, and show him unworthy of credit with the jury, which was inadmissible." Com. *v.* Welsh, 4 Gray, 535 (1855); Sanchez *v.* People, 22 N. Y. 147 (1860).

"It was a direct attempt by the prisoner to discredit his own witness, which the law will not permit." Sanchez *v.* People, 22 N. Y. 147 (1860).

The district-attorney cannot cross-examine one of his witnesses, when recalled by the defendant, as to what he testified before the grand jury. Com. *v.* Hudson, 11 Gray, 64 (1858).

So of that form of impeachment which consists of proofs of contradictory statements at other times. Adams *v.* Wheeler, 97 Mass. 67 (1867); Chamberlain *v.* Sands, 27 Me. 458 (1847); Stearns *v.* Merchants' Bank, 53 Pa. St. 490 (1866); Brewer *v.* Porch, 17 N. J. L. 377 (1840); People *v.* Safford, 5 Denio, 112 (1847); Coulter *v.* American, &c. Express Co., 56 N. Y. 585 (1874); Ellicott *v.* Pearl, 10 Pet. 412 (1836); Cox *v.* Eayres, 55 Vt. 24 (1883).

But see Hemingway *v.* Garth, 51 Ala. 530 (1874).

In Kentucky, the rule is otherwise, by statute. Blackburn *v.* Com., 12 Bush, 181 (1876).

So in Arkansas. Ward *v.* Young, 42 Ark. 542, 553 (1884).

But where the witness is one which the law obliges a party to call, his contradictory statements may be shown. Hildreth *v.* Aldrich, 15 R. I. 163 (1885).

So of an attesting witness. He must be called. But it may be shown that he swore differently at another time. Cowden *v.* Reynolds, 12 S. & R. 281 (1825); Shorey *v.* Hussey, 32 Me. 579 (1851); Thornton *v.* Thornton, 39 Vt. 122 (1866); Dennett *v.* Dow, 17 Me. 19 (1840).

The rule forbidding proof of contradictory statements is limited to cases where the sole probative effect of the proposed evidence would be to discredit the witness. Proof of such statements is not absolutely excluded.

One may ask his witness whether he has made previous inconsistent statements, for the purpose of refreshing his memory (see *supra*, p. 978[26]). Bullard *v.* Pearsall, 53 N. Y. 230 (1873); Humble *v.* Shoemaker, 70 Ia. 223 (1886). Hildreth *v.* Aldrich, 15 R. I. 163

(1885). "We know of no case which holds that, if the witness's recollection is not thus refreshed, the contradictory statements may be put in evidence by other witnesses." *Ibid.*

"A party *bona fide* surprised at the unexpected testimony of his witness may be permitted to interrogate the witness as to his previous declarations alleged to have been made by the latter, inconsistent with his testimony, the object being to probe the witness' recollection, and to lead him, if mistaken, to review what he has said. Such corrective testimony, also, is receivable to explain the attitude of the party calling the witness. But when the sole object of the testimony so offered is to discredit the witness, it will not be received." White *v.* State, 10 Tex. App. 381, 397 (1881).

Or in case a witness has testified differently on the stand and in opposition to the party calling him, the question of whether he has not testified differently at another time may be asked with a view to explaining and justifying the course of the party in offering him as a witness. People *v.* Jacobs, 49 Cal. 384 (1874); Hemingway *v.* Garth, 51 Ala. 530 (1874); Bullard *v.* Pearsall, 53 N. Y. 230 (1873). "Where a witness disappoints the party calling him by testifying contrary to the expectations and wishes of such party, it is a conceded rule that the latter shall not, for the purpose of relieving himself from the effect of such evidence, be permitted to prove that the witness is a person of bad character and unworthy of belief. There is also a great weight of authority sustaining the position that under such circumstances the party calling the witness should not be allowed to prove that he has on other occasions made statements inconsistent with his testimony at the trial, when the sole object of such proof is to discredit the witness. But it is well established that the party calling the witness is not absolutely bound by his statements, and may show by other witnesses that they are erroneous. The further question has frequently arisen whether the party calling the witness should, upon being taken by surprise by unexpected testimony, be permitted to interrogate the witness in respect to his own previous declarations, inconsistent with his evidence. Upon this point there is considerable conflict in the authorities. We are of opinion that such questions may be asked of the witness for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistency. This course of examination may result in satisfying the witness that he has fallen into error and that his original statements were correct, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answers of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry." Bullard *v.* Pearsall, 53 N. Y. 230 (1873).

"We have also held that even at common law, adverse witnesses who tell a story contradicting that which they had previously given may, on the party calling them being thus surprised, be examined as to their former statements in all cases where it would appear that a deception has been practiced on the party examining, and that he has been guilty of no negligence or laches." White *v.* State, 10 Tex. App. 381, 396 (1881). A proper foundation, however, should first be laid "by calling the attention of the witness who is sought to be impeached to the time and place of the statement, so he may have the opportunity of admitting or denying it intelligently." Diffenderfer *v.* Scott, 5 Ind. App. 243 (1892).

Where a witness states facts which militate against the case of the party calling him, the latter is not bound by such evidence. He is quite at liberty, if he can, to prove by other witnesses the fact to be otherwise. That is to say, a party may always go ahead and prove his own case, notwithstanding the conflict or mutiny in his camp. The incidental impeachment of one witness or set of witnesses, by the establishment of this contradiction, is not an infraction of the rule that one who presents a witness endorses his veracity. Stearns *v.* Merchants' Bank, 53 Pa. St. 490 (1866). "If a witness state facts in his testimony which make against the party calling him, that party may contradict him as to facts which are material evidence in the cause, by the introduction of other witnesses; for the object of the additional evidence is not to impeach the first witness, but to prove material facts in the cause, the impeachment of his credit being merely incidental and consequential." Fairly *v.* Fairly, 38 Miss. 280, 288 (1859); Shelton *v.* Hampton, 6 Ired. Law, 216 (1845); Hall *v.* Houghton, 37 Me. 411 (1854); Swamscot Machine Co. *v.* Walker, 22 N. H. 457 (1851); Davis *v.* State, 92 Tenn. 634 (1893); Brown *v.* Wood, 19 Mo. 475 (1854); Olmstead *v.* Winsted Bank, 32 Conn. 278 (1864); Rockwood *v.* Poundstone, 38 Ill. 199 (1865); Chester *v.* Wilhelm, 111 N. C. 314 (1892); Clapp *v.* Peck, 55 Ia. 270 (1880); Norwood *v.* Kenfield, 30 Cal. 393 (1866); Warren *v.* Chapman, 115 Mass. 584 (1874); Wagener *v.* Mars, 27 S. C. 97 (1887); Robinson *v.* Reynolds, 23 Q. B. U. C. 560 (1864); White *v.* State, 10 Tex. App. 381, 395 (1881). The rule is the same where a party calls his adversary as a witness. Warren *v.* Gabriel, 51 Ala. 235 (1874); Mitchell *v.* Sawyer, 115 Ill. 650 (1886); Gardner *v.* Connelly, 75 Ia. 205 (1888).

A party may even contradict, by proving the fact to be otherwise, an attesting witness who, when called by him, denies the execution of the instrument. "A party is not estopped to affirm a fact material to the issue, because it has been denied by a witness called by himself. If it were so, he might be compelled to sacrifice his case by putting on the stand an adverse and corrupt witness whom he

was obliged to call. A party may contradict, but cannot impeach his own witness." Brolley *v.* Lapham, 13 Gray, 294 (1859); Ketchum *v.* Johnson, 4 N. J. Eq. 370 (1843); Duckwall *v.* Weaver, 2 Ohio, 13 (1825).

"Whatever differences of opinion have existed elsewhere, I understand the rule in this State to be settled, that a party may not impeach, either by general evidence or by proof of contradictory statements out of court, a witness whom he has presented to the court as worthy of credit. He may contradict him as to a fact material in the cause, although the effect of that proof may be to discredit him, but he cannot adduce such a contradiction when it is only material as it bears upon his credibility." Coulter *v.* Am. Merchants', &c. Ex. Co., 56 N. Y. 585 (1874).

This is true as to general impeaching evidence, even where a party puts his adversary on the stand. Gardner *v.* Connelly, 75 Ia. 205 (1888).

And whether the mistake of the witness is accidental or by design. "A party calling a witness is not precluded from showing that he mistook and misstated a particular fact; and he may prove the truth of the fact by other competent evidence in contradiction to the testimony of the witness, whether his misstatement was innocent or wilful. And there is no reason why a party should not be permitted to correct his witness as to a date, although he may have led the witness into a mistake of it, by his own interrogatory." Hall *v.* Houghton, 37 Me. 411 (1854). "And this not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief." Norwood *v.* Kenfield, 30 Cal. 393 (1866); Smith *v.* Ehanert, 43 Wis. 181 (1877).

"The rule is, if a witness state facts against the interest of the party calling him, another witness may be called by the same party to disprove those facts, for such facts are evidence in the cause, and the other witness is not called directly to discredit the first, but the impeachment of his credit is incidental, only, and consequential." Rockwood *v.* Poundstone, 38 Ill. 199 (1865). "A party is not then concluded by a fact which a witness, called by him, may unexpectedly state; and he will be permitted to shew by other evidence that he was mistaken." Perry *v.* Massey, 1 Bail. (S. C.) 32 (1828).

Surprise. — A party may in good faith offer a witness, supposing him to be both accurate and friendly. The sequel may show that the witness is either actively or covertly hostile. The requirements of good faith to the court have been discharged, and the entire cause of the party may be involved in meeting, explaining, or offsetting the effect of this unexpected treachery. To aid so difficult a task the court, if satisfied of the necessary facts, may, in its discretion, permit the party to employ many of the resources of

examination *ex adverso* on this witness who is technically but not actually his own witness. Davidson *v.* Arsineau, 10 New Bruns. 289 (1862); McNerney *v.* Reading, 150 Pa. St. 611 (1892); State *v.* Benner, 64 Me. 267 (1874).

'It is apparent that Boyer was an unwilling witness and that his evidence was a surprise to the appellee who called him to the stand. It was proper, therefore, for the learned trial judge, in the exercise of the sound discretion which the law allows him in such cases, to permit a cross-examination of the witness by the party calling him, to show that his previous statements and conduct were at variance with his testimony. This examination 'is not substantive evidence of itself but is permitted to neutralize the evidence given by the witness;' Bank of Northern Liberties *v.* Davis, 6 W. & S. 285." McNearney *v.* Reading, 150 Pa. St. 611 (1892).

In criminal causes, where the prosecuting officers have, as a rule, less opportunity than is usual in civil cases to examine the witnesses produced for the government, less evidence of surprise is required to allow an examination *ex adverso*. "Were not the solicitor allowed to impeach such evidence, a wide door would be opened for the acquittal of the prisoner by false testimony — the prisoner would have nothing more to do, than cause his witnesses to be introduced on the part of the state — they might therefore pass for truth any falsities they might think proper to utter. It is a very easy matter to procure them to be introduced for the state, as the Solicitor General, not being acquainted with the witnesses, would think it his duty to summon and introduce all such persons as he was informed could swear anything against the prisoner." State *v.* Norris, 1 Hayw. (N. C.) 429, 438 (1789).

Where the witness turns out hostile, leading questions may, in the discretion of the court, be put to him by the person calling him. Meixsell *v.* Feezor, 43 Ill. App. 180 (1891).

So of the prosecuting attorney in a criminal case. Com. *v.* Chaney, 148 Mass. 6 (1888).

Although the effect of the questions asked the witness is to "place him in an awkward position." Conway *v.* State, 118 Ind. 482 (1888).

So the inquiry may be made as to previous contradictory statements for reasons stated *supra*. Bullard *v.* Pearsall, 53 N. Y. 230 (1873).

So by statute in Massachusetts. Day *v.* Cooley, 118 Mass. 524 (1875).

But the inquiry must be as to statements on some material point. Force *v.* Martin, 122 Mass. 5 (1877).

Where it appears that the witness was placed on the stand anticipating that he would testify as he actually did testify, there is no

surprise, and the rights of examination *ex adverso* are not allowed. "The rule is that a party cannot impeach the credibility of a witness introduced by him. But to this rule there are certain exceptions, created for the protection of litigants against the fraud of witnesses who are friendly to the opposing party. But where the facts or circumstances suggest the presumption that the party introducing a witness does so with knowledge of the fact that his testimony will not be in accordance with those things which he is professedly introduced to prove, some evidence at least of surprise ought to be required to overcome the presumption, for otherwise the exception would absorb the rule, and let in all the evils which the rule was established to prevent." Moore *v.* Chicago Railroad Co., 59 Miss. 243, 248 (1881).

Cessante ratione, cessat regula. — For reasons stated *infra*, a party may ask leading questions when forced to call his adversary as a witness. *In re* Foster, 44 Vt. 570, 574 (1872); Brubaker *v.* Taylor, 76 Pa. St. 83 (1874).

So of a witness which a party calls, not *suâ sponte*, but as a matter of legal compulsion; — for example, an attesting witness. Dennet *v.* Dow, 17 Me. 19 (1840).

But indulgence is not evidence. The fact that a party is compelled to rely on the testimony of persons in an adverse interest, and that they testify reluctantly, may justify special indulgence in the mode of examination, or have weight in passing upon the testimony, "but it cannot supply the lack of proof or change the tendency of plain statements or admissions." Walker *v.* Detroit Transit Ry. Co., 47 Mich. 338 (1882).

Scope of Direct Examination. — The scope of direct examination is the proof, under the limitations imposed upon the treatment of presumably friendly witnesses, of facts relevant to that side of the issue maintained by the party calling the witness.

It extends to proof of the absence of veracity in an adverse witness. Com. *v.* Billings, 97 Mass. 405 (1867).

Or to sustaining a witness impeached by the adverse interest. Clark *v.* Bond, 29 Ind. 555 (1868); or by the circumstances under which he testifies. Howser *v.* Com., 51 Pa. St. 332 (1865).

Cross-Examination. — "The rule on this subject is almost without exception, and is founded in both reason and the clearest principles of justice, that an examination in chief of a witness by a party, carries with it, the right to a cross-examination by the adverse party; the object being to elicit the whole truth in regard to the particular subject of investigation before the court." Mask *v.* State, 32 Miss. 405, 426 (1856).

Where no opportunity has been afforded for cross-examination, the direct evidence is not admissible. For example, where a government witness fainted before cross-examination, her direct evidence is not competent. People *v.* Cole, 43 N. Y. 508 (1871).

The examination on *voir dire*, being for the information of the court, is under the direction of the presiding justice, who may decline to permit the opposing counsel to cross-examine.

So where the court in a criminal case declined to allow the prisoner's counsel to cross-examine as to the circumstances under which a certain confession was given, that course was sustained. "The other exception relates to the confessions of the defendants. Their counsel requested that a preliminary examination be instituted by the court as to the circumstances under which the confessions were obtained. The purpose of such an examination is to satisfy the judge whether the evidence is admissible. Upon the request being made, it was for him to direct the course of the examination; and he might, if he thought proper, direct the prosecuting officer to conduct it. The defendants' counsel had no legal right to conduct it contrary to the direction of the judge; and the extent to which it should be carried, and its effect upon the admissibility of the confessions, were to be decided by the judge. It is not alleged that the right of cross-examination was abridged when the evidence was offered to the jury." Com. *v.* Morrell, 99 Mass. 542 (1868).

Scope. — Whether the range of cross-examination is limited to an examination of the witness as to facts covered by the direct examination, or, on the other hand, extends to proof of all facts relevant to either side of the case, is a matter in dispute under the American authorities.

A number of leading jurisdictions hold that the limit of cross-examinations is fixed by the range of the direct examination of the witness examined, and that as to all other matters the cross-examining party must make the witness his own by calling him at the proper time. "A party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause." Philadelphia, &c. R. R. Co. *v.* Stimpson, 14 Pet. 448, 461 (1840); Houghton *v.* Jones, 1 Wall. 702 (1863). "A cross-examination should be confined to matters, in relation to which, the witness has been examined in chief, or to such questions as may tend to show his bias or interest. Hopkinson *et al. v.* Leeds, 28 P. F. Smith 396. It was well said in that case by Mr. Justice Williams, 'to permit the defendant under the guise of cross-examination, to give evidence in chief, is not only disorderly, but unfair to the plaintiff.'" Fulton *v.* Central Bank of Pittsburg, 92 Pa. St. 112 (1879); Congar *v.* Chicago, &c. R. R., 17 Wis. 477 (1863); Norris *v.* Cargill, 57 Wis. 251 (1883); Drohn *v.* Brewer, 77 Ill. 280 (1875); *In re* Westerfield, 96 Cal. 113 (1892); Woodbury *v.* District of Columbia, 5 Mackey, 127 (1886); Hanks *v.* Rhoads, 128 Ill. 404 (1889);

Hansen *v.* Miller, 145 Ill. 538 (1892); Krager *v.* Pierce, 73 Ia. 359 (1887); Kelly *v.* Stone, (Ia.) 62 N. W. 842 (1895); Lawder *v.* Henderson, 36 Kans. 754 (1887); Donnelly *v.* State, 26 N. J. Law, 463 (1857); Wendt *v.* St. Paul, &c. R. R., 4 So. Dak. 476 (1893); Northern Pacific R. R. *v.* Urlin, 158 U. S. 271 (1895); Louisville, &c. R. R. *v.* Terrell, (Ind.) 39 N. E. 295 (1895).

The rule is the same in Canada. Morrison *v.* Delorimier, 16 Low. Can. Jur. 137 (1870).

And in equity as at law. Hanks *v.* Rhoads, 128 Ill. 404 (1889).

Or where a party calls his adversary as a witness. Lamb *v.* Ward, 18 Q. B. U. C. 304 (1860).

So where certain conversations between the parties were testified to on direct examination, an additional conversation, though between the same parties, cannot be inquired into on cross-examination. Krager *v.* Pierce, 73 Ia. 359 (1887).

"It is well settled that a cross-examination must be confined to the subject matter of the original examination." Johnson *v.* Wiley, 74 Ind. 233 (1881); Bell *v.* Chambers, 38 Ala. 660 (1863); Chicago, &c. R. R. *v.* Coal & Iron Co., 36 Ill. 60 (1864); Buckley *v.* Buckley, 14 Nev. 262 (1879); Sumner *v.* Blair, 9 Kans. 521 (1872); McCormick *v.* Gliem, 13 Mont. 469 (1893); Stiles *v.* Eastabrook, 66 Vt. 535 (1894).

"If the adverse party desires to examine him as to other matters, he must do so by calling the witness to the stand in the subsequent progress of the cause." Philadelphia, &c. R. R. *v.* Stimpson, 14 Pet. 448 (1840); Houghton *v.* Jones, 1 Wall. 702 (1863); Chicago, &c. R. R. *v.* Coal & Iron Co., 36 Ill. 60 (1864); Congar *v.* Chicago, &c. R. R., 17 Wis. 477 (1863); Woodbury *v.* District of Columbia 5 Mackey, 127 (1886); Austin *v.* State, 14 Ark. 555 (1854); State *v.* Hopkins, 50 Vt. 316 (1877); Hurlbut *v.* Hall, 39 Neb. 889 (1894); Carpenter *v.* Willey, 65 Vt. 168 (1892).

The supreme court of the United States speak of the rule as "long settled." Houghton *v.* Jones, 1 Wall. 782 (1863).

It is not necessary that the subject-matter, in order to be a legitimate subject for cross-examination, should have been fully gone into upon the direct examination. It is sufficient if the matter is touched upon.

"If, as maintained by counsel, the record showed a partial conversation upon this subject, elicited by the plaintiff, there is no question as to the right of the defendants to the whole of such conversation." Wilhelmi *v.* Leonard, 13 Ia. 330 (1862).

It follows where cross-examination is limited by the direct examination that a witness who has been called but not examined in chief cannot be cross-examined at all. Toole *v.* Nichol, 43 Ala. 406 (1869); Brown *v.* State, 28 Ga. 199 (1859); Ellmaker *v.* Buckley, 16 S. & R. 72 (1827); Austin *v.* State, 14 Ark. 555 (1854).

And a party who has not as yet opened his case to the jury cannot cross-examine his opponent's witnesses to prove his case. Ellmaker *v.* Buckley, 16 S. & R. 72 (1827); Wendt *v.* St. Paul, &c. R. R., 4 So. Dak. 476 (1893). To the contrary, see Burke *v.* Miller, 7 Cush. 547 (1851).

The rule applies equally to government witnesses. Brown *v.* State, 28 Ga. 199 (1859).

And therefore, in these jurisdictions, in a criminal case, matter of defence cannot be developed in the course of a cross-examination of the government witnesses. Donnelly *v.* State, 26 N. J. Law, 463, 494 (1857).

Bias, Interest, &c. — Even in jurisdictions where the scope of the cross-examination of witness is limited by the range of their testimony on the direct examination, it is always permissible to cross-examine the witness on the question of bias as between the parties. Fulton *v.* Central Bank of Pittsburgh, 92 Pa. St. 112 (1879); Sumner *v.* Blair, 9 Kans. 521 (1872); Lawder *v.* Henderson, 36 Kans. 754 (1887); State *v.* Montgomery, 28 Mo. 594 (1859); Wendt *v.* St. Paul, &c. R. R., 4 So. Dak. 476 (1893); People *v.* Anderson, 105 Cal. 32 (1894).

Or of his interest in the result of the litigation. Fulton *v.* Central Bank of Pittsburgh, 92 Pa. St. 112 (1879).

Where the evidence of a government witness at the trial differs materially from that given at a preliminary investigation, the extent to which the defendant is to be allowed, on cross-examination, to go into the present surroundings of the witness in order to show the motives inducing him to change his testimony, is within the discretion of the court. People *v.* Dillwood, (Cal.) 39 Pac. 438 (1895).

The difficulties of precisely defining what is legitimate cross-examination, as bearing only on facts developed by the direct examination, where the facts relied on in defence are involved with facts so developed, are well put by the supreme court of California: "It is well settled that a witness cannot be cross-examined, if objection is made, except as to facts and circumstances connected with matters testified to by him on his direct examination. But it is sometimes difficult to say whether a given fact or circumstance is connected with a matter previously stated by him in the sense of this rule. If the broadest latitude be given to the rule, a cross-examination might extend to the whole case, for all the facts of a case may be said to have a certain connection with each other. This rule is, therefore, qualified by another, which is equally well settled. It is, that a party who has not yet opened his own case cannot be allowed to introduce it by a cross examination of the witness of his adversary. In most cases, doubtless, guided by these rules, a Court will be able to prescribe with accuracy the limits to a cross examination; yet it frequently happens that both

sides of a case stand, in part, upon common territory, or are founded in part upon the same or cognate facts. In such cases it is impossible to adhere strictly to the one rule without violating the other, for the question put may apply equally to new matter and to matter already stated, or at least it may be difficult to decide whether it does or does not. Of this class of cases the present is an example." Thornton *v.* Hook, 36 Cal. 223 (1868); Wendt *v.* St. Paul, &c. R. R., 4 So. Dak. 476 (1893); Sayre *v.* Allen, 25 Ore. 211 (1894).

A party always has the right to call out, on cross-examination, any facts within the knowledge of the witness which have a tendency to affect or qualify the evidence he had given in chief, whether it points to the same circumstances about which he has testified or not.

"When a party places a witness upon the stand to testify to facts which tend to support his side of the issue involved, and questions him concerning such facts, it is the right of the opposite party, on cross-examination, to go as fully into the subject as may be necessary to draw from the witness all he may know concerning the transaction about which he has testified, and to put before the jury any pertinent facts which will have a tendency to controvert the testimony which has been given by the witness in favor of the party calling him. A more restricted rule renders cross-examination in many cases nearly valueless, and enables a party, by careful questions to his witness, to give to the jury a one-sided and partial view of the facts within the knowledge of the witness, and effectually to preclude the opposite party from supplementing the witness' statement with the further facts within his knowledge concerning the same transaction, unless he shall make the witness his own, in which case he is supposed to vouch for him as credible, and has also less privilege of searching examination." Detroit, &c. R. R. Co. *v.* Van Steinburg, 17 Mich. 99, 109 (1868).

"Facts and circumstances connected with the subject may be asked for and called out upon cross-examination, and the cross-examining party cannot be restricted to mere parts of a general and continuous subject which constitute a unity." De Haven *v.* De Haven, 77 Ind. 236 (1881).

"It is competent on cross-examination to call out, not only any fact contradicting or qualifying any particular facts stated on the direct examination, but also anything tending to rebut or modify any conclusion or inference resulting from the facts so stated." Wilson *v.* Wager, 26 Mich. 452 (1873).

A witness who on his direct examination simply identified the signature to a receipt from him as the defendant's agent, and offered for the purpose of proving payment, may properly be cross-examined as to the moneys he has received and paid out for and on account of the plaintiff. Patchen *v.* Parke, &c. Co., 6 Wash. 486 (1893).

But it has been held in Louisiana that the range of cross-examination of the defendant's witnesses in a criminal case is tested by the matters stated by the witness in his examination in chief, and not by a consideration of the purpose for which the evidence is offered. State *v.* Taylor, 45 La. Ann. 1303 (1893).

"The question was, doubtless asked for the purpose of testing the accuracy and judgment of the defendant, as a witness, as to his own signature, which constituted the subject-matter of his direct examination. It was, therefore, responsive to the examination in chief. A witness may be asked on his cross-examination any question which tends to test his accuracy, veracity, or credibility. 'The power of cross-examination,' says Greenleaf, 'has been justly said to be one of the principal, as it certainly is one of the most efficacious tests which the law has devised for the discovery of truth. By means of it the situation of the witness with respect to the parties, and the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanor, and of determining the just weight and value of his testimony.' (Greenleaf on Evidence, § 446.) Especially should Courts be liberal in cross-examination of a witness who is himself a party to the suit." Neal *v.* Neal, 58 Cal. 287 (1881).

So thoroughly is cross-examination involved in and essential to the legal value of the evidence of a witness, that where a witness dies between his direct and his cross examination, his evidence is not available to the party which called him. "The common law rule on this subject, was stated by Lord Ellenborough in Cazenove *et al. v.* Vaughn, 1 Maule & Selw. 4, that no evidence shall be admitted but what is, or might be, under the examination of both parties; that it was agreeable to common sense, that what was imperfect and but half an examination, should not be used in the same way as if it was complete. But that if the adverse party has had liberty to cross-examine, and has not exercised it, the case is then the same, in effect, as if he had cross-examined, otherwise the admissibility of the evidence would be made to depend upon his pleasure whether he will cross-examine or not." Kissam *v.* Forrest, 25 Wend. 651 (1841).

A Wider Range. — On the other hand, certain American jurisdictions approve the rule that a witness can be cross-examined "on the whole case." Moody *v.* Rowell, 17 Pick. 490 (1835); Com. *v.* Morgan, 107 Mass. 199 (1871); Fralick *v.* Presley, 29 Ala. 457 (1856); Fulton Bank *v.* Stafford, 2 Wend. 483 (1829); Evansich

v. Gulf, &c. R. R., 61 Tex. 24 (1884); Roberts *v.* Miller, (Tex.) 30 S. W. 381 (1895); Walter *v.* Hoeffner, 51 Mo. App. 46 (1892). But it is said that a defendant cannot be allowed before opening his case to the jury to attempt to prove it by the cross-examination of the plaintiff's witnesses. Mattice *v.* Allen, 33 Barb. 543 (1860). And that as to new matter the right of examination *ex adverso* ceases. People *v.* Court, 83 N. Y. 436 (1881). "Where a witness is called to a particular fact, he is a witness to all purposes and may be fully cross-examined to the whole case." Moody *v.* Rowell, 17 Pick. 490 (1835). The rule is the same in criminal cases. Com. *v.* Morgan, 107 Mass. 199 (1871); State *v.* Sayers, 58 Mo. 585 (1875); Mask *v.* State, 32 Miss. 405 (1856).

Where the only questions asked a witness relate only indirectly to the case under consideration, *e. g.*, where he testifies to the interest of another witness, he may be cross-examined "upon the merits of the cause." Linsley *v.* Lovely, 26 Vt. 123 (1853).

So where a witness testifies only to the court on a preliminary question of fact, he may be cross-examined *to the jury* on the entire case. Linsley *v.* Lovely, 26 Vt. 123 (1853).

Bias, Interest, Animus, etc. — A wide range of cross-examination may be permitted by the court for the purpose of showing the mental attitude of the witness to the case.

Thus, on an action to charge a husband for the value of necessaries furnished his wife, the defendant's son, summoned as a witness for the defendant, may be asked upon cross-examination what was the consideration of a conveyance made to him by his father, and whether it was not fraudulent; and also whether his father lived with him and paid board to him. "There are no positive and fixed limits to a cross-examination. Matters wholly irrelevant are of course to be excluded; but, subject to that rule, much must be left to the judgment and discretion of the court under whose supervision the trial takes place. The conveyance of property from the defendant to his son, the circumstances under which it took place, the influence it would be likely to produce upon his mind, and the general relations subsisting between them, might properly, when considered in reference to the whole testimony of the witness, and his own appearance and demeanor while giving it, have some effect upon the degree of credibility which ought to be awarded to him. Under such circumstances, we do not perceive that the discretionary authority of the court, in fixing the limits of a cross-examination, was here exercised injudiciously; or that the interrogatories proposed to the witness were allowed to extend so far as to afford any just or legal ground of objection to the manner or course of the trial." Mayhew *v.* Thayer, 8 Gray, 172 (1857).

So the accuracy of a witness is always material. Derk *v.* Northern Central R. R., 164 Pa. St. 243 (1894).

CROSS-EXAMINATION AS TO CREDIBILITY. — The range of cross-examination on facts relevant merely as bearing upon the credibility of the witness is within the sound discretion of the court. State *v.* Benner, 64 Me. 267, 279 (1874); Wroe *v.* State, 20 Oh. St. 460 (1870).

"While it is often the case that the relevancy of any particular question, considered without reference to the other facts and circumstances of the case could not be perceived, still it is equally true that if such questions were not allowed on cross-examination, the ends of justice would often be thwarted. . . . A witness may be questioned upon cross-examination, not only on the subject of inquiry, but upon any other subject, however remote, for the purpose of testing his character for credibility, his memory, his means of knowledge, or his accuracy." Amos *v.* State, 96 Ala. 120 (1892).

"To enable the juror to judge of the credibility of the witness, rigid cross-examinations are sometimes necessary and much latitude of inquiry should be permitted. The investigation of truth is sometimes attended with the humiliation and disgrace of the witness and appears to be remorseless." People *v.* Hite, 8 Utah, 461 (1893).

"On cross-examination, a witness may be compelled to answer any questions which tend to test his credibility, or to shake his credit by injuring his character, however irrelevant to the facts in issue, or however disgraceful the answer may be to himself, except where the answer would expose him to a criminal charge." Muller *v.* St. Louis Hospital Ass'n, 73 Mo. 242 (1880).

"A witness may be asked on cross-examination whether he has been in the house of correction for any crime," provided evidence of the record is waived. Com. *v.* Bonner, 97 Mass. 587 (1867). But for a case where the presiding justice was sustained in refusing, *sua sponte*, to allow parol evidence of conviction to be brought out on cross-examination, see Com. *v.* Sullivan, 161 Mass. 59 (1894). Or has been confined to state-prison, — the record not being produced. Wilbur *v.* Flood, 16 Mich. 40 (1867).

Or whether he has been put in jail "for assaulting a poor woman on the street-car and beating her up." State *v.* Pratt, 121 Mo. 566 (1894). Or for stealing. *Ibid.* Or is "working out time" for larceny. Sentell *v.* State, (Tex.) 30 S. W. 226 (1895). Or has been indicted and convicted of a criminal offence. Clemens *v.* Conrad, 19 Mich. 170 (1869); Baltimore, &c. R. R. *v.* Rambo, 59 Fed. Rep. 75 (1893); Chambless *v.* State, (Tex.) 24 S. W. 899 (1894); Roberts *v.* Com., (Ky.) 20 S. W. 267 (1892); Com. *v.* Galligan, 155 Mass. 54 (1891); Texas, &c. Coal Co. *v.* Lawson, (Tex.) 31 S. W. 843 (1895); Wollf *v.* Van Housen, 55 Ill. App. 295 (1894).

The crime must, however, involve moral turpitude. Ford *v.* State, (Ga.) 17 S. E. 667 (1893); State *v.* Warren, 57 Mo. App. 502 (1894).

And the record must of course set out some crime known to the law. "Finding stolen goods" is not such a crime. Norton *v.* Perkins, 67 Vt. 203 (1894).

So a witness may be asked how large a part of his life he has spent in prison. Real *v.* People, 42 N. Y. 270 (1870).

So a witness, for the purpose of discrediting him, may be asked how often he has been in the county jail, and it is unnecessary in such case to produce the record of conviction. State *v.* Martin, 124 Mo. 514 (1894).

The mere fact of the receipt and discharge of prisoners may be proved by parol. Howser *v.* Com., 51 Pa. St. 332 (1865).

Or has led a sexually immoral life. Com. *v.* Curtis, 97 Mass. 574 (1867).

Or has been arrested. State *v.* Taylor, 118 Mo. 153 (1893); Cole *v.* Lake Shore, &c. R. R., 95 Mich. 77 (1893); Hill *v.* State, 42 Neb. 503 (1894).

But whether a witness has been convicted of larceny is a fact which must be established by the record, if inferior evidence is objected to. Newcomb *v.* Griswold, 24 N. Y. 298 (1862); Coleman *v.* State, 94 Ga. 85 (1894); Com. *v.* Sullivan, 161 Mass. 59 (1894).

And in this connection the record cannot be disputed. State *v.* Watson, 65 Me. 74 (1876).

Or has been pleaded guilty to an indictment. Baltimore, &c. R. R. *v.* Rambo, 59 Fed. Rep. 75 (1893).

To the contrary, see Clemens *v.* Conrad, 19 Mich. 170 (1869).

Where parol evidence of a conviction is refused, it is not because the fact of a conviction is not material on the credibility of the witness. The question can be asked if the specific objection be not made that the record has not been produced. State *v.* O'Brien, 81 Ia. 93 (1890).

A female witness may be asked whether, as a domestic servant, she had not left her mistress without consent, and taking things that were not hers. Her denial, however, cannot be contradicted. Stokes *v.* People, 53 N. Y. 164, 175 (1873).

The questions asked must have a bearing upon the credibility of the witness. The mere fact that they tend to disgrace him, without affecting his credibility, is not sufficient to admit them.

So a witness cannot be asked upon cross-examination whether "he was a deserter from the United States Army." Gulf, &c. R. R. *v.* Johnson, 83 Tex. 628 (1892). Or whether he is in the habit of drinking beer. People *v.* Williams, 93 Mich. 625 (1892). Or whether he had not kept his wife as a mistress before marriage. Goins *v.* Moberly, (Mo.) 29 S. W. 985 (1895).

So where the degrading question applies to a subject-matter so remote from that under investigation as to throw no light upon the credibility of the witness *quoad* his present testimony. *In re* Lewis, 39 How. (N. Y.) Prac. 155 (1862).

A witness may be asked whether he had not been discharged from the police force of a certain city. Wroe *v.* State, 20 Oh. St. 460 (1870).

Power of the Court. — Cross-examination as to credit must frequently be limited in time and scope, unless it is to add an almost intolerable burden of annoyance to the frequently unenjoyable position of a witness. Prescott *v.* Ward, 10 All. 203 (1865); Ellsworth *v.* Potter, 41 Vt. 685 (1869).

This discretion is not reviewable except upon satisfactory evidence of prejudice. Comstock *v.* Smith, 20 Mich. 338 (1870).

So far as this limitation is not applied by the good sense and fairness of counsel, it must be imposed by the court. Mayhew *v.* Thayer, 8 Gray, 172 (1857).

To a certain extent this amounts to permitting the reception of relevant evidence to be discretionary with the presiding justice.

But while the credibility of witnesses is an entirely relevant fact, the proof offered to affect it is so frequently indirect and collateral that its regulation frequently partakes of the right of the court to protect witnesses and parties from unseemly abuse.

"It has always been held that within reasonable limits a witness may, on cross-examination, be very thoroughly sifted upon his character and antecedents. The Court has a discretion as to how far propriety will allow this to be done in a given case, and will or should prevent any needless or wanton abuse of the power. But within this discretion we think a witness may be asked concerning all antecedents which are really significant, and which will explain his credibility, and it is certain that proof of punishment in a State prison may be an important fact for this purpose. And it is not very easy to conceive why this knowledge may not be as properly derived from the witness as from other sources. He must be better acquainted than others with his own history, and is under no temptation to make his own case worse than truth will warrant. There can with him be no mistakes of identity. If there are extenuating circumstances, no one else can so readily recall them. We think the case comes within the well established rules of cross-examination, and that the few authorities which seem to doubt it, have been misunderstood, or else have been based upon a fallacious course of reasoning, which would, in nine cases out of ten, prevent an honest witness from obtaining better credit than an abandoned ruffian. We are satisfied there was no error in admitting this testimony." Wilbur *v.* Flood, 16 Mich. 40 (1867). "This character of cross-examination is permitted upon the theory, that where a man's life or liberty depends upon the testimony of another, it is of the highest importance that they whom the law makes the exclusive judges of the facts and the credibility of the witnesses, should know how far the witness is to be trusted. They ought

to know his surroundings and status, so as not to give to one belonging to the criminal class the same credit as he whose character is irreproachable. If, therefore, it should appear on cross-examination, that the witness had a previous criminal experience, or spent a part of his life in jail (Real *v.* The People, 42 N. Y. 270; Thompson on Trials, 458; 1 Greenleaf on Evidence, 455), or was convicted, or has suffered some infamous punishment, or had been in jail on a criminal charge (1 Best on Evidence, 130), it would tend to shake or impair his credit, and the jury should have such information. While it may seem hard to compel a witness to commit perjury or destroy his own standing before the court, it would seem absurd to place the feelings of a profligate witness in competition with the substantial rights of the parties in the case.

"But it is to be remembered, and all the authorities unite in the statement, that the examination must be kept within bounds by the court; that the question should only be permitted where the ends of justice clearly require it, and the inquiry relates to transactions comparatively recent, bearing directly on the present character of the witness, and is essential to the true estimation of his testimony by the jury." Carroll *v.* State, 32 Tex. Cr. Rep. 431 (1893); Tobias *v.* Treist, (Ala.) 15 So. 914 (1894).

"In cross-examining one of defendant's witnesses with a view of locating him at a distant point in Kansas, so as to show that he could not have witnessed the accident, the witness was asked if he was not at the place in Kansas attending a trial for divorce on the charge of adultery, in which he was a co-respondent. He answered that he was not. He was then further asked if he did not have such a case. There is much liberty allowed to the cross-examiner, but it must be utilized *bona fide* for the purpose of eliciting the truth as to the point being examined. It is apparent, from the record, that this question was not put to the witness in this way for the purpose of reminding him that he was in Kansas at the time of the accident, but rather to get a discreditable matter before the jury for purposes not allowable." Ephland *v.* Mo. Pac. R'y Co., 57 Mo. App. 147 (1894).

On an indictment for assault, the complaining witness cannot be asked how frequently he has been drunk since the assault, as the question "had no bearing whatever on the issues involved in the case." People *v.* Sutherland, 104 Mich. 468 (1895). For the same reasons a witness cannot be asked whether he has passed under a name other than his real one. People *v.* Denby, 108 Cal. 54 (1895).

"The antecedents of a witness are a proper subject-matter of inquiry on his cross-examination and the ruling of the court below did not unduly abridge such inquiry, but merely forbids needless prolixity." Toledo, &c. R. R. *v.* Bailey, 43 Ill. App. 292 (1892).

The extent to which the antecedents of a witness can be gone

into on cross-examination is a matter within the sound discretion of the court. Hill *v.* State, 42 Neb. 503 (1894).

The matter being discretionary with the court, it is not error to refuse to permit an inquiry on the matter of religious belief, — for example, to inquire of the witness "whether the spirit of Daniel Webster was present aiding him in the trial, and whether he had been assisted by departed spirits in obtaining information of the defence." "Upon cross-examination, a witness may be asked any questions which tend to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character; and to this end his way of life, his associations, his habits, his prejudices, his mental idiosyncrasies (if they affect his capacity), may all be relevant. Step. Dig. of Ev., Art. 129; 1 Gr. Ev., s. 446. But it is not customary in modern practice to permit an inquiry into a man's peculiarity of religious belief. This is not because the inquiry might tend to disgrace him, but because it would be a personal scrutiny into the state of his faith and conscience contrary to the spirit of our institutions." Free *v.* Buckingham, 59 N. H. 219, 225 (1879); People *v.* Copsey, 71 Cal. 548 (1887).

The range of cross-examination as to collateral matters is discretionary with the court. Dunn *v.* Altman, 50 Mo. App. 231 (1892); Santa Ana *v.* Harlin, 99 Cal. 538 (1893); Thompson *v.* State, 100 Ala. 70 (1893); Bailey *v.* Bailey, (Ia.) 63 N. W. 341 (1895).

"But the substantial right should neither be abridged nor denied." News Pub. Co. *v.* Butler, (Ga.) 22 S. E. 282 (1895).

And while, to test the memory of a witness, much latitude is allowed a cross-examiner, the cross-examination may be prevented from prying into the private affairs of a witness which are foreign to the investigation. Thus, where a jeweller was called to identify a stolen chain made by him some years before, he cannot be asked the approximate amount of business done by him yearly. State *v.* Ellwood, 17 R. I. 763 (1892).

It is the duty of the court not only to protect the rights of litigants, but to prevent useless consumption of the public time, and, consequently, where counsel insist upon needlessly repeating questions or asking irrelevant ones, the court, after cautioning counsel, may order the witness to stand aside. McPhail *v.* Johnson, 115 N. C. 298 (1894); Winslow *v.* Covert, 52 Ill. App. 63 (1893).

The rule imposes no limitation upon the right of parties to develop directly relevant facts upon cross-examination. "So far as the cross-examination of a witness relates either to facts in issue, or relevant facts, it may be pursued by counsel as matter of right; but when its object is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge, and unless abused, its exercise is not the subject of review; nor can the witness be cross-examined as to any facts, which,

if admitted, would be collateral and wholly irrelevant to the matter in issue, and which would in no way affect his credit." Langley *v.* Wadsworth, 99 N. Y. 61 (1885).

Impeachment by Contradictory Statements. — As a further method of impeaching the credibility of a witness, he may be asked, upon cross-examination, whether he has not made statements at other times inconsistent with his present evidence. Sloan *v.* New York Central R. R., 45 N. Y. 125 (1871); Toplitz *v.* Hedden, 146 U. S. 252 (1892).

If the witness do not testify to having made such contradictory statements, the fact may be proved; *provided*, the subject-matter of the statement is material to the case. Keerans *v.* Brown, 68 N. C. 43 (1873); Sloan *v.* New York Central R. R., 45 N. Y. 125 (1871); Woodrick *v.* Woodrick, 141 N. Y. 457 (1894); Welch *v.* Abbot, 72 Wis. 512 (1888); State *v.* Staley, 14 Minn. 105 (1869); People *v.* Furtado, 57 Cal. 345 (1881); Faulkner *v.* Rondoni, 104 Cal. 140 (1894); Beardsley *v.* Wildman, 41 Conn. 515 (1874); Henderson *v.* State, 1 Tex. App. 432 (1876); Schlater *v.* Winpenny, 75 Pa. St. 321 (1874); State *v.* Goodwin, 32 W. Va. 177 (1889); Ray *v.* Bell, 24 Ill. 444 (1860); Goodall *v.* State, 1 Oreg. 333 (1861); Jones *v.* Malvern Lumber Co., 58 Ark. 125 (1893); State *v.* Walters, 7 Wash. 246 (1893); Fremont Butter, &c. Co. *v.* Peters, 45 Neb. 356 (1895); State *v.* Ray, 54 Kans. 160 (1894).

It is not essential to the admissibility of the contradictory statement that its making should be categorically denied. It is sufficient if it is not admitted. Where a witness, upon being asked on cross-examination whether he had not made a certain statement to a particular person at a particular time and place, answered that "he did not know whether he had or not," the refusal of the court to allow the contradicting witness to testify was held to be error. "A witness cannot avoid contradiction by equivocating, nor is the opposite party to be deprived of the right to show that the witness has made contradictory statements, either by his feigned or real forgetfulness. Nothing but an admission that he made the very statement alleged, will deprive the opposite party of the right to prove it." Peck *v.* Ritchey, 66 Mo. 114 (1877); Liddle *v.* Old Lowell Bank, 158 Mass. 15 (1893).

So where the witness testifies that he does not remember having made the contradictory statement. Nute *v.* Nute, 41 N. H. 60 (1860); Ray *v.* Bell, 24 Ill. 444 (1860); Liddle *v.* Old Lowell Bank, 158 Mass. 15 (1892); Smith *v.* State, (Tex.) 20 S. W. 554 (1892); State *v.* Johnson, 47 La. Ann. 1225 (1895).

Such a witness may be contradicted by proof that he afterwards declared that he had made the statement which he has testified he did not remember. Gregg *v.* Jamison, 55 Pa. St. 468 (1867).

So of a witness who says that she does not think she has ever

made the statement in question. Com. *v.* Bean, 111 Mass. 438 (1873).

"It is not necessary that the contradictions should be in terms; statements by the witness, inconsistent with his testimony upon material matters, may be proved against him." State *v.* Kingsbury, 58 Me. 238 (1870); Spohn *v.* Missouri, &c. R. R., 122 Mo. 1 (1894); Liddle *v.* Old Lowell Bank, 158 Mass. 15 (1892); Donahoo *v.* Scott, (Tex.) 30 S. W. 385 (1895).

If the point covered by the alleged contradiction be an immaterial one, the answer of the original witness is conclusive and the denial cannot be contradicted. Shields *v.* Cunningham, 1 Blackf. 86 (1820); Washington *v.* State, 63 Ala. 189 (1879); Combs *v.* Winchester, 39 N. H. 13 (1859); Hamilton *v.* Holder, 2 Pugsley (New Bruns.), 222 (1874); McCulloch *v.* Gore, &c. Ins. Co., 34 Q. B. U. C. 384 (1874); People *v.* Devine, 44 Cal. 452 (1872); Young *v.* Brady, 94 Cal. 128 (1892).

"The court, in such cases, has always a right to inquire of the party offering such counter-testimony, what contradictory statements he expects to prove, or to what points he intends to apply the proposed testimony." Shields *v.* Cunningham, 1 Blackf. 86 (1820).

The rule forbidding proof of contradictory statements on immaterial points is part of a more general rule that "A witness cannot be cross-examined to a distinct collateral fact, for the purpose of afterwards contradicting him." Livingston *v.* Roberts, 18 Fla. 70 (1881); State *v.* Kingsbury, 58 Me. 238 (1870); Com. *v.* Hourigan, 89 Ky. 305 (1889); People *v.* Dye, 75 Cal. 1[illegible]3 (1888); U. S. *v.* White, 5 Cranch C. Ct. 38, 42 (1836); Smith *v.* Royalton, 53 Vt. 604 (1881); Schell *v.* Plumb, 55 N. Y. 592 (1874); Shurtleff *v.* Parker, 130 Mass. 293 (1881); Alexander *v.* Kaiser, 149 Mass. 321 (1889); Gilbert *v.* Gooderham, 6 U. C. C. P. 39 (1856); State *v.* Hawn, 107 N. C. 819 (1890); Lewis *v.* Barker, 55 Vt. 21 (1883); Johnson *v.* State, 22 Tex. App. 206 (1886); Franklin *v.* Franklin, 90 Tenn. 44 (1890); Jones *v.* State, 67 Miss. 111 (1889); Bullard *v.* Lambert, 40 Ala. 204 (1866); Wau-kon-chaw-neek-kaw *v.* U. S., 1 Morris, (Ia.) 332 (1844); Marx *v.* People, 63 Barb. 618 (1872); State *v.* Benner, 64 Me. 267 (1874); Fletcher *v.* Boston & Maine R. R., 1 All. 9 (1861); Johnson *v.* Wiley, 74 Ind. 233 (1881); Jones *v.* M'Neil, 2 Bailey (S. C.), 466 (1831); Seavy *v.* Dearborn, 19 N. H. 351 (1849); Stokes *v.* People, 53 N. Y. 164 (1873); People *v.* Murphy, 135 N. Y. 450 (1892); Union Pacific R. R. *v.* Reese, 56 Fed. Rep. 288 (1893); State *v.* Donelon, 45 La. Ann. 744 (1893); Central R. R. *v.* Allmon, 147 Ill. 471 (1893); State *v.* McGahey, 3 No. Dak. 293 (1893); Battaglia *v.* Thomas, 5 Tex. Civ. App. 563 (1893); Perry *v.* Moore, 66 Vt. 519 (1894).

To permit such contradiction is reversible error. Davis *v.* State, (Tex.) 20 S. W. 923 (1893).

Effect of Established Contradiction. — If the witness whose contradictory statement is shown be a party, the denied statement is itself evidence, upon ordinary principles, as an admission. Brubaker *v.* Taylor, 76 Pa. St. 83 (1874); Lucas *v.* Flinn, 35 Ia. 9 (1872); Rose *v.* Otis, 18 Colo. 59 (1892).

And a foundation for impeachment need not be laid as in case of other witnesses. State *v.* Freeman, (S. C.) 20 S. E. 974 (1895).

While an inconsistent statement by a party would be admitted, on ordinary principles, as an admission (Rose *v.* Otis, 18 Colo. 59, 1892), yet where the effect claimed for the contradictory statement is not that of admission but of impeachment, the same foundation must be laid as in case of any other witness. Browning *v.* Gosnell, 91 Ia. 448 (1894).

In the case of a witness not a party, the denied statement does not become evidence of the facts set forth in it. Its effect is limited to impeaching the present statement of the witness by establishing the fact that he has stated the fact differently at another time. Keerans *v.* Brown, 68 N. C. 43 (1873); Heddles *v.* Chicago, &c. R. R., 74 Wis. 239 (1889); Shields *v.* Cunningham, 1 Blackf. 86 (1820); Peck *v.* Ritchey, 66 Mo. 114 (1877); Dobson *v.* Cothran, 34 S. C. 518 (1890).

To contrary effect, see Henderson *v.* State, 1 Tex. App. 432 (1876). See also Chicago, &c. R. R. *v.* Artery, 137 U. S. 507 (1890).

The further effect is to impeach the witness himself. Keerans *v.* Brown, 68 N. C. 43 (1873); Shields *v.* Cunningham, 1 Blackf. 86 (1820); Henderson *v.* State, 1 Tex. App. 432 (1876); Rose *v.* Otis, 18 Colo. 59 (1892).

And the jury are at liberty to disregard his entire evidence. Blotcky *v.* Caplan, 91 Ia. 352 (1894).

Contradictory statements can only be shown, first, as above stated, when they relate to a material point, and, second, when the attention of the witness whom it is intended to impeach is specifically called to the statement alleged to have been made by such references to time, place, and other circumstances as will enable the witness to identify both the statement and the occasion on which it is said to have been made. Welch *v.* Abbot, 72 Wis. 512 (1888); Sloan *v.* New York Central R. R., 45 N. Y. 125 (1871); McCulloch *v.* Dobson, 133 N. Y. 114 (1892); McKinney *v.* Neil, McLean, 540 (1839); Matthis *v.* State, 33 Ga. 24 (1861); People *v.* Devine, 44 Cal. 452 (1872); Birch *v.* Hale, 99 Cal. 299 (1873); Richardson *v.* Kelly, 85 Ill. 491 (1877); State *v.* Kinley, 43 Ia. 294 (1876); Neeb *v.* McMillan, (Ia.) 60 N. W. 612 (1895); Ayres *v.* Duprey, 27 Tex. 593 (1864); Ledbetter *v.* State, (Tex.) 29 S. W. 1084 (1895); State *v.* Angelo, 32 La. Ann. 407 (1880); State *v.* Lewis, 44 La. Ann. 958 (1892); Hill *v.* Gust, 55 Ind. 45 (1876); Décary *v.* Poirier, 20 Low. Can. Jurist, 167 (1875); Spaunhorst *v.* Link, 46 Mo. 197 (1870); Carder *v.*

Primm, 52 Mo. App. 102 (1892); State *v.* Baldwin, 56 Mo. App. 423 (1893); State *v.* Ragsdale, 59 Mo. App. 590 (1894); Skelton *v.* Light & Power Co., 100 Mich. 87 (1894); Thompson *v.* Wertz, 41 Neb. 31 (1894); Koehler *v.* Buhl, 94 Mich. 496 (1893); Christian *v.* Columbus, &c. R. R., 90 Ga. 124 (1892); Jackson *v.* Swope, 134 Ind. 111 (1892); Rose *v.* Otis, 18 Colo. 59 (1892); Hester *v.* State, (Ala.) 15 So. 857 (1894).

"In no other way can a foundation be laid for putting in the impeaching testimony." Chicago, &c. R. R. *v.* Artery, 137 U. S. 507 (1890).

The rule is the same where the evidence is taken by deposition. Unis *v.* Charlton, 12 Gratt. 484 (1855); Ryan *v.* People, (Colo.) 40 Pac. 775 (1895).

But see, *contra*, Robinson *v.* Hutchinson, 31 Vt. 443 (1859).

Or where the contradictory statement is contained in letters written by the witness. Leonard *v.* Kingsley, 50 Cal. 628 (1875); Randolph *v.* Woodstock, 35 Vt. 295 (1862).

Or where a prior contradictory statement is contained in a deposition. Bradford *v.* Barclay, 39 Ala. 33 (1863).

In Missouri a rule of peculiar strictness apparently prevails. "The universal rule in the practice in this state, so far as we are advised, is to call the witness' attention to the place, time and language he is charged to have uttered, and to ask the same questions of the impeaching witnesses." Spohn *v.* Missouri Pacific R. R., 116 Mo. 617 (1893).

So in Mississippi. "The witnesses sought to be impeached should have been distinctly informed as to time, place and persons present when the supposed conversation took place, and the matter as to which it was designed to call impeaching witnesses should have been clearly and distinctly presented to their attention. And to the matters thus inquired about, the impeaching witnesses should have had their examination strictly confined, and should not have been asked to state what took place on the occasions referred to, and, in response, allowed to go outside of and beyond the issue presented in the predicate laid." Bonelli *v.* Bowen, 70 Miss. 142 (1892).

It follows that an absent witness, whose testimony is admitted to prevent a continuance, cannot be impeached by proof of contradictory statements. St. Louis, &c. R. R. *v.* Sweet, 57 Ark. 287 (1893).

The court may, in its discretion, permit a witness to be recalled for the purpose of laying a foundation for impeaching his testimony. Sanders *v.* State, (Ala.) 16 So. 935 (1895).

And a new trial has even been granted in Louisiana for failure to allow such a foundation to be laid after a brief intermission following upon the closing of the cross-examination of the witness. State *v.* Nixon, 47 La. Ann. 836 (1895).

The requirement that a foundation should be laid by calling the

attention of the witness to the discrediting statement is not universal.

In Connecticut, for example, the discrediting statement is admissible without laying such a foundation. Hedge *v.* Clapp, 22 Conn. 262 (1853).

So in Maine. New Portland *v.* Kingfield, 55 Me. 172 (1867). And New Hampshire. Titus *v.* Ash, 24 N. H. 319 (1851); Cook *v.* Brown, 34 N. H. 460 (1857).

So, also, in Massachusetts. Com. *v.* Hawkins, 3 Gray, 463 (1855); Ryerson *v.* Abington, 102 Mass. 526 (1869); Smith *v.* Metropolitan R. R., 137 Mass. 61 (1884). "Such a course is not necessary under our practice, when the witness is called by the opposite party." Carville *v.* Westford, 163 Mass. 544 (1895).

A Massachusetts statute authorizes such evidence in case a party desires to discredit his own witnesses by proof of contradictory statements. Pub. Stats. Chap. 169, § 22; Com. *v.* Smith, 163 Mass. 411 (1895).

Where a prior statement has been reduced to writing, "a witness is not bound to answer as to matters reduced to writing by himself or another, and subscribed by him, until after the writing has been produced and read or shown to him." Wills *v.* State, 74 Ala. 21 (1883).

Where the contradicting statement is in writing, the writing should be produced for examination and inspection by the witness, and questions as to its contents are not ordinarily admissible. "The reason of the rule applies as strongly to written as to oral statements made by the witness; and when his evidence is sought to be impeached by written statements, alleged to have been made by him, the writing should be first produced, so that he may have an opportunity for inspection and examination. And as the writing is the best evidence of the statement made by the witness therein, questions as to the contents are not ordinarily admissible." Gaffney *v.* People, 50 N. Y. 416, 423 (1872); People *v.* Dillwood, (Cal.) 39 Pac. 438 (1895).

Apparently this principle was not disputed by the court in Chicago, &c. R. R. *v.* Artery, 137 U. S. 507 (1890).

The rule is the same as to contradictory statements made subsequent to the statements made as a witness; a proper foundation must be laid as to such statements.

Where the evidence is by deposition in order to establish a subsequent contradiction, the discrediting party must take out a new commission for the witness.

"The rule is well settled in England, that a witness cannot be impeached by showing that he had made contradictory statements from those sworn to, unless on his examination he was asked whether he had not made such statements to the individuals by

whom the proof was expected to be given. In the Queen's case, 2 Brod. & Bing. 312; Angus *v.* Smith, 1 Moody & Malkin, 473; 3 Starkie's Ev. 1740, 1753, 1754; Carpenter *v.* Wall, 11 Adol. & Ellis, 803. This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enables him to explain the statements referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony.

This rule is generally established in this country as in England. Doe *v.* Reagan, 5 Blackford, 217; Franklin Bank *v.* Steam Nav. Co., 11 Gill & Johns. 28; Palmer *v.* Haight, 2 Barbour's Sup. Ct. R. 210, 213; 1 McLean's R. 540; 2 *Ib.* 325; 4 *Ib.* 378, 381; Jenkins *v.* Eldridge, 2 Story's Rep. 181, 284; Kimball *v.* Davis, 19 Wend. 437; 25 Wend. 259. 'The declaration of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as contained in the depositions, is inadmissible, if objected to. The only way for the party to avail himself of such declarations is to sue out a second commission.' 'Such evidence is always inadmissible until the witness, whose testimony is thus sought to be impeached, has been examined upon the point, and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation.'

This rule equally applies whether the declaration of the witness, supposed to contradict his testimony, be written or verbal. 3 Starkie's Ev. 1741." Conrad *v.* Griffey, 16 How. 38, 46 (1853).

It is immaterial that the contradicting statement is made subsequent to the bringing of the suit. Spaunhorst *v.* Link, 46 Mo. 197 (1870).

Where the discrediting statement was made out of court, and subsequent to the evidence as a witness, it is necessary to recall the witness sought to be impeached for the purpose of laying the usual foundation. Séguin *v.* Rochon, 11 Montreal Legal News, 386 (1888).

The reasons for a contrary rule are given in Tucker *v.* Welsh, 17 Mass. 160 (1821).

The object of the rule requiring that the witness should first be asked whether he has made the contradictory statement alleged is apparently a double one. (1) Fairness to the witness.

"Counsel had no right to limit the witness' answer to a categorical yes or no. The rule requiring that the witness shall be interrogated as to such previous statements, as a preliminary to any offer to prove his prior contradictory statements, as a means of impeaching him, is without aim or meaning, unless it secures to the witness the right and opportunity of explaining what he did say. The law secures to him that right." Washington *v.* State, 63 Ala. 189 (1879); Spaunhorst *v.* Link, 46 Mo. 197 (1870).

Where the witness admits the contradiction, his attempts at explanation, *e. g.*, that he was confused at the time of the first statement, and embarrassed by the absence of his papers, is a collateral matter, and cannot be itself contradicted. Beemer *v.* Kerr, 23 Q. B. U. C. 557 (1864).

But see Ordway *v.* Haynes, 50 N. H. 159 (1870), *contra*.

Where no opportunity has been afforded for laying a foundation, *e. g.*, where the evidence of the original witness is in a statutory deposition taken *ex parte*, the contradicting evidence has been received. McKinney *v.* Neil, 1 McLean, 540 (1839).

But the fact that the witness is now deceased does not affect the operation of the rule. Craft *v.* Com., 81 Ky. 250 (1883).

Where inability to lay a proper foundation is due to the laches or intentional neglect of the impeaching party, the rule requiring a foundation will be enforced and the contradictory statement excluded. "The circumstances under which the former statements of a witness in regard to the subject matter of his testimony when examined in the principal case can be introduced to contradict or impeach his testimony, are well settled, and are the same whether his testimony in the principal case is given orally in court before the jury or is taken by deposition afterwards read to them. In all such cases, even where the matter occurs on the spur of the moment in a trial before a jury, and where the objectionable testimony may then come for the first time to the knowledge of the opposite party, it is the rule that before those former declarations can be used to impeach or contradict the witness, his attention must be called to what may be brought forward for that purpose, and this must be done with great particularity as to time and place and circumstances, so that he can deny it, or make any explanation, intended to reconcile what he formerly said with what he is now testifying. While the courts have been somewhat liberal in giving the opposing party an opportunity to present to the witness the matter in which they propose to contradict him, even going so far as to permit him to be recalled and cross-examined on that subject after he has left the stand, it is believed that in no case has any court deliberately held that after the witness's testimony has been taken, committed to writing, and used in the court, and by his death he is placed beyond the reach of any power of explanation, then in another trial such contradictory declarations, whether by deposition or otherwise, can be used to impeach his testimony. Least of all would this seem to be admissible in the present case, where three trials had been had before a jury, in each of which the same testimony of the witness Johnson had been introduced and relied on, and in each of which he had been cross-examined, and no reference made to his former deposition nor any attempt to call his attention to it. This principle of the rule of evidence is so well understood that authorities

are not necessary to be cited." Ayers *v.* Watson, 132 U. S. 394, 404 (1889).

"The general rule of practice, to insure fairness, requires, if a witness is to be impeached by proof of inconsistent declarations out of court, that such witness should have notice of the time and occasion of such declarations. And such inquiries are so far in the discretion of the court, that it would not be error, in any case, if the court should require a particular statement of the time, place, and occasion when such impeaching declarations were made. Some witnesses, to insure fair dealing, would require the protection of the court, while with others it would be needless." State *v.* Glynn, 51 Vt. 577 (1879).

(2) To establish an unequivocal contradiction.

General questions, such as whether the witness has ever said as claimed, or whether he has always told the same story, are not competent. Henderson *v.* State, 1 Tex. App. 432 (1876). Or as to whether he has not "at various times made different and contradictory statements to different persons." Jones *v.* State, 65 Miss. 179 (1887).

And a witness cannot, upon cross-examination, be required to narrate specified conversations with certain individuals "in order to ascertain whether the witness had given a different version." R. *v.* Mailloux, 3 Pugsley (New Bruns.), 493, 509 (1876).

The specific question must be asked "whether or not he has said or declared that which is intended to be proved;" it is not sufficient to direct the attention of the witness to dates, names, and other attendant circumstances. Higgins *v.* Carlton, 28 Md. 115 (1867).

Where the witness sought to be discredited is a party, as the discrediting statement is itself an admission, and competent as such, it has been held that the ordinary foundation need not be laid. Brubaker *v.* Taylor, 76 Pa. St. 83 (1874); Hunter *v.* Gibbs, 79 Wis. 70 (1891).

To obtain these two ends above mentioned, *viz.* fairness to the witness and the opportunity of securing an unequivocal contradiction, a wide discretion is usually placed in the hands of the court. "To lay the foundation for contradiction, it is necessary to ask the witness specifically whether he has made such statements; and the usual and most accurate mode of examining the contradicting witness, is to ask the precise question put to the principal witness; otherwise, hearsay evidence, not strictly contradictory, might be introduced, to the injury of the parties, and in violation of legal rules. But the practice upon this subject must be, to some extent, under the control and discretion of the court. It is important that the jury should understand that such evidence is collateral, and not evidence in chief; and the witness sought thus to be impeached

should have an opportunity of making explanation, in order that it may be seen whether there is a serious conflict, or only a misunderstanding or misapprehension; and for the purpose of eliciting the real truth, the court may vary the strict course of examination." Sloan *v.* N. Y. Central R. R. Co., 45 N. Y. 125 (1871).

The court may even in its discretion permit proof of contradictory statements without laying the proper foundation. Walden *v.* Finch, 70 Pa. St. 460 (1872).

The abuse of such a discretion is error. *Ibid.*

The contradicting witness can testify only as to statements for which the foundation has been properly laid by calling them to the attention of the witness proposed to be discredited. He cannot state other parts of the same conversation. State *v.* Staley, 14 Minn. 105 (1869). "These witnesses having been called for the sole purpose of impeaching Page, it was only allowable to contradict him as to matters or statements to which his attention had been particularly called, and this having been done, any further conversation was not evidence, and was properly excluded." State *v.* Staley, 14 Minn. 105, 114 (1869).

The interest or bias of a witness is always a material fact within the rule regulating the discrediting of witnesses by proof of contradictory statements. Beardsley *v.* Wildman, 41 Conn. 515 (1874); Combs *v.* Winchester, 39 N. H. 13 (1859); Frazier *v.* State, 42 Ark. 70 (1883); Day *v.* Stickney, 14 All. 255 (1867); People *v.* Austin, 1 Parker, C. R. 154 (1847); People *v.* Brooks, 131 N. Y. 325 (1892); Davis *v.* Roby, 64 Me. 427 (1875); Swift Electric Light Co. *v.* Grant, 90 Mich. 469 (1892); Kent *v.* State, 42 Oh. St. 426 (1884); Hutchinson *v.* Wheeler, 35 Vt. 330 (1862); Cornelius *v.* Com., 15 B. Monr. (Ky.) 539 (1855); Consaul *v.* Sheldon, 35 Neb. 247 (1892).

And a foundation need not be laid for such a contradiction. "It is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him. He is simply seeking to discredit him by showing his hostility and malice; and as that may be proved by any competent evidence we see no reason for holding that he must first be examined as to his hostility." People *v.* Brooks, 131 N. Y. 321 (1892); Frazier *v.* State, 42 Ark. 70 (1883). But see Aneals *v.* People, 134 Ill. 401 (1890).

Accordingly, it is competent to show by cross-examination of a subscribing witness to a will that he has received or been promised a reward for giving testimony, and if this is denied by the witness, admissions or declarations to that effect, made by the witness out of court, may be proved. "The interest which a witness has in the subject of the controversy is a material inquiry, as it bears upon the question of credibility." Matter of Will of Snelling, 136 N. Y. 515 (1893). In the New York case, however, the question is

treated as one of impeachment, by contradictory statements. "The relations which the witness bears to the case are so far relevant to the issue as to admit proof of contradictory statements by way of impeachment when the proper foundation is laid." *Ibid.*

It is not always easy to determine what is "a material point" under the rule authorizing proof of contradictory statements. Much must be left, as in other cases of relevancy, to the sound discretion of the court.

Cases are frequent where no absolute reason presents itself why the decision might not equally well have been the other way.

Thus in a New York case of an alleged contract to support the testator, the statement of a witness, called for another point (and who denied the alleged statement on cross-examination), that the plaintiff ought to have $1,000, was held material, and that the witness could be discredited by proof of having made the statement. Schell *v.* Plumb, 55 N. Y. 592 (1874).

The test laid down for determining a material question is this: Could the subject have been inquired on by the party calling the witness? If so, the subject is one on which a contradiction between statements can be raised upon a foundation properly laid during cross-examination. Combs *v.* Winchester, 39 N. H. 13 (1859).

The same test has also been stated from the standpoint of the cross-examining party. Hildeburn *v.* Curran, 65 Pa. St. 59 (1870). "The test as to whether a fact inquired of on cross examination is collateral, is this: Would the cross examining party be entitled to prove it as part of his own case, tending to establish his plea." Johnson *v.* State, 22 Tex. App. 206, 223 (1886); Com. *v.* Goodnow, 154 Mass. 487 (1891); Carter *v.* State, 36 Neb. 481 (1893).

Privileges of Cross-Examination. — A witness upon cross-examination may be asked leading questions as to matters testified to in direct examination. Harrison *v.* Rowan, 3 Wash. Circ. Ct. 580 (1820).

Redirect Examination, Scope. — The normal scope of re-examination is determined by that of the cross-examination; — which it is designed to supplement, correct, and explain. Sehlencker *v.* State, 9 Brown (Neb.), 241 (1879); Carr *v.* Moore, 41 N. H. 131 (1860); Baxter *v.* Abbott, 7 Gray, 71 (1856); Somerville, &c. R. R. *v.* Doughty, 22 N. J. Law, 495 (1850); State *v.* McGahey, 3 No. Dak. 293 (1893); People *v.* Hanifan, 98 Mich. 32 (1893); Pullman's Palace-Car Co. *v.* Harkins, 55 Fed. Rep. 932 (1893); Robinson *v.* Peru, &c. Co., 1 Okl. 140 (1893); Chicago, &c. R. R. *v.* Griffith, 44 Neb. 690 (1895).

Where the cross-examination is as to inadmissible facts, the re-examination takes the same range. People *v.* Buchanan, 145 N. Y. 1 (1895).

Conversely, a conversation not inquired into upon cross-examination cannot be inquired into upon redirect examination. Dutton *v.* Woodman, 9 Cush. 255 (1852).

Where A's contradictory statements are shown, a proper foundation being laid on A's cross-examination and evidence offered to prove such statements, A can be re-examined as to them. Jaspers *v.* Lano, 17 Minn. 296 (1871); People *v.* Mills, 94 Mich. 630 (1893).

Whether this limitation on the redirect examination shall be rigidly enforced in any specific case is discretionary with the court. Schlencker *v.* State, 9 Brown (Neb.), 241 (1879).

Whether where a witness is impeached by proof of contradictory statement, evidence can be given of general good character, is in dispute. That it can, see Burrell *v.* State, 18 Tex. 713 (1857); Sweet *v.* Sherman, 21 Vt. 23 (1848); Hadjo *v.* Gooden, 13 Ala. 718 (1848); Harris *v.* State, 30 Ind. 131 (1868).

That it cannot, see Frost *v.* McCargar, 29 Barb. 617 (1859); Chapman *v.* Cooley, 12 Rich. L. 654 (1860); State *v.* Archer, 73 Ia. 320 (1887); Brown *v.* Mooers, 6 Gray, 451 (1856); Stamper *v.* Griffin, 12 Ga. 450 (1853).

It follows from the scope of redirect examination that its object is not to enable the plaintiff's witness to repeat his direct statement. Wickenkamp *v.* Wickenkamp, 77 Ill. 92 (1875); Coker *v.* Scheiffer, 16 Fla. 368 (1878).

So the court may, in its discretion, admit upon redirect examination a question which might more properly have been asked upon the direct examination of the witness. Hemmens *v.* Bentley, 32 Mich. 89 (1875).

Or even after the close of the evidence on both sides admit a witness for the plaintiff to set up in evidence a case substantially different from that testified to in his direct examination. Devlin *v.* Crocker, 7 Q. B. U. C. 398 (1850).

Or to correct his previous testimony, and such exercise of discretion does not constitute error unless there is a manifest abuse of discretion apparent. Cherokee Packet Co. *v.* Hilson, 95 Tenn. 1 (1895).

Re-Cross-Examination, Scope. — Re-cross-examination sustains the same relation to the redirect examination that the latter does to the original cross-examination. "Had the second examination by the plaintiffs been confined to what was either explanatory of the first, or in rebuttal of his cross-examination, the examination might have been considered as closed. But the Court having suffered this new matter to be brought out, opportunity should have been extended to the defendants to have interrogated the witness further as to this new matter." Wood *v.* McGuire's Children, 17 Ga. 303 (1855).

MUCH IS DISCRETIONARY WITH THE COURT. — Where a witness was recalled purely to make a correction, it was held to be discretionary with the court to limit the re-cross-examination strictly to the point sought to be corrected. Thornton *v.* Thornton, 39 Vt. 122 (1866).

The court may even refuse to permit a re-cross-examination where, in its judgment, no useful purpose will be served by it. Com. *v.* Nickerson, 5 All. 518 (1862); State *v.* Hoppiss, 5 Ired. Law, 406 (1845); People *v.* Keith, 50 Cal. 137 (1875); Jackson *v.* Filleau, 15 Lower Can. Reports, 60 (1864).

And such exercise of discretion will not be reviewed, unless it has been abused. People *v.* Keith, 50 Cal. 137 (1875).

But it is error not to allow an important witness to correct his evidence on a material point. State *v.* Mays, 24 S. C. 190 (1885).

FURTHER EXAMINATIONS. — Examinations in surrebuttal are discretionary with the court. "The examination of the defendant's daughter in surrebuttal, after she had been examined before, was a matter within the sound discretion of the court. Slight explanations will often explain apparent discrepancies, or exhibit a witness's truthfulness; and a court will not suffer truth to be smothered by form, when a discreet exercise of its power will prevent it." Koenig *v.* Bauer, 57 Pa. St. 168 (1868).

"And the exercise of that discretion will not be reviewed." Goodyear Rubber Co. *v.* Scott Co., 96 Ala. 439 (1892).

A trial court may even, of its own motion, recall a witness for the purpose of clearing up a matter left uncertain upon his examination in its different stages, as conducted by counsel. Snodgrass *v.* Com., 89 Va. 679 (1893).

ORDER OF EVIDENCE DISCRETIONARY. — The wide discretion of the court in moulding the examination of witnesses to the discovery of truth is a marked feature of this branch of the law of evidence.

The court of review will not interpose "except where it sees that injustice has been done through this action." Coker *v.* Hayes, 16 Fla. 368 (1878).

An instance of this is found in the power of the court to admit in evidence, at any time during the trial, facts not introduced at the proper stage. "It is also assigned for error, that the court permitted a witness who had been examined in chief, and cross-examined, to be again called and examined in chief. The manner of examining a witness is entirely within the discretion of the court before whom the witness is produced, and that discretion must be governed, in a great measure, by a knowledge of the character of the witness, and from his demeanor during his examination. A party producing a witness who, whilst deposing, manifests intelligence, candor, and a freedom from all bias for or against either party, would be more liberally indulged than one who introduced a

witness who displayed all the opposite qualities." Brown *v.* Burrus, 8 Mo. 26 (1843); Woolsey *v.* Trustees, 84 Hun, 236 (1895); Consaul *v.* Sheldon, 35 Neb. 247 (1892).

So the court may permit one of the plaintiff's witnesses to be recalled at the end of the defendant's case. Robbins *v.* Springfield St. R. R., 165 Mass. 30 (1895).

So where a plaintiff, desiring to anticipate a defence, offers evidence in chief tending to negative the anticipated defence, it is discretionary with the court to refuse to allow him to accumulate evidence on the same point in rebuttal. York *v.* Pease, 2 Gray, 282 (1854).

CHAPTER IV.

PUBLIC DOCUMENTS.

§ 1479.[1] WRITINGS are divisible into two classes, PUBLIC and PRIVATE. Public writings consist of the acts of public functionaries, in the *Executive*, *Legislative*, and *Judicial* Departments of Government: including, under this general head, the transactions which official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. Foreign acts of State, and the judgments of foreign courts also belong to the class of Public Documents. In the present chapter it is proposed to treat of all such public documents; and the inquiry will be directed first, to the MEANS OF OBTAINING AN INSPECTION OR COPY of them; secondly, to the METHOD OF PROVING them; and thirdly, to their ADMISSIBILITY AND EFFECT.

§ 1480. In former times it was apparently necessary to obtain the sanction of the Attorney-General to entitle any private person to inspect, or take copies of, the *general records of the realm*.[2] At the commencement, however, of the present reign, the Public Record Office Act, 1838, was passed.[3] By it most of these invaluable documents were placed under the charge and superintendence of the Master of the Rolls. The Act contains, indeed, no section directly entitling the public to inspect these documents, or declaring whether they have any, or what, remedy, in the event of their being refused access to them; but, after a preamble stating that "it is expedient to establish one Record Office and a better custody, and to allow the free use of any public records, as far as stands with

[1] Gr. Ev. § 470, in great part.

[2] Legatt *v.* Tollervey, 1811 (Ld. Ellenborough); Doe *v.* Date, 1842 (Williams, J.).

[3] 1 & 2 V. c. 94. See, also, "The Public Records (Ireland) Act, 1867" (30 & 31 V. c. 70), Ir.

their safety and integrity, and with the public policy of the realm," it empowers the Master of the Rolls to make rules "for the admission of such persons as ought to be admitted to the use of such records," and "to fix the amount of fees, if any," to be paid for such use;[1] and authorises either his Honour, or the Deputy-Keeper of the Records, to allow copies to be made of any of the documents "at the request and cost of any person desirous of procuring the same."[2]

§ 1481. In exercise of these powers, the late Lord Langdale directed,[3] that all the public record offices should be open daily, excepting on Sundays and a few holidays,[4]—prescribed a reasonable scale of fees,[5] which were not chargeable at all to "*literary inquirers*,"[6]—and instructed the assistant-keepers to give to all applicants every information and assistance in their power, not merely from the calendars and indexes, but also from their own knowledge of records.[7] Indeed, in a letter to the Premier, shortly after the passing of the Act, he remarked that 'he Records are justly called the *Muniments of the Kingdom and the People's Evidences;* and that they ought to be kept and managed under such arrangements as may afford to the public the greatest facility of using them that is consistent with their safety, while the public should have access to them for the purpose of easily obtaining information upon the subjects to which the records relate, and ought to be enabled easily to obtain authentic copies of all documents, which can be adduced as evidence in the establishment or defence of rights, which are at issue in the course of judicial or Parliamentary proceedings.[8]

§ 1482. The late Lord Romilly, when Master of the Rolls, in 1866, on the opening of the New Search Rooms,[9] abolished all

[1] 1 & 2 V. c. 94 ("The Public Record Office Act, 1838"), § 9; 30 & 31 V. c. 70, § 17, Ir.

[2] 1 & 2 V. c. 94, § 12; 30 & 31 V. c. 70, § 19, Ir.

[3] In 11 Beav. xxii. et seq., the rules are set out at length.

[4] 2nd Rep. of Dep.-Keeper of Pub. Rec. i., Append. p. 14.

[5] Id., p. 15.

[6] Letter of Lords of the Treasury, dated 17th Nov., 1851.

[7] 2nd Rep. of Dep.-Keeper of Pub. Rec. i., App. p. 15.

[8] Dated 7 Jan., 1839, and cited 1st Rep. of Dep.-Keeper of Pub. Rec. App. 67.

[9] Open every day, except Sunday, Christmas Day to New Year's Day inclusive, Good Friday and the Saturday following, Easter Monday and Tuesday, Whit Monday and Tuesday, Her Majesty's Birthday 24th May, and Coronation Day 28th

fees whatever for searches and inspections, permitting each searcher to take notes, or even examined copies, of any records, gratis,[1] and retained only moderate fees for the furnishing of authenticated copies of documents, or for the attendance of clerks as witnesses.[2]

§ 1483. It would be difficult to establish that the *public have a strict legal right to inspect these records, except* as to the *records of the superior courts* of law or equity; and it is doubtful whether the Queen's Bench Division of the High Court would interfere by mandamus to enforce an inspection even of these, unless the applicant could show that he was interested in the document of which he sought inspection.[3] If, too, the disclosure of the contents of any of the general records of the realm, or of any other documents of a public nature, would, in the opinion of the court, or of the chief executive magistrate, or of the head of the department under whose control they may be kept, be injurious to the public interests, an inspection would certainly not be granted.[4]

§ 1484. A general *Record Office*, in lieu of the many repositories which previously existed, has (as contemplated by "The Public Record Office Act, 1838" (1 & 2 V. c. 94)) been established in a building erected on the Rolls Estate in Fetter Lane.[5] To this all the records, formerly deposited in the Tower of London, the Carlton Ride, and the Chapter House at Westminster, and many

June, and days appointed for public fasts or thanksgivings. Hours of attendance from 10 till 4 o'clock, except on Saturday, when closed at 2. See 28th Rep. of Dep.-Keep. of Pub. Rec. p. iv.

[1] "A searcher may take notes, or a full copy of any record, and examine the same with the record with his own agent; but no officer shall examine, correct, or certify such copy or extracts. Tracings are not allowed without permission." 28th Rep. of Dep.-Keep. of Pub. Rec. p. iv.

[2] The table of fees is (see 28th Rep. of Dep.-Keep. of Pub. Rec. App. 2) as follows:—

	£	s.	d.
For authenticated copies, per folio of 72 words:			
Docum. to the end of reign of G. 2	0	1	0
Docum. after reign of G. 2	0	0	6
For attend. at either H. of Parl. to be sworn	1	1	0
Do. do. or elsewhere to give evid.; or with 10 records or less number, each day	2	2	0
Do. at either H. of Parl. for each additional record, each day	0	2	0
For attend. on Master of the Rolls on a Vacatur	1	1	0
Do. to receive mortgage-money	0	5	0
On payment of mortgage-money	0	10	6

[3] See R. *v.* Staffordshire JJ., 1837 (Ld. Denman) and see further *infra*, § 1493.

[4] Ante, §§ 939, 947.

[5] The Public Record Office for Ireland is in Dublin, near the Four Courts.

of those which used to be kept in the Rolls House and Chapel, and in the State Paper Office,[1] have been removed. The Tower adjoining the Chapter House at Westminster (and formerly the prison of the Monastery there), is still the repository for all original Acts of Parliament.

§ 1485. The documents which are now placed under the custody of the Master of the Rolls are very numerous.[2] Very many of the documents in his custody are, it will be observed, not strictly records; but it has been provided,[3] that the word "records" in that

[1] Some of the State Papers of the last half century are deposited in two houses in Whitehall Yard.

[2] Among such records now under the custody of the Master of the Rolls are, mentioned in alphabetical order, the following: *Admiralty* documents, including the records of the Admiralty Courts, the log-books of the Navy, and various branches of the correspondence and documents of the Admiralty and Navy Boards; the *Alienation Office* records; the *Augmentation Office* records; *Chancery suitors'* deeds, books, and documents (see 23 & 24 V. c. 149, § 9; Gen. Ord. in Chanc. 22nd May, 1866; 42 & 43 V. c. 78, Sched. I.; and R. S. C. 1883, Ord. LX. r. 3; Ord. LXI. r. 1); the *Charity Commission* papers; the *Chester Circuit* fines and recoveries, and other records; the *Chirographer's Office* records; Court of *Chivalry* proceedings in some cases; the *Clerk of the Estreats Office*, and the *Clerk of the Nichils Office* records; *Close Rolls*; *Colonial* papers of various sorts; the Superior Courts of *Common Law* records which are more than twenty years old; *Crown Lands* surveys in some cases; *Domesday Book*; the Superior Courts of *Equity* records when more than twenty years old; the records of *First Fruits* and *Tenths*; the *Foreign Apposer Office* records; *Foreign Office* papers: comprising (inter alia) many important transcripts from the royal or public archives of Bavaria, Belgium, France, Hamburgh, Italy, Normandy, Portugal, Prussia, Saxony, and Switzerland, which latter, however, are not in his official custody under the Act, but are merely deposited with the Master of the Rolls for convenience; *Forfeited Estates* records; the *French Claim Commission* papers; the *King's Silver Office* records; *Land and Assessed Taxes* duplicates; the *Land Revenue Record Office* records, and some other records relating to the land revenue (as to others, see § 1486); the *Lord Chamberlain's Office* and the *Lord Treasurer's Remembrancer's Office* records; the *Marshalsea Court* records, muniments, and writings; *Miscellaneous* documents, such as calendars, indices, minute-books, &c., collected by the late Record Commissioners, or by persons employed by them; the dissolved *Monasteries*, *Priories*, &c., lieger-books and chartularies; the *Palace Court* records; *Parliament Rolls*; *Patent Rolls*; the *Pell* records; the *Peveril Court* records; the *Pipe Office* records; the *Placita Forestæ*; *Population* returns; the Court of *Star Chamber* proceedings, in some cases; *Statute* rolls; the *Surveyor of Green Wax Office* records; many *Treasury* papers of various descriptions; *War Office* papers; the Court of *Wards and Liveries* records; many *Welsh Courts* equity records; and some very valuable home, foreign, colonial and Treasury papers. The above list is compiled from the annual reports of the Deputy-Keeper of the Public Records, but it is not offered as anything like a complete list, though believed to be accurate as far as it goes. For an enumeration of the public records in Ireland, see "The Public Records (Ireland) Act, 1867" (30 & 31 V. c. 70, Ir.), § 4.

[3] By 1 & 2 V. c. 94 ("The Public Record Office Act, 1838").

Act is to be taken to mean all rolls, records, writs, books, proceedings, decrees, bills, warrants, accounts, papers, and documents whatsoever of a public nature, belonging to her Majesty, or deposited on the 14th of August, 1838, in any of the offices or places of custody in the Act mentioned.[1]

§ 1486. Besides the above records, which are now placed in his actual custody, the Master of the Rolls has control of many *other documents of a public character*, the *custody* of which belongs to *particular courts and offices*, and which are severally deposited in various places in London.[2]

[1] See §§ 20, and 1 and 2. See, also, 30 & 31 V. c. 70, §§ 3, 5, Ir.; and 38 & 39 V. c. 59, Ir. Under this last Act many parochial records have been transferred to the Irish Record Office.

[2] Among the principal of these documents, and their places of deposit, are the following:—*Duchy of Cornwall* records, in the Duchy Office at Buckingham Gate; *Duchy of Lancaster* records, in the Duchy Office at Lancaster Place, Waterloo Bridge; *Heralds' College* records (as to which see Hubb. Ev. of Suc. 538—566), which are either in the Heralds' College, on St. Benet's Hill, near St. Paul's, or in the Harleian Library; *Indian Records of Baptisms, Marriages, and Burials* (viz., those ... Bengal from 1713 to 1737; those at Madras from 1698 to 1834; those in Bombay from 1709 to 1837; and those in St. Helena from 1767 to 1835), at the office of the Secretary of State for India in Charles Street, St. James' Park, as to which Indian Registers see p. 13 of Report of Commissioners appointed to make inquiries as to Non-parochial Registers, published in 1838, and also the case of Regan *v.* Regan, 1893, which decides that a register compiled by the Secretary of State for India from reports sent him from India by clergymen of various denominations is admissible as evidence; *Land Revenue* records (see 2 W. 4, c. 1, otherwise "The Crown Lands Act, 1832," §§ 15, 20, 22), at the "Office of Land Revenue Records and Enrolments" in Spring Gardens, which include (see 7 & 8 V. c. 89) the audited accounts of the Commissioners of Woods and Forests, though (see ante, § 1485), as before mentioned, many of these records are in the Record Office; and the *Registers of Births, Baptisms, Marriages, and Burials of British Subjects beyond Seas*, transmitted from different British embassies and factories on the Continent of Europe and elsewhere, which (since 1816) have been in the registry of the Consistory Court of London, and may be divided into the three following classes:—(1) Certificates, in the original books, of baptisms and marriages, bearing the signatures of the parties and witnesses, and authenticated by the chaplain performing the ceremony, the parties, and the British envoy or minister at whose house such ceremony was performed, which have from time to time been sent through the Foreign Office to the registry of the Bishop of London, among which are registers from the Cape of Good Hope, Geneva, Gibraltar, and Oporto (between 1706 and 1802); (2) Transcripts, consisting of a book of transcripts from the register kept at the British Embassy in Paris from 1816 to the present time; a transcript of the similar registers kept at St. Petersburg from 1706 to the present time; and also of transcripts from original registers, certified by the ministers of the different places in the same manner as transcripts under 52 G. 3, c. 146; (3) A book of registers from Cronstadt, which appear to have been transcribed, but which are not in any way certified as having been so;—as to the whole of which registers in the Consistory Court of London, see p. 11 of Report just cited.

§ 1487. In 1857, the Act establishing the Court of Probate,—now the Probate Division of the High Court—directed that all persons who heretofore either had jurisdiction to grant probate or administration, or had the custody of the papers of any old Court of Probate, upon receiving from a registrar a requisition under the seal of the Probate Court thereby established, should transmit to the place specified in such requisition, "all [or one or more[1]] records, wills, grants, probates, letters of administration, administration bonds, notes of administration, court books, calendars, deeds, processes, acts, proceedings, writs, documents, and every other instrument relating exclusively or principally to matters or causes testamentary, to be deposited and arranged in the registry of each district or in the principal registry, as the case may require, so as to be of easy reference, under the control and direction of the court,"[2] and provided that there should be "one place of deposit under the control of the court,[3] in which all the original wills brought into the court, or of which probate or administration with the will annexed is granted under this Act in the principal registry thereof, and copies of all wills the originals whereof are to be preserved in the district registries, and such other documents as the court may direct, shall be deposited and preserved, and may be inspected, under the control of the court, and subject to the rules and orders under this Act."[4] The Act also directed the judge of the court to cause calendars of the grants of probate and administration to be made and printed from time to time, and copies of them deposited in the district registries, the office of her Majesty's Prerogative in Dublin, the office of the commissary of the county of Midlothian in Edinburgh, and such other offices as the court might order, which should be open to inspection "by any person on payment of a fee of one shilling for each search, without reference to the number of calendars inspected."[5]

[1] This amendment was introduced into the Eng. Act by § 27 of 21 & 22 V. c. 95.

[2] 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), § 89; 20 & 21 V. c. 79, § 96, Ir.

[3] This place was formerly at No. 6, Great Knightrider Street, Doctors' Commons. See Gazette of 4th Dec., 1857. But by requisition made under the Act (no Order in Council appears to have been made on this occasion) all old wills have been removed to, and now are at, the Registry of the Probate Division at Somerset House.

[4] 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), § 66; 20 & 21 V. c. 79, § 71, Ir.

[5] 20 & 21 V. c. 77, §§ 67, 68. See, also, 20 & 21 V. c. 79, §§ 72, 73, Ir.

§ 1488.[1] The inspection and exemplification of the *Records of the Queen's Courts*, when they are required for the purpose of *being given in evidence*, have been admitted, from a very early period, to belong to the public of *common right*. This right was, by an ancient ordinance or statute,[2] extended to cases where the subject was concerned against the Crown, but the statute[2] giving that right was repealed in 1871.[3] A prisoner charged either with high treason or felony has, at common law, only the rights given by the rule which will be presently stated, and (as he does not require it for the purpose of being given in evidence) is certainly not entitled, except by statute, to a copy of any indictment, or other of the proceedings, against him.[4] By statutes of the time of Will. III.[5] and of Anne,[6] however, in most cases of *treason*, the accused must now be supplied, ten clear days before his trial, with a copy of the indictment. The rule in ordinary cases of felony however, even at the present day, is that the *accused is not entitled to a copy of the indictment;* but all that he can claim as of right is, to have it read slowly to him in open court;[7] and this rule includes that class of treasons which consists in compassing the death or personal injury of the Sovereign.[8] The rule,—which is the very essence of injustice,[9]—does not *extend to misdemeanor* on charges of which the accused is, both by common and statute law, entitled to a copy of the indictment, in spite of the fact that a

[1] Gr. Ev. § 470, in part, as to first five lines.

[2] 46 E. 3.

[3] "The Statute Law Revision Act, 1871" (34 & 35 V. c. 116).

[4] R. *v.* Ld. Preston, 1691.

[5] 7 W. 3, c. 3 ("The Treason Act, 1695"), § 1.

[6] 7 A. c. 21 ("The Treason Act, 1708"), § 11, extended to Ireland by 17 & 18 V. c. 26. See, also, 5 G. 3, c. 21, Ir.

[7] R. *v.* Parry, 1837 (Bolland, B.); R. *v.* Vandercomb, 1796; R. *v.* Cruise, 1842 (Ir.) (Torrens, J.). Though this seems to be also the law in Ireland, it is curious that, in 1641, the Irish judges unanimously resolved that they had no power by law to refuse to give to the accused a copy of the indictment; and the Irish House of Commons in the same year declared, that judges ought not to deny copies of indictments to parties indicted. See an able note on this subject in Ir. Cir. R. 375—378. See, also, Bothe's case, 1602.

[8] See 39 & 40 G. 3, c. 93 ("The Treason Act, 1800"); 1 & 2 G. 4, c. 24, § 2, Ir.; 5 & 6 V. c. 51 ("The Treason Act, 1842"), § 1. See, also, ante, § 958.

[9] Mr. Chitty observes on this subject, "It is a remarkable circumstance that the English law should allow so much nicety to prevail with respect to formal defects in the indictment, and yet afford the defendant so little opportunity of discovering them." 1 Chit. Cr. L. 403. The flagrant absurdity of the one rule caused the equally flagrant injustice of the other.

person on trial for his life may possibly not possess this right.[1] A prisoner committed for trial or held to bail, preparatory to being tried for some indictable crime,[2] is also by statute[3] entitled not only to inspect at the trial, without fee, the depositions upon which he has been so committed or held to bail, but also to obtain copies of them on payment of a small sum, and this whatever be the nature of the offence imputed.[4]

§ 1489. It has been doubted whether a person *tried for felony and acquitted is entitled to a copy of the record* of his acquittal, for the purpose of giving it in evidence in an action for *malicious prosecution*.[5] This doubt has arisen in consequence of an order made by five judges, *temp.* Charles II., for the regulation of the Sessions

[1] Lady Fulwood's case, 1637; 1 Chit. Cr. L. 404. See, also, 60 G. 3 & 1 G. 4, c. 4, § 8; and 7 & 8 G. 4, c. 53 ("The Excise Management Act, 1827"), § 42.

[2] A person who has been committed for want of sureties to keep the peace cannot demand a copy of the examinations on which the commitment proceeded: R. *v.* Herefordshire JJ., 1850.

[3] 6 & 7 W. 4, c. 114, § 4, enacts, that, "all persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had."

[4] 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), § 27, enacts, that "at any time *after* the examinations aforesaid shall have been completed, and *before* the first day of the assizes or sessions, or other first sitting of the court, at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require and be entitled to have of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three halfpence for each folio of ninety words." See, also, "The Coroners Act, 1887" (50 & 51 V. c. 71), § 18, subs. 5, enacting that "a person charged by an inquisition with murder or manslaughter shall be entitled to have, from the person having for the time being the custody of the inquisition, or of the depositions of the witnesses at the inquest, copies thereof on payment of a reasonable sum for the same, not exceeding the rate of three halfpence for every folio of ninety words." As to Ireland, § 14 of 14 & 15 V. c. 93, enacts, that "at any time after the examinations in any proceedings for an indictable offence shall have been completed, and on or before the first day of the assizes or sessions, or other first sitting of the court at which any person committed to gaol or admitted to bail is to be tried, such person may require and shall be entitled to receive from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed (or copies of depositions taken at any inquest in case of murder or manslaughter), on payment of a reasonable sum for the same, not exceeding a sum at the rate of three halfpence for each folio of ninety words." See, also, 44 & 45 V. c. 35, § 9, Ir.

[5] Browne *v.* Cumming, 1829. In R. *v.* Dunne, 1838 (Ir.), the court refused to allow a *convicted* prisoner a copy of the depositions of a Crown witness, for the purpose of assigning perjury upon them.

at the Old Bailey, directing, that "no copies of any indictment for felony be given without special order upon motion made in open court, at the general gaol delivery upon motion;[1] for the late frequency of actions against prosecutors, which cannot be without copies of the indictments, deterreth people from prosecuting for the King upon just occasions."[2] But this order appears to be directly at variance with the Act of 46 Edward III.,—which (as may be gathered from what has been stated just now in § 1488) was in force at the date when such order was made,—and to be also wholly inconsistent with the provisions of Magna Charta, "nulli negabimus vel differemus justitiam." In the case of an evidently vexatious prosecution, where the prisoner, after acquittal, applied to Willes, C.J., for a copy of the indictment, his lordship refused to make an order on the subject, on the ground that none was necessary; declaring that by the laws of this realm, every prisoner, upon his acquittal, had an undoubted right to a copy of the record of such acquittal, for any use he might think fit to make of it; and that, after a demand of it had been made, the proper officer might be punished for refusing to make it out.[3]

§ 1490. If this view be correct (as it is submitted it is), the Old Bailey order, though confirmed by a decision of Ld. Holt,[4] is illegal. In any event, first, the order does not extend to misdemeanors, but in such cases the prisoner has an absolute right to a copy of the indictment on which he has been either acquitted or convicted;[5] secondly, even in cases of felony, where the party acquitted brings an action for malicious prosecution, the judge at Nisi Prius is bound to receive in evidence a true copy of the indictment, though proved to have been obtained without an order;[6] and lastly, for the purpose of pleading autrefois acquit, or autrefois convict, the prisoner is entitled to have a copy of the former record, whatever be the nature of the accusation; and if the court where he was first tried refuses to grant him one, the

[1] Sic.

[2] 7th Res., cited in Kel. 3 (Hyde, C.J., O. Bridgman, C.J., Twisden, Tyril, and Kelyng, JJ.).

[3] R. *v.* Brangan, 1742. See, also, Doe *v.* Date, 1842 (Williams, J.).

[4] Groenvelt *v.* Burrell, 1696-7.

[5] Morrison *v.* Kelly, 1762 (Ld. Mansfield); Evans *v.* Phillips, 1763 (Adams, B.).

[6] Legatt *v.* Tollervey, 1811; Jordan *v.* Lewis, 1739-41.

Queen's Bench Division of the High Court will enforce his right by mandamus.[1]

§ 1490A. A person tried by court-martial is entitled, on demand, in the case of a general court-martial within seven years, and in the case of any other court-martial within three years, after the confirmation of the sentence, to obtain from the officer having custody of the proceedings a copy of the same, including those with respect to the confirmation, upon payment for the same at the prescribed rate, not exceeding twopence for every seventy-two words.[2]

§ 1491. Independently of the general law governing the right to inspect and take copies of the records of courts of justice, the Bankruptcy Act[3] and Rules of 1883 contain several special regulations on the subject. B. R. 10, after declaring that "all proceedings of the court shall remain of record in the court," provides that "they may at all reasonable times be inspected by the trustee, the bankrupt, and any creditor who has proved, or *any person* on their behalf." R. 14 provides that, "all office copies of petitions, proceedings, affidavits, books, papers, and writings, or any parts thereof, required by any trustee, or by any debtor, or by any creditor, or by the *solicitor* of any such person, shall be provided by the Registrar," without any unnecessary delay, and in the order in which they shall have been bespoken. By § 16, subs. 4, of the Act itself, any person, stating himself in *writing* to be a creditor, may at all reasonable times, personally or by agent, inspect, or take any copy of, or extract from, the debtor's statement of affairs, which has been submitted to the official receiver. Under § 17, subs. 8, after the debtor has been publicly examined by the court, the note of his examination may be inspected by any creditor at all reasonable times. Every creditor, too, who has lodged a proof of his claim, is entitled at all reasonable times, and even before the first meeting, to examine the proofs of the other creditors.[4] The audited accounts of the trustees, copies of which are filed with the court, are, too, "open to the inspection of any creditor, or of the bankrupt, or of

[1] R. *v.* Middlesex JJ., In re Bowman, 1834.

[2] Under "The Army Act, 1881" (44 & 45 V. c. 58), § 124.

[3] 46 & 47 V. c. 52.

[4] Sched. II. of the Act, r. 7.

any person interested"; [1] and all books kept by the trustees may, subject to the control of the court, be inspected by any creditor or by his agent.[2] The trustee must also, when required by any creditor, and on payment of the proper fee, transmit to him by post a list of the creditors, showing the debt due to each creditor.[3]

§ 1491A. The Rr. S. C., 1883, contain several provisions for facilitating the inspection of the numerous and varied documents, now deposited in the Central Office of the Royal Courts of Justice.[4]

[1] § 71, subs. 4. [2] § 80. [3] § 79.

[4] Ord. LXI. (which contains the most important of these rules), by r. 1 provides:—"The Central Office shall, for the convenient despatch of business, be divided into the departments specified in the first column of the following scheme, and the business of the office shall be distributed among the departments in accordance with that scheme, and shall be performed by the several officers and clerks in the said office who are now charged with the same or similar duties, and by such others as may from time to time be appointed by lawful authority for that purpose.

SCHEME.

Name of Department.	Business.
1. Writ, appearance, and judgment.	The sealing and issue of writs of summons for the commencement of actions. The entry in the cause book of writs of summons, appearances, and judgments. The sealing and issue of notices for service under Ord. XVI. r. 48. The receipt and filing of pleadings and notices delivered on entry of judgment. The transaction of all business heretofore conducted in the Record and Writ Office, except such part thereof as is transacted in the Record Department.
2. Summons and Order . .	The issue of summonses in the Queen's Bench Division, and the drawing up of all orders made either in court or in chambers in that division.
3. Filing and Record. . .	The filing of all affidavits to be filed in the Central Office, and all depositions to be used in the Chancery Division, and such other documents as may from time to time be directed by the Masters to be filed, and the making and examination of office copies of documents filed in the department. The custody of all deeds and documents ordered to be left with the Masters. The business heretofore performed in the Report Office under the direction and control of the Clerk of Records and Writs.
4. Taxing	The taxation of costs in the Queen's Bench Division, except such costs as have heretofore been taxed in the Queen's Remembrancer's Office or the Crown Office.

R. S. C., O. LX., R. 17, provides that "proper indexes or calendars to the files or bundles of all documents filed at the Central Office shall be kept, so that the same may be conveniently referred to when required; and such *indexes or calendars and documents* shall, at all times during office hours, be *accessible to the public* on payment of the usual fee."

R. 18 provides, that "there shall also be entered in proper books kept for the purpose the time when any certificate is delivered at the Central Office to be filed, with the name of the cause and the date of the certificate; and the like entry shall be made of the time of delivery of every other document filed at the Central Office; and *such books* shall, at all times during office hours, be *accessible to the public* on payment of the usual fee."

R. 23 provides, that "the Clerk of Enrolments and each of the following Registrars, namely—

(*a.*) The Registrar of Bills of Sale;[1]

(*b.*) The Registrar of Certificates of Acknowledgments of Deeds by Married Women;

(*c.*) The Registrar of Judgments;

shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search."

R. 24 states, that "for the purpose of enabling all persons to

SCHEME—*continued.*

Name of Department.	Business.
5. Enrolment	The business heretofore performed in the Enrolment Office.
6. Judgments and married women's acknowledgments.	The registry of judgments, executions, &c., and the registry of acknowledgments of deeds by married women.
7. Bills of Sale	The registry of bills of sale and other duties connected therewith.
8. Queen's Remembrancer .	The business heretofore performed in the Queen's Remembrancer's Office.
9. Crown Office	The business heretofore performed in the Crown Office.
10. Associates	The business heretofore performed in the Associates' Offices."

[1] See post, § 1521.

obtain precise information as to the state of any cause or matter, and to take the means of preventing improper delay in the progress thereof, the proper officer shall, at the request of *any person*, whether a party or not to the cause or matter inquired after, but on payment of the usual fee, give a *certificate* specifying therein the dates and general description of the several proceedings which have been taken in such cause or matter in the Central Office."

§ 1491B. Independently of the Rules just cited, every person is entitled by statutory authority to inspect, on payment of a small sum, the *warrants of attorney* to confess judgment, the *cognovits actionem*, the *judge's orders* to enter up judgment by consent, and the *bills of sale* of personal chattels, which must now be filed or registered in the Bills of Sale Department of the Central Office,[1]—the first three classes of documents within twenty-one days,[2] and Bills of Sale within seven days,[3] after their respective execution or making; as also the books and indexes relating to these documents, which the proper officer of the Central Office is directed to keep.[4] When a bill of sale has been given by a person residing "outside the London bankruptcy district," or whose chattels are outside such district, an abstract of the contents of such bill of sale must be transmitted from the Central Office to the local County Court Registrar, who must file and index the same; and "any person may search, inspect, make extracts from, and obtain copies of, the abstract so registered."[5]

§ 1491C. Again, all persons are, by statute, at liberty, on payment of one shilling, to search the judgments book, kept at the Central Office,[6] which contains an alphabetical list of the persons whose real estate is intended to be affected by the judgments, decrees, orders, or rules of the courts, or by orders in lunacy;[7] as also the "Index

[1] Ord. LXI. r. 1, cited ante, § 1491A, n. [4].

[2] 3 G. 4, c. 39, §§ 1, 2, 3, 5; 32 & 33 V. c. 62, §§ 26—28.

[3] 45 & 46 V. c. 43, § 8; 46 V. c. 7, § 8, Ir.

[4] 3 G. 4, c. 39, §§ 5, 6; 6 & 7 V. c. 66; 32 & 33 V. c. 62, §§ 26—28; 41 & 42 V. c. 31, § 12; 45 & 46 V. c. 43, § 16. See, also, 46 V. c. 7, § 16, Ir.

[5] 45 & 46 V. c. 43, § 11; 46 V. c. 7, § 11, Ir. In Ireland, the abstract is sent to the local clerk of the peace.

[6] Which used to be kept by the Senior Master of the Common Pleas, and is now in the custody of one of the Masters of the Supreme Court: 42 & 43 V. c. 78, §§ 5—8; Ord. LXI. r. 1.

[7] 1 & 2 V. c. 110 ("The Judgments Act, 1838"), § 19; 2 & 3 V. c. 11 ("The Judgments Act, 1839"),

to debtors and accountants to the Crown," kept by the same officer.[1]

§ 1492.[2] It is highly questionable whether the *records of inferior tribunals* are open to the inspection of all persons without distinction;[3] but it is clear that everyone has a *right to inspect* and *take copies* of the parts of the proceedings in which he is *individually interested*. The party, therefore, who wishes to examine any particular record of one of those courts, should first apply to that court, showing that he has some interest in the document in question, and that he requires it for a proper purpose.[4] If his application be refused, either the Chancery, or the Queen's Bench, Division of the High Court, upon affidavit of the fact, may send either for the record itself or an exemplification; or the latter court will, by mandamus, obtain for the applicant the inspection or copy required. A person convicted under the game laws, afterwards having an action brought against him for the same offence, was held entitled to a copy of the conviction; and this having been refused, a writ of certiorari was granted for the mere purpose of procuring a copy, and thus enabling the action to be defeated.[5] So the court has granted a party—who having been taken in execution in a court of conscience, has brought an action of trespass and false imprisonment—a rule to inspect so much of the book of the proceedings as related to the suit against himself.[6]

§ 1493. Indeed, as a general rule, the Queen's Bench Division will *enforce by mandamus the production of every document of a public nature*, in which any one of her Majesty's subjects can prove himself to be *interested*.[7] Every officer appointed by law to keep records, ought, therefore, to deem himself a trustee for all interested parties, and allow them to inspect such documents as concern themselves,—without putting them to the expense and trouble of making application for a mandamus.[8] But the applicant

§§ 3, 8; 3 & 4 V. c. 82 ("The Judgments Act, 1840"), § 2; 37 & 38 V. c. 96, Sched. See, also, 18 & 19 V. c. 15 ("The Judgments Act, 1855"), §§ 2, 3, as to the courts in counties palatine. And see generally, post, "Registration of Judgments."

[1] 2 & 3 V. c. 11, §§ 8, 9.

[2] Gr. Ev. § 473, in some part.

[3] R. *v.* Chester, 1819 (Abbott, C.J.), questioning Herbert *v.* Ashburner, 1750.

[4] See R. *v.* Wilts. and Berks. Can. Co., 1835; R. *v.* Leicester JJ., 1825.

[5] R. *v.* Midlam, 1765.

[6] Wilson *v.* Rogers, 1745-6.

[7] R. *v.* Staffordshire JJ., 1837 (Ld. Denman).

[8] Id.

must show some direct and tangible interest in the documents sought to be inspected, and that the inspection is bonâ fide required on some special and public ground,[1] or the court will not interfere in his favour; consequently, if his object be merely to gratify a rational curiosity, or to obtain information on some general subject, or to ascertain facts which may be indirectly useful to him in some ulterior proceedings, he cannot claim inspection as a right capable of being enforced.[2] Thus, the ratepayers of a county are not entitled to inspect and copy the bills of charges of county officers, which, having been paid by the treasurer under orders of justices, have become items in his accounts, and which have been allowed by the sessions, and deposited by the clerk of the peace among the county records.[3] For in such case, the individual ratepayers would have no power to interfere, even though they might prove to demonstration that the bills had been improperly paid and allowed.

§ 1494.[4] Moreover, there are some books and documents which partake *both of a public and private character*, and are treated as the one or the other according to the relation in which the applicant stands to them. Thus, a stranger has no right to an inspection of the *rolls of copyhold courts* and of courts baron;[5] but the *copyhold tenants* of a manor are clearly entitled to inspect and take copies of such parts, though of such parts only,[6] of the court rolls, as relate to their own titles, privileges, or interests; and this, too, whether an action be pending or not.[7] Indeed, by a general rule of court,[8] "an order upon the lord of a manor to allow limited inspection of the court rolls, may be made on the application of a copyhold tenant, supported by an affidavit that he has applied for inspection, and that the same has been refused." This right is not strictly confined to cases where the applicant is a copyhold tenant; but if he has a primâ facie title to a copyhold,[9] or is otherwise

[1] Ex parte Briggs, 1859.
[2] R. v. Staffordshire JJ., 1837 (Ld. Denman).
[3] Id.; overruling R. v. Leicester JJ., 1825. See, also, R. v. St. Marylebone, 1836.
[4] Gr. Ev. § 474, as to first three lines.
[5] Crew v. Saunders, 1734-5; R. v. Shelley, 1789 (Buller, J.).
[6] R. v. Merch. Tailors' Co., 1831 (Littledale, J.).
[7] R. v. Tower, 1815; R. v. Lucas, 1808.
[8] R. S. C. 1883, Ord. XXXI. r. 19.
[9] R. v. Lucas, 1808.

interested in copyhold property,[1] as, for instance, if he is the devisee of a rent-charge on such property,[2] the court will make the order. Even a *freehold tenant* of a manor has a right to inspect the court rolls;[3] though it may, perhaps, be doubtful, whether he must not first show that some suit is actually depending.[4]

§ 1495. The *books of a corporation* are, at common law,[5] regarded as, to a certain extent, public, with respect to its members, but private with respect to strangers. Thus, on the application of a *member*, the Queen's Bench Division will, in general, grant a rule for a limited inspection of the documents of the corporation,[6] if it be shown that such inspection is requisite with reference either to an action then instituted, or at least to some specific dispute or question depending, in which the applicant is interested;[7] but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion.[8] The rule was formerly sometimes laid down more broadly, and the language ascribed to the court in one or two cases, might almost lead to the inference, that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body.[9] But any such doctrine is now exploded; and the privilege of inspection is confined to cases where the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object.[10] Thus, where certain members of a corporation applied for a mandamus to the master and wardens to allow them inspection of all the documents of a corporation, alleging their belief that its affairs were improperly conducted, and complaining of misgovernment in some particulars not affecting themselves, nor then in dispute, it was held that the applicants had no right on

[1] Ex parte Hutt, 1839 (Coleridge, J.).
[2] Ex parte Barnes, 1842 (Wightman, J.).
[3] Addington *v.* Clode, 1774-5; Hobson *v.* Parker, 1753-4, cited by Buller, J. (1789) in 3 T. R. 142; Warrick *v.* Queen's Coll., Oxford, 1867. But see Owen *v.* Wynn, 1878, C. A.
[4] R. *v.* Allgood, 1798. But see R. *v.* Lucas, 1808, and R. *v.* Tower, 1815.
[5] As to the stat. law, see post, §§ 1504—1507.
[6] R. *v.* Beverley, 1839.
[7] R. *v.* Merchant Tailors' Co., 1831; In re Burton and the Saddlers' Co., 1862.
[8] Id.
[9] R. *v.* Hostmen of Newcastle, 1744-5; R. *v.* Babb, 1790 (Ashhurst, J.).
[10] R. *v.* Merch. Tailors' Co., 1831.

these speculative grounds to the inspection prayed;[1] parties sued by an incorporated company for alleged misconduct by, while directors, making false entries in the books of the corporation, were held not entitled to a general inspection of the company's books, at least without an affidavit that such inspection was necessary for their defence;[2] and where a shareholder, sued for calls, applied to inspect the minute-books of the company, and of the meetings of the directors, "particularly with respect to the calls" in question, the application was rejected, as it appeared to have been made for the purpose, not of assisting the defendant to set up any specific defence, but of enabling him to fish out one if he could.[3]

§ 1496. The right of inspection enjoyed by members of a corporation being thus limited, it is justly still more restricted in the case of *persons who are not members*. Accordingly, a stranger has no right to inspect the documents of a corporation, unless they contain the common evidence of some transaction between him and the corporation, or at least furnish the rule by which he is sought to be bound, even though he be a defendant in a suit brought by the corporation. Accordingly, in an action by a corporation against a stranger for tolls, the defendant cannot be granted inspection of the corporation muniments,[4] but in an action by it against a party residing in a borough, for the breach of a by-law restraining persons, not freemen, from exercising trades within the limits, the corporation will be ordered to grant inspection of such by-law, because it must be taken to have been made for the public weal, and for the rule and government of persons dwelling within the borough.[5]

§ 1497. The rules with regard to the inspection of *parish books* are regulated by the same principles as those which govern corporation books. In other words, strangers and non-parishioners have no right of access to or inspection of such books at all, and, in strictness, even a man who himself denies that he is a parishioner,

[1] R. *v.* Merchant Tailors' Co., 1831.
[2] Imperial Gas Co. *v.* Clarke, 1830.
[3] Birming. Brist. & Thames Junc. Rail. Co. *v.* White, 1841.
[4] May. of Southampton *v.* Graves, 1800, overruling May. of Lynn *v.* Denton, 1787, and Barnstable *v.* Lathey, 1789; Bolton *v.* Corp. of Liverpool, 1831, recognised in Nias *v.* North. & East. Rail. Co., 1838.
[5] Harrison *v.* Williams, 1824.

although he is alleged by the parish to be one, is not entitled to see parish books,[1] and the inhabitants of a county are not, as such, entitled to see the books of a *parish*.[2] But *parishioners* have a qualified right to inspect the parish books for ordinary parochial purposes, such as when a dispute is pending as to the validity of a rate.[3] But even a parishioner has no right to inspect parish books for private purposes—as, for instance, to enable him to plead a justification for libel;[4] or to support his claim to an estate lying in the parish;[5] or to dispute the appointment of a parish officer.[6] In some old cases,[7] in which persons were held not to be at common law entitled to inspect books, they were, however, entitled, *as litigants*, to see them by the ordinary process of discovery in the course of litigation pending between them and the parish.[8]

§§ 1498—9. The right to an inspection of various other books is regulated by principles similar to those which govern the right to inspect parish books. On the one hand, strangers—that is, persons whose property is not referred to in the entries in the books which it is sought to inspect, and who have no interest in such books—have no right of access to them or inspection of them.[9] Thus, for instance, a party who had brought a "qui tam" action against a postmaster for interfering in the election of a member of Parliament, was, in the old days, possessed of no right to inspect the books of the Post Office, inasmuch as the action was not in relation to any transaction recorded in the books, and the applicant had no interest in them;[9] and a person had no right to inspect the books of the College of Physicians unless he was a member of it.[10] On the other hand, persons whose property is referred to in entries therein, or who otherwise have an interest in them, are entitled to inspect the books containing such entries. For instance, persons assessed to a sewers rate have a right to inspect entries and pro-

[1] Burrell *v.* Nicholson, 1832.
[2] R. *v.* Buckingham JJ., 1828.
[3] Newell *v.* Simpkin, 1830.
[4] May *v.* Gwynne, 1821.
[5] R. *v.* Smallpiece, 1821.
[6] R. *v.* Harrison, 1816.
[7] Burrell *v.* Nicholson, 1832, is a good instance. See next note.
[8] Id., 1833. It would appear that R. *v.* JJ. of Buckingham, 1828, cited above in note [2], would now fall within the same principle. In such cases, the rules of Equity as to discovery now prevail. See "The Judicature Act, 1873" (36 & 37 V. c. 66), § 25, subs. 11.
[9] Crew *v.* Saunders, 1734-5. See, also, Atherfold *v.* Beard, 1788; Benson *v.* Post, 1748; and supra, § 1497.
[10] R. *v.* Dr. West, undated.

ceedings in the books kept by the Commissioners of Sewers, which refer to a rate to which they are themselves assessed, or to a "level" on which they have property;[1] a prebendary has a right to inspect at all reasonable times such of the charters, statutes, injunctions, and acts of the chapter as relate to his rights concerning his prebend;[2] all persons claiming rights of presentation to livings in the diocese are entitled to inspect the bishop's register of presentations and institutions kept for such diocese;[3] fundholders are entitled to inspect and take copies of entries in the deposit and transfer books of the Bank of England which relate to the stock in which they claim an interest;[4] other stockholders have similar rights;[5] merchants can demand access to such Custom House books as contain entries relating to their goods;[6] and persons engaged in contesting a disputed claim are, as of right, entitled to an inspection of entries in books, &c., which are common evidence of transactions between public offices and private individuals.[7] But even in such cases the inspection will not be granted when it is merely sought for some private object.[8]

§ 1500. In accordance with the invariable rule which protects a witness or party from being compelled to furnish evidence, which may expose him to a criminal charge,[9] the court will never oblige a person to allow the inspection[10] of either public or private documents in his custody, where the inspection is sought for the purpose of *supporting a prosecution against himself*.[11] But an information in the nature of a quo warranto,[12] or a mandamus, the object of which

[1] R. *v.* Commrs. of Sewers for Tower Hamlets, 1842.

[2] Young *v.* Lynch, 1747.

[3] R. *v.* Bishop of Ely, 1828.

[4] See Foster *v.* Bank of England, 1846.

[5] As to the stock of the old East India Company, see Geary *v.* Hopkins, 1702; and as to Colonial stock, see "The Colonial Stock Act, 1877" (40 & 41 V. c. 59), §§ 1, 18.

[6] Crew *v.* Saunders, 1734-5.

[7] See note by Nolan to R. *v.* Hostmen of Newcastle, 1744-5, collecting and classifying all the old authorities on the subject; and also R. *v.* King, 1788 (Ashhurst, J.), collecting the cases as to assessments to the land tax.

[8] See Crew *v.* Sanders and other cases cited in first note to thi section.

[9] Ante, § 1453.

[10] The order respecting discovery and inspection in the R. S. C. 1883, viz., Ord. XXXI., does not affect either criminal proceedings, or proceedings on the Crown or Revenue sides of the Queen's Bench Division. See Ord. LXVIII.

[11] Wigr. Disc. §§ 130—132, 268—270, 285, et seq.; Ld. Montague *v.* Dudman, 1751; Glyn *v.* Houston, 1836; R. *v.* Purnell, 1748-9; R. *v.* Heydon, 1762; R. *v.* Buckingham JJ., 1828; R. *v.* Cornelius, 1743-4. See Bradshaw *v.* Murphy, 1836.

[12] R. *v.* Shelley, 1789; R. *v.* Babb, 1790; R. *v.* Purnell, 1748-9.

is to enforce a civil right, are not regarded as criminal proceedings for the purposes of this rule.[1] On an *indictment* against the lord of a manor for not repairing ratione tenuræ, it, however, has been in vain urged in support of a rule to inspect the court rolls, that the indictment, though in form a criminal proceeding, was really to try the right of repair, which was a civil right.[2]

§ 1501. Where writs, or other proceedings in a cause, are officially in the custody of an officer of the court, he probably can be compelled to permit them to be inspected for the purpose of furnishing evidence in a civil action against himself, though on this point the old Queen's Bench and Common Pleas came to opposite conclusions in actions against the governor of Holloway prison for a debtor's escape.[3]

§ 1502. In all cases where the interference of a court is required in order to obtain the inspection of a document, it must appear by affidavit that an express *demand* to inspect has been made to the proper quarter, and has been distinctly *refused*.[4] This demand must, moreover, come either directly from the applicant or indirectly from his agent, and a demand by a person whom the agent has employed for that purpose will not suffice.[5] To constitute a distinct refusal, it is not necessary that the word "refuse" or any equivalent expression should be employed, but it will be enough if the party applied to shows clearly by his conduct that he is determined not to do what is required.[6] Still, nothing short of this will suffice.[7] It is questionable whether the court will interfere where, on the application of a party to inspect books, liberty to do so is *offered as a favour*, though *not as a right*, and is conse-

[1] R. *v.* Ambergate, &c. Rail. Co., 1852.

[2] R. *v.* E. Cudogan, 1822.

[3] Fox *v.* Jones, 1828; Davies *v.* Brown, 1824. See, also, R. *v.* Sheriff of Chester, 1819.

[4] R. *v.* Wilts. & Berks. Can. Co., 1835; R. *v.* Bristol & Exeter Rail. Co., 1843. See, also, R. *v.* Thompson, 1845; R. *v.* JJ. of Bodmin, 1892. But the objection that the affidavits disclose no sufficient demand and refusal must be taken before the merits are discussed, 4 Q. B. 171 (1843) (Ld. Denman), recognising R. *v.* East. Cos. Rail. Co., 1839.

[5] Ex parte Hutt, 1839.

[6] R. *v.* Brecknock & Aberg. Can. Co., 1835 (Ld. Denman and Littledale, J.).

[7] R. *v.* Wilts. & Berks. Can. Co., 1835. Where, however, a party applied at chambers for leave to inspect certain books, but the judge after hearing both parties, referred the question to the court, it seems to have been considered that the proceedings at chambers were equivalent to a demand and refusal: Birmingham, &c. Rail. Co. *v.* White, 1841.

quently declined by the applicant,[1] but it is submitted that it ought to do so, since *the right* is denied.

§ 1503. The preceding observations have been confined to cases where the right of inspection depends upon the common law.

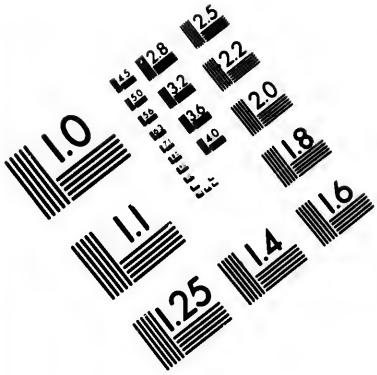
§§ 1504-21. But rights of inspection also exist under numerous *statutes*, which especially provide for the keeping of particular public documents, and for their inspection by parties interested.[2]

[1] R. *v.* Trust. of Northleach, &c. Roads, 1834 (Ld. Denman).

[2] Some of the more important matters, as to which rights of inspection are conferred by statute, mentioned in alphabetical order, are as follow.—"*The Ballot Act*, 1872" (35 & 36 V. c. 33), 1st Sched. 1st Part, r. 42, provides that all documents forwarded by the returning officer to the Clerk of the Crown in Chancery (that is, it is presumed, to the Crown Office Department of the Central Office), other than ballot papers and counterfoils, are to be open to public inspection at such time and under such regulations as the Clerk, with the consent of the Speaker, may prescribe; and the Clerk is also to supply copies or extracts to any person on the payment of such fees as the Treasury may sanction. *Barmote Courts:* see *High Peak Mining Customs and Mineral Courts Act.* "*The Baths and Washhouses Acts*, 1846" (9 & 10 V. c. 74; 9 & 10 V. c. 87, § 5, Ir.), enact that the books of accounts which the commissioners of public baths are thereby directed to keep may be examined and copied gratis by any commissioner, churchwarden, overseer, or ratepayer of the parish in which the baths are established. See similar clauses as to the metropolis in 18 & 19 V. c. 120, §§ 61, 198, 199. As to *Births, Baptisms, Marriages, Deaths or Burials Registers* various rights of inspection exist—Thus, "The Births and Deaths Registration Act, 1836" (6 & 7 W. 4, c. 86), which has been amended by "The Births and Deaths Registration Act, 1874" (37 & 38 V. c. 88), by § 35 enacts, that "every rector, vicar, or curate, and every registrar, registering officer, and secretary, who shall have the keeping for the time being of any register-book of births, deaths, or marriages, shall at all reasonable times allow searches to be made of *any register-book in his keeping.*" [This will include register-books of *baptisms and burials*, which the rector, vicar, or curate of each parish is bound to keep, under the provisions of 52 G. 3, c. 146, § 5.] "And shall give a copy certified under his hand of any entry or entries in the same, on payment of the fee hereinafter mentioned; (that is to say,) for every search extending over a period not more than one year, the sum of one shilling, and sixpence additional for every additional year, and the sum of two shillings and sixpence for every single certificate." By § 32 of "The Births and Deaths Registration Act, 1874" (37 & 38 V. c. 88), every superintendent registrar is to make indexes of the register-books in his offices; and "every person shall be entitled at all reasonable hours to search the said indexes, and to have a certified copy of any entry or entries in the said register-books under the hand of the superintendent registrar, on payment in each case of the appointed fee;"—that is, as explained in the 2nd Sched., for a general search, five shillings; for a particular search, one shilling; for a certified copy, two shillings and sixpence. "The Births and Deaths Registration Act, 1836" (6 & 7 W. 4, c. 86), § 37, enacts, that "the registrar-general shall cause indexes of all the said certified copies of the registers to be made, and kept in the general register office; and that every person shall be entitled, on payment of the fees hereinafter mentioned, to search the said indexes between the hours of ten in the morning and four in the afternoon of every

day, except Sundays, Christmas-day, and Good Friday, and to have a certified copy of any entry in the said certified copies of the registers; and for every general search of the said indexes shall be paid the sum of twenty shillings, and for every particular search the sum of one shilling; and for every such certified copy the sum of two shillings and sixpence, and no more, shall be paid to the registrar-general, or such other officer as shall be appointed for that purpose on his account." These certificates are made evidence by the provisions set out post (sub tit. "*Certified Extracts*"), § 1611, n. The Act for registering marriages, and also the Act for registering births and deaths, in Ireland, respectively contain similar provisions. See 7 & 8 V. c. 81, §§ 68—70, Ir., and 26 & 27 V. c. 11, §§ 50—52, Ir. See, also, 52 G. 3, c. 146, § 5. Similar provisions to the above are contained in "The Burial Act, 1853" (16 & 17 V. c. 134), § 8, and "The Registration of Burials Act, 1864" (27 & 28 V. c. 97), § 6, with respect to searches to be made in, and copies and extracts to be taken from, the registers of burials respectively kept under the directions of "The Metropolitan Interment Act" (15 & 16 V. c. 85), and of those Acts. "The Marriage Act, 1836" (6 & 7 W. 4, c. 85), § 5, enacts, that the "marriage notice-book," which the superintendent registrar is bound to keep, shall be "open at all reasonable times without fee to all persons desirous of inspecting the same" (as to marriages in Ireland, see "The Marriages (Ireland) Act, 1844" (7 & 8 V. c. 81, Ir.), §§ 2, 14, and "The Marriage Law (Ireland) Amendment Act, 1863" (26 & 27 V. c. 27, Ir.), §§ 2, 3). The Act of 3 & 4 V. c. 92, and "The Births and Deaths Registration Act, 1858 (21 & 22 V. c. 25), provide for the deposit of certain non-parochial registers in the custody of the registrar-general. These registers consist of more than seven thousand books, belonging to one or other of the following religious communities:—The foreign Protestant churches in England; the Quakers; the Presbyterians; the Independents; the Baptists; the Wesleyan Methodists, in their several branches; the Moravians; the Countess of Huntingdon's connection; the Calvinistic Methodists, and the Swedenborgians. Besides these, a few registers have been deposited, which belong either to Roman Catholic, Irvingite, Inghamite, Bible Christian, New Jerusalemite, Unitarian, or Scotch Church congregations. The registers transmitted from the foreign Protestant churches contain entries of births, baptisms, marriages, deaths, and burials; and those sent by the Quakers are registers of births, marriages, and deaths. The remaining books are for the most part registers of births or baptisms, but there are some registers of deaths or burials, and one or two registers of marriages. The dates of these books range from the middle of the 16th century to the year 1840. Most of the registers were sent to the registrar-general from the minister of the congregation to which they belonged, but a valuable collection of these documents was transmitted from Dr. Williams' library, in Redcross Street, and another smaller one from the Wesleyan Registry in Paternoster Row. It may be observed, that the Jews have declined to part with their registers, as have also the Roman Catholic prelates, in most instances. The registers, too, of births and deaths, which are kept at the Heralds' College, from the year 1747 to 1783; the records of Indian baptisms, deaths, and marriages, deposited at the office of the Secretary for India; and the registers of births, baptisms, marriages, and burials of British subjects abroad, transmitted to the registry of the Consistory Court of London, are excluded from the operation of the Act. See Report of Commissioners appointed to inquire into the state, &c., of non-parochial registers, which was presented to Parliament in 1838; and another Report of the Commissioners bearing date 31st December, 1857. A list of the non-parochial registers in the custody of the registrar-general was published in 1841, and contains a statement—1, of the number marked on each register; 2, of the name of the place of worship; 3, of

the denomination and date of the foundation; 4, of the name of the last minister; 5, of the number of the books deposited, and the nature of the entries; and, 6, of the period over which each register extends. Copies of this list have been sent to every person, congregation, or society, having had the custody of any of the deposited registers, as also to every superintendent registrar, and to the registrar-general, to be open for inspection at the respective offices, without fee. A list of the registers deposited under 21 & 22 V. c. 25, is given in App. A. to the Report of the Commissioners dated 31st December, 1857. Under § 5 of 3 & 4 V. c. 92, every person is entitled on payment of certain fees, but upon personal application only (see fly-sheet to "Lists of Non-Parochial Registers," published by the registrar-general pursuant to the Act of 1841), to inspect these registers and the lists of the same, and to have certified copies of such entries as he may require. A similar law prevails with respect to the register of marriages in the Ionian Islands, which is now, under 27 & 28 V. c. 77, § 9, deposited with the registrar-general. *Charity trustees.*—Under "The Charitable Trusts Acts, 1853 and 1855" (16 & 17 V. c. 137, § 61, and 18 & 19 V. c. 124, § 44), the annual accounts of trustees of charities, which are now either deposited at the office of the Charity Commissioners or inserted in the books of the local vestries, are open to inspection by all persons at all reasonable hours, subject to the regulations of the Commissioners; and any person may, on payment of a trifling sum, require a copy of any such account or of any part thereof. "*The Commissioners Clauses Act*, 1847" (10 & 11 V. c. 16), contains, in §§ 31, 55, 76, 88—90, somewhat similar provisions to those below mentioned under head "Companies" as contained in "The Companies Clauses Consolidation Act." *Companies.*—Under "The Companies Act, 1862" (25 & 26 V. c. 89), § 174, r. 5, any person may inspect, and require a certified copy or extract of, any document which is kept by the *registrar of joint-stock companies* (see R. *v.* Mariquita and New Granada Min. Co., 1858); and by § 32, every member of a company duly registered under that Act is entitled, during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, to inspect gratis the register of members which is kept at the registered office of the company. Strangers have a similar right on payment of a small fee, and they, as well as members, can obtain a copy of any part of the register on paying sixpence for every hundred words copied. So, "The Companies Clauses Consolidation Act, 1845" (8 & 9 V. c. 16), which applies to every joint-stock company incorporated by statute since the 8th of May, 1845, for the purpose of carrying on any undertaking, by § 10, requires such company to keep a book, called "The Shareholders' Address Book," in which are to be entered in alphabetical order the names and addresses of all the shareholders. By § 45, a register is to be kept in which are to be entered particulars of all mortgages and bonds. § 63 requires the company to cause the names of the parties interested in the general capital stock of the company, with the amount of the interest possessed by them respectively, to be entered in the book, to be called the "Register of Holders of Consolidated Stock." §§ 115—119 provide for the accounts of the company to be kept, and to be balanced at certain periods, and to be open for inspection at those periods, or else for fourteen days before and a month after each ordinary general meeting; and the above-mentioned sections also provide for the inspection by shareholders and other persons interested of the books therein respectively required to be kept, and for the taking of copies thereof. See R. *v.* London and St. Katharine Dock Co., 1874. Under "The Companies Clauses Act," under various Consolidation Acts passed in 1847, under "The Railways Companies Securities Act, 1866," and under "The Metropolis Water Act, 1871," various rights of



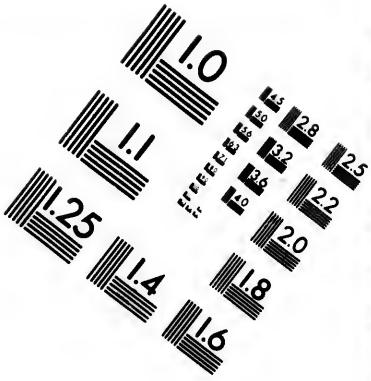
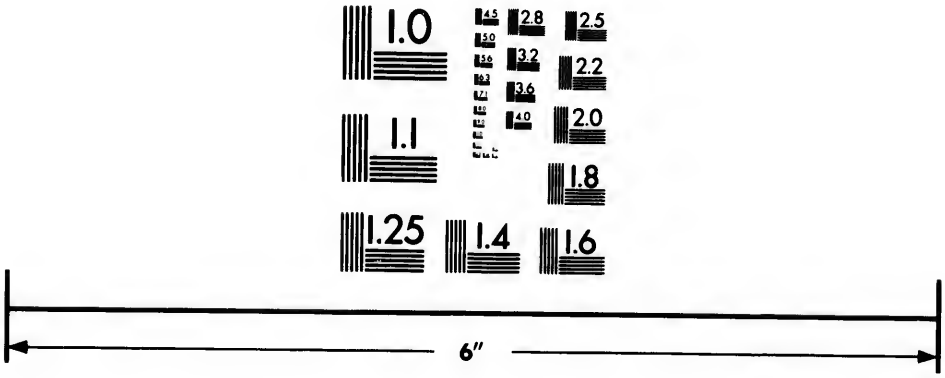
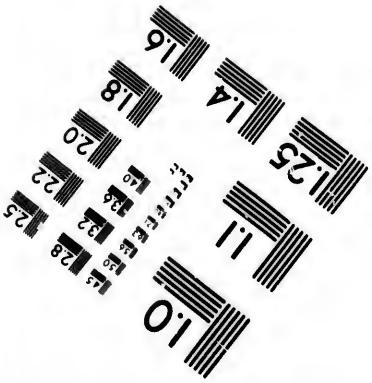
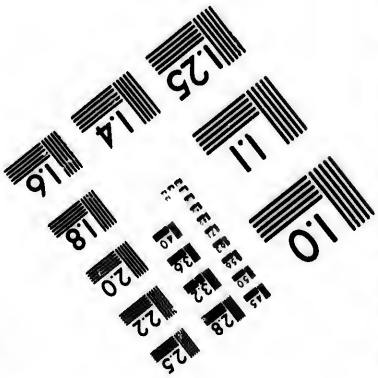


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

2.8
3.2
3.6
2.5
2.2
2.0
1.8
1.6
1.1
1.0

inspection and of demanding copies, are likewise conferred (as to which see those several titles). "*The Copyright Amendment Act*, 1842" (5 & 6 V. c. 45), § 11, provides,—and the provision is incorporated in "The International Copyright Act, 1844" (7 & 8 V. c. 12), § 8, and in "The Fine Arts Copyright Act, 1862" (25 & 26 V. c. 68), §§ 4, 5,—that a register of the proprietorship of copyright, and of the assignments thereof, shall be kept at the Hall of the Stationers' Company, and shall, at all convenient times, be open to the inspection of any person, on payment of one shilling for every entry inspected; and any person may, on payment of five shillings, obtain a certified copy of any entry: see Lucas *v.* Cooke, 1880. *Deposits under Standing Orders of Parliament:* see title '*Parliamentary Documents Deposit Act.*" Under "*The Elementary Education Act*, 1870" (33 & 34 V. c. 75), § 87, "every ratepayer in a school district may, at all reasonable times, without payment, inspect and take copies of, or extracts from, all books and documents belonging to or under the control of the school board of such district." "*The Friendly Societies Act*, 1875" (38 & 39 V. c. 60), § 14, subs. 1, r. (g), enables "any member or person having an interest in the funds of the society" to "inspect the books at all reasonable hours, at the registered offices of the society"; but this enactment will not empower one member to inspect the loan account of another without his written consent. "*The Gasworks Clauses Act*, 1847" (10 & 11 V. c. 15), § 38, and "*The Harbours, Docks, and Piers Clauses Act*, 1847" (id. c. 27), § 50, also contain provisions authorizing parties interested to inspect and demand copies of the books and documents relating to the company's affairs. Under "*The High Peak Mining Customs and Mineral Courts Act*, 1851" (14 & 15 V. c. 94), § 45, facilities are given for all persons to search and examine documents in the custody of the steward of the Barmote Court, under that Act. "*The Highway Act*, 1835" (5 & 6 W. 4, c. 50), § 40, directs that the surveyors keep books of account, and that these books be open at all seasonable times to the inspection of all inhabitants rated to the highway rate of the parish or district, and that they be also entitled to take copies or extracts from them without fee. See, also, title "*Turnpike*." *Jurors' Lists*—Under "The Juries Act, 1825" (6 G. 4, c. 50), § 9, the churchwardens and overseers of every parish are directed to make out a list of every person qualified to serve on juries, and to allow such list to be perused gratis by any inhabitant, at all reasonable times during the first three weeks of September; while "The Common Law Procedure Act, 1851" (15 & 16 V. c. 76, §§ 106–108: see, also, 6 G. 4, c. 50, § 19), enacts, that a printed panel of the jurors summoned, whether common or special, shall, seven days at least before the sitting of every court, be kept at the sheriff's office for public inspection; and that a printed copy of such panel shall be delivered by the sheriff to any party requiring it, on payment of one shilling. As to the practice in Ireland, see "The Juries Act (Ireland), 1871" (34 & 35 V. c. 65, Ir.), §§ 12, 18. "*The Land Transfer Act*, 1875" (38 & 39 V. c. 107), § 104, enables any registered proprietor of any land or charge, and any person authorized by him, or by an order of the court, or by general rule, but no other person, to, subject to the regulations in force, inspect and make copies of, and extracts from, any register or document in the custody of the registrar relating to such land or charge. Subject, also, to such regulation as may be made by the Treasury, every person has, under 13 & 14 V. c. 72, § 52, Ir., a right to search any of the indexes kept at the office for the registration of assurances of lands in Ireland. *Local Loans*—The registers which are kept under "The Local Loans Act, 1875" (38 & 39 V. c. 83), § 24, provides that the registers of "nominal securities" may be inspected at all reasonable times upon payment of the prescribed fee. "*The Markets and Fairs Clauses Act*, 1847"

(10 & 11 V. c. 14), § 50, also enables parties interested to inspect and demand copies of books and documents relating to the undertaking. "*The Merchant Shipping Act*, 1894" (57 & 58 V. c. 60), provides, that any person may, upon payment of a reasonable fee, inspect the register-book kept by any registrar of British ships (§ 64 (1)), as also any of the documents recorded by the registrar-general of shipping and seamen: § 256 (1). "*The Metropolis Management Act*, 1855" (18 & 19 V. c. 120), also contains, in §§ 61, 198, and 199, provisions as to inspecting and taking copies of books and other documents kept under that Act. "*The Metropolis Water Act*, 1871" (34 & 35 V. c. 113), §§ 23, 37, also enables parties interested to inspect and demand copies of the books and documents of the company. Under "*The Mortgage Debenture (Amendment) Act*, 1870" (33 & 34 V. c. 20), § 11, on payment of the prescribed fees, "any person may inspect, and make copies of, and extracts from, the register of securities, the register of mortgage debentures, and the returns made by the company to the registrar," under "The Mortgage Debenture Act, 1865" (28 & 29 V. c. 78). Again, "*The Municipal Corporations Act*, 1882" (45 & 46 V. c. 50), contains, in § 233, the following special provisions relating to the inspection and copying of documents:—"(1.) The minutes of proceedings of the council shall be open to the inspection of a burgess on payment of a fee of one shilling, and a burgess may make a copy thereof or take an extract therefrom. (2.) A burgess may make a copy of, or take an extract from, an order of the council for the payment of money. (3.) The treasurer's accounts shall be open to the inspection of the council, and a member of the council may make a copy thereof, or take an extract therefrom. (4.) The abstract of the treasurer's accounts shall be open to the inspection of all the ratepayers of the borough, and copies thereof shall be delivered to a ratepayer on payment of a reasonable price for each copy. (5.) The Freemen's Roll shall be open to public inspection, and the town clerk shall deliver copies thereof to any person on payment of a reasonable price for each copy." *Newspaper Proprietors.*—Under "The Newspaper Libel and Registration Act, 1881" (44 & 45 V. c. 60), § 13, all persons are at liberty to search and inspect the book called "The Register of Newspaper Proprietors," which is kept by the registrar of joint stock companies, and to demand certified copies of any such entry. *Nominal Securities:* see "*Local Loans.*" "*The Parliamentary and Municipal Registration Act*, 1878": see "*Poor Rate.*" "*The Parliamentary Documents Deposit Act*, 1837" (7 W. 4 & 1 V. c. 83), § 1, requires clerks of the peace, town-clerks, and other persons holding official situations to take custody of all maps, plans, sections, books, and writings, which, by the standing orders of either House of Parliament, are directed to be deposited with them, previous to the introduction of any railway bill, or other bill of a like nature; and the same statute enacts, in § 2, that all persons interested shall have liberty to inspect, and take copies of, or extracts from these documents, on payment of certain regulated fees. The provisions of this Act have been extended by several consolidation and other Acts to the maps, plans, and sections of other undertakings, and to the maps, plans, and sections of alterations proposed to be made therein [see "The Railways Clauses Consolidation Act, 1845" (8 & 9 V. c. 20), § 9; do. for Scotland, id. c. 33, § 9; "The Waterworks Clauses Act, 1847" (10 & 11 V. c. 17, § 21); as also to copies of the Special Acts, by which particular companies, commissioners, or other undertakers have been authorised to act. (See "The Companies Clauses Consolidation Act" (8 & 9 V. c. 16), § 161; do. for Scotland, id. c. 17, § 165; "The Lands Clauses Consolidation Act," id. c. 18, § 150; do. for Scotland, id. c. 19, § 142; "The Railways Clauses Consolidation Act," id. c. 20, § 162; do. for Scotland, id. c. 33, § 153; "The Markets and Fairs Clauses Act," (10 & 11 V.

c. 14), §. 58; "The Gasworks Clauses Act," id. c. 15, § 45; "The Commissioners Clauses Act," id. c. 16, § 110; "The Waterworks Clauses Act," id. c. 17, § 90; "The Harbours, Docks, and Piers Clauses Act," id. c. 27, § 97; "The Towns Improvement Clauses Act," id. c. 34, § 214; "The Cemeteries Clauses Act," c. 65, § 66; and "The Town Police Clauses Act," id. c. 89, § 77. See 9 & 10 V. c. 39, § 6. See, also, 9 & 10 V. c. 3, § 13, as to plans, &c., of harbours, and other works in Ireland, constructed by commissioners to encourage sea fisheries.] *Parliamentary Voters.*—Under "The Parliamentary Voters Registration Act, 1843" (6 & 7 V. c. 18): [as to the law in Ireland, see 13 & 14 V. c. 69], §§ 5, 8, 13, 14, 18 and 20, every person may, during the fortnight next after publication, inspect gratis the lists of claimants, the register of voters, and the lists of persons objected to, which are made out by the overseers and town-clerks respectively, and obtain copies thereof on payment of a small sum. So under § 49 of the same Act, any person may, at a stipulated price, purchase copies of the revised registers; and under § 16 of the Act, every registered elector and claimant may, between the 10th and 31st August, without payment, inspect and take extracts from any poor-rate book, for any purpose relating to any claim or objection, made or intended to be made, by or against him. More extensive rights of inspecting and making copies of poor-rates are by "The Parliamentary and Municipal Registration Act, 1878" (41 & 42 V. c. 26), extended to every person "who is registered as a parliamentary voter." "*The Patents, Designs, and Trade Marks Act*, 1883" (46 & 47 V. c. 57), § 88, requires every register, whether of patents, or of designs, or of trade marks, which is kept in the Patent Office, to, at all "convenient times, be open to the inspection of the public, subject to such regulations as may be prescribed (see Patents Rules, 1883, r. 75, and Sched. I. r. 32, cited in 53 L. J. Ord. and Rules, 86, 89); and certified copies, sealed with the seal of the Patent Office, of any entry in any such register shall be given to any person requiring the same, on payment of the prescribed fee" (46 & 47 V. c. 57, § 88); but by § 52, the right of inspecting registered designs is limited. The Patents Rules, 1883, further provide by r. 76, that "certified copies of, or extracts from, patents, specifications, disclaimers, affidavits, statutory declarations, and other public documents in the Patent Office, or of or from registers or other books kept there, may be furnished by the comptroller on payment of the prescribed fee." See as to the fees, Sched. I. rr. 33, 34, 35. *Poor Law rates and rules* may be inspected under the following statutes. Under "The Poor Law Amendment Act, 1834" (4 & 5 W. 4, c. 76, § 18; [see, also, "The Poor Law Board Act, 1847" (10 & 11 V. c. 109), §§ 10, 29; "The Local Government Board Act, 1871" (34 & 35 V. c. 70)], every owner of property or his agent, and every ratepayer, is entitled to inspect gratis the rules sent by the late Poor Law Board, or the present Local Government Board, to the overseers of his parish, or to the guardians of his union, as also to take copies of such rules, or to require copies to be furnished to him, on payment of a trifling charge. Under "*The Poor Law Amendment Act*, 1844 (7 & 8 V. c. 101), § 33, for seven days before the auditing of the overseer's accounts, their rate-books are open, between the hours of eleven and three, for the inspection of every person liable to be rated to the relief of the poor. [See, also, "The Poor Rate Act, 1743" (17 G. 2, c. 3), § 3; 6 & 7 W. 4, c. 96, § 5; Tennant *v.* Overton, 1846; Tennant *v.* Bell, 1846.] Moreover, under certain circumstances defined therein, burgesses have a right under "The Parliamentary and Municipal Registration Act, 1878" (41 & 42 V. c. 26), § 13, to inspect and make copies free of charge from the books containing the poor rates: see, also, title "*Parliamentary Voters*." As to returns by railway companies for the purposes of poor law assessments, see "The Railway Clauses Consolidation Act,"

§ 1522. When the public are entitled by law to inspect any register kept in pursuance of any Act of Parliament, the publication of a mere copy of it is privileged.[1]

infra. *Public Baths:* see *Baths. Public Health, Rates, Mortgages of Rates, and Registers of Voters.*—Under "*The Public Health Act*, 1875" (38 & 39 V. c. 55), § 219, "any person interested in or assessed to any rate" made under that Act, "may inspect the same, and any estimate made previous thereto, and may take copies of or extracts therefrom, without fee or reward." Under § 237 of the same Act, all registers of mortgages on rates, kept at the offices of the local authorities, "shall be open to public inspection during office hours, without fee or reward." And by Sched. 2, r. 1, sub-r. 30, of the same Act, the register of voters is also open to a limited inspection. "*The Railway Clauses Consolidation Act*" (8 & 9 V. c. 20),—which applies to all railways authorised to be constructed since the 8th of May, 1845,—contains also an important provision on this subject, for it enacts, in § 107, that every railway company subject to that Act shall, if required, transmit a copy of its annual account of disbursements and receipts, duly audited, and free of charge, to the overseers of the poor of the several parishes, and to the clerks of the peace of the counties, through which the railway shall pass; and such accounts shall be open to the inspection of the public at all reasonable hours, on payment of one shilling. An easy mode is thus afforded of ascertaining the sum at which the company should be assessed to the parochial and county rates. "*The Railway Companies Securities Act*, 1866" (29 & 30 V. c. 108), also contains, in §§ 7—9 and 12, provisions authorising parties interested to inspect and demand copies of the books and accounts required to be kept by the Act. *Rating of Railways:* see *The Railway Clauses Consolidation Act.* As to *Registers of Mortgages of Rates:* see *Public Health. Register of Newspaper Proprietors:* see *Newspaper Proprietors.* As to *Registers of Voters under "The Public Health Act":* see *Public Health. Shipping:* see *The Merchant Shipping Act.* "*The Solicitors Acts*, 1843 *and* 1877" (6 & 7 V. c. 73, §§ 11, 23; 40 & 41 V. c. 25, 2nd Sched., Part 2, substituted for 6 & 7 V. c. 73, § 20; see, also, 29 & 30 V. c. 84, §§ 15, 26, 29, Ir.), make every person entitled, without fee, to have free access to the rolls of solicitors, which are now kept by the officer appointed for that purpose under the last-named Act; to the books containing an abstract of the affidavits sworn by such solicitors as have articled clerks, which books are placed under the same custody as the rolls; and to the books kept by the registrar, in which are entered the particulars of the declarations signed by solicitors preparatory to obtaining their certificates. "*The Turnpike Roads Acts*, 1823 *and* 1829" (3 G. 4, c. 126, §§ 72, 73; 9 G. 4, c. 77, § 2), require that the books containing the oaths, orders, accounts, and proceedings of the trustees, as well as those kept for registering mortgages or assignments, shall be open to be inspected and copied gratis, at all seasonable times, by the trustees, or by any creditor of the tolls; while, by the Act relating to *Turnpike Trusts in South Wales* (7 & 8 V. c. 91, § 71), similar books, kept by the County Roads Board, may be inspected and copied without fee by all members of such board, and of all district boards within the county, and by every person paying any rate by that Act authorised to be made. "*The Valuation* (*Metropolis*) *Act*, 1869" (32 & 33 V. c. 67), §§ 67—69, provides that any documents required by the Act to be deposited with the rate books of the parish, and especially all valuation lists, may be inspected and copied without charge by any ratepayer.

[1] Searles *v.* Scarlett, 1892, C. A.; Fleming *v.* Newton, 1848, H. L.

§ 1523. In the SECOND PLACE, we must consider THE MODE OF PROVING PUBLIC DOCUMENTS. And, first, as to *legislative Acts*. *Public statutes* (as already seen[1]) require no proof, being supposed to exist in the memories of all. Yet, for certainty of recollection, reference may, nevertheless, be had to a printed copy, and if the accuracy of such copy be questionable, the court will consult the Parliament roll.[2] In most *local and personal Acts* it was formerly customary to insert a clause, declaring that the Act should be deemed public, and should be judicially noticed: and this dispensed with the necessity, not only of pleading the Act specially, but of producing an examined copy, or a copy printed by the printer for the Crown.[3] But the Legislature has enacted that every Act made after the commencement of the year 1851 shall be deemed a public Act, and judicially noticed as such, unless the contrary be expressly provided.[4] Acts, whether local and personal, or merely private, which, being passed before 1851, contain no clause declaring them to be public, or which, being passed since that date, contain an express clause, declaring them not to be public, can most simply be proved by producing a copy, which *purports* to be printed by the Queen's printer, or under the superintendence or authority of Her Majesty's Stationery Office,[5] and then need not be proved to be so printed;[6] but may also be proved by means of an examined copy, shown on oath to have been compared with the Parliament roll.[7] Acts which have not been printed by any such authorised printer, (as is sometimes the case with Acts for naturalising aliens, for dissolving marriages, for inclosing lands, and other purposes of a strictly personal character), can be regularly proved by an examined copy, or a certified transcript into Chancery, if there be one.[8]

§ 1524. *Statutes passed in Ireland prior to the Union* are conclusively proved in any court of Great Britain by producing a copy of them printed and published by the printer for the Crown; and the

[1] Ante, § 5.
[2] R. *v.* Jeffries, 1720-1.
[3] Woodward *v.* Cotton, 1834; Beaumont *v.* Mountain, 1834. These cases explain, and partially overrule, Brett *v.* Beales, 1829.
[4] See "The Interpretation Act, 1889" (52 & 53 V. c. 63), § 9.
[5] 45 V. c. 9 ("The Documentary Evidence Act, 1882"), § 2.
[6] 8 & 9 V. c. 113, § 3, cited ante, § 7.
[7] B. N. P. 225.
[8] Roos Barony, 1804, Min. Ev. 145, cited Hubb. Ev. of Suc. 613.

copies of statutes passed since that event, printed and published by the government printer, are similarly receivable as conclusive evidence in any court in Ireland.[1]

§ 1525. The *statute* or *written law* of any *foreign nation* cannot (as we have seen) be proved in English courts by the production of a copy, however well authenticated; but it is in all cases necessary to call some person, skilled in the foreign law, to prove the existence and meaning of the statute or code on which reliance is placed.[2]

§ 1526. *Acts of state* may be proved in various ways, according to the nature of the document. *British treaties* may be proved, by producing either the originals, or copies exemplified under the Great Seal, or examined copies, or copies coming from the government press; but, in this last case, it may be doubtful whether the courts would be satisfied, without proof that the copy was actually printed by the printer for the Crown. *Charters*, *letters-patent*,[3] *letters-close*, *grants from the Crown*, *pardons*, and *commissions*, will be most conveniently proved by the production of the originals under the Great Seal,[4] the Privy Seal,[5] or the Royal Sign-manual; but as these are matters of public record,[6] they might also, as it seems, be proved by exemplifications under the Great Seal, or by examined copies. It may be noted that Letters Patent under the Great Seal, being records, are valid before enrolment, and are (both in England and Ireland) admissible in evidence without proof of an inquisition, or of a warrant or letter from the Crown directing the grant.[7]

§ 1527. *Royal Proclamations, and Orders and Regulations issued under the authority of Government*, may be proved, like other public documents, by producing either the originals, or examined

[1] 41 G. 3, c. 90 ("The Crown Debts Act, 1801"), § 9. It is presumed that this section would be satisfied by producing a copy which *purported* to be printed by the government printer, without proof that it was actually so printed. The words, however, in their strict sense, do not admit of this construction, and the evil is not remedied by "The Documentary Evidence Act" (8 & 9 V. c. 113), cited ante, § 7. See Woodward *v.* Cotton, 1834. See, also, 45 V. c. 9, and qu. as to the effect, if any, produced by that Act.

[2] See ante, §§ 1423—1425.

[3] As to proof of patents for inventions, see post, § 1603.

[4] See "The Great Seal Act, 1884" (47 & 48 V. c. 30); also, 40 & 41 V. c. 41.

[5] Since 28th July, 1884, no instrument is required to be passed under the Privy Seal: 47 & 48 V. c. 30, § 3.

[6] 2 Bl. Com. 346.

[7] D. of Devonshire *v.* Neill, 1876-7 (Ir.).

copies;[1] and in addition to these modes of proof, both as regards these and certain other public documents,[2] further facilities of proof have been afforded and defined by the Documentary Evidence Act, 1868,[3] as amended by the Documentary Evidence Act, 1882.[4] These enactments, when read together, provide[5] that "Primâ facie evidence of any proclamation, order, or regulation[6] issued before or after the passing of this Act by her Majesty, or by the Privy Council, or by the Lord Lieutenant or other chief governor or governors of Ireland, either alone or acting with the advice of the Privy Council in Ireland, also of any proclamation, order,[7] 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[8] purporting to contain such proclamation, order, or regulation:[9]

"(2.) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the government printer,[10] or by any printer to her Majesty in Ireland, or by any printer printing either in England or Ireland under the superintendence or authority of Her Majesty's Stationery Office,[11]—or, where the question arises in a

[1] As to when proof of this kind will be admissible, see, further, post, § 1662.

[2] See Schedule, infra.

[3] 31 & 32 V. c. 37.

[4] 45 V. c. 9.

[5] See § 2 of "The Documentary Evidence Act, 1868" (31 & 32 V. c. 37), and § 4 of "The Documentary Evidence Act, 1882" (45 V. c. 9).

[6] This Act is made specially applicable to "any regulation made by a Secretary of State in pursuance of" "The Naturalisation Act, 1870" (33 & 34 V. c. 14), § 12, subs. 5, and to "any rule made by a Secretary of State" in pursuance of "The Prison Act, 1877" (40 & 41 V. c. 21), § 51. As to the proof of the Irish prison rules, see post, § 1663.

[7] "Any approval of the Treasury" under "The Post Office Act, 1870," and "any warrant of the Treasury" under "The Post Office Act, 1875," shall be deemed an "order" within this Act: 33 & 34 V. c. 79, § 21; 38 & 39 V. c. 22, § 9.

[8] This includes the London, the Dublin, and also the Edinburgh Gazettes. See 31 & 32 V. c. 37, § 5, cited post, *n.* to this §. See, also, 40 & 41 V. c. 41, § 3, subs. 3. The entire Gazette must be produced; a cutting from it will not suffice: R. *v.* Lowe, 1883.

[9] See, also, "The Contagious Diseases (Animals) Act, 1878" (41 & 42 V. c. 74), § 58.

[10] Huggins *v.* Ward, 1873.

[11] 45 V. c. 9, §§ 2, 4.

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 by the Privy Council in England, or by the Lord Lieutenant or his Privy Council in Ireland,[1] 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 connexion with such department or officer.[2]

[1] 45 V. c. 9, § 4.

[2] This Schedule to "The Documentary Evidence Act, 1868" (31 & 32 V. c. 37), as altered by subsequent legislation, stands now as follows:—

Column I. Name of Department or Officer.	Column II. 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 late Poor-law Board (abolished by 34 & 35 V. c. 70, § 2).	Any Commissioner of the Poor-law Board, or any Secretary or Assistant Secretary of the said Board.
The Local Government Board (34 & 35 V. c. 70, § 5. See, also, 38 & 39 V. c. 55, §§ 130, 135, 297, subs. 7; and 41 & 42 V. c. 52, § 265, Ir.).	Any Member of the Local Government Board, or any Secretary or Assistant Secretary of that Board.
The Education Department (33 & 34 V. c. 75, § 83).	Any Member of the Education Department, or any Secretary or Assistant Secretary of that Department.
The Postmaster-General (33 & 34 V. c. 79, § 21. See, also, 44 & 45 V. c. 20, §§ 6 and 7; and 47 & 48 V. c. 76, § 15).	Any Secretary or Assistant Secretary of the Post Office.
A Secretary of State acting under "The Artillery and Rifle Ranges Acts, 1885" (48 & 49 V. c. 36, § 6; and 49 V. c. 5).	Any of Her Majesty's Principal Secretaries of States.

"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." [1]

[1] Sect. 3 of "The Documentary Evidence Act, 1868" (31 & 32 V. c. 37), enacts, that, "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."

Sect. 4 of the same Act enacts, that "if any person commits any of the offences following, that is to say,

(1.) Prints any copy of any proclamation, order, or regulation, which falsely purports to have been printed by the government printer, or to be printed under the authority of the Legislature of any *British* colony or possession, or tenders in evidence any copy of any proclamation, order, or regulation, which falsely purports to have been printed as aforesaid, knowing that the same was not so printed; or

(2.) Forges, or tenders in evidence, knowing the same to have been forged, any certificate by this Act authorized to be annexed to a copy of or extract from any proclamation, order, or regulation;

he shall be guilty of felony, and shall on conviction be liable to be sentenced to penal servitude for such term as is prescribed by ['The Penal Servitude Act, 1891' (54 & 55 V. c. 69, § 1)], as the least term to which an offender can be sentenced to penal servitude" (that is, "three years"), "or to be imprisoned for any term not exceeding two years, with or without hard labour."

By § 5 of the same Act, "the following words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such construction; (that is to say.)

"'British colony and possession' shall for the purposes of this Act include the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in her Majesty, by virtue of any Act of Parliament for the government of India and all other her Majesty's dominions:

"'Legislature' shall signify any authority, other than the Imperial Parliament or her Majesty in Council, competent to make laws for any colony or possession:

"'Privy Council' shall include her Majesty in Council, and the lords and others of her Majesty's Privy Council, or any of them, and any committee of the Privy Council that is not specially named in the schedule hereto: also the Privy Council in Ireland or any committee thereof [see 45 V. c. 9, § 4.]:

"'Government printer' shall mean and include the printer to her Majesty, whether in England or Ireland, and any printer printing either in England or Ireland under the superintendence or authority of Her Majesty's Stationery Office [see 45 V. c. 9, §§ 2, 4], and any printer purporting to be the printer authorised to print the statutes, ordinances, acts of state, or other public acts of the Legislature of any British colony or possession, or otherwise to be the government printer of such colony or possession:

"'Gazette' shall include 'The London Gazette,' 'The Edinburgh Gazette,' and 'The Dublin Gazette,' or any of such gazettes."

Sect. 6 of the Documentary Evidence Act, 1868, enacts, that "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."

§ 1528. All *proclamations, treaties, and other acts of state*, of any *Foreign State* or of any *British Colony*, may be proved either by examined copies, or by copies *purporting* to bear the seal of the state or colony to which they respectively belong.[1] But a mere book purporting to be a collection of treaties concluded by America, and to have been published by authority there, as a regular copy of the archives in Washington, vouched by the evidence of the American minister resident at this court, that such book was the rule of his conduct, was rejected.[2]

§ 1529. Copies of the *Journals* of either House of Parliament are rendered admissible in evidence (as already seen)[3] by the Documentary Evidence Act, 1845,[4] if they *purport* to be printed by the printers of either House; and it is not necessary to prove that they were in fact so printed.[4]

§ 1530. The *Articles of War* for the government of the navy, the army, and the marines, are respectively embodied or authorised in public statutes,[5] and, consequently, require no proof.[6]

§ 1531. The *Reports made by the Commissioners or the Surveyor-General of the Woods and Forests*, either to the Queen or to Parliament, may, by the Crown Lands Act, 1873, be proved by

[1] 14 & 15 V. c. 99 ("The Evidence Act, 1851"), § 7, cited ante, § 10.

[2] Richardson *v.* Anderson, 1805 (Ld. Ellenborough, who observed that he would have rejected a book purporting to be one of Spanish treaties, even if it also purported to be printed by the printer to the King of Spain).

[3] See ante, §§ 7, 8.

[4] 8 & 9 V. c. 113, § 3; cited ante, §§ 7, 8.

[5] 29 & 30 V. c. 109 ("The Naval Discipline Act, 1866"); 44 & 45 V. c. 58 ("The Army Act, 1881"), §§ 69, 179.

[6] Ante, § 5. Nevertheless, an express provision to this effect (perhaps a superfluous one) is contained in § 163, subs. (c), and § 179, subs. 11 of "The Army Act, 1881" (44 & 45 V. . . enacting, that all "copies purporting to be printed by a government printer," whether of Queen's regulations, including Admiralty regulations so far as concerns the Royal Marines, or of royal warrants, or of army circulars, or of rules made by her Majesty, or a Secretary of State, in pursuance of that Act, shall be evidence of such regulations, royal warrants, army circulars and rules. "The Military Manœuvres Act, 1882" (45 V. c. 19), §§ 5, 10, also contains some special provisions for facilitating the proof of certain orders, regulations, and rules, which the consultative commission appointed by that statute are authorised to make.

copies purporting to have been printed by the order of either House.[1] This enactment might well be rendered applicable to all reports presented either to the Crown or to Parliament.

§ 1532. In Ireland *a deed founding a public trust* has been regarded as quasi-public, and an alleged extract from it, which was publicly exhibited and subsequently kept by a governor of the trust and purported to be signed by the founder of the charity, has been admitted in evidence.[2]

§ 1533. *General records of the realm*, in the custody of the Master of the Rolls,[3] may be proved by copies purporting to be certified by the deputy-keeper of the records, or one of the assistant record-keepers, and to be sealed or stamped with the seal of the Record Office.[3] In cases of importance before the House of Lords or elsewhere, permission will, however, be given to one of the assistant-keepers to produce the original record.

§ 1534. The *records of courts of justice*, and other judicial writings, constitute another class of public documents. Amongst these are the *records* of the Supreme Court, and of the old *superior courts* of law and equity, and the *quasi records* of those courts. An *original record* of the High Court, if required to be produced, is subject to the following R. S. C.:—"No affidavit or record of the court shall be taken out of the Central Office without the order of a judge or master, and no subpœna for the production of any such document shall be issued."[4] The expression "quasi records" embraces depositions, affidavits, bills, answers, orders, and decrees,

[1] 36 & 37 V. c. 36, § 6.

[2] In re Hospital for Incurables, 1884 (Ir.).

[3] By 1 & 2 V. c. 94 ("The Public Record Office Act, 1838") § 12, "the Master of the Rolls or deputy-keeper of the records may allow copies to be made of any records in the custody of the Master of the Rolls, at the request and costs of any person desirous of procuring the same; and any copy so made shall be examined and certified as a true and authentic copy by the deputy-keeper of the records, or one of the assistant record-keepers aforesaid, and shall be sealed or stamped with the seal of the Record Office, and delivered to the party for whose use it was made." By § 13, "every copy of a record in the custody of the Master of the Rolls, certified as aforesaid, and purporting to be sealed or stamped with the seal of the Record Office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, without any further or other proof thereof, in every case in which the original record could have been received there as evidence." For the corresponding enactments in "The Public Records (Ireland) Acts, 1867 and 1875," see 30 & 31 V. c. 70, §§ 19, 20, Ir.; 38 & 39 V. c. 59, §§ 9, 10, Ir.

[4] R. S. C. 1883, Ord. LXI. r. 28.

filed in the old Court of Chancery, rules of court, and certain other documents, which, although not strictly records,[1] partake so much of their nature, that they can be proved by means of copies[2] to the same extent as records, and are subject generally to the same rules of evidence. But, for the sake of convenience, the general term "records" will alone be used in this work, and will include all the documents just mentioned. Now, subject to the rule just cited,[3] the records of the superior courts may be proved by the mere production of the *originals*. They may also be proved by the production of a duly certified copy of an entry in the Entry-Book of Judgments of the court in which judgment was given.[4] They further may be proved by means of *copies*.[5]

§ 1535. Of copies there are *four kinds;* viz., exemplifications under the Great Seal; exemplifications under the seal of the particular court where the record remains; office copies; and examined copies.[6] Copies of one or the other of these four sorts will always be admissible in lieu of the original *record excepting in two cases:*[7] first, if issue has been joined on a statement of defence or a reply of *nul tiel record*, in some cause in a court to which the disputed record belongs;[8] and secondly, if a person be indicted for perjury in any affidavit, or deposition, or for forgery with respect to any record.[9] In either of these two cases, the original document,—unless it be shown that the prisoner has got possession of it,

[1] B. N. P. 235. Buller, J., after stating that a record is "a memorial of what is the law of the nation," adds, "now Chancery proceedings are no memorials of the laws of England, because the *Chancellor is not bound to proceed according to the law*." As to rules of court not being records, see R. *v.* Bingham, 1829. Records of the Chancery Division of the High Court, however, clearly are evidence.

[2] See, as to decrees: B. N. P. 234, 235; as to bills and answers: Ewer *v.* Ambrose, 1825; as to depositions in Chancery: Highfield *v.* Peake, 1827; as to affidavits: Davies *v.* Davies, 1840; Garvin *v.* Carroll, 1847 (Ir.); as to rules of court: Selby *v.* Harris, 1698; Duncan *v.* Scott, 1807.

[3] Viz., Order LXI. r. 28.

[4] In re Tollemache, Ex parte Anderson, 1885.

[5] Ante, § 439. Post, § 1598.

[6] B. N. P. 226—228.

[7] As to a possible third case, see ante, § 1448.

[8] 2 Ph. Ev. 196.

[9] B. N. P. 239; R. *v.* Morris, 1761; R. *v.* Benson, 1810; R. *v.* Spencer, 1824; Crook *v.* Dowling, 1782; Stratford *v.* Greene, 1810; Garvin *v.* Carroll, 1847 (Ir.) (Crampton, J.); Lady Dartmouth *v.* Roberts, 1812 (Ld. Ellenborough and Le Blanc, J.). In this last case, the opinion intimated, that the same strictness was necessary in actions for malicious prosecution, would seem to be a mistake. See B. N. P. 13; Purcell *v.* M'Namara, 1808.

or that it has been lost or destroyed,[1]—must be actually produced. Moreover, on a trial for perjury, not only must the original record be produced, but the signatures of the defendant, and of the person whose name is attached to the jurat, must be proved;[2] after which the court will presume that the oath was duly administered.[3] To ensure the production of the original record, application should be made to the court to which it belongs, or to a judge or master thereof, who will make the necessary order.[4]

§ 1536. Returning to the consideration of the admissibility of each of the four copies above indicated,[5] we note that the first-named of these, viz., *an exemplification under the Great Seal*, was formerly required where an issue was raised as to the *existence of a record* which did *not belong to the same court*. To obtain this, if the record did not belong to the old Court of Chancery, a literal transcript of it was removed thither by certiorari, (the Court of Chancery being regarded as the centre of all the courts, and the Great Seal being kept there,) and then the exemplification was transmitted by mittimus out of Chancery to the court in which the cause was pending.[6] An exemplification under the Great Seal is considered a record of the highest validity.[7] It, too, was the proper mode of proof, where the existence of a judgment of one of the superior courts was put in issue in any County Court.[8] The proper mode of proceeding now would be by the production of an office copy under Order XXXVII. r. 4.[9]

§ 1537. Exemplifications under the seal of the court where the record remains, are the second of the above-mentioned two kinds of exemplifications, and also the second of the four above-mentioned kinds of copies. Exemplifications of this second sort may be used as proofs thereof when the existence or contents of the record are *not directly in issue*. Practically, however, recourse is seldom had

[1] R. *v.* Milnes, 1860 (Hill, J.).
See cases cited in last note but one.

[3] R. *v.* Spencer, 1824 (Abbott, C.J.); R. *v.* Turner, 1848 (Erle, J.).

[4] See ante, § 1532; Crook *v.* Dowling, 1782 (Ld. Mansfield); Bastard *v.* Smith, 1839; Bentall *v.* Sidney, 1839. The application to the court for leave to take an affidavit off the file, in order to prosecute the defendant for perjury, will be granted as a matter of right: Stratford *v.* Greene, 1810; Keiman *v.* Boylan, 1893.

[5] Supra, § 1534.

[6] B. N. P. 226 b; Hewson *v.* Brown, 1760.

[7] B. N. P. 226 b, 228.

[8] Winsor *v.* Durnford, 1848.

[9] Set out in full, infra, § 1538, which see further on the point.

to this medium of proof, where the record belongs to any Division of the Supreme Court.[1]

§ 1537A. Both the above-named species of *exemplifications* are *proved by mere production*, as the judges are bound to take judicial notice of the seals attached to them;[2] and are deemed of higher credit than examined copies, being presumed to have undergone a more critical examination.[3]

§ 1538. The third of the four above-mentioned kinds of copies is an *office copy* of a record. By an "office copy" is meant a copy authenticated by a person intrusted with the power of furnishing copies. It is admitted in evidence upon the credit of the officer without proof that it has been actually examined, and it has ever been regarded, even at common law, when tendered as evidence in the *same court*, and in the *same cause*, as equivalent to the record itself.[4] Its admissibility is, however, now much extended, as the Rr. S. C. provide, that "office copies of all writs, records, pleadings, and documents filed in the High Court shall be admissible in evidence in all causes and matters, and between all persons or parties, to the same extent as the original would be admissible."[5] The Rules, moreover, provide further, that office copies of *affidavits*, duly authenticated with the seal of the office, may, in all cases, be used, provided the originals have been duly filed;[6] and original affidavits may, in some cases, be used before filing,[7] and even an office copy of an affidavit of discovery of documents is not necessary.[8]

§ 1539. It is provided,[9] that, "All copies, certificates, and other documents, appearing to be sealed with a seal of the Central Office, shall be presumed to be office copies or certificates or other documents issued from the Central Office, and, if duly stamped, may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, shall be required for the authentication of any such copy, certificate, or other docu-

[1] See R. S. C. Ord. XXXVII. r. 4, infra.
[2] Ante, § 6.
[3] B. N. P. 226 b, 228.
[4] Den *v.* Fulford, 1761 (Ld. Mansfield); Jack *v.* Kiernan 1840 (Ir.) (Bushe, C.J.); Barron *v.* Daniel, 1838 (Ir.) (Doherty, C.J.).
[5] R. S. C. Ord. XXXVII. r. 4.
[6] Ord. XXXVIII. r. 15.
[7] Id., and Ord. LXV. r. 27, subs. 53.
[8] Ord. LXV. r. 27, subs. 54.
[9] Ord. LXI. r. 7.

ment." As has been already stated,[1] the Central Office of the Supreme Court is now divided into the following ten Departments:—1. Writ, appearance and judgment. 2. Summons and Order. 3. Filing and Record. 4. Taxing. 5. Enrolment. 6. Judgments and Married Women's acknowledgments. 7. Bills of Sale. 8. Queen's Remembrancer. 9. Crown Office. 10. Associates.[2] Each of these has an official seal.[3]

§§ 1540—41. Independently of the general provision set out in the preceding paragraph, office copies of some of the records of the Supreme Court and of the Central Office are by statute rendered admissible in evidence in all courts.[4]

§ 1542. It would be no easy matter to enumerate all the records and documents which are deposited in the Petty Bag Office,[5] and which may now, under the above enactment, be proved by office copies.[6]

[1] See Ord. LXI. And see, also, ante, § 1491A, n.

[2] R. 1 of Ord. LXI.

[3] R. 6 of Ord. LXI.

[4] Thus, the following office copies are by statute admissible:—Certificates of *Acknowledgments of deeds by Married Women*, which are filed in No. 6 Department of the Central Office, may, by virtue of "The Conveyancing Act, 1882" (45 & 46 V. c. 39, § 7, subss. 7 and 8; see, also, 4 & 5 W. 4, c. 92, § 79, Ir.), be proved by office copies. Under "*The Bills of Sale Act*, 1878" (41 & 42 V. c. 31, § 16; 42 & 43 V. c. 50, s. 16, Ir.: see Emmott *v.* Marchant, 1878), any person may, on paying the proper fees, have an office copy or extract of any bill of sale registered in the Central Office (see Ord. LXI. r. 1), and of the affidavit of execution filed therewith, or of any copy thereof with its accompanying affidavit, or of any registered affidavit of renewal; and any such copy shall in all courts and before all persons, "be admitted as primâ facie evidence thereof, and of the fact and date of registration as shown thereon." The orders and decisions of the Court of Appeal from the decisions of *Revising Barristers*, may be proved by copies, though such copies are not strictly "office copies," as they bear no official seal, but must purport to be signed by a master of the court, (see 6 & 7 V. c. 18 ("The Parliamentary Voters Registration Act, 1883"), §§ 66, 68; and, for the corresponding law in Ireland, 13 & 14 V. c. 69 ("The Representation of the People (Ireland) Act, 1850") §§ 79, 91.) Certificates of *Searches* made, under "The Conveyancing Act, 1882" (45 & 46 V. c. 39), in the Central Office for entries of judgments, deeds, matters, or documents, setting forth the result of such search must, under § 2 of the Act, be filed by the proper officer; and every such certificate may be proved by an office copy, and shall, in favour of a purchaser, furnish conclusive evidence "according to the tenour thereof," whether affirmative or negative.

[5] See 37 & 38 V. c. 81 ("The Great Seal (Offices) Act, 1874"), §§ 5, 10, which give power to abolish this office, and to transfer the muniments elsewhere, which, for some unexplained reason, has never been exercised. See Rules respecting Solicitors, 2nd Nov. 1875, rule "as to Custody of Rolls and Documents."

[6] Among the most important of these are the *Bedford Level* decrees; the *Charity Commissioners'* decrees, from the reign of Queen Elizabeth;

§ 1543. Before leaving the subject of office copies, attention may be drawn to a provision in the rules regulating proceedings in Divorce and Matrimonial causes, which is very likely to mislead. Documents relating to any matter or suit depending in the Court for Divorce and Matrimonial Causes, are now (Rule 118) deposited in the Registry of the Court of Probate; and the registrar of that court is bound to permit searches and inspection, and to grant copies and extracts, as if the documents had reference to some disputed probate. But Rule 119 provides that "*office copies* or extracts furnished from the Registry of the Court of Probate will *not be collated* with the originals from which the same are copied, unless specially required. *Every copy so required* shall be certified under the hand of one of the principal Registrars of the Court of Probate to be an examined copy." And by Rule 120, "the seal of the court will not be affixed to any copy which is not certified to be an examined copy." Documents deposited with the Probate Division of the High Court are, in short, required to be proved by *examined*[1] copies, and not by mere *office* copies.

§ 1544. In Ireland, although the officers of the superior courts are authorised, if not required, by statute,[2] to furnish office copies of the proceedings of such courts, these copies, with one statutory exception, seem to be only admissible in evidence, in the same cause and the same court.[3] The one exception, just mentioned, arises on an Act[4] which enacts, that in every proceeding before the court of the assistant barrister, or of the judge of assize upon appeal, an *office copy* of any judgment, decree, or order, made by or before any court of law or equity in Ireland, *certified to be a true copy* by

Escheats commissions and inquisitions, from the time of Charles II.; *Lunacy* commissions and inquisitions, from the same date; *Parliamentary Records*, including the Parliament Rawns, that is, the list of writs issued on calling new Parliaments, from the time of Henry VII.; a few qualifications of members of Parliament; and the returns of members to Parliament from the date of the Restoration; *Patents and specifications* records, which, prior to the 1st of January, 1849, were enrolled in this office; *Returns to writs*, including those for electing coroners, verderors, and regardors; those for swearing in the old masters extraordinary of the Court of Chancery and justices of the peace; those of scire facias, and many others which have issued from what used to be the common law side of the Court of Chancery. See 12 & 13 V. c. 109, § 14.

[1] As to which, see infra, § 1545.

[2] See 7 & 8 V. c. 107, § 11, and Sched., Ir.

[3] Jack *v.* Kiernan, 1840 (Ir.).

[4] "The Civil Bill Courts (Ireland) Act, 1851" (14 & 15 V. c. 57), § 107.

the proper officer of such court, shall, *upon proof of such officer's handwriting*, be deemed and taken as primâ facie evidence of such document. This clause sets at naught the valuable provisions of the Documentary Evidence Act, 1845, relating to the proof of copies.[1]

§ 1545. *An examined copy* is the fourth kind of copy mentioned above,[2] and the most usual means of proving records. When proof by means of an examined copy is adopted, a witness must swear that he has compared the copy tendered in evidence with the original, or with what the officer of the court, or any other person, read as the contents of the record, and that such copy is correct.[3] It is not necessary for the persons examining to exchange papers, and read them alternately both ways;[4] but it is necessary that the copy should be an accurate and complete copy, and, therefore, if it contains abbreviations where, in the original, words were written at length, it cannot be received.[5] Moreover, if the record be written or printed in an ancient or foreign character, the witness, who has compared the copy with it, must have been able to read and understand the original.[6] It must also appear in all these cases, that the record from which the copy was taken was found in the proper place of deposit, or in the hands of the officer in whose custody the records of the court are kept. And this cannot be shown by any light reflected from the record itself, which may have been improperly placed where it was found.[7]

§ 1546. The records or judicial proceedings of the old Admiralty Court,[8] of the Ecclesiastical Courts,[9] of the Court of Stannaries,[10] and of the Courts of Quarter Sessions, may be proved, either by producing the originals, or by means of exemplifications, whether under the Great Seal or under the seals of the respective courts,

[1] Supra, §§ 7—8.
[2] § 1534.
[3] Reid *v.* Margison, 1808; Gyles *v.* Hill, 1809; M'Neil *v.* Perchard, 1795; Fyson *v.* Kemp, 1833; Rolf *v.* Dart, 1809; R. *v.* M'Donald, 1841 (Ir.) (Crampton, J.); R. *v.* Hughes, 1839 (Ir.) (Doherty, C.J.); Hill *v.* Packard, 1830 (Am.); Lynde *v.* Judd, 1807 (Am.).
[4] Cases cited in last note.
[5] R. *v.* Christian, 1842.
[6] Crawford and Lindsay Peer., 1845-8, H. L.
[7] Adamthwaite *v.* Synge, 1816 (Ld. Ellenborough).
[8] See 3 & 4 V. c. 65; 24 & 25 V. c. 10 ("The Admiralty Court Act, 1861"); 30 & 31 V. c. 114, Ir. Both the last-mentioned Acts are amended by 57 & 58 V. c. 60 ("The Merchant Shipping Act, 1894").
[9] See 6 & 7 V. c. 38 ("The Judicial Committee Act, 1843"), § 14.
[10] See 6 & 7 W. 4, c. 106 ("The Stannaries Act, 1836"), §§ 19, 21.

(which latter seals require no proof);[1] or by office copies in the same cause and the same court;[2] or by examined copies in any court.[3] Indeed, these modes of proof are generally available with respect to the judgments or other proceedings of all inferior courts of record;[4] and even where the court is not one of record, and where short notes of its proceedings are alone kept, these notes, being considered as public documents, may be proved by examined copies.[5] Where the existence of a record or judgment of any of the inferior common-law courts is put in issue in some cause in the Queen's Bench Division, the party who has to produce the document questioned, may move that court for a certiorari; and on the issuing of this writ, a literal transcript of the document, under the seal of the inferior tribunal, will be returned directly into the court, and will be sufficient to countervail the statement of defence denying the existence of the original.[6]

§ 1547. While the records, and other judicial proceedings, of all inferior courts are capable of the above common-law modes of proof, special *statutes* have in a few instances been passed with a view of *facilitating the proof*, either of the records or other proceedings of *particular tribunals*, or of *particular records and documents*. The Acts which thus render a convenient species of evidence admissible, do not deprive parties of the right of having recourse to any other mode of proof allowable at common law; or, in other words, the *statutable methods of proof are cumulative*, and *not substitutionary*. Indeed, it is a doctrine founded on common sense, largely sanctioned by authority, and especially applicable where the common law is concerned, that, unless the enactment of a new provision clearly indicates an intention by the Legislature to abrogate the old law, both shall be understood to stand together, provided their so doing would not be impossible or obviously absurd.[7]

§ 1548. In the first place, numerous provisions facilitating proof

[1] Ante, § 6.
[2] Ante, § 1538.
[3] R. *v.* Hains, 1695 (Holt, C.J.).
[4] Id.
[5] Id.
[6] Woodcraft *v.* Kinaston, 1742 (Ld. Hardwicke); Butcher's case, 1601.
[7] Escott *v.* Mastin, 1842, P. C. (Ld. Brougham); Northam *v.* Latouche, 1829 (Tindal, C.J.); R. *v.* Carter, 1845; Edwards *v.* Buchanan, 1832.

of proceedings under that Act are contained in "The Bankruptcy Act, 1883."[1] Thus,[2] "any petition or copy of a petition in bankruptcy, any order[3] or certificate, or copy of an order or certificate, made by any court having jurisdiction in bankruptcy, any 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, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever."

§ 1549. It is again, in addition to this general enactment, provided by the Bankruptcy Act, and the Rules made under it,[4] that the proof of particular documents shall be facilitated, and that their admissibility and effect shall be enlarged in several respects. Thus, "A copy of the London Gazette, containing any *notice* inserted therein in pursuance of this Act, is to be evidence of the facts stated in the notice."[5] The notices here referred to—which must all be gazetted by the Board of Trade,[6]—are ten in number,[7]

[1] 46 & 47 V. c. 52. As to "The Bankruptcy (Scotland) Act, 1856," see post, § 1559. "The Irish Bankrupt and Insolvent Act, 1857" (20 & 21 V. c. 60), enacts, in § 361, that "every petition of bankruptcy, petition of insolvency, schedule, adjudication, petition for arrangement between a debtor and his creditors, appointment of assignees, certificate, deposition, order, document or other proceeding in bankruptcy or insolvency, or under any such petition for arrangement, appearing to be sealed with the seal of the court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, without any further proof thereof; provided always, that all commissions of bankrupt, depositions, and other proceedings under the same, which may have been entered of record before the commencement of this Act, and having the certificate of entry thereon, purporting to be signed by the person appointed to enter the same by the Act of the Irish Parliament, 11 & 12 G. 3, c. 8, and the Act 6 & 7 W. 4, c. 14, or his deputy, shall, without proof of the appointment or handwriting of such person, be received as evidence of the same, and of the same having been duly entered of record, and of such proceedings having respectively taken place."

[2] By § 134. See, as to the former law on this point, 24 & 25 V. c. 134, § 203; 32 & 33 V. c. 71, § 107.

[3] R. *v.* Thomas, 1870, as to orders of adjudication.

[4] In pursuance of § 127.

[5] § 132, subs. 1.

[6] R. 203. But see Sched. I. r. 2, which directs the official receiver to gazette the notices of first meetings, and compare it with R. 185 of the Bankruptcy Rules.

[7] F. 127.

ard relate to, (1) Receiving orders; (2) First meetings; (3) Adjudications; (4) Approvals of compositions or schemes; (5) Intended dividends; (6) Dividends; (7) Applications for discharge; (8) Adjudications annulled; (9) Appointments of Trustees, and (10) Orders on application for discharge. And by a sub-section in the Act,[1] "the production of a copy of the London Gazette containing any notice of a receiving order,[2] or of an order adjudging a debtor bankrupt,[3] shall be *conclusive* evidence in all legal proceedings of the order having been duly made, and of its date."

§ 1550. Moreover, the appointment of a trustee in bankruptcy under the Bankruptcy Act, 1883[4] (and probably, too, that of a trustee appointed under the Bankruptcy Act of 1890, in a composition, or a scheme of arrangement[5]), will be *conclusively* proved by producing the certificate of the Board of Trade, declaring him to be such trustee.[6] The appointment of all official receivers, and assistant official receivers, by such Board must again be *judicially noticed*;[7] and a certificate of the official receiver that a composition or scheme has been duly accepted by the creditors and approved by the court, is also, "in the absence of fraud, *conclusive* as to its validity."[8]

§ 1551. Further, by the Bankruptcy Act, 1890, not only is the court, on hearing any application for the discharge of a bankrupt, now required to "take into consideration a report of the official receiver as to the bankrupt's conduct and affairs,"[9] but, for the purposes of this inquiry, such report is—contrary to the ordinary rules of justice—to be received as "primâ facie evidence of the statements therein contained."[10] And, again, the Bankruptcy Rules, 1886, 1890, provide that when the Board of Trade has objected to the appointment of a trustee, and has, at the instance of the creditors, notified the objection to the High Court, any report of the grounds of the objection, when communicated by the Board to the court, must be received as "primâ facie evidence of statements therein contained."[11]

§ 1552. By the Bankruptcy Act, 1883,[12] too, not only is it directed

[1] § 132, subs. 2.
[2] § 13.
[3] § 20, subs. 2.
46 & 47 V. c. 52.
[5] 46 & 47 V. c. 52; 53 & 54 V. c. 71, § 3.
[6] § 138; r. 218; F. 71.
[7] Rr. 233, 242.
[8] 53 & 54 V. c. 71, § 3, subs. 13.
[9] Id. § 8, subs. 2.
[10] Id. subs. 5.
[11] R. 299, subs. 1 and 2.
[12] 46 & 47 V. c. 52, Sched. I. r. 25.

that the chairman[1] of every meeting of creditors shall "cause minutes of the proceedings at the meeting to be drawn up, and fairly entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting;" but[2] any such minute, "signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof;" and,[3] "until the contrary is proved, every meeting of creditors, in respect of the proceedings whereof a minute has been so signed, shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had." Rule 58 of the Bankruptcy Rules, 1886, 1890, provides, that "the court shall take *judicial notice* of the seal or signature of any person, authorised by or under the Act to take affidavits, or to certify to such authority."

§ 1553. The Bankruptcy Act of 1883 also provides,[4] that "subject to general rules, any affidavit to be used in a bankruptcy court may be sworn before any person authorised to administer oaths in the High Court, or in the Court of Chancery of the County Palatine of Lancaster, or before any registrar of a bankruptcy court, or before *any officer of a bankruptcy court authorised in writing on that behalf by the judge of the court*, or, in the case of a person residing in Scotland or in Ireland, before a judge ordinary, magistrate, or justice of the peace, or, in the case of a person who is out of the kingdom of Great Britain and Ireland, before a magistrate, or justice of the peace, or other person qualified to administer oaths in the country where he resides (he being certified to be a magistrate, or justice of the peace, or qualified as aforesaid, by a British minister or British consul, or by a notary public)."[5]

§ 1554.[6] The County Court Act, 1888,[7] provides in § 28, that

[1] The chairman has primâ facie authority to decide all incidental questions requiring immediate decision, and his decision as entered on the minutes is primâ facie correct: In re Indian Zoedone Co., 1884, C. A.

[2] By § 133, subs. 1 of same Act.

[3] Id. subs. 2, which is a very valuable enactment, and as to which see, further, Bankruptcy Rules, 1883, r. 161, subs. 1.

[4] Id. § 135.

[5] See further as to the proof and admissibility of particular proceedings in bankruptcy, post, §§ 1747 et seq.

[6] See post, § 1586A.

[7] 51 & 52 V. c. 43. As to the mode of proving Civil Bill decrees

"the registrar of every court shall cause a note of all plaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of 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 registrar 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 such entry or entries, and of the regularity of such proceeding,[1] without any further proof." The note entered by the Registrar of the County Court in his book cannot be contradicted even by an entry made by the judge in his own minute book.[2]

§ 1555. The Summary Jurisdiction Act, 1879, provides for the keeping by the clerk of every such court of a register, and that extracts therefrom certified by him shall be evidence in any other Court of Summary Jurisdiction.[3]

§ 1555A. The proceedings of courts-martial, by virtue of the Army Act, 1881, are, moreover, rendered admissible in evidence on their mere production, if purporting to be signed by the President, and coming from the custody of the Judge Advocate-General, or of the officer having charge of them; and they may also be proved by copies purporting to be certified by such judge-advocate, or his deputy, or by such other officer as aforesaid.[4]

§ 1555B. The verdicts and judgments in compensation cases under the Lands Clauses Consolidation Act must be signed by the sheriffs, and deposited with the records of the Quarter Sessions; and the same, or copies thereof signed and certified to be true copies by the Clerk of the Peace, are good evidence in all courts and elsewhere.[5]

in Ireland, see and compare 14 & 15 V. c. 57 ("The Civil Bill Courts (Ireland) Act, 1851"), §§ 10, 97, 110, 114; 27 & 28 V. c. 99, § 57, cited post, § 1572; Alcorn *v.* Larkin, 1842; and Donagh *v.* Bergin, 1842.

[1] As, for instance, the regularity of the appointment of a deputy judge: R. *v.* Roberts, 1878.

[2] Dews *v.* Ryley, 1851.

[3] See 42 & 43 V. c. 49, § 22; and also § 31, subs. 6.

[4] 44 & 45 V. c. 58, § 165.

[5] 8 & 9 V. c. 18, § 50.

§ 1555c. Various other statutes facilitate the proof of convictions under their respective provisions.[1]

§ 1556. The records and judicial proceedings of *foreign and colonial courts*, including those of the Channel Islands, India, and all other possessions of the British Crown, except Scotland,[2] are proveable as directed by Lord Brougham's Evidence Act of 1851,[3] which enacts,[4] that 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 either by examined copies, or by copies authenticated as follows: that is to say, they must purport either to be sealed with the seal of the court to which the originals belong; or if there be no seal, to be signed by one of the judges of such court, who must also certify to the fact of there being no seal. When these provisions are complied with, no evidence is required either to authenticate the seal, signature, or certificate attached to the copy, or to prove the official character of the judge. If the foreign document, sought to be proved by a copy, does not fall within the language of the section just cited, evidence must be given that it is a public writing deposited in some registry or place, whence, by the law or the established usage of the country, it cannot be removed,[5] and the copy must then be shown to have been duly examined.

§ 1557. Besides the section just referred to, Lord Brougham's Evidence Act of 1851[6] contains several clauses which greatly facilitate the proof of English documents in Ireland, of Irish documents in England, and of English and Irish documents in the Colonies. Thus it[7] enacts, that "every document, which, by any law

[1] Thus, under "*The Customs Consolidation Act*, 1876," "Condemnation by any justice under the customs laws, may be proved in any court of justice, or before any competent tribunal, by the production of a certificate of such condemnation, purporting to be signed by such justice, or an *examined* copy of the record of such condemnation certified by the clerk to such justice." See 39 & 40 V. c. 36, § 263. Amongst others, summary convictions for offences against "*The Factory and Workshop Act*, 1878" (41 V. c. 16, § 92), (which must be filed amongst the records of the Quarter Sessions), or against "*The Seamen's Clothing Act*, 1869" (32 & 33 V. c. 57, § 6), may respectively be proved upon any future proceedings under these Acts, by copies certified under the hand of the Clerk of the Peace.

[2] 14 & 15 V. c. 99, §§ 18, 19.

[3] Id., § 7, cited ante, § 10.

[4] § 7.

[5] Allyon *v.* Furnival, 1834; Furnell *v.* Stackpoole, 1831 (Ir.).

[6] 14 & 15 V. c. 99.

[7] § 9.

now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in England or Wales, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same." It also enacts,[1] that "every document, which, by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same." It further enacts,[2] that "every document, which, by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in England or Wales or Ireland, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British Colonies, or before any person having in any of such colonies, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

§ 1558. An affidavit purporting to be sworn before a Master

[1] 14 & 15 V. c. 99, § 10. [2] Ibid. § 11.

Extraordinary of the old Court of Chancery in Ireland is by this Act[1] admissible in evidence in this country, without proof of the signature or official character of such master.[2]

§ 1559. Moreover, clauses in "The Bankruptcy (Scotland) Act, 1856,"[3] facilitate the proof, and regulate the effect, of certain proceedings under that statute, when tendered in evidence before English or Irish tribunals. One, relative to the mode of proving orders and decrees made under the Scotch Bankruptcy Law, has been cited in an earlier chapter of this work.[4] A further section[5] provides that "the warrant granting protection or liberation [to the debtor], or a copy thereof, certified by one of the Bill Chamber Clerks if it is granted by the Lord Ordinary, or by the Sheriff Clerk if it is granted by the Sheriff, shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland, and her Majesty's other dominions, for civil debt contracted previous to the date of sequestration; and all courts of justice and judges, and all officers and gaolers, shall be bound to give effect to such warrant; but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of apprehension or imprisonment, in meditatione fugæ, or ad factum præstandum, or for any criminal act." Others[6] enact, that the deliverance pronounced by the Lord Ordinary or the Sheriff, "discharging the bankrupt of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration," "shall operate as a complete discharge and acquittance to the bankrupt in terms thereof, and shall receive effect within Great Britain and Ireland, and all her Majesty's other dominions." Further,[7] the Act and warrant granted by the Sheriff in confirmation of the trustee of a sequestrated estate, which vests in the trustee the whole property of the debtor,[8] is made "an effectual title to the trustee to perform the duties hereby imposed on him, and shall be evidence of his right and title to the sequestrated estate for the purposes of this Act; and a copy of

[1] § 10.
[2] In re Mahon's Trust, 1852.
[3] 19 & 20 V. c. 79.
[4] § 174, cited ante, § 13.
[5] § 47.
[6] See §§ 140 and 147.
[7] § 73. For the Form of the Act and Warrant, see Sched. D. of the Statute.
[8] § 102.

such act and warrant in favour of the trustee, purporting to be certified by the Sheriff Clerk, and to be authenticated by one of the judges of the Court of Session, shall be received in all courts and places within England, Ireland, and her Majesty's other dominions, as primâ facie evidence of the title of the trustee, without proof of the authenticity of the signatures or of the official character of the persons signing, and shall entitle the trustee to recover any property belonging or debt due to the bankrupt, and to maintain actions in the same way as the bankrupt might have done if his estate had not been sequestrated."

§ 1560. Certain particular documents coming either from abroad, or from some place out of the jurisdiction of the court, may be proved in a special manner. Thus, under the Extradition Act, 1870,[1] "Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act." Moreover, by the same Act,[2] "Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Act, if authenticated in manner provided for the time being by law, or authenticated as follows:—

"(1.) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued;

"(2.) If the depositions, or statements, or the copies thereof, purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken, to be the original depositions or statements, or to be true copies thereof, as the case may require; and

"(3.) If the certificate of or judicial document stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place; and

"(4.) If in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness, or by being sealed

[1] 33 & 34 V. c. 52, § 14. [2] § 15.

with the official seal of the minister of justice, or some other minister of state: And all courts of justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof." [1]

§ 1561. All the above provisions relating to depositions extend to affirmations taken in a foreign state, and to copies of such affirmations, as well as to depositions.[2] No objection to depositions duly authenticated under the Extradition Act, 1870,[3] can be urged on the ground that they were not taken in the presence of the accused or in relation to the particular charge.[4]

§ 1562. The Fugitive Offenders Act, 1881,[5] again authorises the apprehension, committal, and return, of certain offenders, who have escaped from one part of her Majesty's dominions into another, and enacts,[6] that "depositions, whether taken in the absence of the fugitive, or otherwise, and copies thereof, and official certificates of, or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under that Act," that is, in all proceedings before the committing magistrate. The statute gives minute directions as to what shall constitute due authentication of these several documents,[7] and adds a proviso, that nothing in the Act shall authorise the reception of any of them in evidence "against a person upon his trial for an offence." [8]

§ 1562A. Under "Jervis' Acts" of 1848,[9] proof should be made on oath of the handwriting of the justice issuing the original warrant,[10] as a preliminary step towards giving jurisdiction to another magistrate to "back" such warrant. The Acts[9] just mentioned contain provisions for apprehending offenders who escape from one part of the United Kingdom to another, or from one county or place in England to another, and empower any magistrate of the place to which an offender is supposed to have escaped to "back" the warrant for his apprehension.

[1] See R. *v.* Ganz, 1882.
[2] 36 & 37 V. c. 60 ("The Extradition Act, 1873"), § 4.
[3] 33 & 34 V. c. 52.
[4] In re Counhaye, 1873.
[5] 44 & 45 V. c. 69.
[6] § 29.
[7] Id.
[8] Id.
[9] 11 & 12 V. cc. 42 and 43.
[10] See §§ 11—15 of 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), extended to Scotland by 55 & 56 V. c. 55, § 475; and § 3 of 11 & 12 V. c. 43 ("The Summary Jurisdiction Act, 1848").

§ 1563. Depositions taken either in India, respecting misdemeanors committed in that country, or in any place belonging to her Majesty out of the United Kingdom, respecting offences against the Acts for the abolition of the slave trade, under a writ of mandamus from the Queen's Bench Division, may be read on the trial in that Division of any indictment or information for these respective crimes, if they have been duly taken, and have also been returned to that Division, closed up and under the seal of two of the judges of the foreign court.[1]

§§ 1564—5. The following section of the Merchant Shipping Act, 1894,[2] facilitates the proof of crimes committed either at sea or abroad, when a witness is at the time of trial out of the court's jurisdiction:—"(1.) Whenever, in the course of any legal proceedings instituted in any part of her Majesty's dominions before any judge or magistrate, or before any person authorised by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceeding, then, upon *due proof*,[3] if the proceeding is instituted in the United Kingdom, that the witness cannot be found in that Kingdom, or if in any British possession, that he cannot be found in that possession, any deposition that the witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in her Majesty's dominions, or any British consular officer elsewhere, shall be admissible in evidence, provided that—(a.) If the deposition was made in the United Kingdom, it shall not be admissible in any proceeding instituted in the United Kingdom; and (b.) If the deposition was made in any British possession, it shall not be admissible in any proceeding instituted in that British possession; and (c.) If the proceeding is criminal, it shall not be admissible unless it was made in the presence of the person accused. (2.) A deposition so made shall be

[1] 13 G. 3, c. 63 ("The East India Company's Act, 1772"), § 40; 6 & 7 V. c. 98 ("The Slave Trade Act, 1843"), § 4. See, also, ante, §§ 500—505. As to how far it is necessary to prove that they have been duly taken and returned, see R. *v.* Douglas, 1846.

[2] 57 & 58 V. c. 60, § 691. As to the proof, admissibility, and effect of depositions taken in French ports with respect to offences under "The Sea Fisheries Act, 1868," see 31 & 32 V. c. 45, § 61, and Sched. 1, Art. 28; 46 & 47 V. c. 22, § 30, subs. 2 (*d*); and 48 & 49 V. c. 70.

[3] See R. *v.* Conning, 1868; R. *v.* Anderson, 1868.

authenticated by the signature of the judge, magistrate, or consular officer, before whom the same is made; and the judge, magistrate, or consular officer shall certify, if the fact is so, that the accused was present at the taking thereof. (3.) It shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition; and in any criminal proceeding a certificate under this section shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified.[1] (4.) Nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any Act of Parliament, or by any Act or ordinance of the Legislature of any colony, so far as regards that colony, or interfere with the power of any colonial Legislature to make those depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible."

§ 1566. R. S. C., 1883, Ord. XXXVIII., R. 6,[2] after regulating the mode of swearing and taking examinations, affidavits, and other documents,[3] whether in her Majesty's foreign dominions, or in any foreign parts, provides that the seal or signature of the court, judge, notary, consul, or other person, attached[4] to such documents, shall be *judicially noticed*.[5]

§§ 1567—8. The Commissioners for Oaths Act, 1889,[6] enacts,[7] that "every British ambassador, envoy, minister, chargé d'affaires, and secretary of embassy or of legation, exercising his functions in any foreign country, and every British consul-general, consul, vice-

[1] See R. *v.* Stewart, 1876.

[2] Cited ante, § 12.

[3] Under these general words, a power of attorney executed in British Honduras in the presence of a notary-public, has been proved in a Court of Equity by the production of the notary's certificate under his hand and official seal: Armstrong *v.* Stockham, 1835 (Stuart, V.-C.). See, also, Hayward *v.* Stephens, 1867.

[4] In Haggitt *v.* Ineff, 1854 (followed by Cooke *v.* Wilby, 1884; see, also, cases cited in last note), the Lords Justices received an affidavit, sworn in the United States before, and attested by, a notary-public, to which was appended a certificate of the British Consul at New York, stating that the notary held that office, and that his signature was entitled to credit. See, also, Savage *v.* Hutchinson, 1855; Levitt *v.* Levitt, 1865; and Lyle *v.* Ellwood, 1872. But see In re Earl's Trusts, 1858, cited ante, at end of note to § 6.

[5] See, also, 46 & 47 V. c. 52, § 135, and r. 50 of Bkptcy. Rules, cited ante, § 1552.

[6] 52 V. c. 10.

[7] § 6.

consul, acting consul, pro-consul, and consular agent, exercising his functions in any foreign place, may, in that country or place, administer any oath, and take any affidavit, and also do any notarial act which any notary-public can do within the United Kingdom; and every oath, affidavit, and notarial act, administered, sworn, or done by or before any such person, shall be as effectual as if duly administered, sworn, or done by or before any lawful authority in any part of the United Kingdom."[1]

§ 1569. The object of all the statutes just mentioned not being to abrogate the old law, but to facilitate the administration of oaths abroad, strict compliance with them is apparently not always necessary, but it will seemingly suffice if an affidavit taken abroad is sworn before some functionary able to administer an oath in his own country.[2]

§ 1570. In general, before any document, whether an original, or a copy purporting to evidence a judicial proceeding, can be accepted as satisfactory proof of such proceeding, it must appear that the record or entry of such proceeding has been *finally completed*. Thus, to prove the finding of an indictment, either at the Assizes or Sessions, it will not be sufficient to produce the indictment itself indorsed a true bill, or the minute-book of the Clerk of the Peace, or other officer of the court, in which that fact is entered, but the record must be formally drawn up, and proved in the regular way;[3] a judgment, whether interlocutory or final, of any Division of the High Court, cannot be proved by producing the minutes, from which it is to be made up, for, until it is actually made up, the judgment is no record;[4] and a verdict cannot, in general, be proved by putting in the Nisi Prius record with the *postea* indorsed, but a copy of the judgment rendered upon it must be produced; for it may be that the judgment was arrested, or that a new trial was granted,[5] though if the record itself be produced

[1] See In re Lambert, 1866; overruling In re Barnard, 1862.

[2] Kevan *v.* Crawford, 1876; In the goods of Fawcus, 1884; Brittlebank *v.* Smith, 1884.

[3] R. *v.* Smith, 1828; Porter *v.* Cooper, 1834; Cooke *v.* Maxwell, 1817; R. *v.* Thring, 1832.

[4] Godefroy *v.* Jay, 1827; R. *v.* Bellamy, 1824; Lee *v.* Meecock, 1805; R. *v.* Birch, 1842 (Ld. Denman); Ayrey *v.* Davenport, 1807; R. *v.* Robinson, 1839 (Ir.). See Fisher *v.* Dudding, 1841.

[5] B. N. P. 234; Pitton *v.* Walter, 1718; Lee *v.* Gansel, 1774 (Ld. Mansfield); Fitch *v.* Smallbrook, 1661; Fisher *v.* Kitchingman, 1742; Gillespie *v.* Cumming, 1841 (Ir.); Jameson *v.* Leitch, 1842 (Ir.); Holt

from the proper custody, no objection can be taken to it as not yet having been filed.[1]

§ 1571. The formal record does not necessarily mean (as has sometimes been imagined)[2] a record enrolled *at full length on parchment*. In the Superior Courts, indeed, a practice of making up a record in this way has long been established, but in several other courts a less formal method of making up records, and entering proceedings, prevails. For instance, in the House of Lords itself, the minutes of a judgment on the Journals constitute the judgment itself, and a judgment of such House may, consequently, be proved, either by an examined copy of the minute,[3] or by producing a copy of the Journal in which it is entered, purporting to be printed by the authorised printer;[4] and the orders of Quarter Sessions respecting the removal of paupers may be proved by the paper book, in which the proceedings of the court have been entered by the Clerk of the Peace, or by a copy of it, if such minutes sufficiently disclose the jurisdiction of the court, and it be shown that, in practice, no more formal record is kept[5]—though, if this last fact be not proved, or if the jurisdiction of the court do not appear in the minutes,[6] neither the book nor the copy can be received.[7]

§ 1572. In much the same way, in all proceedings civil or criminal before the Civil Bill Courts in Ireland, the entry in the clerk of the peace's book of a decree or dismiss, is[8] conclusive evidence of such a judgment having been pronounced; the proceedings of the ecclesiastical courts may be proved by the minute books in which they are entered, or by copies of such books, if it be shown that in practice they are never reduced into a more formal shape;[9] and the same rule will prevail with respect to the

v. Miers, 1839. This rule seems to have been relaxed in two N. P. cases: Foster *v.* Compton, 1818; and Garland *v.* Scoones, 1798. Sed qu. See post, § 1573, as to some exceptions to the rule.

[1] R. *v.* Sharp, 18.3.

[2] See 3 Bl. Com. 24; Co. Lit. 260 a.

[3] Jones *v.* Randall, 1774.

[4] 8 & 9 V. c. 113, § 3; cited ante, § 7.

[5] R. *v.* Yeoveley, 1838. Orders of justices forming a highway district are provable by copies certified by the clerk of the peace: 27 & 28 V. c. 101, § 12.

[6] If, for instance, the caption be omitted.

[7] R. *v.* Ward, 1834; explained in R. *v.* Yeoveley, 1838; Giles *v.* Sivey, 1864.

[8] By statute 27 & 28 V. c. 99, § 57, Ir.

[9] Houliston *v.* Smyth, 1825; R. *v.* Hains 1695 (Ld. Holt).

orders of the Metropolitan Police Magistrates,[1] and the judgments and other proceedings of courts-baron,[2] sheriffs' courts,[3] mayors' courts,[4] and other courts of inferior jurisdiction.[5] It seems, indeed, that the judgments of such courts of inferior jurisdiction as are not courts of record may be proved by the officer of the court, or any other competent person, if it appear that, in fact, no entry of them has been made in any official book.[6] Therefore, where a railway Act provided that certain verdicts and judgments as to claims for compensation for land taken after assessment by a sheriff's jury should be deposited with the Clerk of the Peace for the county among the records, and should be deemed records, it was held that, on proof of non-compliance with this direction, parol evidence of such a verdict, and of the grounds on which it proceeded, might be given, and the under-sheriff was called for this purpose.[7]

§ 1573. There are, however, *three exceptions* to the rule requiring the record or judicial entry to be formally completed, before either the original of such judgment or a copy of it can be admitted in evidence. First, to show any particular court that some trial has been held or other proceeding has occurred before *the same* court while sitting under the same commission, a minute of the former proceeding will be admitted in lieu of the record, because, in this case, the formal record cannot be presumed to have been made up.[8] Secondly, the same course will be allowed where, in consequence of some ulterior proceedings, the record cannot, at the time when the evidence is required, have been regularly completed. For instance, on an indictment for perjury committed on a trial at Nisi Prius,[9] the previous trial at Nisi Prius record may be proved, without the production of more formal evidence, by the production of a mere minute by the associate, and proof by him that a motion for a new trial is pending, and that until such motion is disposed of no more formal record can be made up. Thirdly, where the evidence

[1] London School Board *v.* Harvey, 1879.
[2] Dawson *v.* Gregory, 1845.
[3] Arundell *v.* White, 1811.
[4] Fisher *v.* Lane, 1771.
[5] R. *v.* Hains, 1695.
[6] Dyson *v.* Wood, 1824.
[7] Manning *v.* E. Cos. Rail. Co., 1843.
[8] R. *v.* Tooke, 1794; recognised in R. *v.* Smith, 1828; R. *v.* Robinson, 1839 (Ir.); R. *v.* Reilly, 1843 (Ir.) (Doherty, C.J.).
[9] R. *v.* Browne, 1829.

is merely to show that a certain judicial proceeding has taken place (as, for instance, that a trial has been had, a verdict given, or a writ issued) without regard to the facts in dispute at such trial, or found by the jury by such verdict, or mentioned in such writ, and has no reference to any ulterior proceedings, the record need not be formally drawn up.[1] Accordingly, the postea indorsed on a Nisi Prius record will be sufficient evidence of a trial, to let in the testimony of a witness since deceased,[2] and perhaps, to support an indictment against a witness for perjury;[3] where the fact that a writ has issued is mere matter of inducement, it may be proved by producing the writ, though it has not been returned, and is, consequently, not a record;[4] and on a trial at the Central Criminal Court for perjury committed on a trial at the same court some six months before, the production by the officer of the court of the caption, the indictment with the indorsement of the prisoner's plea, the verdict, the sentence, and the minutes of the trial as made by the officer, was held[5] to be sufficient evidence of the trial, without the production of the record, or of any certificate of it.[6]

§ 1574. It is difficult to lay down any distinct rule as to how much of the proceedings referred to by it *must be given in evidence* on proving a record, since the practice on this differs widely according to the *object* for which the evidence is tendered. It may, however, be stated broadly, that where the object is merely to prove the existence of the record in question, that fact may be established by producing the document alone; but if the record be relied upon as proof of any particular facts stated therein, or adjudicated thereby, all the proceedings necessary, either to render valid, or to explain, such document must, generally, be put in evidence.

§ 1574A. Accordingly, if *a decree in Chancery* is offered, merely

[1] B. N. P. 234; Pitton *v.* Walter, 1718; Fisher *v.* Kitchingman, 1742; Barlow *v.* Dupuy, 1823 (Am.).

[2] Pitton *v.* Walter, 1718.

[3] R. *v.* Browne, 1829; R. *v.* Coppard, 1827. See R. *v.* Page, 1798; and R. *v.* Gordon, 1842, where Lord Denman held that an allegation in an indictment for perjury that judgment was "entered up" in an action was proved by producing from the judgment office the book in which the inscription was entered. But, in R. *v.* Thring, 1832; and R. *v.* Robinson, 1839 (Ir.), it was held that, on an indictment for perjury in a prosecution, the record of the former trial must be made up.

[4] B. N. P. 234.

[5] R. *v.* Newman, 1852. See post, §§ 1612, 1613.

[6] Given either under § 13 of 14 & 15 V. c. 99 ("The Evidence Act, 1851"), or § 22 of 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851").

to prove that it was in fact made, here, as in the case of verdicts,[1] no proof of any other proceeding is required;[2] but if a party intends to avail himself of a decree, as an adjudication upon the subject-matter, he must generally prove, not only the decree, but also the pleadings upon which it was founded; since, without such proof, it may be impossible either to understand the decree itself, or to ascertain with certainty what disputed questions it decided.[3] And it has, indeed, been even contended that it is necessary that the depositions referred to in a decree should also be read as part of the record; but it has been decided that this need not be done.[4]

§ 1575. On like principles, *judgments of the Ecclesiastical Court* cannot be made evidence without producing the libel and answer, and the defensive allegations;[5] and on appeals from judgments of such courts being given in evidence, the process of appeal, that is, the transcript of the proceedings sent from the court below, must also be produced (so as to show what points the Court of Appeal had before it).[6]

§ 1575A. Rules similar to the above also apply to sentences in the Admiralty Division of the High Court, and to judgments in courts-baron and other inferior courts.[7]

§ 1575B. Authorities, however, differ as to whether an adjudication by the former Insolvent Debtors Court for the discharge of a prisoner can be received as evidence of his insolvency, without putting in his petition and schedule; though, on strict principle, such evidence would seem to be required.[8]

§ 1576. Generally, *depositions in Chancery*, taken under the ol[d]

[1] Ante, § 1573.

[2] Jones *v.* Randall, 1774; B. N. P. 235; Blower *v.* Hollis, 1833, where it was held that an order for an attachment for not paying costs of an equity suit was alone primâ facie evidence that a suit had been pending.

[3] Blower *v.* Hollis, 1833 (Bayley, B.); Leake *v.* M. of Westmeath, 1841 (Tindal, C.J.); Attwood *v.* Taylor, 1840 (Ld. Abinger). Where the decree fully recites the pleadings the reasons mentioned above do not apply; and it has been more than once held that in this case the production of such decree will alone be sufficient: Wheeler *v.* Lowth, 1710; Wharton Peer., 1845, H. L.

[4] Laybourn *v.* Crisp, 1838.

[5] Leake *v.* M. of Westmeath, 1841 (Tindal, C.J.); virtually overruling Stedman *v.* Gooch, 1793.

[6] Leake *v.* M. of Westmeath, 1841 (Tindal, C.J.).

[7] Com. Dig. tit. Ev. C. 1.

[8] In M'Kee *v.* Farnam, 1841 (Ir.), Torrens, J., rejected the adjudication; but in Brennan *v.* Dillane, 1843 (Ir.), Bull, J., admitted it without the petition, though he required the production of the schedule. This last decision is said (id.) to have been subsequently followed by Jackson, J.

system, cannot be read, without previous proof of the bill and answer, in order to show that a cause was depending, who were the parties to it, and what was the subject-matter in issue; for, if no cause were depending, the depositions are but voluntary affidavits; and if there were one, it is further necessary to show that it was against the same parties or those claiming in privity with them, and on the same subject.[1] The bill and answer do not, however, by being so put in, become evidence for the jury, and consequently the opposite counsel has no right to read or refer to them in his address; but the judge only looks at them, for the purpose of determining whether the depositions are evidence, by seeing what was in issue in the suit.[2] Moreover, no proof of the bill or answer is necessary, where the deposition is used against the deponent as his own admission, or for the purpose of contradicting him as a witness.[3]

§ 1577. A party who relies upon depositions taken in England prior to 1852,[4] or to 1867,[5] must read the interrogatories as well as the answers, unless he can prove that the former are lost or destroyed,[6] and it seems that he must also read as part of his case the whole depositions, including the cross-interrogatories and answers thereto.[7] Depositions taken since those dates, whether under the present system,[8] or that which immediately preceded it, are not open to these niceties.[9] The oral examination of the witness is at present "taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness."[10] Such depositions to be evidence must, however—except under special circumstances[11]—be written by or in the presence of the examiner, authenticated by his signature, and have been trans-

[1] See Laybourn *v.* Crisp, 1838 (Ld. Abinger); Blower *v.* Hollis, 1833 (Maule, argu.); 2 Ph. Ev. 210; B. N. P. 240; Nightingal *v.* Devisme, 1770.

[2] Chappell *v.* Purday, 1845.

[3] Highfield *v.* Peake, 1827.

[4] When 15 & 16 V. c. 86 ("The English Chancery Act, 1852"), passed.

[5] When 30 & 31 V. c. 44 ("The Chancery (Ireland) Act, 1867"), passed.

[6] Rowe *v.* Brenton, 1828.

[7] Temperley *v.* Scott, 1832 (Tindal, C.J.).

[8] R. S. C. 1883, Ord. XXXVII. r. 5, cited ante, § 504.

[9] Fleet *v.* Perrins, 1868.

[10] R. S. C. 1883, Ord. XXXVII. r. 12. The Irish Act adds the words, "and in the first person."

[11] Bolton *v.* Bolton, 1876; Stobart *v.* Todd, 1854; Cooper *v.* Macdonald, 1867.

mitted by him to the Central Office to be filed.[1] Proof that these regulations have been complied with must be forthcoming if the admissibility of depositions be disputed; but the original documents need not be produced, and it will suffice to put in evidence either examined copies of them,[2] or copies certified as true copies by the officer to whose custody the originals are intrusted.[3]

§ 1578. In general, *depositions* taken under special *commissions* cannot be read without proof of the commission and return. The better and modern opinion (apart from the Rr. S. C.) apparently is, however,[4] that it is not necessary in these cases to go further, and to put in the order, the pleadings, or the other judicial proceedings upon which the commission has been founded.

§ 1579. It has not yet been finally determined whether commissioners may avail themselves of the Post Office to transmit the depositions home, or whether they must be sent by a special messenger.[5] Where a commission was sent to commissioners by post, and after a few months a sealed packet, was brought to the Master's office by a person unknown, containing the commission, the return to it, and the examinations of the witnesses, signed by the persons named as commissioners, it was held that after proof of the handwriting and residence of the commissioners, sufficient had been shown to primâ facie establish the validity of the return.[6]

§ 1580. Subject, however, to the observations in the two foregoing sections, it is provided[7] that *examinations* or *depositions* may be read in evidence, saving all just exceptions, if they purport to be certified under the hand of the commissioner, examiner, or other person taking the same,[8] and if it further appears to the

[1] Ord. XXXVII. r. 16.
[2] Fleet *v.* Perrins, 1868.
[3] 30 & 31 V. c. 44, § 102 Ir.; 14 & 15 V. c. 99 ("The Evidence Act, 1851"), § 14, cited post, § 1599; Reeve *v.* Hodson, 1853 (Wood, V.-C.).
[4] See Entwistle *v.* Dent, 1846; and this, notwithstanding the contrary ruling in Bayley *v.* Wylie, 1807 (Ld. Ellenborough). See, also, Greville *v.* Stultz, 1847; and see further, as to examinations under writs of mandamus, ante, §§ 500—505, 1563.
[5] See Cox *v.* Newman, 1813.
[6] Simms *v.* Henderson, 1848.
[7] Whether taken under the present practice in accordance with R. S. C. 1883, Ord. XXXVII. rr. 5 et seq.; or under the old practice existing in England under 1 W. 4, c. 22; or, in Ireland, under 3 & 4 V. c. 105 ("The Debtors (Ireland) Act, 1840").
[8] 8 & 9 V. c. 113, § 1, cited ante, § 7.

satisfaction of the judge, either that the examinant or deponent is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial, or,—where the depositions have been taken under the new Practice,—that the judge ordering the examinations has given some special directions with respect to their admissibility.[1]

§ 1581. The mode of proving the *examination* of prisoners, and *informations* or *depositions* of witnesses, taken by justices or coroners, in *criminal* cases, has been explained.[2]

§ 1582.[3] Returns to *inquisitions* post mortem, and other inquisitions, surveys, extents, and the like, cannot *strictly*[4] be proved, without reading the commissions on which they depend;[5] unless in cases of general concernment, when the commission will be regarded as a thing of such public notoriety as not to require proof.[6]

§ 1583. To prove an *award*, it is not only necessary to produce and prove the due execution of that instrument, but the submission to reference must also be proved; for otherwise the authority of the arbitrator to decide the question between the parties does not appear.[7] If the submission be by a written agreement, its execution by all the parties, including the party relying upon it, must be strictly proved;[8] and that, too, though it has been made a rule of court, pursuant to one of its terms.[9] If, however, the arbitrator has been appointed by rule of court, judge's order, or order of Nisi Prius, in an action,[10] then, on proving the award, and producing the rule or order of reference, a sufficient primâ facie case will be made out; and it will not be necessary to show, by producing the record in the original action, or otherwise, what

[1] Ord. XXXVII. rr. 5, 18, cited ante, § 506.

[2] As to examinations, ante, §§ 888—901; as to depositions, ante, §§ 479—494.

[3] Gr. Ev. § 515, in part.

[4] As to when this rule will be relaxed, see post, § 1585.

[5] Evans *v.* Taylor, 1838; B. N. P. 228; Newburgh *v.* Newburgh, 1712; Hubb. Ev. of Suc. 589, 590.

[6] Sir Hugh Smithson's case, undated (Ld. Hardwicke), cited B. N. P. 228, 229.

[7] Ferrer *v.* Oven, 1827; Antram *v.* Chace, 1812; Brazier *v.* Jones, 1828. Arbitrations are now regulated by "The Arbitration Act, 1889" (52 & 53 V. c. 49), which see generally on the subject.

[8] Cases cited in last note.

[9] Berney *v.* Read, 1845.

[10] 3 & 4 W. 4, c. 42, § 39; 3 & 4 V. c. 105 ("The Debtors (Ireland) Act, 1840"), § 63.

specific matters were actually referred.[1] Where the submission contains a power to appoint an umpire, or to enlarge the time for making the award, and it has been acted upon, proof must be given of the instrument appointing the umpire, or enlarging the time; and neither will a mere recital in the award be evidence of these facts,[2] nor can the appointment of an umpire be proved by showing that he has undertaken the duties belonging to his office, and has actually signed the award.[3] The executing an award is a judicial act, and, therefore, proof should in all cases where more than one arbitrator is appointed, be given, that the signing by the joint arbitrators took place in the presence of each other;[4] or if, under the terms of reference, the award is to be good although executed by a less number than all the arbitrators, that the arbitrator, who has not signed the instrument, had notice to attend the execution, and omitted or refused to do so.[5]

§ 1584. A less rigid amount of proof of *awards by public officers* than is called for in ordinary cases will sometimes be deemed sufficient, and in the absence of evidence of a subsequent usage inconsistent with the award, the maxim, omnia præsumuntur ritè esse acta, will be held to apply.[6] Accordingly, where commissioners, named in an Inclosure Act, and thereby authorised to stop up roads, if two justices made an order to that effect, published their award stopping up a certain public footpath in which such order of justices was recited, this recital was held sufficient primâ facie evidence of a valid order, on proof of an ineffectual search for the instrument itself, and it was also held, that the award must be taken to have been rightly made, unless some proof of enjoyment inconsistent with it could be given.[7] Following the principle of this case, awards made and confirmed by commissioners under many of the General Inclosure Acts[8] are by statute expressly ren-

[1] Gisborne *v.* Hart, 1839; recognised in Dresser *v.* Stansfield, 1845 (Parke, B.).

[2] Still *v.* Halford, 1814 (Ld. Ellenborough); Davis *v.* Vass, 1812.

[3] Still *v.* Halford, 1814.

[4] Stalworth *v.* Inns, 1844; Wright *v.* Graham, 1848; Eads *v.* Williams, 1854; Lord *v.* Lord, 1855.

[5] White *v.* Sharp, 1844; Wright *v.* Graham, 1848 (Parke, B.); In re Beck and Jackson, 1857.

[6] R. *v.* Haslingfield, 1814; Doe *v.* Gore, 1837; Doe *v.* Mostyn, 1852; Heysham *v.* Forster, 1829. As to when such awards may be proved by certified copies, see post, § 1607.

[7] Manning *v.* East. Cos. Rail. Co., 1843; Williams *v.* Eyton, 1858.

[8] 6 & 7 W. 4, c. 115; 3 & 4 V. c. 31; 8 & 9 V. c. 118 ("The Inclosure Act, 1845"); 9 & 10 V c. 70 ("The

dered *conclusive* evidence of a compliance with those Acts, and of all necessary notices and consents; and everything[1] specified in such awards is binding and conclusive on all persons.

§ 1585. The strict rules of evidence are sometimes relaxed in proving *ancient* records. Thus, a document, purporting to be an exemplification of a commission issued by Queen Elizabeth, and produced from the proper place of deposit, has been read, without any evidence of its being a true copy, though no seal was affixed to it, and the state of the parchment was such as to render it impossible to say whether the Great Seal had ever been appended;[2] ancient depositions may be read without putting in the interrogatories,[3] or the bills and answers to which they relate,[4] or the commissions under which they were taken,[5] if it be proved that search has been unsuccessfully made for these documents; on like proof, old answers are received in evidence, though the bills be not forthcoming; and so are ancient extents, surveys, or returns to inquisitions, coming from the proper custody, and bearing internal evidence of having been taken under due authority (especially when tendered as evidence of reputation), notwithstanding that the commissions on which their legality depended cannot be found.[6] Such documents, however, where they contain no internal evidence of authenticity, cannot be read without the production of the commissions from the proper depository;[7] nor then, if there appears to have been any excess of authority, or other such irregularity in the proceedings as to render them not only voidable but void.[8] After proof that a record has been destroyed then, whether it be ancient

Inclosure Act, 1846"); 10 & 11 V. c. 111 ("The Inclosure Act, 1847"); 11 & 12 V. c. 99 ("The Inclosure Act, 1848").

[1] That is, all matters of fact; and an award under the Act is not conclusive as to legal title or the jurisdiction of the Commissioners: Jacomb *v.* Turner, 1891. See, also, 3 & 4 V. c. 31, § 1; and 8 & 9 V. c. 118, §§ 104, 105, 157. See 57 & 58 V. c. 60, § 137 (2), as to submissions to, and awards by, shipping masters.

[2] May. of Beverley *v.* Craven, 1838 (Alderson, B.).

[3] Rowe *v.* Brenton, 1828.

[4] Byam *v.* Booth, 1814.

[5] Bayley *v.* Wylie, 1807 (Ld. Ellenborough).

[6] Rowe *v.* Brenton, 1828; Doe *v.* Roberts, 1844; Vicar of Kellington *v.* Trinity College, 1747; Alcock *v.* Cook, 1829, cited 2 Ph. Ev. 216, n. 2; Anderston *v.* Magawley, 1726; Gabbett *v.* Clancy, 1844-5 (Ir.).

[7] Evans *v.* Taylor, 1838. See D. of Beaufort *v.* Smith, 1849; Freeman *v.* Read, 1863.

[8] Vaux Barony, 1836; Powis Barony, 1731, cited Cruise, Dign. c. 6, § 60; Leighton *v.* Leighton, 1720; Hubb. Ev. of Succ. 590.

or modern, it is of course allowable to show its contents (as in the case of any other document) by secondary evidence.[1]

§ 1586. The mode of proving certain documents, which, though emanating from courts of justice, are not strictly records, or such proceedings, as, for the most part, are capable of being primarily proved by means of copies, must now be noticed. First, *writs of execution and warrants of commitment*, until they are returned, must be proved by actual production, though, after their return, they become matters of record, and are, consequently, provable by copies.[2] Writs of summons in the High Court may be proved by the production, either of the originals, or of copies filed by the officer of the court,[3] or, if the originals be lost, by copies, authenticated by the court or a judge,[4] and any one of these documents will furnish proper evidence of the institution of the action to which they relate.[5] When writs of summons or writs of execution in the High Court have been renewed,[6] the fact of renewal may be proved by the production of the respective writs, provided they purport to be marked with the seal of the court, showing them to have been duly renewed.[7] The renewal of a writ of execution may also be proved by a written notice to the sheriff signed by the party or his solicitor, and bearing the seal of the court, with the day, month, and year of renewal, impressed thereon.[8] Next, a *certificate of a judge*, if not indorsed on a record, cannot, it seems, be proved by a copy, but the original must be produced, when the courts will judicially notice the signature, if it purport to be that of one of the judges of the Supreme Court, or of one of the equity or common law judges of the old Superior Courts at Westminster.[9] But a judge's *order* in any cause or matter may now be proved and enforced in the same manner as a judgment to the same effect.[10] The *pleadings* in an action may be proved either

[1] Ante, §§ 428 et seq.

[2] B. N. P. 234. If the writ is the gist of the action it must be returned. Id. As to inhibitions, citations, monitions, &c. arising out of appeals to the Privy Council, see 6 & 7 V. c. 38 ("The Judicial Committee Act, 1843"), § 9, amended by 53 & 54 V. c. 27.

[3] Under R. S. C., Ord. V. rr. 12, 13.

[4] Under Ord. VIII. r. 3.

[5] R. *v.* Scott, 1877.

[6] Ord. VIII. r. 1; Ord. XLII. r. 20.

[7] See Ord. VIII. r. 2. And see, also, Ord. XLII. r. 21.

[8] Ord. XLII. rr. 20, 21.

[9] 8 & 9 V. c. 113, § 2, cited ante, § 7.

[10] Ord. XLII. r. 24.

by producing the originals, or by means of the copies filed[1] with the officer of the court.[2]

§ 1586A. In the High Court the most important Rules as to the service of proceedings therein, and as to the proof of such service, are as follow:—First, by Order LXIV., R. 11, "Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be effected *before the hour of six in the afternoon, except on Saturdays*, when it shall be effected before the hour of *two* in the afternoon. Service effected after six in the afternoon on any week-day except Saturday, shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall, for the like purpose, be deemed to have been effected on the following Monday." By R. 12, "In any case in which any particular number of days, not expressed to be clear days, is prescribed by these Rules, the same shall be reckoned exclusively of the first day and inclusively of the last day." By Order LXVII., R. 1, "Except in the case of an order for attachment, it shall not be necessary to the regular service of an order that the original order be shown if an office copy of it be exhibited." And by R. 2, "All writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications, in respect of which personal service is not requisite, shall be sufficiently served if *left* within the prescribed hours,[3] at *the address for service* of the person to be served as defined by Orders IV. and XII., with any person resident at or belonging to such place;" while by R. 3, "*Notices* sent from any office of the Supreme Court *may be sent by post;* and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service." It is also provided, in the same Order, by R. 4, that "Where no appearance has been entered for a party, or where a party or his solicitor, as the case may be, *has omitted to give an address* for service as required by Orders IV. and XII., all writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written

[1] Under Ord. XLI. r. 1. Ord. XXXVI. r. 30.
[2] R. *v.* Scott, 1877. See, also,
[3] See R. 11, cited above.

communications, in respect of which personal service is not requisite, may be served *by filing them with the proper officer;*" by R. 5, that "Where *personal* service of any writ, notice, pleading, order, summons, warrant, or other document, proceeding, or written communication is required by these Rules or otherwise, the service shall be effected as nearly as may be in the manner prescribed for the personal service of a writ of summons," and by R. 6, that "Where personal service of any writ, notice, pleading, summons, order, warrant, or other document, proceeding, or written communication is required by these Rules or otherwise, and it is made to appear to the Court or a Judge that prompt personal service cannot be effected, the Court or Judge may make such order for *substituted or other service*,[1] or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just." The same Order also contains provisions—in R. 7, that "Where a party after having sued or appeared in person has given notice in writing to the opposite party or his solicitor, through a solicitor, that such solicitor is authorised to act in the cause or matter on his behalf, all writs, notices, pleadings, summonses, orders, warrants, and other documents, proceedings, and written communications, which ought to be delivered to or served upon the party on whose behalf the notice is given, shall thereafter be delivered to or served upon such solicitor;" in R. 8, that "Where a person who is not a party appears in any proceeding either before the Court or in Chambers, service upon the solicitor in London by whom such person appears, whether such solicitor act as principal or agent, shall be deemed good service except in matters requiring personal service," and in R. 9, that "Affidavits of service shall state when, where, and how, and by whom, such service was effected." It is also required (by Order X., R. 1), that "Every application to the Court or a Judge for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit setting forth the grounds upon which the application is made."

§ 1586*a*. The service of any summons or process of the County Courts by a bailiff may be proved by indorsement on a copy of such document under the bailiff's hand, showing the fact and mode

[1] See Ord. X., cited below.

of such service; and any bailiff wilfully and corruptly indorsing any false statement on such copy shall incur the same penalties as if he had committed perjury.[1]

§ 1586c. The proof of the service of *process* of *courts of summary jurisdiction* is now considerably simplified,[2] and "In a proceeding within the jurisdiction of a court of summary jurisdiction, without prejudice to any other mode of proof, service on a person of any summons, notice, process, or document required or authorised to be served, and the handwriting and seal of any justice of the peace or other officer or person on any warrant, summons, notice, process, or document, may be proved by a solemn *declaration* taken before a justice of the peace, or before a commissioner to administer oaths in the Supreme Court of Judicature, or before a clerk of the peace, or a registrar of a county court; and any declaration purporting to be so taken shall, until the contrary is shown, be sufficient proof of the statements contained therein, and shall be received in evidence in any court or legal proceeding, without proof of the signature or of the official character of the person or persons taking or signing the same."[3] Any person wilfully making a false declaration in any material particular "shall be guilty" of perjury.

§ 1587. The most usual modes of proving the service of the *process* of courts having now been discussed, it remains to see how the *practice and proceedings* of certain particular courts can be proved. Now, the Rules and Orders of the Supreme Court, the Rules of the old Superior Common Law Courts, and the Orders of the old Court of Chancery, may severally be proved in any court by the production of office copies, for such copies are given out by the officer in the usual course of his business.[4] Probably, however, it will in practice never be necessary to have recourse to this mode of proof, but advocates and suitors will be content to rely on the

[1] 51 & 52 V. c. 43, § 78.

[2] By 42 & 43 V. c. 49 ("The Summary Jurisdiction Act, 1879"), § 41. See, also, 44 & 45 V. c. 24 ("The Summary Jurisdiction (Process) Act, 1881"), § 4, subs. 1, extending the operation of the section cited above to the proof of English process executed in Scotland, and Scotch process executed in England.

[3] The form and fee (viz. 1s.) for a declaration are provided by the rules (16th July, 1886) made under the Act.

[4] Selby *v.* Harris, 1698; Duncan *v.* Scott, 1807; Streeter *v.* Bartlett, 1848; Jack *v.* Kiernan, 1840; May. of Ludlow *v.* Charlton, 1840.

authenticity of any copy purporting to be published as a portion of the authorised reports, or, indeed, printed by any printer of repute. In proving the *general rules* and regulations of an *inferior court*, if a printed copy of such rules, &c., be made use of, it must be proved that it has received the sanction of such court.[1]

§ 1588. Among the proceedings of competent courts are *probates* and *administrations*. The *probate* of a will is a copy of that instrument under the seal, either of the Ecclesiastical Court, or, since 11th January, 1858, of the Probate Court or Division, to which is attached a certificate, stating that the original will has been duly proved and registered, and that administration of the goods of the deceased has been granted to one or more of the executors named therein.[2] This document,—which, in the event of the will being proved in solemn form of law, can only be granted after satisfactory evidence has been furnished to the court of adequate capacity on the part of the testator, of testamentary intention untainted by fraud, and of due execution,[3]—constitutes the title deed of the executor, without which his character cannot be recognised, and armed with which it cannot in general be impugned.[4]

§ 1589. The primary mode of proving a probate is by producing either the document itself, when due notice will be taken of the seal,[5] or the Act-book or register from the Probate Division,[6] containing an entry that the will has been proved, and probate granted, or even a certified or examined copy of such book or register.[7] In

[1] In one case (Dance *v.* Robson, 1829 (Ld. Tenterden)), one of the printed copies of the rules of the old Insolvent Court, proved to be printed by order of the court, was admitted. In a later one (R. *v.* Koops, 1837, in which, however, Dance *v.* Robson was not cited), proof that the court had ever sanctioned such printed rules not being given, a similar copy of the same rules was rejected.

[2] Toller on Ex. 58.

[3] Jones *v.* Godrich, 1845, P. C. (Dr. Lushington).

[4] Toller on Ex. 74, 75; Allen *v.* Dundas, 1789; Ryres *v.* D. of Wellington, 1846. As to the jurisdiction of the Probate Division to grant probate in the case of a married woman's will made in pursuance of a power, see Barnes *v.* Vincent, 1846, P. C., cited post, § 1712. See, also, Ward *v.* Ward, 1848. As to the effect of the Probate Division sealing Scotch confirmations of executors, see 21 & 22 V. c. 56 ("The Confirmation of Executors (Scotland) Act, 1858"), §§ 12, 13. See, also, Hawarden *v.* Dunlop, 1861; and Hood *v.* Ld. Barrington, 1868.

[5] Kempton *v.* Cross, 1735; ante, § 6.

[6] Cox *v.* Allingham, 1822. So, the revocation of probate may be proved by the Act-book: R. *v.* Ramsbottom, 1787. See, ante, § 425.

[7] Davis *v.* Williams, 1811; R. *v.* Phillpott, 1851 (Talfourd, J.); Dorrett *v.* Meux, 1854; 14 & 15 V. c. 99, § 14, cited post, § 1599.

some of the inferior spiritual courts,[1] no Act-book, or other separate record of the granting of probates was kept, and in such a case it will be enough to prove that a memorandum has been indorsed on the will itself, stating that the executor has proved it, and that the probate has passed the seal; and on proof of the practice to keep no Act-book, and on production of the will with such indorsement, the title of the executor will be sufficiently established, without accounting for the non-production of the probate.[2] Under no other circumstances, however, will the original Will be admitted as evidence of title to *personal* property.[3] In the event of the probate being lost or destroyed, it seems that it *may* be proved by an examined copy;[4] but in such case the practice of the Probate Division,[5]—like that which used to prevail in the spiritual courts,—is to grant either an exemplification, or a certified copy of the entry of the Act-book or register in which the grant of probate is recorded.[6]

§ 1590. A grant of *administration* may also be proved either by producing the letters of administration under the seal of the court,[7] or the Act-book or register containing a record of the grant, or an exemplification, or an examined or a certified copy of such record,[8] or an official certificate of the grant.[9] Either of these kinds of proof will be primary evidence.[10]

§ 1591.[11] The next class of public writings to be considered con-

[1] For instance, the bishops' courts at Winchester and Wells.

[2] Doe *v.* Mew and Doe *v.* Gunning, 1837. See, also, Gorton *v.* Dyson, 1819.

[3] Pinney *v.* Pinney, 1828; R. *v.* Barnes, 1816 (Le Blanc, J.); Stone *v.* Forsyth, 1781.

[4] R. *v.* Hains, 1695 (Ld. Holt); Hoe *v.* Nelthorpe, or Nathrop, 1697.

[5] See 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), by § 69, enacting, that "an official copy of the whole or any part of a will, or an official certificate of the grant of any letters of administration, may be obtained from the registry or district registry where the will has been proved or the administration granted, on the payment of such fees as shall be fixed for the same by the rules and orders under this Act." The fees fixed by the Rules are sixpence for every folio of seventy-two words of office-copy, and an additional fee of £1 for "every office-copy of will *under seal* of the court." See, also, 20 & 21 V. c. 79, § 74, Ir.

[6] Shepherd *v.* Shorthose, 1719. See post, § 1599.

[7] The seal is judicially noticed, ante, § 6.

[8] See M'Kenna *v.* Eager, 1875 (Ir.).

[9] See 20 & 21 V. c. 77, § 69, cited above, n. [5]. See, also, 20 & 21 V. c. 79, § 74, Ir.

[10] Kempton *v.* Cross, 1735; Elden *v.* Keddell, 1807; Davis *v.* Williams, 1811. See ante, § 425, and post, § 1599.

[11] Gr. Ev. § 483, in great part.

sists of *official books* or *registers*, kept by persons in public offices, in which such persons are required, (either by statute or as naturally incidental to the office,) to write down particular transactions, occurring in the course of their public duties, and under their personal observation. Entries in such books, as well as all other documents of a public nature, are generally admissible in evidence, although their authenticity be not confirmed by the usual test of truth, namely, the swearing, and the cross-examination, of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly, because in some cases they are required by law to be kept, and in all because their contents are of public interest and notoriety. They are, too, made under the sanction of an oath of office, or, at least, under that of official duty, by accredited agents appointed for that purpose. Moreover, though the facts stated in them are of a public nature, it would often be difficult to prove them by means of sworn witnesses.[1]

§ 1592. To render a document admissible in evidence as an *official register*, it must be one which the *law requires to be kept for the public benefit*. When a book does not answer this description neither the original book nor extracts from it can be admitted in evidence.[2]

[1] 1 St. Ev. 230.

[2] Accordingly, the following books (and, of course, extracts from them) are not admissible in evidence:— *Bankruptcy proceedings*, shown by a book produced from the office (now abolished by 15 & 16 V. c. 77, § 1) of the Secretary of Bankrupts: Henry *v.* Leigh, 1813. *Baptism and marriage* registers and records (now deposited in the office of the registrar-general pursuant to the Act 3 & 4 V. c. 92, §§ 6, 20) as to the performance of those ceremonies at the Fleet and King's Bench Prisons, at May Fair, at the Mint, in Southwark, and in certain other places: Read *v.* Passer, 1794; Doe *v.* Gatacre, 1838. *Custom house returns*, voluntarily made, *e.g.*, a report stating the burthen of a foreign ship, and the number of the crew, made by the master to the authorities at the custom house, and there filed, when tendered in evidence as a public document: Huntley *v.* Donovan, 1850; or a certificate filed at the custom house, signed by a party who certified that he had measured the vessel, and stated the amount of the tonnage: Id. *Dissenting chapels*, registers of births, marriages, or burials, whether from Wesleyan or other dissenting chapels, unless such register has been deposited in the office of the registrar-general, and entered in his list pursuant to 3 & 4 V. c. 92: Whittuck *v.* Waters, 1830; Newham *v.* Raithby, 1811; Ex parte Taylor, 1820; and as to the Act, see ante, § 1503, and post, § 1602, note. *Heralds' College books*, as, *e.g.*, a book produced from the Heralds' College called "Arms and Descents of the Nobility": Shrewsbury Peer., 1857, H. L. *Marriage registers*, kept by clergymen in Ireland, prior to the 31st of March, 1845, when the Irish Marriage Act came into operation: Stockbridge *v.* Quicke, 1853. *Jewish*

§ 1593. A similar rule prevails with respect to the reception in evidence of *foreign* and *colonial registers*. Such registers or extracts from them are only admissible on proof that they are required to be kept, either by the law of the country to which they belong,[1] or by the law of this country.[2] In America, too, authenticated copies of foreign registers are always receivable in evidence.[3]

§ 1594.[4] It is essential to the official character of books, which would, if properly kept, be admissible in evidence, that the entries in them be made promptly, or, at least, without such long delay

registers of circumcisions, kept at the great synagogue in London, though the entries in it be proved to be in the handwriting of a deceased chief rabbi, whose religious duty it was to perform the rites of circumcision, and to make corresponding entries in the book: Davis *v.* Lloyd, 1844; but see observations on this case, ante, § 791. *Lloyd's Registers of Shipping* (for a description of which registers see Kerr *v.* Shedden, 1831): Freeman *v.* Baker, 1833. Although in Bain *v.* Case, 1829, and in Abel *v.* Potts, 1800, this book was admitted: in the first case to prove that the coast of Peru was in a state of blockade at a particular time, and in the other as evidence of the capture of a vessel. See, also, Richardson *v.* Mellish, 1824 (Best, C.J.). *Poor law medical officer's* register of attendance, not kept by him under any statute, but merely for the inspection of the guardians, in obedience to a rule of the Poor Law Commissioners, no additional payment being given to the officer in respect of the entries (he being paid by a yearly salary), but the book being simply intended as a check upon him: Merrick *v.* Wakley, 1838.

[1] See Perth Peer., 1846-8, H. L.; Abbott *v.* Abbott and Godoy, 1860.

[2] Accordingly, in the absence of proof of any such requirement, the following have been rejected:— *Baptismal registers* kept voluntarily in Guernsey: Huet *v.* Le Mesurier, 1786, (on which case Dr. Lushington, in Coode *v.* Coode, 1838, observed that the evidence was rejected, "because it did not appear by what authority the register was kept. Supposing it had been proved that Guernsey was part of the diocese of Winchester, which it is, and that by ancient custom a register was required to be kept there, different considerations might have applied to the case. * * * I am of opinion, that there is no ground of distinction, supposing the register had been kept by order of a competent authority, between registers kept in Guernsey and in this country"). *Baptismal registers* kept voluntarily by the chaplain of a British minister at a foreign court: Dufferin Peer., 1848. *Marriage registers as to marriages solemnized abroad*, kept in the Swedish ambassador's chapel at Paris (prior to the 28th of July, 1849, the date of the passing of 12 & 13 V. c. 68 ("The Consular Marriage Act, 1849")): Leader *v.* Barry, 1795. And a book kept at the British ambassador's hotel in Paris, wherein the ambassador's chaplain had made and subscribed entries of all marriages of British subjects celebrated by him: Athlone Peer., 1841. On the other hand, marriage registers are admissible which are proved to have been kept in Barbadoes under a law of that colony requiring such register to be kept. Moreover, the marriage register which used to be kept in the Ionian Islands is receivable in evidence; and by 27 & 28 V. c. 77, § 7, a copy of such register is admissible if it *purports* "to be certified under the signature and official seal of the secretary of the Lord High Commissioner."

[3] Kingston *v.* Lesley, 1824 (Am.).

[4] Gr. Ev. § 485, as to first five lines.

as to impair their credibility, and that they be made by the person whose duty it was to make them, and in the mode required by law, if any has been prescribed.[1] Accordingly, a minister's entry of a baptism, which took place before he had any connexion with the parish, and of which he received information from the clerk, is inadmissible. An entry in a parish register will not be rejected *merely* because it was not made contemporaneously, or because it was made or sanctioned by the incumbent, on information received from some other person; since it will be presumed that the incumbent, however he got his information, had satisfied himself of the fact before he authorised the entry. Accordingly, an entry in a parish book (kept at the parish church), of a burial in the workhouse cemetery within the parish, has been admitted, though it appeared that the incumbent sanctioned the entries on the faith of statements by others, and not from personal knowledge of the burials.[2]

§ 1595. There are, however, many books which the *law recognises as official registers*, or as being public documents.[3]

[1] Doe *v.* Bray, 1828; Walker *v.* Wingfield, 1812.

[2] Doe *v.* Andrews, 1850.

[3] An enumeration of the whole of the documents which are on this ground recognised as being admissible in evidence would probably be practically impossible. But among the more important of such documents are the following:—*Admiralty* documents, including the log-books and muster-books of her Majesty's ships, and even official letters lodged at the Admiralty (D'Israeli *v.* Jowett, 1795; Watson *v.* King, 1815; R. *v.* Fitzgerald, 1741; R. *v.* Rhodes, 1742; Barber *v.* Holmes, 1800; most of these documents are now lodged at the Record Office, see ante, § 1485); lists of convoy (Richardson *v.* Mellish, 1824); the books of the Sick and Hurt Office (Wallace *v.* Cook, 1804); and the books kept by the coastguard, showing the state of wind and weather (The Catherina Maria, 1866). The *Bank of England's* deposit and transfer books: Mortimer *v.* M'Callan, 1840. The registers of *Births, Marriages, or Deaths*, including parish registers (Doe *v.* Barnes, 1834); the registers of births, marriages, and deaths made pursuant to "The Registration Act" (6 & 7 W. 4, c. 86); the registers of births and deaths (26 & 27 V. c. 11, § 5, Ir.); and the register of marriages (7 & 8 V. c. 81, §§ 52, 71, Ir.; 26 & 27 V. c. 27, § 16, Ir.) in Ireland; Scotch parochial registers (Lyell *v.* Kennedy, 1889, H. L.); the registers of marriages abroad, as kept by British consuls, since the 28th of July, 1849 under 12 & 13 V. c. 68 (now repealed), and now under "The Foreign Marriage Act" (55 & 56 V. c. 23); the register of marriages in the Ionian Islands, which has been transmitted to the registrar-general by the lord high commissioner (27 & 28 V. c. 77, §§ 8—10); the registers and certificates of Indian marriages, as delivered to the registrar-general since the 1st of January, 1852 (14 & 15 V. c. 40, § 22); certain non-parochial registers deposited in the office of the registrar general by virtue of the Act 3 & 4 V. c. 92 (see ante, § 1503, n., as to what these registers consist of; and post, § 1602, n., as to the conditions on which

§§ 1596—7. In all cases the most satisfactory mode of proving official registers and other public documents of a like nature, is by *producing* the *books* or documents themselves, and showing that they come from the proper *repository*.[1] And in *some* cases, moreover, this is the only legitimate mode of proof.[2]

they are receivable in evidence); certain registers, muster-rolls, and pay-lists, and certified extracts therefrom, transmitted to the same office under "The Registration of Births, Deaths, and Marriages (Army) Act, 1879" (42 V. c. 8); and the books of baptisms, marriages, and burials in India, deposited at the office of the Secretary for India (Ratcliff *v.* Ratcliff and Anderson, 1859; Queen's Proctor *v.* Fry, 1879; Rep. of 1838 by Comm. to inquire into the state of non-parochial registers, p. 13). *Corporations.*—Books containing their official proceedings, and matters respecting their property, if the entries are of a public nature: Marriage *v.* Lawrence, 1819; R. *v.* Mothersell, 1707; Thetford's case, 1719; Warriner *v.* Giles, 1734. *Courts Baron* rolls: B. N. P. 247; Doe *v.* Askew, 1809. *Ecclesiastical documents*, such as bishops' registers and chapter-house registers (Arnold *v.* Bp. of Bath and Wells, 1829; Coombs *v.* Cocther, 1829; Humble *v.* Hunt, 1817), and terriers: B. N. P. 248; 1 St. Ev. 239. The *East India Company's* deposit and transfer books (2 Doug. 593, n. 3), and the lists of passengers which, in pursuance of an old statute, used to be transmitted by the captains of ships in the India trade to the court of directors of that company: Richardson *v.* Mellish, 1824. *Land-tax assessments:* Doe *v.* Seaton, 1834 (Patteson, J.); Doe *v.* Arkwright, 1833 (Ld. Denman); R. *v.* King, 1788; Doe *v.* Cartwright, 1824. The official *Log-books* kept by the masters of merchant ships (57 & 58 V. c. 60, §§ 239—243). The registers of *Parliamentary rolls* which are in the custody of the sheriffs or returning officers (Reed *v.* Lamb, 1860; 6 & 7 V. c. 18, §§ 48, 49); and some of the documents relating to the election of members of parliament (35 & 36 V. c. 33, Sched. 1, Part 1, r. 42). *Poor law valuations*, and valuations of rateable property in Ireland: Swift *v.* M'Tiernan, 1848 (Ir.) (Brady, C.); Welland *v.* Lord Middleton, 1844 (Ir.) (Sugden, C.); 15 & 16 V. c. 63, Ir.; 23 & 24 V. c. 4, § 9, Ir. *Public offices.*—Books and other official papers; the above terms including books and papers of the Custom House (Johnson *v.* Ward, 1806; Tomkins *v.* Att.-Gen., 1813 (Ir.); Buckley *v.* U. S., 1846 (Am.)); the office of Inland Revenue (53 & 54 V. c. 21, §§ 4, 6); of what were formerly the Excise (Fuller *v.* Fotch, 1695; R. *v.* Grimwood, 1815); of the Stamp Offices; of the Post Office; and those of the Register Offices of Merchant Seamen (57 & 58 V. c. 60, §§ 251, 256, cited post, § 1604, n.); as also those kept at the Register Offices of Joint Stock Companies (25 & 26 V. c. 89, § 174, r. 5), or at the Register Office of Copyright (5 & 6 V. c. 45 ("The Copyright Act, 1842"), § 11, cited ante, § 1511, n.; and 7 & 8 V. c. 12 ("The International Copyright Act, 1844"), § 8; and likewise the books kept at *Public Prisons:* Salte *v.* Thomas, 1802; R. *v.* Aickles, 1785; and *Vestry* books: R. *v.* Martin, 1809.

[1] Atkins *v.* Hatton, 1794; Armstrong *v.* Hewett, 1817; Pulley *v.* Hilton, 1823; Swinnerton *v.* M. of Stafford, 1810. See ante, §§ 432 et seq.; and §§ 659 et seq.; and Croughton *v.* Blake, 1843, as to the repository.

[2] Some of the principal of the instances in which it is necessary to produce the original document itself from the proper repository are in the cases of documents under "*The Army Act*, 1881" (44 & 45 V. c. 59), § 172, subs. 1, amended by 48 V. c. 8, § 7, providing that all orders authorised by the Act "to be made by the Commander-in-Chief or the Adjutant-General, or by the Commander-in-Chief or Adjutant-General of the

§ 1598. However, in the case of several other books and documents of a semi-public nature, which are rendered admissible in

Forces in India, or in any Presidency in India, or by any general or other officer commanding," and also that any "such order may be signified by an order, instruction, or letter under the hand of any officer authorised to issue orders on behalf of such" superior officer; and any such document purporting to be so signed, shall be evidence of the party signing being so authorised. While by § 163, subs. 1 (b), of the same Act, any letter, return, or other document respecting the service, non-service, or discharge of any person as a soldier or marine is made evidence of the facts stated in such letter, return, or document, provided that, on production, it purports to be signed as in the subsection mentioned. So, also, any descriptive return, within the meaning of § 154 of the same Act, must be produced as an original document, but it will be evidence of the matters therein stated if it purport to be signed by a justice of the peace. *Company's Books*, where the company is subject to the provisions of "The Companies Clauses Consolidation Act" (8 & 9 V. c. 16), which contain, pursuant to § 98 of the Act, entries of the proceedings of the directors, of the committees of directors, and of the meetings of the company, where each entry purports to be signed by the chairman of the meeting. *Books of Companies*, to which the Companies Act of 1862 (25 & 26 V. c. 89) applies, if containing minutes purporting to be signed by the chairman, either of the meeting to which it relates or of the next succeeding meeting, as, by § 67 of the Act, such books are to be received as primâ facie evidence; (see, also, as to proof of other documents relating to companies, and registered under the Companies Acts, post, § 1603; also, as to certificates of incorporation under the same Acts, § 1630). *Incorporated Law Society.*—Rules, regulations, certificates, notices, or other documents made or issued by the Incorporated Law Society, which §§ 19 and 20 of "The Solicitors Act, 1877" (40 & 41 V. c. 25), expressly enacts may be made by the council on behalf of the Society, and "may be in writing or print, or partly in writing, and partly in print, and may be signed on behalf of the Society by the secretary, or by such other officer or officers of the Society as may be from time to time prescribed by the council." *Merchant Shipping Documents.*—It being, by "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), provided generally (§ 719) that "all documents purporting to be made, issued, or written by or under the direction of the Board of Trade, and to be sealed with the seal of the Board, or to be signed by their secretary or one of their assistant secretaries, or if a certificate by one of the officers of the marine department, shall be admissible in evidence in manner provided by this Act;" while provision as to the proof of regulations in force for preventing collisions at sea is made by § 419 (5) of the same Act, cited post, § 1604. "*The Metropolis Local Management Act*, 1855" (18 & 19 V. c. 120), § 60, renders the minutes of proceedings of the *Metropolitan Board of Works* (which has now ceased to exist, and whose powers, duties, and liabilities are, by "The Local Government Act, 1888" (51 & 52 V. c. 41), § 40, transferred to the London County Council), and of district boards and vestries in the metropolis, admissible in evidence, provided they purport to be signed by any two of the members present. *Non-parochial Registers* deposited with the registrar-general must, too, in order to be used in evidence in criminal proceedings, be produced to the court (see 3 & 4 V. c. 92, § 17, cited post, § 1602, n.; and as to what these registers contain, see ante, § 1503, n.) *Public Prisons.*—The daily books of these are also only evidence when the originals are produced: Salte *v.* Thomas, 1824 (Ld. Alvanley). *Public Baths.*—Books containing entries of the proceedings of the commissioners may, under 9 & 10 V.

evidence by the statute law, the strictness of the common law rule that their contents can only be proved by production of the originals of such books and documents, is not now usually insisted upon—the public inconvenience that would follow the removal of *books of general concernment*, being felt to be so great, as to justify, and in some cases to compel, the introduction of secondary evidence.[1] The books to which this indulgence is extended are those belonging to a particular custody, out of which they are not usually taken but by special authority, granted only in cases where inspection of the book itself is necessary for the purpose of identifying it, or of determining some question arising upon the original entry, or of correcting an error, which has been duly ascertained. Such books are, in general, not removable at the call of individuals, and they, moreover, being interesting to many persons, might be required as evidence in different places at the same time. In consequence of these considerations, it has become a common law axiom of almost universal application, that *whenever a book is of such a public nature as to be admissible in evidence on its mere production from the proper custody, its contents may be proved by an authentic copy.*[2] So anxious are the judges not to break in upon this rule, founded as it is on public convenience, that even though the original document be

c. 74 ("The Baths and Washhouses Act, 1846"), § 13, be read as evidence if the originals are produced purporting to be signed by two commissioners. *Railway* documents are in many cases evidence, *e.g.*, the orders and documents which have proceeded from the old (see 14 & 15 V. c. 64, § 1) commissioners of railways, when purporting to be sealed or stamped with the seal of the commissioners, and to be signed by two or more of that body (9 & 10 V. c. 105, § 4), and documents that proceed from the present commissioners if purporting to be signed by any one of such commissioners (36 & 37 V. c. 48, § 30); the same rule applies to all documents relating to railways which now emanate from the Board of Trade, and which purport to be signed by one of the secretaries or assistant secretaries of the Board, or by some officer appointed by the Board to sign such documents (14 & 15 V. c. 64, § 3; 31 & 32 V. c. 119, §§ 39, 47, and Sched. 2. This last Act repeals 7 & 8 V. c. 85 ("The Railways Regulation Act, 1844"), § 23, which made certain of such documents provable by "certified copies"). "*The Sea Fisheries Act*, 1883" (46 & 47 V. c. 22), § 17, renders any document drawn up in pursuance of the 1st Schedule thereof admissible as evidence of the facts or matters therein stated, and under certain circumstances such facts may be certified officially, and such document or certificate will be admissible evidence without proof of the signature.

[1] Mortimer *v.* M'Callan, 1840 (Ld. Abinger).

[2] Lynch *v.* Clerke, 1696 (Holt, C.J.); R. *v.* Hains, 1695; Hoe *v.* Nathrop, 1696.

in court, they will not require its production, but will admit the copy, provided its authenticity be established.[1]

§ 1599. An *examined copy*, duly made and sworn to by a competent witness, has ever been considered as "authentic," within the meaning of the above axiom.[2]

§ 1599A. The Legislature has, however, also provided a more simple mode of proof, namely, by the production of a *certified copy*. For by Lord Brougham's Evidence Act of 1851,[3] it is enacted:[4]— "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 means of 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 by 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 intrusted, and which officer is hereby required to furnish such certified copy or extract to a 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." In conformity with this section, a copy of an entry in a local registry of births, certified under the hand of a "deputy superintendent registrar," has been received in evidence;[5] and under the same enactment the now abolished[6] Clerk of Records and Writs was ordered by the court to furnish certified copies of any bills, answers, and depositions which were in his custody, and which were required to be used on the trial of a cause.[7]

§ 1600. Among the public books and documents, the contents of which, in the absence of the originals, are now provable under the enactment just cited, either by examined or by certified copies,

[1] Marsh *v.* Collnett, 1798 (Ld. Kenyon). See § 87, ante, as to an analogous rule, in not requiring a subscribing witness to an *ancient* deed or will to be called, even though present in court.

[2] See R. *v.* Mainwaring, 1856.

[3] 14 & 15 V. c. 99.

[4] Id. § 14.

[5] R. *v.* Weaver, 1873.

[6] See 42 & 43 V. c. 78, Sched. 1; and R. S. C. 1883, Ord. LX. r. 3; Ord. LXI. r. 1.

[7] Reeve *v.* Hodson, 1853 (Wood, V.-C.).

some of those which are most commonly met with are mentioned below in a footnote.[1]

[1] The principal of the documents referred to in § 1600 are the following:—*Bank of England's* deposit and transfer books (Breton *v.* Cope, 1791; Marsh *v.* Collnett, 1798; Mortimer *v.* M'Allan, 1840). *Birth, Marriage, or Death* registers, including parish registers (Doe *v.* Barnes, 1834. In Re Porter's Trusts, 1855, Wood, V.-C., held that an extract from a parish register, signed by the curate of the parish, was admissible. So, also, did the Lords Justices in Re Hall's Estate, 1852, though that case is erroneously reported as a decision to the contrary in 2 De Gex, M. & G.; see 52 G. 3, c. 146); the books of baptisms (Queen's Proctor *v.* Fry, 1879), marriages (as to those solemnized since the 1st January, 1852: see 14 & 15 V. c. 40, §§ 21, 22), and deaths in India, which are deposited in the office of the Secretary for India (Ratcliff *v.* Ratcliff and Anderson, 1859, in which case, however, the original was produced: see, also, Report of 1838, by Commission to inquire into the state of non-parochial registers, p. 13); the register of marriages in the Ionian Islands, which has been transmitted to the registrar-general by the Lord High Commissioner (27 & 28 V. c. 77, §§ 8, 10); the registers of marriages kept by British consuls abroad prior to the 28th July, 1849; but "The Consular Marriage Act, 1849" (12 & 13 V. c. 68, § 20), now repealed by the Foreign Marriage Act, 1892 (which see below), made valid all marriages which—one or both of the parties to which being a British subject—were solemnized before the 28th July, 1849, according to any religious rites or ceremonies, or were contracted per verba de presenti in any foreign country or place, and *registered* by or under the authority of any British consul-general, consul, or vice-consul, exercising his functions within such country or place, if the signature of the parties were written in the register. "The Foreign Marriage Act, 1892" (55 & 56 V. c. 23) was passed the 27th June, 1892, and, by § 1, makes valid all marriages between parties, of whom one at least is a British subject, before a "marriage officer." By § 11, a marriage officer is defined to be a person authorised in writing by a secretary of state; and, by § 21, power is given to make regulations, and to direct who shall be "marriage officers"); and foreign registers of marriages, on proof that they are required to be kept by the laws of the countries to which they respectively belong (Burnaby *v.* Baillie, 1889; Abbott *v.* Abbott and Godoy, 1860). *Court Baron* rolls (B. N. P. 247), though they are not the copies delivered to the tenant of the estate (Breeze *v.* Hawker, 1844). *East India Company's* deposit and transfer books (2 Doug. 593, n. 3; Doe *v.* Roberts, 1844). *Land-Tax* assessments (R. *v.* King, 1788)—as to those in the Record Office see ante, § 1533. *Log-books* officially kept by the masters of British ships, as directed by "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60, §§ 239—243). *Middlesex Registry* of deeds, apparently (see Collins *v.* Maule, 1838; Doe *v.* Kilner, 1826). *Poor Law Valuations* in Ireland (Swift *v.* M'Tiernan, 1848 (Ir.) (Brady, C.); Welland *v.* Ld. Middleton, 1844 (Ir.) (Sugden, C.)). *Probate Division* Registry's Act-book and registers (see Davis *v.* Williams, 1811; Dorrett *v.* Meux, 1854. Entries in this book may also be proved by an exemplification; ante, § 1589). *Public Offices* books, and other official papers, including the books of the Customs, of the office of Inland Revenue (12 & 13 V. c. 1, § 6, amended by 43 & 44 V. c. 19; see, also, 53 & 54 V. c. 21, §§ 3, 13, et seq.), and of the Post Office (Mortimer *v.* M'Callan, 1840 (Ld. Abinger); Fuller *v.* Fotch, 1695); and the books of entry, records, deeds, instruments, writings, maps, plans, and other official papers deposited in the office of land revenue, records, and enrolments (Doe *v.* Roberts, 1844; 2 W. 4, c. 1 ("The Crown Lands Act, 1832"), §§ 15 et seq.; 7 & 8 V. c. 89. As to proof of Crown leases, &c., recorded in Scotland, see 36 & 37 V. c. 36, § 5). *Railway* companies' by-laws, made pursuant to "The Railways Clauses Consolidation Act, 1845" (Motteram

§ 1601. The section of Lord Brougham's Act, quoted above,[1] refers only to such documents as are not provable by means of copies under any other statutable provision. But there are many registers and documents, *certified copies* of which are receivable in evidence, by virtue of some enactment having special reference to them. Some of the principal of the registers thus provable are referred to in the footnote.[2]

v. E. Cos. Rail. Co., 1859; 8 & 9 V. c. 20, §§ 108—111, cited post, § 1656). *Rate-books*, including, probably, poor-rate books (Justice *v.* Elstob, 1858 (Hill, J.); see, however, 32 & 33 V. c. 41, § 18, cited ante, § 147A.), and, perhaps, those kept by local authorities, under "The Public Health Act, 1875" (38 & 39 V. c. 55), § 223 of which enacts, that "the *production* of the books purporting to contain any rate or assessment made under this Act, shall, without any other evidence whatever, be received as primâ facie evidence of the making and validity of the rates mentioned therein." *Savings Banks* rules, though they cannot be proved by certified copies under Lord Brougham's Act, are provable, under 26 & 27 V. c. 87 ("The Trustee Savings Bank Act, 1863"), § 4, either by production of the originals deposited with the Commissioners for the Reduction of the National Debt, or by examined copies.

[1] Ante, § 1599A.

[2] The principal documents which are, under particular Acts of Parliament, thus provable by means of *certified copies*, and are most commonly met with, are as follows:—*Army* documents.—All records made in regimental books in pursuance of any Act, or of the Queen's Regulations, or of military duty, are, by "The Army Act, 1881" (44 & 45 V. c. 58), § 163, subs. 1 (g) and 1 (h), admissible in evidence of the facts therein stated, provided they purport to be signed by the commanding officer, or the officer whose duty it is to make them; and a copy of any such record, purporting to be signed by the officer having the custody of such book, is evidence of such record. So, also, by § 163, subs. 1 (e), of the same Act, all warrants or orders made in pursuance of the Act by any military authority are "evidence of the matters and things therein directed to be stated," and may be proved by copies purporting to be certified "by the officers therein alleged to be authorised by a Secretary of State or Commander-in-Chief to certify the same." Again, by § 163, subs. 1 (a), the attestation paper (as to which see § 80 of the Act) purporting to be signed by a soldier, or his declaration made on re-engagement in any of the regular forces, or on any enrolment in any branch of the service, is evidence of his having given the answers to questions which he is therein represented as having given; and his enlistment may be proved by a copy of his attestation paper, purporting to be certified by the officer having the custody of such document. The provisions of § 163 of "The Army Act, 1881," also apply to proceedings under "The Reserve Forces Act, 1882" (45 & 46 V. c. 48), § 27, and "The Militia Act, 1882" (45 & 46 V. c. 49), § 44, subs. 2. The same mode of proof applies to the rules for the management of the property, finances, and civil affairs of volunteer corps, which are provable by copies certified under the hands of the respective commanding officers as true copies of the rules whereof her Majesty's approval has been notified: 26 & 27 V. c. 65 ("The Volunteer Act, 1863"), § 24. This Act, so far as its provisions are applicable, also extends to volunteer drill-grounds, by 49 V. c. 5, while Part V. of such Act is applied to yeomanry by 54 & 55 V. c. 54, § 14. See, also, 36 & 37 V. c. 77, § 22, as to proof of the Rules of the Naval Artillery Volunteer Force. By-

laws as to land held for rifle ranges may, by 48 & 49 V. c. 36, be proved under "The Documentary Evidence Act, 1868." *Ballot Act*: see *Parliamentary Elections*. *Banking copartnerships.*—The memorials setting forth the firm names, and the names and places of abode of the members and public officers of banking copartnerships (see 7 G. 4, c. 46 ("The Country Bankers Act, 1826"), §§ 4, 6), which are kept at the Office of Inland Revenue (53 & 54 V. c. 21 ("The Inland Revenue Regulation Act, 1890"), § 1, subs. 2, and §§ 3—5), may be proved by copies certified under the hand of one of the Commissioners of Inland Revenue. *Birth, Marriage, or Death Registers.*—Certified copies of entries in the registers of births, marriages, and deaths, made pursuant to "The Births and Deaths Registration Act, 1836" (6 & 7 W. 4, c. 86), as amended by "The Births and Deaths Registration Act, 1874" (37 & 38 V. c. 88), § 32 (cited ante, § 1504, n. [2]), are, by § 38 of the first-named Act, if purporting to be sealed or stamped with the seal of the register office, to be received as evidence of the birth, death, or marriage to which the same relate, 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. See, also, § 35, cited ante, § 1504, n. [2], which authorises the clergymen, superintendent registrar, and other officers, to give certified copies of the *local registers*; but as the Act contains no provision for making such copies evidence, it may be doubtful whether they would be admissible, were it not for the Act of 14 & 15 V. c. 99 ("The Evidence Act, 1851"), § 14, cited ante, § 1599A. See R. *v.* Mainwaring, 1856; R. *v.* Weaver, 1873. So, also, the register-books kept under "The Registration of Burials Act, 1864" (27 & 28 V. c. 97), §§ 5, 6, are provable by certified copies. Entries in the non-parochial registers of births, baptisms, marriages, deaths, and burials, which are deposited in the office of the registrar-general, are provable, under 3 & 4 V. c. 92, § 9, in all civil proceedings by means of certified extracts purporting to be stamped with the seal of the said office; every such extract must describe the register or record from which it is taken, and express that it is one of the registers or records deposited in the general register office under that Act; and any party intending to use such extract in evidence must comply with the regulations as to notice contained in §§ 11—16 of the Act; but in all criminal cases the original register must be produced. The same rules have been extended to the registers deposited under 21 & 22 V. c. 25 ("The Births and Deaths Registration Act, 1858"), by § 3 of that Act. Certified copies are also admissible to prove entries in the registers, muster-rolls, and pay-lists transmitted to the registrar-general of births and deaths in England, in pursuance of "The Registration of Births, Deaths, and Marriages (Army) Act, 1879" (42 V. c. 8); the registers of the marriages of British subjects in foreign countries, which, since the 28th of July, 1849, have been kept by British consuls, and certified copies of which are annually transmitted through one of the secretaries of state to the registrar-general, formerly under 12 & 13 V. c. 68, §§ 11, 12, 18, and now under "The Foreign Marriage Act, 1892" (55 & 56 V. c. 23); the registers of births and deaths in Ireland (26 & 27 V. c. 11, § 5, Ir.); and the register of marriages in Ireland, deposited in the general register office at Dublin (7 & 8 V. c. 81 ("The Marriage (Ireland) Act, 1844"), §§ 52, 71. This last section is the same as § 38 of 6 & 7 W. 4, c. 86 ("The Births and Deaths Registration Act, 1836"), the substance of which is above set out. See, also, 26 & 27 V. c. 90, Ir.). So, the statute passed in 1854 for the better registration of births, deaths, and marriages in Scotland, 17 & 18 V. c. 80 ("The Registration of Births, Deaths, and Marriages (Scotland) Act, 1854"), by § 58, enacts, that "every extract of any entry in the register-books to be kept under the provisions of this Act, duly authenticated and signed by the registrar-general, if such extract shall be from

the registers kept at the general registry office, or by the registrar, if from any parochial or district register, shall be admissible as evidence in all parts of her Majesty's dominions, without any other or further proof of such entry." As "The Documentary Evidence Act, 1845" (8 & 9 V. c. 113), does not extend to Scotland, it would seem to be still necessary to prove the signatures and official characters of the persons signing these extracts. See ante, § 7. As to irregular Scotch marriages, the Act 19 & 20 V. c. 96 ("The Marriage (Scotland) Act, 1856"), § 2, enacts, in substance, that any certified copy of the entry of any irregular marriage in the Scottish register of marriages, shall, if signed by the registrar, be received in evidence of such marriage, and of the residence in Scotland required by the Act, in all courts in the United Kingdom and dominions thereunto belonging. The signature of the registrar seems, in this case also, to require proof. *Board of Agriculture:* see *Inclosures* and *Tithes*. *Building Societies'* rules, by § 20 of "The Building Societies Act, 1874" (37 & 38 V. c. 42), may be proved by "a printed copy certified by the secretary or other officer of the society to be a true copy of its registered rules." *Cab Licenses:* see *Public Conveyances*. *Charity Commissioners.*—By 16 & 17 V. c. 137, § 8, the minutes of the proceedings of these commissioners, and all orders, certificates, and schemes made or approved by them under that Act, are provable by copies purporting to be extracted from the books of the board, and to be certified by the secretary. See, also, 18 & 19 V. c. 124, §§ 4 and 5, cited ante, § 6, n. [p]. *Common Lodging-Houses.*—All entries made in the registers of common lodging-houses kept under "The Public Health Act, 1875" (38 & 39 V. c. 55), are, by § 76 of that Act, provable by copies certified to be true by the clerk of the local authority. See, also, the Scotch Act, 30 & 31 V. c. 101, § 61. *Companies.*—The order of a general meeting of any company subject to the provisions of "The Companies Clauses Consolidation Act" (8 & 9 V. c. 16), authorising the borrowing of any money, is, by § 40 of the Act, provable by a copy certified to be true by one of the directors or by the secretary. The reports of inspectors appointed under "The Companies Act, 1862" (25 & 26 V. c. 89), are, by § 61, provable by copies authenticated by the seal of the company whose affairs have been inspected; and copies or extracts from documents kept by the registrar of joint stock companies, certified under the hand of the registrar or his authorised substitute, and sealed with the seal of office, are receivable in evidence. See 25 & 26 V. c. 89, § 174, rr. 4, 5, 8; and 40 & 41 V. c. 26, § 6. *Copyright.*—Certified copies are admissible to prove the contents of the book kept at the Hall of the Stationers' Company, wherein are registered the proprietorships and assignments of copyright in books, and in dramatic and musical pieces, whether printed or in manuscript, and licences affecting such copyright (5 & 6 V. c. 45 ("The Copyright Act, 1842"), § 11, cited ante, § 1504, n. [z]; and 7 & 8 V. c. 12 ("The International Copyright Act, 1844"), § 8); and the register of proprietors of copyright in paintings, drawings, and photographs, which is also kept at Stationers' Hall (25 & 26 V. c. 68 ("The Fine Arts Copyright Act, 1862"), §§ 4, 5). "*The Diseases of Animals Act*, 1894."—Orders or regulations of a local authority under this Act (57 & 58 V. c. 57) may, by § 37 thereof, be proved by the production of a newspaper purporting to contain a copy of them as an advertisement, or by the production of a copy purporting to be certified as a true copy by the clerk of the local authority. *Drainage (Ireland).*—Orders made by the Commissioners of Public Works in Ireland, by virtue of "The Drainage Maintenance Act, 1866" (29 & 30 V. c. 49, Ir.), are, by § 20, provable by copies purporting to be sealed by the commissioners. *Ecclesiastical Documents.*—All deeds of exchange made by ecclesiastical corporations under the

provisions of the Act for facilitating the exchange of lands lying in common fields, and all leases and other instruments made under the Act for enabling incumbents of ecclesiastical benefices to demise their lands on farming leases, which are respectively entered in the proper ecclesiastical registry, may be proved by office copies certified under the hand of the registrar or his deputy (4 & 5 W. 4, c. 30, §§ 10, 11; 5 & 6 V. c. 27, § 14); all counterparts of leases and other instruments deposited with the Ecclesiastical Commissioners for England, under the provisions of the Act enabling ecclesiastical corporations to grant leases for long terms, are provable by office copies certified under the seal of the commissioners (5 & 6 V. c. 108 ("The Ecclesiastical Leasing Act, 1842"), § 29. "*The Explosives Act*, 1875."—Licences and rules confirmed or made under this Act may be proved by copies certified by a government inspector. See 38 & 39 V. c. 17, § 60. *Fisheries* (*Ireland*).—Licences granted by the inspectors of Irish fisheries for the formation of oyster-beds are provable by copies testified under the hand of the respective clerks of the peace with whom true copies of the originals shall have been lodged. See 29 & 30 V. c. 97, § 7, Ir., amended by 32 & 33 V. c. 92, Ir. *Friendly Societies.*—Rules of such societies may, it would seem, be proved by copies purporting to be certified by the central office. See 38 & 39 V. c. 60 ("The Friendly Societies Act, 1845"), § 10, subs. 4; and 18 & 19 V. c. 63, § 30. See, also, § 39 of 38 & 39 V. c. 60 ("The Friendly Societies Act, 1845"), cited post, § 1609. *Highways Districts:* see *Justices' Orders*. *Inclosures.*—The awards and orders made or confirmed by the Board of Agriculture, and other instruments proceeding from their board, may be proved by copies purporting to be sealed with the seal of the board (52 & 53 V. c. 30 ("The Board of Agriculture Act, 1889"), §§ 2—6); the copies of the confirmed awards of the same Board, which are deposited with the clerk of the peace of the county where the lands inclosed are situate, are provable by copies or extracts "signed by the clerk of the peace or his deputy, purporting the same to be a true copy" (8 & 9 V. c. 118 ("The Inclosure Act, 1845"), § 146. See, also, 41 G. 3, c. 109 ("The Inclosure (Consolidation) Act, 1801"), § 35; and 3 & 4 W. 4, c. 87, § 24). The powers and duties of the Land Commissioners are, by "The Board of Agriculture Act, 1889" (52 & 53 V. c. 30), transferred to the Board of Agriculture thereby established. This Act repeals § 2 of the 8 & 9 V. c. 118; and, by § 7, orders, licences, or other instruments issued by the board may be proved by means of documents purporting to be such orders, licences, or other instruments, and sealed or signed as there directed. *Industrial Schools.*—Rules of such schools are provable by printed copies purporting to be rules approved in writing by a secretary of state, and to be signed by the inspector of such establishments (29 & 30 V. c. 118, § 29; 31 & 32 V. c. 25, § 23, Ir.). As to orders of detention in such schools, see *Justices' Orders*. *Justices' Orders.*—Orders of detention in industrial schools, which must be signed by two justices or a magistrate, may be proved by copies purporting to be certified by the clerk to the justices or magistrate by whom the same were made (29 & 30 V. c. 118, § 24; 31 & 32 V. c. 25, § 18, Ir.); but warrants of detention in reformatory schools cannot, it seems, be proved by copies (see 29 & 30 V. c. 117, § 33; and 31 & 32 V. c. 59, § 29, Ir.); and the orders of justices for forming a highway district are, by 27 & 28 V. c. 101, § 12, provable by copies certified by the clerk of the peace. *Inland Revenue Books:* see 12 & 13 Vict. c. 1, § 6, and 43 & 44 Vict. c. 19. *Ireland.*—As to proof of births, &c. in, see supra, tit. *Birth, &c. Certificates*. As to valuations of property in, see infra, tit. *Valuations*. *Land Commissioners:* see *Inclosures*. "*The Licensing Act*, 1872."—The registers of licences kept in pursuance of this Act are receivable in evidence of the matters required to be entered therein, and the entries therein are provable by copies certified to be true, and purporting to be signed by the clerk of the licensing

justices (35 & 36 V. c. 94, § 58; see, also, 37 & 38 V. c. 69, §§ 35, 36, Ir.). *Loan Societies' Rules* may be proved either by the book in which they are entered, or by the transcript deposited with the clerk of the peace, or town clerk, or by an examined copy of such transcript, or by a copy certified by the barrister appointed for that purpose (3 & 4 V. c. 110 ("The Loan Societies Act, 1840"), § 7; 26 & 27 V. c. 56). *London Cab Licences:* see *Public Conveyances. Lunacy.*—The orders made by a judge in lunacy in matters in lunacy, and the reports of the masters in lunacy, confirmed by fiat, may, under § 144 of "The Lunacy Act, 1890" (53 V. c. 5), be proved by office copies purporting to be signed by a master, and to be sealed or stamped with the seal of his office, and under the same section certificates in lunacy may also be proved by office copies. A variety of other documents filed in lunacy, and enumerated in the Lunacy Orders, 1883, Ord. CIX., may be proved by office copies made by the officers in the master's office. The licences, orders, and instruments granted, made, issued, or authorised by the Commissioners in Lunacy in pursuance of "The Lunacy Act, 1890," may be proved by copies purporting to be sealed with the seal of the commission (53 V. c. 5, § 152). *Metropolitan Public Carriages Licences:* see *Public Conveyances. Naturalization.* — Entries in the registers authorised to be made in pursuance of "The Naturalization Act, 1870" (33 & 34 V. c. 60), must, under § 12, subs. 4, be proved by such certified copies as may be directed by one of the secretaries of state. *Newspaper Proprietors' Register.*—Copies of entries in this register, which is kept by the registrar of joint stock companies, certified by the registrar or his deputy, or under the official seal of the registrar, are in all proceedings sufficient prima facie evidence of all matters thereby appearing. See 44 & 45 V. c. 60, § 15. *Parliamentary Elections.*—Documents relating to the election of members of Parliament, deposited with the clerk of the Crown in Chancery (see ante, § 1504. n. [2], sub voce "Ballot"), when admissible in evidence at all, may, by 35 & 36 V. c. 33, Sched. I. Part 1, r. 42, be proved by office copies issued by such clerk. *Patent Office.*—By 46 & 47 V. c. 57, § 89, registers and books kept at the Patent Office, and patents for inventions, specifications, disclaimers, and all other documents in that office, are provable by printed or written copies or extracts purporting to be certified by the comptroller, and sealed with the office seal. § 100 of the same Act provides that copies of all specifications, drawings, and amendments left at the Patent Office shall be transmitted to Scotland, Ireland, and the Isle of Man, and that certified copies of or extracts from such documents shall be admitted in evidence in all courts in those places without further proof. *Poor Law.*—"The Poor Law Amendment Act, 1844" (7 & 8 V. c. 101), § 69, provides that the minutes of the orders given by any board of guardians or district board, respecting any complaint, claim, or application made to them, may be proved by a copy purporting to be signed by the chairman of the board, and to be sealed with their seal, and to be countersigned by their clerk. *Post Office Books.* See Mortimer *v.* M'Callan, 1840 (Lord Abinger); Fuller *v.* Fotch, 1695. *"The Public Health Act*, 1875."—Orders and resolutions of the local authorities under this Act, or of their committees or joint boards, may be proved by copies purporting to be signed by the chairmen of their respective meetings (38 & 39 V. c. 55, Sched. I. r. 1, sub-r. 10, and r. 2, sub-r. 8). *Public Conveyances.*—Entries in the books kept at the office of the Commissioners of the Police of the Metropolis, as to the particulars of the licences granted to the drivers, conductors, and watermen of metropolitan public carriages, may, under 6 & 7 V. c. 86 ("The London Hackney Carriage Act, 1843"), § 16, be proved by copies purporting to be certified by the persons having the charge of the books (see, also, 16 & 17 V. c. 33 ("The London Hackney Carriage Act, 1853"); and 32 & 33 V. c. 115, §§ 6, 8, 11, 15). The Act 16 & 17 V. c. 112, § 12, as to licences granted to drivers and conductors of public carriages in Dublin, is somewhat similar. The duplicates or copies of stage carriage licences, filed in

the office of Inland Revenue, whence the licences issue, are provable by copies purporting to be certified under the hand of one of the Commissioners of Inland Revenue, or of the officer by whom the licence has been granted, or of some other person appointed and authorised by the commissioners in that behalf (12 & 13 V. c. 1, § 16; see 10 & 11 V. c. 42). *Railways.*—The plans and books of reference deposited by railway companies with the clerks of the peace, may be proved by copies or extracts certified by those officers (8 & 9 V. c. 20, § 10; see post, § 1637). *Reformatory School Rules* are provable by copies purporting to be signed by the inspector of such establishments (29 & 30 V. c. 117, § 33; 31 & 32 V. c. 59, § 29, Ir.). As to orders of detention in such schools, see *Justices' Orders*. *Ships.*—Under "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), register books, certificates of registry, indorsements on such certificates, and declarations in respect of British ships (§ 64, subs. 2); a copy or transcript of the register of British ships kept by the registrar-general of shipping and seamen (§ 64, subs. 3); certificates of competency (§ 100); statements of changes in his crew sent by a master of a foreign-going ship to a superintendent (§ 117); releases of seamen's wages (§ 136, subs. 3); submissions to, or awards of, superintendents as to any questions between a master or owner and any of his crew (§ 137, subs. 2); duplicate agreements or lists of crew in cases where ship is lost (§ 174, subs. 3); certificates of amount paid for expenses attendant upon illness of seamen (§ 208); official log-books (§ 239, subs. 6); certificates of execution of bonds given by master of emigrant ship (§ 310, subs. 2); certificates of expenses incurred in respect of wrecked passenger, or forwarding a passenger (§ 334, subs. 2); certificates of tonnage of fishing-boats (§ 371, subs. 3); decisions of superintendents of disputes between owners, skippers, and seamen of fishing-boats (§ 387, subs. 2); indorsements of superintendents on indentures of apprentices, and agreements with boys (§ 395, subs. 4); registers of certificated skippers and second hands (§ 416); records of draught of water of sea-going ships (§ 436, subs. 2); reports of proceedings of naval courts (§ 484); valuations of property in respect of which salvage claims are made by valuers appointed by receiver of district where such property is (§ 551); depositions previously made, when witness cannot be produced (§ 691); and documents purporting to be made, issued, or written by or under the direction of the Board of Trade (§ 719),—are, by § 695, on their production from the proper custody, admissible in evidence, and a copy of any such document or extract therefrom is also so admissible, if proved to be an examined copy or extract, or if it purport to be signed and certified as a true copy or extract; and by § 695, subs. 2, of "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), a copy of or extract from any document declared by the Act to be admissible in evidence is made also evidence when it is proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the officer having the custody of the original; and by § 256, subs. 1, of "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), all the documents therein referred to are to be deemed public records of documents within the meaning of "The Public Record Office Acts, 1837 (1 & 2 V. c. 94) and 1877 (40 & 41 V. c. 55)," and those Acts, where applicable, apply to such documents in all respects as if specifically referred to therein. The regulations for preventing collisions at sea, and the rules concerning lights, fog signals, and steering and sailing (as to which, so far as regards British ships and boats, see Order in Council of 11th Aug., 1884, which came into operation 1st Sept., 1884, and, so far as regards ships of certain foreign countries, Order in Council of 14th Aug., 1879, which is set out L. R. 4 P. D. 241, and 49 L. J., Orders and Rules, p. 1) may be proved by the production either of the Gazette in which the Order in Council concerning them is pub-

§§ 1602—7. The mode of proof afforded in these cases has been much simplified by the Documentary Evidence Act of 1845; and if the certified copies respectively *purport* to be duly signed or sealed, or otherwise authenticated in the manner pointed out by statute, they will in almost every case be now admitted in evidence, without proof of the seal, the signature, or the official character of the party certifying.[1]

§ 1608. There are two cases in which documents are allowed by special legislation to be proved by copies or extracts certified by the persons who have the custody of the originals.

§ 1608A. In the first place the inconvenience caused to bankers by constantly having their clerks subpœnaed to produce the books of the firm in courts of justice was felt to be so great that it is now, by the Bankers' Books Evidence Act, 1879,[2] in substance enacted as follows:—1. Subject to the provisions of the Act, a copy of any entry in a banker's book,—which term includes ledgers, day books, cash books, account books, and all other books

lished, or of a copy of such regulations purporting to be signed by the secretary or assistant-secretaries of the Board of Trade; and the Board of Trade is bound to furnish a copy of the collision regulations to any master or owner of a ship who applies for it (see 57 & 58 V. c. 60, § 419). *Stage Carriage Licences*: see *Public Conveyances*. *Tithes*. — All agreements, and awards, apportionments, maps, or plans (Giffard *v.* Williams, 1869) confirmed by the Tithe Commissioners, who, with certain other commissioners, under § 42 of "The Settled Land Act, 1882" (45 & 46 V. c. 38), became and were styled the Land Commissioners for England, and other instruments proceeding from their board, are provable by copies purporting to be sealed or stamped with the seal of the board (6 & 7 W. 4, c. 71 ("The Tithe Act, 1836"), § 64, amended by 52 & 53 V. c. 30. The tithe commutation maps are not made evidence by any Act of the boundaries of lands as between two proprietors: Wilberforce *v.* Hearfield, 1877 (Jessel, M.R.); but they may be admissible sometimes on questions of general public right. See Smith *v.* Lister, 1895). The powers and duties of the Land Commissioners are now transferred to the Board of Agriculture, as to proof of whose orders or other instruments see ante, under *Inclosures*. *Valuations*.—The valuations of rateable property in Ireland, and all field-books and documents relating thereto, are provable by copies or extracts purporting to be signed by the commissioner of valuations, or by his deputy (23 & 24 V. c. 4, § 9, Ir.); or, for the purposes of any proceeding in any Civil Bill Court, by the clerk of the union in the rate-book of which the valuation appears (40 & 41 V. c. 56, § 32, Ir.); the valuation lists of property in the Metropolis may, under § 34 of "The Valuation (Metropolis) Act, 1869" (32 & 33 V. c. 67), be proved by duplicates or copies certified by the clerk of the assessment committee that approved them. See, also, "The Local Government Act, 1888" (51 & 52 V. c. 41).

[1] 8 & 9 V. c. 113, § 1; cited ante, § 7.

[2] 42 & 43 V. c. 11; repealing (by § 2, now itself repealed by "The Statute Law Revision Act, 1894" (57 & 58 V. c. 56)) an earlier Act on the same subject (39 & 40 V. c. 48), passed in 1876.

used in the ordinary business of the bank,[1]—shall, in all legal proceedings, civil or criminal, including arbitrations,[2] and for or against any one,[3] be received as primâ facie evidence of such entry, and of the matters, transactions and accounts therein recorded.[4] But such copy cannot be received unless proof be given that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and is in the custody or control of the bank, and that the entry was made in the ordinary course of business.[5] Such proof may be given by a partner or officer of the bank, and either orally or by affidavit.[6] The copy must also be an *examined* copy, and proof of that fact "*shall* be given by some person who has examined the copy with the original entry," and *may* be given either orally or by affidavit.[7] The statute also enacts,[8] that "A banker or officer of a bank shall not, in any legal proceeding to which the *bank is not a party*, be compellable to produce any banker's book," or to appear as a witness to prove the matters therein recorded, unless by order of a judge[9] made for special cause.[10] By another section[11] the court or judge is empowered, on the application of any party to a legal proceeding, to order[12] "that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings;" and any such order may be made with or without summoning the bank or any other party,[13] "and shall be served on

[1] 42 & 43 V. c. 11, § 9.
[2] § 10.
[3] Harding *v.* Williams, 1880 (Fry, J.).
[4] § 3.
[5] § 4.
[6] Id.
[7] § 5.
[8] § 6.
[9] This term includes the judge of a county court with respect to any action in such court: § 10.
[10] The costs of such an order are "in the discretion of the court or judge": § 8.
[11] § 7. As to this, see Perry *v.* Phosphor Bronze Co., 1894 (C. A.).
[12] See Davies *v.* White, 1884, as to what affidavit will be required in support of an application for an order under the Act. Such order may be for the inspection of books relating to an account kept for a person not a party to the action: Howard *v.* Beal, 1889. Generally speaking, the person whose account is to be inspected must, however, be served with the order: Arnott *v.* Hayes, 1887, C. A. Such order ought, moreover, to be limited to the time which covers the dispute. See S. C. (Cotton, L.J., and Bowen, L.J.). A person against whom such an order has been made is entitled to seal up such parts of the books which are the subject of the order as he swears to be irrelevant to the matters in issue: Parnell *v.* Wood, 1892, C. A.
[13] An order to inspect *may* be granted ex parte, and without evidence, in any *civil* proceeding. See Arnott *v.* Hayes, 1887, C. A.

the bank three clear days[1] before the same is to be obeyed, unless the court or judge otherwise directs." This statute applies to all ordinary banks, savings banks, post office savings banks,[2] and companies carrying on business as bankers to which the Companies Acts, 1862 to 1880, apply, which have duly furnished to the registrar of joint-stock companies the prescribed lists and summaries;[3] and it endeavours[4] to facilitate the proof of "any person, persons, partnership, or company" being included within any one of these categories.

§ 1609. The second of the two cases just referred to[5] arises in the case of documents relating to friendly societies. The Friendly Societies Act, 1875,[6] enacts,[7] that "every instrument or document, copy or extract of an instrument or document bearing the seal or stamp of the central office shall be received in evidence without further proof," and it is also provided that "every document purporting to be signed by the chief or any assistant registrar, or any inspector or public auditor under this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature." The last provision relates only to *original* documents, and copies or extracts are not admissible as evidence unless they are sealed in accordance with that first quoted.

§ 1610. Returning again to the consideration of the mode of proof of documents under the Documentary Evidence Acts, it may be enquired what documents can be regarded as certified copies or extracts within the meaning of those Acts.

[1] Exclusive of Sunday, Christmas Day, Good Friday, and any Bank Holiday: § 11.

[2] § 9.

[3] 45 & 46 V. c. 72, § 11, subs. 2.

[4] By § 9, which is as follows:—"In this Act the expressions 'bank' and 'banker' mean any person, persons, partnership, or company carrying on the business of bankers, and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the Acts relating to savings banks, and also any post office savings bank. The fact of any such bank having duly made a return to the Commissioners of Inland Revenue, may be proved in any legal proceeding, by production of a copy of its return verified by the affidavits of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the Acts relating to savings banks may be proved by an office or examined copy of its certificates; the fact that any such bank is a post office savings bank may be proved by a certificate, purporting to be under the hand of her Majesty's Postmaster-General, or one of the secretaries of the post office."

[5] Supra, § 1608A.

[6] 38 & 39 V. c. 60.

[7] § 39.

§ 1610A. A general provision[1] on this subject exists to the effect that documents which *purport* to be verified in the manner required by the statute rendering them admissible must be received in evidence without proof of the seal, the signature, or the official character of the party verifying them.

§ 1611. It would be alike tedious and unprofitable to enumerate in the text of this work all, or even many, of the cases in which evidence may be given by means of certificates, or of certified copies of, or extracts from, documents. It will suffice, in this place, to mention a few of the matters of most frequent occurrence which are provable by certificates or by certified copies of, or extracts from, documents.[2]

[1] Contained in "Documentary Evidence Act, 1845" (8 & 9 V. c. 113), § 1, cited ante, § 7.

[2] Some (but not all) of the other matters as to which proof is allowed to be given, in the way mentioned in the text, are the following:—*Adulteration:* see *The Sale of Food and Drugs Act*, 1875. *Analysts' Certificates:* see *The Sale of Food and Drugs Act*, 1875. "*The Army Act*, 1881" (44 & 45 V. c. 58), §§ 157, 162, subs. 6, provides that no person subject to military law, who has been acquitted or convicted of any offence, either by a court-martial or by a competent civil court, is liable to be tried again by a court-martial in respect of the same offence; and by § 164, the officer having the custody of the records of a civil court in which any such person has been tried must, if required by the commanding officer of the accused, or by any other officer, transmit to him a certificate setting forth the offence for which the accused was tried, together with the judgment, whether of conviction or acquittal; and any such certificate is to be "sufficient evidence of the conviction and sentence or of the acquittal." This section has been applied to the reserve forces by 45 & 46 V. c. 48, § 27; and to the militia by "The Militia Act, 1882" (45 & 46 V. c. 49), § 44, subs. 1. *Birth Certificates:* see infra, "*Certified Extracts from Registers.*" Under "*The Building Societies Acts*, 1874 *and* 1877" (37 & 38 V. c. 42, § 20; 40 & 41 V. c. 63, § 6, and Sched. of Forms), any certificate of incorporation or of registration, or other document relating to a building society, and purporting to be signed by the registrar, shall, in the absence of any evidence to the contrary, be received by all courts without proof of the signature. "*The Cemeteries Clauses Act*, 1847" (10 & 11 V. c. 65), by § 7, empowers two justices to correct any omission, misstatement, or wrong description which it shall appear to them arose by mistake, respecting any lands, or the owners, lessees, or occupiers thereof, which shall be contained in the special Act, or in the schedule thereto, or in the plans or books of reference relating to the undertaking; and the correction shall be embodied in a certificate which shall state the particulars of the error, and shall, along with the other documents to which it relates, be deposited with the clerk of the peace for the county where the lands are situate; and thereupon the undertakers may take the lands or make the works in accordance with such certificate. § 8 further provides that copies of the plans and books of reference, and of the corrections or extracts therefrom, certified by the clerk of the peace in whose custody the documents are, shall be received in all courts of justice and elsewhere as evidence of their contents. See further, post, § 1637A. *Certified Extracts from Registers of Births, Deaths, or Marriages:* As to these, see ante, § 1601, n., sub tit. "*Birth, Marriage, or Death Registers.*" As to what original registers are themselves admissible in evidence (in which cases certified copies or extracts will, generally speaking, be also evidence), see ante, § 1595, n.; also as to registers of births, deaths, and burials, post, § 1775; and, as to registers of marriages, ante, §§ 1592-5. Further, 3 & 4 V. c. 92, by § 9, requires the registrar-general to certify and seal with his official seal all extracts granted by him; and makes all extracts purporting to be so sealed receivable in evidence in all cases; by § 10, requires every extract to describe the register, &c., from which it is taken, and to express that it is one of those deposited in the General Register Office under the Act; and by §§ 11—16, requires every party intending to use in evidence in *civil* cases a certified copy of a register, to give notice in writing to the other side, at the same time delivering to him a copy of the extract; while by § 17, it is provided that in all *criminal* cases the original registers shall be produced. Certified copies, sealed or purporting to be sealed with the seal of

the General Register Office, are made evidence by § 38 of "The Registration Act, 1836" (6 & 7 W. 4, c. 86). The same Act, by § 35, enables the clergyman, superintendent registrar, and other officers to give certified copies of local registers, and these are evidence under § 14 of "The Evidence Act, 1851" (14 & 15 V. c. 99, cited ante, § 1599). As to Scotch marriages, 17 & 18 V. c. 80, § 58, enacts, that every extract from a register book kept under that Act, if authenticated and signed by the registrar-general, when made from registers kept at the General Registry Office, or by the registrar, if made from any parochial or district register, shall be admissible in evidence; but as "The Documentary Evidence Act, 1845," does not extend to Scotland, it apparently is necessary to prove the signatures and official characters of the persons signing the extracts. Similar provisions open to the same remark are contained in 19 & 20 V. c. 26, § 2, as to certified copies of irregular Scotch marriages. Marriages of British subjects in foreign countries have, since 28th July, 1849, been kept by British consuls, and certified copies of them annually furnished for the registrar-general, and are evidence by 12 & 13 V. c. 68, §§ 11, 12, 18. And see also infra, sub tit. "*Registers.*" "*The Charitable Trustees Incorporation Act*, 1872" (35 & 36 V. c. 24), §§ 1, 6, empowers the Charity Commissioners to grant certificates of incorporation to the trustees of charities established for religious, educational, literary, scientific, or public charitable purposes; and every such certificate is conclusive evidence that all the preliminary requisitions of the Act have been complied with; and the date of incorporation shall be deemed to be that which is mentioned in the certificate. Under "*The Chimney Sweepers Act*, 1875" (38 & 39 V. c. 70), § 14, any entry in the registers of master sweeps, which are required by the Act to be kept by the chief officers of police, may be proved by a copy purporting to be certified as true by the chief officer; and any statement purporting to be signed by him "of the absence of such an entry in any case" is "evidence of the matters therein appearing." "*The Clerical Disabilities Act*, 1870" (33 & 34 V. c. 91).—To render a parson's deed of relinquishment available under this Act, first, the deed must be inrolled in the Inrolment Department of the Central Office (R. S. C. 1883, Ord. LXI. rr. 1, 9); and next, an office copy of it must be recorded by the bishop. The Act then provides (§ 7) that "a copy of the record in the registry of the diocese, duly extracted and certified by the registrar of the bishop, shall be evidence of the due execution, inrolment, and recording of the deed, and of the fulfilment of all the requirements of the Act in relation thereto." Under "*The Colonial Stock Act*, 1877" (40 & 41 V. c. 59), § 18, certain certificates and lists, furnishing particulars of the amount of the debt, the numbers and names of the stockholders, and other matters, and authorised to be given to any stockholder by the registrar of colonial stock, are made admissible in evidence. "*The Consular Marriages Act*, 1849" (12 & 13 V. c. 68), as to marriages since 1st January, 1893, repealed and superseded by the Foreign Marriage Act, 1892 (55 & 56 V. c. 23) (which see), after authorising British consuls to solemnise and register certain marriages, enacted, in § 17, that in every action or suit for forfeiture, and upon every prosecution for perjury, "the declaration and certificate of the consul, under his hand and consular seal, shall be received and taken as good and valid evidence in the law of all facts and matters stated in such declaration and certificate, without its being necessary for the said consul to attend in person to prove the same." "*The Corrupt and Illegal Practices Act*, 1883" (46 & 47 V. c. 51), § 53, subs. 3, provides that in any prosecution or action for any offence against the Act, the certificate of the returning officer that the election was duly held, and that the person named in the certificate was a candidate, "shall be sufficient evidence of the facts therein stated." *Costs in Parliamentary Proceedings:* see *Parliamentary Costs, &c. Courts-martial:* see *The Army Act.* "*The Crown Lands Act*, 1832" (2 W. 4, c. 1, § 26; see, also, "The Crown Lands Act, 1853," § 6), enacts with respect to all deeds relating to the possessions of the Crown, which are inrolled in the Land Revenue Office, that a memorandum of inrolment on the deed, purporting to be signed by the keeper of the records and inrolments, or his deputy or assistant, shall be receivable as sufficient evidence, not only of the inrolment, but even of the due execution of the deed, and that, too, without proof of the signature attached to it. The Act, 11 & 12 V. c. 83, §§ 6, 14, contains somewhat similar enactments as to documents inrolled in the Duchy of Cornwall, or in the Duchy of Lancaster, since the 31st of August, 1848, and relating to the lands or possessions of the respective Duchies. *Death Registers, or Certificates from Registers:* see infra, "*Registers,*" and supra, "*Certified Extracts, &c.*" "*The Diseases of Animals Act*, 1894" (57 & 58 V. c. 57), provides, by § 48 (subs. 1), that

"in any proceeding under this Act no proof shall be required of the appointment or handwriting of an inspector or other officer of the Board of Agriculture, or of the clerk or an inspector or other officer of a local authority." On an inspector reporting *a cow-shed, field*, or *other place*, to have been, within ten days, infected with cattle plague, he is to inform the Board of Agriculture, who forthwith inquire into the subject. Id. § 5. The certificate of a veterinary inspector that an *animal* is or was affected with disease is, by § 46, subs. 5, *conclusive* evidence, in all courts of justice, of the matter certified. "*The Ecclesiastical Dilapidations Act*, 1871" (34 & 35 V. c. 43), §§ 27, 46, 50, makes the certificate of the official surveyor of the diocese conclusive evidence of the due execution of repairs directed by him to be executed. "*The Elementary Education Acts, 1870 and 1873*" (33 & 34 V. c. 75, §§ 64, 83; 36 & 37 V. c. 86, § 24, subs. 5), contain special clauses with respect to the proof and admissibility of certificates granted either by the Education Department or by the principal teacher of a public elementary school. "*The Factory and Workshop Act*, 1878" (41 V. c. 16).—Certificates of fitness for employment, granted by the "surgeon for the district," under §§ 27—30 of this Act, are probably primâ facie evidence of the age of the persons named therein, and are, it seems, if purporting to be duly signed by such surgeon (see, however, 21 & 22 V. c. 90, § 37, which enacts that no medical or surgical certificate "shall be valid, unless the person signing the same be registered under this Act"), receivable in evidence without proof; and, whether the law be so or not, it is clear that, by § 92, a written declaration by the certifying surgeon "that he has personally examined a person employed in a factory or workshop in his district, and believes him to be under the age set forth in the declaration, shall be admissible in evidence of the age of that person." *The Foreign Marriage Act*, 1892, provides, § 17, as follows:—"All the provisions and penalties of the Marriage Registration Acts, relating to any registrar, or register of marriages, or certified copies thereof, shall extend to every marriage officer, and to the registers of marriages under this Act, and to the certified copies thereof (so far as the same are applicable thereto), as if herein re-enacted and in terms made applicable to this Act, and as if every marriage officer were a registrar under the said Acts." Under "*The Friendly Societies Act*, 1875" (38 & 39 V. c. 60), § 11, subs. 7 and 10, and Sched. IV., "an acknowledgment of registry" issued by the registrar, on being satisfied that a society has complied with the statutory requirements, and specifying the designation of the society according to the classification in the Act, is conclusive evidence that the society has been duly registered, unless it be proved that the registry has been suspended or cancelled; and under § 13, subs. 4, the registrar shall, on being satisfied that any proposed amendment of a rule of any such society is not contrary to the provisions of the Act, issue to the society an acknowledgment of registry of the same, which shall be conclusive evidence that the same is duly registered. By § 15, subs. 15, documents under the Act are exempt from stamp duty. "*The Harbours, Docks and Piers Clauses Act*, 1847" (10 & 11 V. c. 27), contains, in §§ 7, 10, provisions similar to those in §§ 7, 8, of "The Cemeteries Clauses Act, 1847," mentioned above, and also, in § 26, provides that the chairman of quarter sessions may grant certificates, which shall be conclusive evidence that the works are completed and fit for public use. *Highway Districts:* Justices' Orders for the formation of. See ante, § 1571, n. *Indemnity Certificates* are sometimes granted to witnesses who make full disclosures respecting corrupt practices at parliamentary elections, gaming, and other illegal transactions; and in the event of any ulterior proceedings against such witnesses the certificates constitute a valid defence, and will be received in evidence on their mere production, provided that they be drawn up in the proper form, and that they purport to be signed by the persons who are respectively authorised to grant them. See the Acts noticed ante, § 1455, n., and 8 & 9 V. c. 113, § 1, cited ante, § 7. Under "The Parliamentary Elections Act, 1868" (31 & 32 V. c. 125), § 33, "the certificate shall be given under the hand of the judge." Under "*The In-*

dustrial Schools Act, 1866" (29 & 30 V. c. 118; see as to Ireland, 31 & 32 V. c. 25, § 24, Ir.), § 30, a certificate purporting to be certified by one of the managers of such a school, or the secretary, or by the superintendent or other person in charge of the school, to the effect that the child therein named was duly received into, and is at the signing thereof detained in, the school, or has been duly discharged, or otherwise disposed of, shall be evidence of the matters therein stated. In §§ 7, 9, 46, of the same Act, and in §§ 6, 8, 36, of the Irish Act, are contained provisions somewhat similar to those below stated to be contained in §§ 4, 33, of "The Reformatory Schools Act, 1866." "*The Industrial and Provident Societies Act*, 1876" (39 & 40 V. c. 45), § 7, subs. 7, 10, contains provisions as to proof of the due registration of such societies similar to those in § 11, subs. 7, 10, of "The Friendly Societies Act, 1875." *Judgments:* see *Registrar of Judgments in Ireland*. Under "*The Judgment Mortgage* (*Ireland*) *Act*, 1850" (13 & 14 V. c. 29), §§ 6, 7, in order to prove a judgment mortgage, first, the judgment must be proved in the usual way; next, the affidavit filed when the judgment is entered must be proved by an office, or a certified, or an examined, copy; and, lastly, the due registration of an office copy of this affidavit in the office for registering deeds and wills in Ireland must be proved either by an examined or a certified copy. It seems doubtful whether such last-named copy will be received in evidence unless the notice required by "The Registry of Deeds (Ireland) Act, 1832," § 32, below cited, has been duly given. See Duncan *v.* Brady, 1860 (Ir.); 13 & 14 V. c. 72, § 9. Under "*The Lands Clauses Consolidation Act*, 1845" (8 & 9 V. c. 18), §§ 16, 17, the fact that the whole capital has been subscribed, until which has been done no company can put in force its compulsory powers of taking land, may be proved by a certificate under the hands of two justices, granted on the application of the promoters, and the production of such evidence as such justices think sufficient. "*The Markets and Fairs Clauses Act*, 1847" (10 & 11 V. c. 14), contains, in §§ 7, 8, clauses similar to those in §§ 7, 8, of "The Cemeteries Clauses Act, 1847," above noticed; it also provides, in § 32, that two justices may grant certificates, which shall be conclusive evidence that the works are completed and fit for public use. *The Marriage Acts* (see "The Marriage Act, 1836" (6 & 7 W. 4, c. 85), § 37; "The Birth and Deaths Registration Act, 1836" (7 W. 4 & 1 V. c. 22), § 5; "The Marriages (Ireland) Act, 1844" (7 & 8 V. c. 81), § 43, Ir.), provide that if any action be brought against a party for having vexatiously entered a caveat, "a copy of the declaration of the Registrar-General, purporting to be sealed with the seal of the General Register Office, shall be evidence that the registrar-general has declared such caveat to be entered on frivolous grounds, and that they ought not to obstruct the grant of the licence, or the issue of the certificate;" and the plaintiff thereupon shall recover costs and damages. "*The Marriage and Registration Act*, 1856" (19 & 20 V. c. 119), contains, in § 24, provisions somewhat similar to those in § 11 of "The Places of Worship Registration Act, 1855," below mentioned. *Marriage Certificates:* see supra, sub tit. *Certified Extracts from Registers, &c.* "*The Naturalization Act*, 1870" (33 & 34 V. c. 14), § 12, provides that certificates of naturalization, and of re-admission to British nationality, as well as all declarations authorised to be made under the Act, may be proved by the production of the original documents, or of any copies certified to be true by a Secretary of State, or by some person authorised by such secretary to give them. Under "*The Parliamentary Costs Act*, 1865" (28 & 29 V. c. 27), §§ 3, 5, "The House of Lords Costs Taxation Act, 1849" (12 & 13 V. c. 78), § 9, and "The House of Commons Costs Taxation Act, 1847" (10 & 11 V. c. 69), § 9, the Clerk of the Parliaments, or Clerk-Assistant, the Speaker, and the Taxing Officer of the Lower House, are respectively authorised to issue certificates of the amount of costs allowed on taxation in respect of private bills; and such certificates are *conclusive* evidence of the amount of such costs in all legal proceedings,

and operate on production as warrants of attorney to confess judgment, unless the defendant has in his statement of defence denied his liability to make any payment in respect of them. The signatures to such certificates need not be proved. See 8 & 9 V. c. 113, § 1, cited ante, § 7. See, also, Williams *v.* Swansea Canal Navigation Co., 1868. *Parliamentary Papers.*—The Act to give Summary Protection to Persons employed in the Publication of Parliamentary Papers (3 & 4 V. c. 9), § 1, provides that all proceedings, civil or criminal, against any person for the publication of papers printed by order of Parliament shall be stayed upon the production of a certificate under the hand of the Lord Chancellor the Lord Keeper, or the Speaker of the House of Lords for the time being, the Clerk of the Parliaments, the Speaker of the House of Commons, or the Clerk of the same House, stating that such papers were published by order of either House. The affidavit verifying such certificate required by the Act is not now necessary. See 8 & 9 V. c. 113, § 1, cited ante, § 7. "*The Patents, Designs, and Trade Marks Act*, 1883" (46 & 47 V. c. 57), § 31, provides that the judge before whom any action for infringing a patent shall be tried may "certify that the validity of the patent came in question; and if the court or a judge so certifies, then in any subsequent action for infringement, the plaintiff in that action, on obtaining a final order or judgment in his favour, shall have his full costs, charges, and expenses, as between solicitor and client, unless the court or a judge trying the action certifies that he ought not to have the same." See Honiball *v.* Bloomer, 1854. The same statute provides, in § 96, that any certificate purporting to be under the hand of the Comptroller-General of Patents, Designs, and Trade Marks "as to any entry, matter, or thing, which he is authorised by that Act, or any general rules made thereunder, to make or do, shall be primâ facie evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone." The Comptroller is further directed, in § 49, to "grant a certificate of registration to the proprietor of the design when registered." "*The Places of Worship Regulation Act*, 1855" (18 & 19 V. c. 81), § 11, provides that a certificate of the Registrar-General, sealed or stamped with the seal of the General Register Office, that, at the time or times therein stated, any place certified to him as a place of meeting for religious worship was duly certified and duly recorded as required by the Act, and that at the date of such sealed or stamped certificate the record of such certification remained uncancelled, shall be received in all judicial proceedings as evidence of the several facts therein mentioned without further or other proof. "*The Poor Law Amendment Acts*, 1844 *and* 1848" (7 & 8 V. c. 101; and 11 & 12 V. c. 110).—§ 69 of the Act of 1848 authorises boards of guardians and district boards to make certificates of the chargeability of any paupers; and if these documents substantially follow the form given in Schedule C. of the Act, and purport to be signed by the chairmen of the respective boards, to be sealed with their seals, and to be countersigned by their clerk, they are primâ facie evidence of the truth of all statements contained therein; and no other proof of chargeability is required for the purpose of making any order of removal or other order, provided such order bear date within twenty-one days after the day of the date of any such certificate. In order to clear up any doubt respecting the admissibility of these certificates, the Act of 1848 further enacts, in § 11, that in any court, and before any justice or justices, and for all purposes, a certificate in the form prescribed in Sched. C. of the Act of 1844, and purporting to have been executed in the manner prescribed by that Act, shall be received within twenty-one days from the date thereof as sufficient evidence of the chargeability of the person named therein, unless the contrary be otherwise shown. "*The Railway Clauses Consolidation Act*, 1845" (8 & 9 V. c. 20), authorises the grant of certificates enabling railway companies to modify the construction of roads, bridges, and other engineering works. These

certificates now, under 14 & 15 V. c. 64, § 3, issue from the Board of Trade, and are admissible in evidence if they purport to be signed by one of the secretaries or assistant-secretaries of the board, or by any other officer appointed by the board to sign documents relating to railways. As to the proof of certificates granted before the last-mentioned Act, see "The Railways Clauses Act, 1845" (8 & 9 V. c. 20), §§ 66, 67; and 9 & 10 V. c. 105, §§ 2, 4. "*The Railway Companies Powers Act*, 1864" (27 & 28 V. c. 120, §§ 18, 30); "*The Railway Construction Facilities Act*, 1864" (27 & 28 V. c. 121, §§ 20, 60).—Certificates granted by the Board of Trade under these Acts must be judicially noticed, and are provable by copies published in the London, or Edinburgh, or Dublin Gazette. See, also, "The Railways (Powers and Construction) Acts, 1864, Amendment Act, 1870" (33 & 34 V. c. 19). "*The Reformatory Schools Act*, 1866" (29 & 30 V. c. 117), §§ 4, 33, authorises the Home Secretary, by writing under his hand, to certify that any school is fitted for the reception of youthful offenders; and the grant of every such certificate may be proved by the production either of the certificate itself, or of a copy of the same, purporting to be signed by the inspector of reformatory schools, or of the Gazette containing a notice of such grant. The withdrawal of the certificate may also be proved by means of the Gazette. As to proof of the detention of an offender in such schools, see § 33, subs. 3, of the Act. The Irish Act of 1868 (31 & 32 V. c. 59, Ir.), contains, in §§ 6, 8, 29 and 36, somewhat similar provisions. The Act to amend the Laws for "*Registration of Assurances of Lands in Ireland*" (13 & 14 V. c. 72, Ir.), provides, in § 47, that copies or extracts provided by the registrar from any document which has been deposited in the register office under the Act, and sealed on each sheet with the seal of the said office, and having written thereon a certificate purporting to be signed by the proper officer of the said office, stating that such copy or extract is an examined copy of, or extract from, a document deposited in the said register, and specifying the book or parcel in which such document is made up, and the number of such document in such book or parcel, shall be evidence of the facts stated in such certificate, and of the contents of the document deposited in the register office, or of such part thereof as is purported to be extracted. "*The Registry of Deeds (Ireland) Act*, 1832" (2 & 3 W. 4, c. 87), enacts (§ 32), that an office copy of any memorial registered in the register office shall, upon being proved in like manner as an office copy of any other record, be receivable in all judicial proceedings as evidence of the contents of the memorial of which it purports to be an office copy, without the production of the original. But notice in writing of the production of such office copy must be given to the adverse party, who may, by a counter-notice require production of the original, the costs of producing which will, however, have to be paid by either party as the court, or its taxing officer, may determine. The Act for the better *Regulation of the Office of the Registrar of Judgments in Ireland* (13 & 14 V. c. 74, Ir.), § 10, requires the registrar to grant a certificate under his hand of the registry or re-entry of any judgment, or revival, decree, rule, order, Crown bond, recognizance, or lis pendens, or of any satisfaction, vacate, or quietus in his office, and this certificate is made evidence of any registry or re-entry. An assignment of a judgment in Ireland may be proved by an examined copy of the inrolment of the memorial (Fitzgerald *v.* Fitzgerald, 1849; Hobhouse *v.* Hamilton, 1803; 9 G. 2, c. 5, Ir., amended by "The Statute Law Revision Act, 1888" (51 V. c. 3); 25 G. 2, c. 14, Ir.; 12 G. 3, c. 19, § 3, Ir.), and a certified copy of such inrolment would probably, also, be admissible (see ante, § 1455). "*The Sale of Food and Drugs Act*, 1875" (38 & 39 V. c. 53), § 21, renders certificates given by analysts under the Act admissible in evidence if they

§§ 1612—14. It so frequently, however, becomes necessary in courts of justice to furnish proof of the trial, conviction, or acquittal of a person who has been charged with an indictable offence, that it is worth while to set out in this place the provisions which Par-

purport to be signed by the persons giving them, and they are primâ facie evidence of the result of the analysis, unless the party against whom they are tendered in evidence shall require that the analyst shall be called as a witness. "*The Towns Improvement Clauses Act*, 1847" (10 & 11 V. c. 34), § 20, contains similar provisions to those in § 7 of "The Cemeteries Clauses Act, 1847," above set out. "*The Trades Union Act*, 1871" (34 & 35 V. c. 31), § 13, subs. 5, empowers registrars to issue certificates of registry of trade unions, and such certificates are "conclusive evidence that the regulations of the Act with respect to registry have been complied with." *Title.*—Certificates as to title may be given under either of the following Acts:—Under "The Declaration of Title Act, 1862" (25 & 26 V. c. 67; and see, also, 28 & 29 V. c. 88, Ir.), the Chancery Division may (§ 22), after making a declaration of title in favour of any landowner, grant him a certificate under seal setting forth the title so declared, and further stating that the time for appealing has expired, which certificate will be conclusive evidence of the facts therein stated. Under "The Land Transfer Act, 1862" (25 & 26 V. c. 53), which first established a registry of title to landed estates, the registrar was directed (see §§ 70, 71) to, upon request, deliver to every registered proprietor a certificate, called a "land certificate," under the seal of the office, and signed by the registrar, and containing (§ 68) "all such particulars as are material or useful for the purpose of manifesting the exact nature of the owner's estate or interest," which certificate was made evidence of the several matters contained therein; and, under particular circumstances, such certificate might be a "special land certificate," in which latter case it was made "conclusive evidence of the title of the registered proprietor to the land as appearing by the record of title." Under "The Land Transfer Act, 1875," (38 & 39 V. c. 87), certificates of title, whether absolute, qualified, or possessory, are made "primâ facie evidence of the several matters therein contained," and office copies of registered leases are made (§ 80) "evidence of the contents of the lease." "*The Volunteer Acts*, 1863 *and* 1869" (26 & 27 V. c. 65, § 29; 32 & 33 V. c. 81, § 5), empower justices to receive proof of a previous conviction by means of a certified copy, in the event of the offender being again charged with buying, selling, pawning, or taking in pawn, any arms, clothing, or other public stores from volunteers. "*The Waterworks Clauses Act*, 1847" (10 & 11 V. c. 17), contains, in §§ 7 and 10, provisions similar to those above stated to be contained in §§ 7 and 8 of "The Cemeteries Clauses Act, 1847." "*The Weights and Measures Act*, 1878" (41 & 42 V. c. 49: see ante, § 144A), requires an account to be kept by the Board of Trade of all local standards verified or re-verified of weights and measures; and by § 37 every indenture of verification or indorsement of re-verification, "if purporting to be signed by an officer of the board, shall be evidence of the verification or re-verification of the weights and measures therein referred to." When a local standard has been compared, as it may be, by a local authority, the justice in whose presence the comparison is made must sign an indorsement on the indenture of verification of that standard, which indorsement must be recorded by the Board of Trade. It will then become "evidence of the local comparison and verification, and a statement of the record thereof, if purporting to be signed by an officer of the board, shall be evidence of the same having been so recorded" (§ 41).

liament has enacted to facilitate such proof. It is, by Lord Brougham's Evidence Act of 1851,[1] provided that "whenever, in any proceeding whatever," (which term, it is scarcely necessary to state, will include all civil as well as criminal proceedings,[2]) "it may be necessary to prove the *trial and conviction or acquittal* of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient[3] that it be certified or purport to be certified 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 the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof."[4] It is still necessary to rely on the above provision whenever it becomes requisite to formally prove an *acquittal*. As to other cases, it is further enacted[5] as follows:—"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[6] 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[7] 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

[1] 14 & 15 V. c. 99 ("The Evidence Act, 1851"), § 13.

[2] Richardson *v.* Willis, 1872.

[3] See ante, § 1573, ad fin.

[4] See 28 & 29 V. c. 18, § 6, cited ante, § 1437, which regulates the proof of certificates of conviction, when produced for the purpose of discrediting witnesses.

[5] By "The Prevention of Crimes Act, 1871" (34 & 35 V. c. 112), § 18.

[6] See R. *v.* Levy, 1858. Photography affords an easy mode of establishing this identity. See Beamish *v.* Beamish, 1876 (Ir.); R. *v.* Tolson, 1864.

[7] See R. *v.* Parsons, 1866.

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 authorised by this section shall be in addition to, and not in exclusion of, any other authorised mode of proving such conviction."[1]

§§ 1615—20. Justices in petty sessions are empowered by "The Summary Jurisdiction Act, 1879,"[2] to deal summarily with many indictable offences, provided the persons accused consent to such a mode of trial;[3] and if, in any such case, the court think fit to dismiss the information, "they shall, if required, deliver to the person charged a copy certified under their hands of the order of such dismissal, and such dismissal shall be of the same effect as an acquittal on a trial on indictment for the offence."[4] A certificate of dismissal in pursuance either of the provisions of the above Act, or of very similar provisions contained in the Act of 1848,[5] which regulates the duties of justices out of sessions with respect to summary convictions and orders, is, however, merely intended to afford a convenient mode of proving the dismissal of a charge with which justices have power to deal summarily, and the party acquitted may still establish the fact of his discharge by any other species of legal

[1] The principal Acts here alluded to are, 7 & 8 G. 4, c. 28, § 11; 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 22; 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 116; 24 & 25 V. c. 99 ("The Coinage Offences Act, 1861"), § 37; and 5 G. 4, c. 84, § 24. See. also. 34 & 35 V. c. 112, §§ 9, 20; and Lond. School Board *v.* Harvey, 1879, cited ante. § 1572.

[2] 42 & 43 V. c. 49.

[3] §§ 10—14.

[4] § 27, subs. 4.

[5] 11 & 12 V. c. 43 ("The Summary Jurisdiction Act, 1848"), § 14.

evidence.[1] Two justices are by statute[2] empowered to hear cases of *common assault or battery;* and also cases of aggravated assaults on boys not exceeding fourteen years of age, and on females; and if upon the hearing of any such case they "shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a *certificate under their hands* stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred."[3] It is declared[4] that the person obtaining such certificate shall be released from all proceedings, civil[6] or criminal,[7] for the same cause. It seems that a certificate under this Act should specify the ground of dismissal,[8] and should be given within a reasonable time after the hearing,[9] if not before the justices separate;[10] and it has also been held, that, in order to take advantage of the certificate, the defendant must plead it specially.[11]

§ 1621. In the course of many legal proceedings it becomes necessary to prove the fact of a marriage having been duly solemnized. The usual[12] mode of proving the fact of a marriage is by putting in a certificate certified to be an extract from such a register as is itself legal evidence of that fact.[13] The mode of proving the fact of a marriage by a certified extract from such a register has already been considered.[14]

§ 1621A. A great many marriages—and this has been more especially the case in comparatively recent years—are solemnized

[1] R. *v.* Hutchins, 1880.

[2] "The Offences against the Person Act, 1861" (24 & 25 V. c. 100), §§ 42, 43.

[3] Id. § 44.

[4] Id. § 45.

[6] See Tunnicliffe *v.* Tedd, 1848. There, the complainant, after summons, declined to proceed, saying he meant to bring an action, and the justices dismissed the complaint, stating in the certificate that they did so as the complainant offered no evidence. The court held that the certificate was a bar to the action: S. P., Vaughton *v.* Bradshaw, 1860.

[7] See post, § 1710.

[8] Skuse *v.* Davis, 1839; Holden *v.* King, 1876.

[9] See Hancock *v.* Somes, 1859; Coster *v.* Hetherington, 1859; Christie *v.* Richardson, 1842.

[10] Compare R. *v.* Robinson, 1840, with Thompson *v.* Gibson, 1841.

[11] Harding *v.* King, 1834 (Gurney, B.). See, also, Skuse *v.* Davis, 1839; and R. *v.* Sidney Westley, 1868.

[12] Of course, a certificate, though the *usual*, is not the only, mode of proof in which the fact of a marriage can be established; for instance, it can be shown by "reputation," as to which see ante, § 172 and § 578.

[13] As to such registers, see ante. §§ 1591 et seq.

[14] See ante, § 1600 and *n.*

in Nonconformist places of worship. As regards these, it has, since 1855,[1] been directed that the Registrar-General shall, "with respect to any place certified to him as a place of meeting for religious worship, the record whereof remains uncancelled, give to any person demanding the same a certificate, sealed or stamped with the seal of the General Register Office, that, at the time or respective times in such certificate in that behalf stated, the place therein described was duly certified and duly recorded as required by this Act, and that, at the date of such sealed or stamped certificate, the record of such certification remained uncancelled; and every such sealed or stamped certificate, if tendered in evidence upon any trial or other judicial proceeding in any civil or criminal court, shall be received as evidence of the said several facts therein mentioned; without any further or other proof of the same." The Marriage Registration Act, 1856, contains provisions somewhat similar.[2]

§ 1622. Foreign marriages, too, have not unfrequently to be proved in a court of law. The proof of a foreign marriage which took place some years ago is often a matter of considerable difficulty, and can, indeed, often only be proved by reputation. Foreign registers are comparatively seldom admissible in evidence, and when they are not, certified extracts from them are, of course, equally inadmissible; and the few cases in which such foreign registers are admissible have already been mentioned.[3] From the

[1] By "The Places of Worship Registration Act, 1855" (18 & 19 V. c. 81).

[2] 19 & 20 V. c. 119, § 24. These are as follow:—"The Registrar-General, on payment to him of the several fees hereinafter mentioned, shall allow searches to be made in the returns so made to him as aforesaid, and shall give to any person demanding the same a certified copy thereof, or extract therefrom, with respect to any place of meeting for religious worship contained therein; and every such certified copy or extract shall be sealed or stamped with the seal of the General Register Office, and when so sealed or stamped as aforesaid, if tendered in evidence upon any trial or other judicial proceeding in any civil or criminal court, shall be received as evidence of the place of meeting therein mentioned or described having been at the time in that behalf therein stated duly certified and registered or recorded as by law required, without any further or other proof of the same; and the Registrar-General shall be entitled to demand and receive for every search in the said returns extending over a period of not more than ten years, the sum of one shilling, and for every additional period of ten years the sum of sixpence, and the further sum of two shillings and sixpence for every single certified copy or extract."

[3] See ante, § 1593.

year 1892 the law as to foreign marriages has, however, been consolidated in the Foreign Marriage Act, 1892.[1] By this Act[2] "any book, notice, or document" which is directed by the Act to be kept or preserved by a marriage officer under the Act, "shall be of such a public nature as to be admissible in evidence on its mere production from the custody of the officer." The same section of the Act also directs that "a certificate of a Secretary of State as to any house, office, chapel, or other place being or being part of the official house of a British ambassador or consul shall be conclusive."

§§ 1623—30. Proof of certain documents connected with shipping also frequently becomes essential in the course of legal proceedings. The Merchant Shipping Act, 1894, renders certain documents purporting to be issued by the Board of Trade under the Act, admissible in evidence. These provisions have already been set out.[3] By the same statute, every certificate of registry of any British ship purporting to be signed by the registrar or other proper officer, is receivable in evidence as primâ facie proof of all the matters either contained in or indorsed on it, provided they purport to be authenticated by the signature of a registrar.[4] So, all certificates, whether of competency or of service, granted to the masters or mates of British ships, or to the engineers of British steam-vessels,[5] are provable not only by the production of the originals as issued by the Board of Trade, but also primâ facie by copies, purporting to be certified by the Registrar-General of Seamen, or his assistant, or by such other person as the Board of Trade appoints for that purpose.[6]

[1] 55 & 56 V. c. 23.

[2] § 16.

[3] 57 & 58 V. c. 60, § 719; set out in note to §§ 1596-7, title "Merchant Shipping Documents."

[4] 57 & 58 V. c. 60, § 64, subs. 2, cited ante, note to § 1601, title "Ships." See post, § 1778-80 n., title "The Merchant Shipping Act." As to certificates of desertion from any ship, see § 229 of the Act.

[5] 57 & 58 V. c. 60 ("The Merchant Shipping Act, 1894"), §§ 10, 92, 93, 96, 99, 101, 103, 104, 272, subs. 4 (f), and 471.

[6] 57 & 58 V. c. 60, § 100, enacts, that "(1.) All certificates of competency shall be made in duplicate, one part to be delivered to the person entitled to the certificate, and the other to be preserved. (2.) Such last-mentioned part of the certificate shall be preserved, and a record of certificates of competency, and the suspending, cancelling, or altering of the certificates, and any other matter affecting them, shall be kept in such manner as the Board of Trade direct by the Registrar-General of Shipping and Seamen, or by such other person as the Board of Trade direct. (3.) Any such certificate,

§§ 1631—7. The Companies Acts render various certificates as to matters connected with companies admissible in evidence. Thus *certificates of incorporation*, under the Companies Act, 1862, are of common occurrence, and therefore of practical importance. Every such certificate must set forth under the hand of the registrar, or, in his absence, under the hand of such person as the Board of Trade shall for the time being authorise,[1] and in either event, as it would seem, under the seal of the registrar's office,[2] that the company is incorporated, and in the case of a limited company, that the company is limited;[3] and it will then, without proof of the seal, or of the signature, or of the official character of the person signing it,[4] be "*conclusive* evidence that all the requisitions of the Act in respect of registration have been complied with."[5] Where the certificate purports to have been signed by a person whom the Board of Trade has authorised to act for the registrar, the court, on its being tendered in evidence, will presume that the registrar himself was absent when it was signed, and it is not necessary that that fact should either be stated on the face of the document, or be proved aliundè.[6] The certificate will be equally admissible in evidence to whomsoever it may have been given, and the registrar, on payment of 5*s*., is bound to issue one to any person who may apply for it.[7] Moreover, any copy "certificate of the incorporation of any company given by the registrar, or by any assistant registrar for the time being, shall be received in evidence as if it were the original certificate."[8] Every *certificate* of the *proprietorship of shares or stock* in any company registered under the same Act of 1862, must be under the common seal of the company, and must specify the shares or stock held by any member; and it will then be admitted as primâ facie evidence[9] of the title of the member to the shares or stock therein specified.[10]

and any record under this section, shall be admissible in evidence in manner provided by this Act." See, also, §§ 101, 103, and 104.

[1] 25 & 26 V. c. 89, § 174, r. 8.

[2] § 174, r. 4.

[3] § 18.

[4] 8 & 9 V. c. 113, § 1, cited ante, § 7.

[5] 25 & 26 V. c. 89, §§ 18, 192; In re Barned's Banking Co., Peel's case, 1867 (Ld. Cairns), H. L.; Oakes *v.* Turquand, 1867, H. L.

[6] Baker *v.* Cave, 1857.

[7] 25 & 26 V. c. 89, § 174, r. 5.

[8] 40 & 41 V. c. 26, § 6.

[9] See Shropshire Union Rails. & Can. Co. *v.* R., 1875, H. L. See, also, Re British Farmers Pure Lins. Cake Co., 1878, C. A.

[10] 25 & 26 V. c. 89, § 31.

Very similar provisions are contained in the Companies Clauses Consolidation Act[1] as to the certificates of the proprietorship of shares in undertakings subject to that Act, and it is only necessary that these last certificates should be sealed with the seal of the company, and should specify the share to which the holder is entitled.

§ 1637A. In connection with companies, certain proceedings may be proved by certificates of Justices of the Peace. Thus, by the Companies Clauses Act,[2] where by its special Act a company is restricted from borrowing money on mortgage or bond until a definite portion of their capital has been subscribed or paid up, any justice, upon production to him of the books of the company, and of such other evidence as he shall think sufficient, may grant a certificate that such capital has been subscribed or paid up, and this certificate will be sufficient evidence of the fact stated therein.[3] Again, under the Lands Clauses Consolidation Act, 1845,[4] no company can put in force their compulsory powers of taking land until the whole capital has been subscribed; but their compliance with this requisite may be proved by a certificate under the hands of two justices, who are authorised to grant it on the application of the promoters, and the production of such evidence as they think sufficient.[5]

[1] 8 & 9 V. c. 16. It is by § 11 of this Act provided, that "on demand of the holder of any share, the company shall cause a certificate of the proprietorship of such share to be delivered to such shareholder, and such certificate shall have the common seal of the company affixed thereto; and such certificate shall specify the share in the undertaking to which such shareholder is entitled, and the same may be according to the form in the Schedule A. to this Act annexed, or to the like effect; and for such certificate the company may demand any sum not exceeding the prescribed amount, or, if no amount be prescribed, then a sum not exceeding two shillings and sixpence." It is by § 12 of the Act enacted, that "the said certificate shall be admitted in all courts as prima facie evidence of the title of such shareholder, his executors, administrators, successors, or assigns, to the share therein specified; nevertheless, the want of such certificate shall not prevent the holder of any share from disposing thereof." The form of certificate provided by Schedule A. to the above Act is as follows:—

Form of Certificate of Share.

"No. . The Co.

"This is to certify, that A. B., of , is the proprietor of the share No. , of 'The Company,' subject to the regulations of the said company. Given under the common seal of the said company, the day of , in the year of our Lord ."

[2] 8 & 9 V. c. 16.

[3] Id. § 10.

[4] 8 & 9 V. c. 18.

[5] Id. §§ 16, 17. See Ystalyfera Iron Co. *v.* Neath and Brecon Rail. Co., 1873.

§ 1638. It is frequently necessary (especially in actions by them for their fees) to prove the qualifications of medical men, dentists, and veterinary surgeons. This proof may, in the case of medical practitioners, falling within the Medical Act of 1858, be proved by a copy of the "Medical Register" for the time being, purporting to be printed and published by or at the instance of the Registrar of the General Council of Medical Education and Registration of the United Kingdom, under the direction of such council, or, "in the case of any person whose name does not appear in such copy," by, "a certified copy under the hand of the Registrar of the General Council, or of any branch council, of the entry of the name of such person on the general or local register."[1] The registration of dentists is provable, under the Dentists Act, 1878,[2] in a similar manner. Again, the registration of "pharmaceutical chemists and of chemists and druggists" is provable by printed copies of the registers purporting to be published by the registrar appointed under the Pharmacy Acts of 1852 or 1868, and countersigned by the president or two members of the Council of the Pharmaceutical Society.[3] And here also "the absence of the name of any person from such printed register" is, in most cases,[4] evidence, till the contrary is made to appear, that such person is not duly registered.[5] Similar provisions with respect to the proof and admissibility of the printed copies of the register of Veterinary Surgeons are contained in the Veterinary Surgeons Act, 1881.[6]

§ 1638A. The position of military or naval officers is again, in practice, often needed to be proved. With regard to this, it is provided by the Army Act, 1881, that "an army list or gazette purporting to be published by authority, and either to be printed by a Government printer, or to be issued, if in the United Kingdom, by Her Majesty's Stationery Office, and if in India, by some

[1] 21 & 22 V. c. 90, § 27. This section further enacts, that "the absence of the name of any person from the printed copy of the medical register shall be evidence, until the contrary be made to appear, that such person is not registered according to the provisions of this Act."

[2] 41 & 42 V. c. 33, § 29. See, also, § 11.

[3] 15 & 16 V. c. 56 ("The Pharmacy Act, 1852"), § 7; 31 & 32 V. c. 121, § 13. The same law prevails in Ireland. See 38 & 39 V. c. 57, § 27, Ir.

[4] But see 32 & 33 V. c. 117, § 1.

[5] 31 & 32 V. c. 121, § 13. See, also, 38 & 39 V. c. 57, § 27, Ir.

[6] 44 & 45 V. c. 62, § 3, subs. 2, and § 9.

officer under the Governor-General of India, or the Governor of any Presidency in India, shall be evidence of the status and rank of the officers therein mentioned, and of any appointment held by such officers, and of the corps, or battalion, or arm, or branch, of the service to which such officers belong."[1]

§ 1639. It, further, is frequently necessary to show that a solicitor is duly certificated. A certificate authorising a solicitor to practise must follow the form given by the Solicitors Act, 1877,[2] must be signed by the secretary of the Incorporated Law Society, and must have the annual stamp duties denoted thereon, with the date of the payment of such duties certified by the proper officer of the Inland Revenue Office, "by writing under his hand, or by other sufficient means." Certificates complying with the above requirements will "be deemed the proper stamped certificates required by law to be taken out" by solicitors;[3] and will, it is presumed, be admissible in evidence without further proof.[4] The Law List, which purports to be published by the authority of the Commissioners of Inland Revenue, is also made[5] primâ facie evidence in all courts, and before all justices and others, that the persons named therein as solicitors, or conveyancers, are duly certificated; and the absence of the name of any person from such list is evidence, until the contrary be made to appear,[6] that such person is not qualified to practise for the current year.[7] An extract from the roll of solicitors kept by the registrar,[8] certified under the hand of the secretary of the Incorporated Law Society, is also evidence of the facts appearing in such extract.[9]

§ 1640—5. Under the Factory and Workshop Act, 1878, a child or young person under sixteen may not be employed in a factory subject to the Act for more than seven, or, if the certifying surgeon of the district reside more than three miles from the factory, for more than thirteen days, unless the proprietor of the factory has obtained a certificate from the "surgeon for the district." Such

[1] 44 & 45 V. c. 58, § 163, subs. 1 (*d*).
[2] 40 & 41 V. c. 25, § 16, Sched. I. Form A.
[3] 23 & 24 V. c. 127, § 18.
[4] See, also, 29 & 30 V. c. 84 (Ir.), §§ 28, 32, and Sched. II. of Act, Form A.
[5] By § 22 of "The Solicitors Act, 1860" (23 & 24 V. c. 127).
[6] R. *v.* Wenham, 1866.
[7] 23 & 24 V. c. 127.
[8] See 36 & 37 V. c. 66, § 87; 38 & 39 V. c. 77, § 14; 40 & 41 V. c. 57, § 78, Ir.
[9] 23 & 24 V. c. 127, § 22.

a certificate will probably be regarded as primâ facie evidence of the age of the persons named therein, of the fitness of such child or young person for such employment. Certificates of fitness given under this Act are probably receivable in evidence without proof, provided they purport to be duly signed by the person granting them.[1] Whether this be so or not, it is expressly provided that a written declaration by the certifying surgeon "that he has personally examined a person employed in a factory or workshop in his district, and believes him to be under the age set forth in the declaration, shall be admissible in evidence of the age of that person."[2]

§ 1646. Inrolment of them is, it will be recollected,[3] *necessary* to perfect certain transactions, while it is *permissible* with regard to others.[4] The principal transactions of this description appear to be about eleven in number, and are as follow, viz. :—(i.) Conveyances and Leases of Crown Lands, including lands of the Crown in the Duchy of Lancaster,[5] and those of the Heir Apparent to it, as Prince of Wales, of lands in Cornwall;[6] (ii.) Bargains and Sales;[7] (iii.) Conveyances in Mortmain or under the Charitable Trusts Act, 1853;[8] (iv.) Disentailing Deeds;[9] (v.) Annuity Deeds; (vi.) Judgments against land in England or Ireland;[10] (vii.) Deeds as to lands in Yorkshire;[11] (viii.) Deeds as to lands in Middlesex;[12] (ix.) Deeds executed under the Clerical Disabilities Removal Act, 1870, relinquishing Holy Orders;[13] (x.) Articles of Clerkship;[14] and (xi.) Bills of Sale[15] and Warrants of Attorney and Cognovits.[16]

§ 1647. Inrolments may in most cases—probably in all—be proved, where it is necessary to do so, by the production of office copies; and, as will be seen below, by several Acts of Parliament, such copies are expressly made evidence not only of the inrolment

[1] 41 V. c. 16, §§ 27—30. See, however, 21 & 22 V. c. 90, § 37, which enacts, that no medical or surgical certificate "shall be valid, unless the person signing the same be registered under this Act."

[2] 41 V. c. 16, § 92.

[3] See ante, § 1119, as to what documents generally *require*, and what *permit*, of inrolment.

[4] See ante, § 1127.

[5] Ante, § 1121.

[6] Id.

[7] Ante, § 1120.

[8] Ante, § 1119 and § 1127.

[9] Ante, § 1122.

[10] Infra, § 1652.

[11] Ante, § 1127.

[12] Id.

[13] Ante, § 1119.

[14] Ante, § 1126.

[15] Ante, § 1120.

[16] Ante, § 1116A.

itself, but of the contents of the instruments inrolled. Wherever deeds, memorials, or other instruments are required by statute to be inrolled or registered, the exact mode of proving such inrolment or registration of course depends upon the language of such statute. Under such statutes, however, as a general rule, where, in pursuance of the uniform practice of the office in which the inrolment or registration is made, the officer, at the time of making the proper entry in his books, returns to the party the original instrument, with a certificate or memorandum of inrolment or registration endorsed thereon, such certificate or memorandum will be evidence both of the fact and date of inrolment or registration, without proof being given of the signature or official character of the person signing it.[1] This general rule has, by statute,[2] been expressly made applicable to the Inrolment Department of the Central Office. By the same Act, copies of documents which are inrolled in this office are also made evidence.[3]

[1] See Doe *v.* Lloyd, 1840; Kinnersley *v.* Orpe, 1779 (Buller, J.); Compton *v.* Chandless, 1801 (Ld. Kenyon).

[2] See 12 & 13 V. c. 109; § 18 of which is as follows:—"The Clerk of the said Inrolment Office, or his deputy or assistant, shall, upon request, and payment of the proper fees payable in respect thereof, indorse or write upon every deed, specification, instrument in writing, and document, which at any time heretofore has been, or at any time hereafter shall be, inrolled in the said Inrolment Office, a certificate that such deed, specification, instrument in writing, or document, has been or was inrolled in Chancery, and the day on which such inrolment was made, and shall cause such certificate to be sealed or stamped with the said seal of the Chancery Inrolment Office; and every such certificate purporting or appearing to be so sealed or stamped shall be admitted and received in evidence by all courts and other tribunals, judges, justices, and others, without further proof, and as sufficient primâ facie evidence that the deed, specification, document, or instrument in writing, therein mentioned was duly inrolled in the Court of Chancery on the day and at the time mentioned in such certificate." Sect. 12 of the statute is to the same effect, with slight verbal alterations, the most important of which are that the officer spoken of is called "the Clerk of the Petty Bag," with no mention of his deputy or assistant, and that an inrolment is made evidence "as well before either House of Parliament, as also before any committee thereof, as before all courts," &c. It will be recollected that the seal of the Petty Bag Office is judicially noticed (ante § 6). Both the Chancery Inrolment Office and the Petty Bag Office are now parts of "The Inrolment Department of the Central Office." See R. S. C. 1883, Ord. LXI. r. 1, as to Inrolment Office, and R. S. C. Jan. 1889, as to Petty Bag Office.

[3] By 12 & 13 V. c. 109, § 17, "Every document or writing sealed or stamped, or purporting or appearing to be sealed or stamped, with the said seal of the Chancery Inrolment Office, and purporting to be a copy of any inrolment or other record, or of any other document or writing of any description whatsoever, including any drawings, maps, or plans thereunto annexed or indorsed there-

§ 1647A. The provisions which have been made affording special facilities for giving proof of inrolment in certain particular cases may be now shortly mentioned.

§ 1648. In the first place, as regards all deeds relating to the possessions of the Crown,[1] which are inrolled in the *Land Revenue Office*, it is enacted that a memorandum of inrolment on the deed, purporting to be signed by the Keeper of the Records and Inrolments, or his deputy or assistant, shall be receivable as sufficient evidence, not only of the inrolment but even of the due execution of the deed, and that, too, without proof of the signature attached to it.[2] The inrolment of deeds relating to lands belonging to either the Duchy of Lancaster or that of Cornwall may also be proved in the manner prescribed by an Act,[3] which relates, among other things, to the mode of proving documents inrolled in the

on, shall be deemed to be a true copy of such inrolment, record, document, or writing, and of such drawing, map, or plan, if any, thereunto annexed, and shall, without further proof, be admissible and admitted in evidence as well before either House of Parliament, as also before any committee thereof, and also by and before all courts, tribunals, judges, justices, officers, and other persons whomsoever, in like manner and to the same extent and effect as the original inrolment, record, document, or writing, could or might be admissible or admitted in evidence, as well as for the purpose of proving the contents of such inrolment, record, document, or writing, and the drawing, map, or plan, if any, thereunto annexed, as also proving such inrolment, record, document, or writing, to be an inrolment, record, document, or writing, of or belonging to the said Court of Chancery; and that such inrolment, record, document, or writing, was made, acknowledged, prepared, filed, or entered, on the day, and at the time, when the original inrolment, record, document, or writing shall purport to have been made, acknowledged, prepared, filed, or entered."

[1] As to what documents as to Crown lands (including those in the Duchies of Cornwall or Lancaster) need to be inrolled, see ante, § 1121.

[2] By 2 W. 4, c. 1, § 26, "where any deed or certificate, receipt, or other instrument, which shall appear to have been made, given, or executed under the authority of this Act, or of any Act heretofore passed relating to the possessions of land revenues of the Crown, shall have written thereon a memorandum of its having been inrolled in the said office of records and inrolments, and such memorandum shall purport to be signed by the Keeper of the Records and Inrolments, or by any person acting as his deputy or assistant, such memorandum shall, in the absence of evidence to the contrary, be sufficient proof of the deed, certificate, receipt, or other instrument, having been duly made, granted, given, or executed by the party or parties by whom the same shall purport to have been signed or executed, and of its having been duly inrolled as stated by such memorandum, and of the provisions of the Act, under which the same shall appear to have been made, granted, given, or executed, having been duly complied with; and such memorandum shall be receivable in evidence without proof of the handwriting of the signature thereto." See 16 & 17 V. c. 56, § 6.

[3] Viz., 11 & 12 V. c. 83.

respective Duchies of Cornwall and Lancaster. That Act[1] enacts that "where any deed, certificate, receipt, or other instrument relating to the lands or possessions of the Duchy of Cornwall, shall have been duly inrolled in the office of the said Duchy, the inrolment in the books of the said office, or an examined copy of such inrolment, or a certificate purporting to set forth a true copy of the whole or part thereof, and purporting to be signed and certified by the Keeper of the Records of the Duchy for the time being, shall, in the absence of evidence to the contrary, and without producing the original, or calling any attesting witness, and (in the case of a certified copy) without proof, other than the production of such certificate, that such certified copy is in fact a true copy, be admitted by and before all courts and justices, and in all legal proceedings, to be proof of such original instrument or inrolment thereof, or of so much thereof as the said certified copy purports to set forth, and that the original was duly made, granted, given, or executed by the parties thereto." The same Act[2] extends the provisions just set out to all instruments inrolled in the Duchy of Lancaster since the 31st of August, 1848. Inrolments of land in the same Duchies[3] may probably also be proved in the manner authorised by the general rule already set out.[4]

§ 1649. In the next place, every bargain and sale passing an inheritance or freehold must be inrolled in the Inrolment Department of the Central Office, as already mentioned. Proof of such inrolment is given in the way already pointed out.

§ 1650. Thirdly, inrolments of conveyances of lands in mortmain,[5] whether they have been made previously to, or under the provisions of, the Mortmain and Charitable Uses Act, 1888,[6] require inrolment. Inrolments of conveyances of lands in mortmain[7] may be proved in the manner indicated in the general rule set out

[1] By § 6.
[2] § 14.
[3] See Kinnersley *v.* Orpe, 1779.
[4] § 1647.
[5] As to which, see ante, § 1119.
[6] 51 & 52 V. c. 42, § 4 (1).
[7] As to which, see ante, § 1119. In Doe *v.* Lloyd, 1840, a deed, requiring inrolment under the Mortmain Act, was produced at the trial, and bore the following indorsement:—"Inrolled in the High Court of Chancery the 17th of December, 1836, being first duly stamped, according to the tenor of the statutes made for that purpose. D. Drew." The court held that, without proving the signature or official character of Mr. Drew, the memorandum was evidence that the deed was inrolled on the day stated, it having been *certified to the court* by an officer of the inrolment office, that the memorandum was in the usual form. See ante, § 21.

already.[1] They may also be proved in accordance with the statutory provisions relating to the old Chancery Inrolment Office (now the Inrolment Department of the Central Office).[2] We have already seen[3] how deeds inrolled with the Charity Commissioners, under the provisions of the Charitable Trusts Act, 1855,[4] may be proved.

§ 1650A. Fourthly, it being by the Fines and Recoveries Act, 1833,[5] required[6] that all disentailing deeds shall be inrolled in the Inrolment Department of the Central Office; proof of the inrolments of such deeds may be made in accordance with the general principles already indicated.[7]

§ 1651. Fifthly, similar observations apply to proof of the inrolment, in the same office, of an annuity deed.[8]

§ 1652. Judgments against land generally require what modern Acts term "Registration," rather than "Inrolment," but the general effect of such judgments against land must now be considered. Judgments against land in England bind land therein by force of the Judgments Act, 1838,[9] if they were obtained before 23rd July, 1860, and re-registered every five years,[10] but by the Law of Property Amendment Act, 1860,[11] judgments obtained between 23rd July, 1860, and 29th July, 1864, do not bind such land in the hands of a purchaser (whether at the time of his purchase he had notice of them or not) unless a writ of execution has been issued and registered before his conveyance or mortgage, and execution put in force within three calendar months from the registration of the writ. By the Judgments Act, 1864,[12] judgments entered up since 29th July, 1864, do not affect land until it has been actually delivered in execution under lawful authority.[13] When a judgment is against land in Ireland, if it was entered up previously to 15th July, 1850, it operates as a charge on the lands of the debtor, and is subsequently binding on him and all persons claiming under him, and the creditor has a similar charge to that which he would have had if the debtor having power to so charge

[1] Supra, § 1647.
[2] See 12 & 13 V. c. 109, § 18, set out ante, § 1647 n., and also, § 17, set out ante § 1647 n., making office copies evidence.
[3] See ante, § 1127.
[4] 18 & 19 V. c. 87.
[5] 3 & 4 W. 4, c. 74.
[6] See ante, § 1122.
[7] See supra, § 1647.
[8] As to which, see ante, § 1125.
[9] 1 & 2 V. c. 110.
[10] 2 & 3 V. c. 11, § 4.
[11] 23 & 24 V. c. 38.
[12] 27 & 28 V. c. 112.
[13] Id. § 1.

the land, had done it by writing under his hand;[1] but the above provisions do not apply to lands purchased by a judgment debtor after 15th July, 1850; against which, by the Judgments Mortgage (Ireland) Act, 1850, a judgment creditor has the same rights as a judgment creditor under a judgment obtained after the last-mentioned date.[2] And by the Judgments Mortgage (Ireland) Act, 1850, the judgment creditor, on a judgment obtained since 15th July, 1850, may, at any time after such judgment was obtained, file in the court in which it was obtained an affidavit of ownership of land by the debtor, and may register the same in the office for registering deeds, conveyances, and wills, in Ireland, and such registration will operate to vest in the creditor all the estate and interest of the debtor in the lands mentioned in such affidavit, subject, however, to redemption on payment of the debt; and the creditor has all such rights, powers, and remedies, as if an effectual assurance to him had been made when the affidavit was registered.[3] In order that a purchaser of such lands may be affected, there must be a re-registration every five years.[4] The sum of the matter consequently is, that, to affect Irish land by a judgment, there must be a chain of evidence consisting of three links. First, the judgment must be proved in the usual way; next, the affidavit, which has been filed in the court when the judgment was entered, must be proved by an office, or a certified, or an examined, copy; and, lastly, the due registration of an office copy of this affidavit in the office for registering deeds and wills in Ireland, must be proved either by an examined or by a certified copy.[5] It seems, too, to be still a question of doubt[6] whether such last-named copy will be received in evidence, unless a notice, such as is required by the Registry of Deeds (Ireland) Act, 1832,[6] has been duly given.

[1] 5 & 6 W. 4, c. 55; 3 & 4 V. c. 105 ("The Debtors (Ireland) Act, 1840").

[2] 13 & 14 V. c. 29, § 6.

[3] 13 & 14 V. c. 29, § 7 ("The Judgment Mortgage (Ireland) Act, 1850").

[4] Id. § 4.

[5] See Duncan v. Brady, (Ir.) 1860; 13 & 14 V. c. 72, § 9.

[6] 2 & 3 W. 4, c. 87, § 32, which enacts as follows, "in all proceedings before any court of justice, for all purposes whatsoever, an office copy of any memorial registered in the said office shall, upon such office copy being proved in like manner as an office copy of any other record, be received and taken as evidence of the contents of the memorial of which it purports to be an office copy, without the production of the original memorial: provided always, that the party producing such office copy

§ 1652A. In the sixth place, there exist special provisions as to the mode of proof which may be given of the inrolment of deeds relating to lands in Yorkshire. The Yorkshire Registries Act, 1884,[1] which now authorises the *registration of deeds*, conveyances, wills, incumbrances, and other matters affecting lands in Yorkshire, provides that the registrar, or his deputy, shall indorse on each instrument registered a certificate stating the date of registration, and the volume, page, and number in the register in which it is inrolled; that this certificate shall then be signed by the registrar and sealed with the office seal; and that after this it shall be evidence,[2] and the signature and seal judicially noticed.[3] The registrar must also, at the instance of any person, cause an official search to be made in the office books, and furnish a certificate of the result under his hand and the office seal; and every certificate so signed and sealed, shall be receivable in evidence.[4] By the same Act, it is also provided[5] that any person shall be authorised—subject to the provisions of the Act, and to any rules made thereunder—to require a certified copy of, or extract from, any document inrolled in the register, or of or from any entry in the register, or any book or index kept at the office, or any rule made under the Act, and such Act then proceeds to enact, that "thereupon a certified copy or extract, signed by the registrar and sealed with the seal of the register office, shall be given to such person; and every such copy or extract, so signed and sealed, shall be receivable as evidence of the contents of such document or entry, in every case where such contents may, under the rules of evidence, be proved by means of any copy or extract; but nothing in this section contained shall be taken to dispense with the production of any original document,

shall, if out of Dublin ten days, and if in Dublin eight days, before producing the same, give notice in writing to the adverse party thereof; and provided also, that such adverse party shall not within four days after receiving such notice, demand by a counter notice that the original memorial shall be produced; and in every case in which such counter notice shall be given, the costs of producing the original memorial shall be paid by either party, as the court in which the proceeding shall take place, or the taxing officer of such court, may determine."

[1] 47 & 48 V. c. 54, amended by 48 V. c. 4. The first-named Act repeals the old statutes relating to registration in Yorkshire, cited ante, § 1127, and establishes three register offices—at Northallerton, Beverley, and Wakefield, § 31. As to inrolment of deeds relating to lands in Yorkshire, see ante, § 1127

[2] § 9.

[3] § 32.

[4] §§ 20, 21.

[5] § 22.

in any case in which the production thereof might otherwise be required, nor to dispense with any proof, which might otherwise be required, as to the due making and execution thereof." By another section of the Act, all copies of inrolments of bargains and sales inrolled in the old registries, and of the entries or inrolments of deeds, wills, writings, or conveyances registered, at full length in the old registry for the North Riding, shall be signed by the registrar and sealed with the seal of the office; and all copies so signed and sealed shall be as good evidence as attested copies under the old law.[1]

§ 1652a. Seventhly, an Act of the reign of Queen Anne,[2] authorises the registration of every "deed, conveyance, will, or probate of the same" relating to lands in Middlesex. This Act has, however, been partially repealed by the Land Registry (Middlesex Deeds) Act, 1891.[3] This latter Act contains[4] enactments by which the registration and inrolment of deeds as to lands in Middlesex are now governed. Those as to certificates of inrolment,[5] and of searches,[6] are, generally speaking, the same as under the Yorkshire Registries Act, 1884; but these certificates need only be signed "by an officer of the registry," and—unlike those in Yorkshire—require no official seal. Certificates of searches are now directed[6] to be given by the registrar.[7]

§ 1653. In the eighth place, to render a parson's deed of relinquishment available under the Clerical Disabilities Act, 1870,[8] first, the deed must be inrolled in the Inrolment Department of the Central Office,[9] and next, an office copy of it must be recorded by the bishop. The statute then provides[10] that "a copy of the record in the registry of the diocese, duly extracted and certified by the registrar of the bishop, shall be evidence of the due execu-

[1] § 45. The old statutes, repealed by this Act, required the copies to be attested by "two credible witnesses." See ante, § 1645, ad fin.; also 5 A. c. 18, § 2; 6 A. c. 35, § 17; and 8 Geo. 2, c. 6, § 21.

[2] 7 A. c. 20, partly repealed by "the Land Registry (Middlesex Deeds) Act, 1891" (54 & 55 V. c. 64). See ante, § 1127.

[3] 54 & 55 V. c. 64.

[4] Id. Sched. I.

[5] Sched. I. to 54 & 55 V. c. 64, r. 7.

[6] Id. r. 11.

[7] The registrar's signature does not require to be proved in any way. See 8 & 9 V. c. 113, "The Documentary Evidence Act, 1845," § 1, cited ante, § 7.

[8] 33 & 34 V. c. 91; cited ante, § 1119.

[9] R. S. C. 1883, Ord. LXI. rr. 1, 9.

[10] § 7.

tion, inrolment, and recording of the deed, and of the fulfilment of all the requirements of the Act in relation thereto." The above section must be read in connection with the Documentary Evidence Act, 1845, and when this is done, the mode in which proof of the execution and inrolment of such a deed must be proved is plain.

§ 1653A. The inrolment of articles of clerkship, which we have seen[1] is required to be made in the Inrolment Department of the Central Office, may be proved in the manner pointed out in a previous paragraph as to the proof of documents inrolled in that office, or in the old Petty Bag Office.[2]

§ 1654. In the tenth, and last, place, there are various provisions in force under which bills of sale, warrants of attorney, and cognovits are required to be inrolled. As regards bills of sale, under the Bills of Sale Acts, 1878 and 1882,[3] the certificate of registration of a bill of sale in the Bills of Sale Department of the Central Office,[4] even though it state that the affidavit of execution has been duly filed, as required by those statutes, is not sufficient evidence of the bill of sale; but an authenticated or office copy of the document registered, must, in strict law, be actually produced.[5] Warrants of attorney, cognovits, and judge's orders being inrolled in the Bills of Sale Department of the Central Office, proof of such inrolment may be given in the usual way,[6] and copies of the documents may be given in evidence, under the Documentary Evidence Act, 1845.[7]

§ 1654A. There are many cases in which it is necessary to give proof of *Bye-laws*. In two of these, which are of frequent occurrence, the bye-laws may be proved by the production of certified copies thereof.

§ 1655. In the first of these cases the Companies Clauses Consolidation Act, 1845,[8] empowers every company to which that Act applies, to make bye-laws for the purpose of regulating the conduct of their officers and servants, and of providing for the due management of their affairs;[9] and enacts that the production of a written or printed copy *purporting* to have the *seal of the com-*

[1] See ante, § 1126.
[2] See supra, § 1647.
[3] 41 & 42 V. c. 31, § 10; 45 & 46 V. c. 43, § 8.
[4] R. S. C. 1883, Ord. LXI. r. 1.
[5] See Halkett *v.* Emmott, 1878; Mason *v.* Wood, 1875.
[6] See supra, § 1647.
[7] See ante, §§ 7, 8.
[8] 8 & 9 V. c. 16.
[9] Id. §§ 124—6.

pany affixed thereto, "shall be sufficient evidence of such bye-laws in all cases of prosecution under the same."[1]

§ 1656. The second of such cases is where proof of the bye-laws of a railway company is required in a court of law. A railway company have power to make bye-laws for regulating the travelling upon or using and working their railway, by which penalties may be imposed upon persons other than the railway company's servants. Before such bye-laws can be enforced, however, the company must produce either the book containing the original bye-laws purporting to be under its seal, or an examined or certified copy of such bye-laws;[2] it must also probably (although this is not altogether clear) show that a certified copy of such bye-laws has, in cases where they were made between the 9th of November, 1846,[3] and the 10th October, 1851,[4] been sent to the old Commissioners of Railways, and in other cases to the Board of Trade, and that such bye-laws have not been disallowed;[5] and it further must prove such bye-laws to have been duly published.[6] Due publication is at least, on the hearing of an information before justices charging a railway passenger with a violation of railway bye-laws, sufficiently proved by showing that copies of such bye-laws were affixed at each of the two stations at which the defendant entered and left a train.[7] The present law does not require any further proof.[8]

§§ 1657—8. The mode of proof of bye-laws in other cases, however, varies, according to the language of the particular statute

[1] Id. 127. See, also, Id. § 1, cited ante, § 7: and query whether the same proof would suffice if the company offered the bye-laws in evidence in defending an action for false imprisonment.

[2] Motteram *v.* Eastern Counties Rail. Co., 1859.

[3] See 9 & 10 V. c. 105, § 2; and Gazette, 6th Nov. 1846.

[4] The date when the Act appointing Commissioners of Railways was repealed, viz., 14 & 15 V. c. 64, § 1.

[5] Compare 3 & 4 V. c. 97, §§ 7—9; and 8 & 9 V. c. 20, §§ 108—11. As to proof of order by old Commissioners of Railways, allowing the bye-laws, see ante, note to §§ 1596—7, title "*Railway Documents*;" and as to proof of similar order by Board of Trade, see id.; and see also § 1527.

[6] Motteram *v.* Eastern Counties Rail. Co., 1859.

[7] Motteram *v.* Eastern Counties Rail. Co., 1859 (diss. Williams, J.).

[8] By § 10 of 3 & 4 V. c. 97 ("The Railway Regulation Act, 1840") "so much of every clause, provision and enactment in any Act of Parliament heretofore passed as may require the approval or concurrence of any justice of the peace, court of quarter sessions, or other person or persons, other than members of the said companies to give validity to any bye-laws, orders, rules, or regulations made by any such [*i.e.*, railway] company shall be repealed."

or charter under the authority of which the bye-laws have been made.[1]

[1] Stated in alphabetical order, the following examples may be usefully instanced:—"*The Commissioners Clauses Act*, 1847" (10 & 11 V. c. 16), contains, in §§ 96—98, provisions as to the making and proof of bye-laws under that Act. "*The Common Lodging Houses (Ireland) Acts*" (29 & 30 V. c. 44, §§ 21, 23, Ir.; 35 & 36 V. c. 69, §§ 2, 5, Ir.) enable bye-laws made thereunder to be proved by copies signed or sealed by the proper local authority, and countersigned by some person or persons duly representing the local government, which would seem to be either the under-secretary to the lord lieutenant or the president or vice-president of the board, or any two other members of the board, "both executing." See 35 & 36 V. c. 69, § 4, Ir. *Dublin Corporation* bye-laws may, under 12 & 13 V. c. 97, § 20, Ir., be proved by a copy under the corporate seal, provided it contain a declaration signed by the lord mayor that the bye-law has been duly made, published, and allowed, and is still in force. "*The Explosives Act*, 1875" (38 & 39 V. c. 17), though it contains in §§ 34—38, and 84, several elaborate provisions for the making and publication of bye-laws with respect to the loading and conveyance of gunpowder, has no clause to regulate or simplify the mode of proving such rules. "*The Harbours, Docks, and Piers Clauses Act*, 1847" (10 & 11 V. c. 27), also provides for the making and proof of bye-laws. See §§ 83-90. *London Corporation* bye-laws, made in pursuance of 10 G. 4, c. cxxiv.; 1 & 2 W. 4, c. lxxvi.; 1 & 2 V. c. ci.; and 8 & 9 V. c. 101, for regulating the port of London and the vending and delivery of coals, may, under §§ 6 and 7 of the last-mentioned Act, and 8 & 9 V. c. 113 ("The Documentary Evidence Act, 1845"), § 1 (cited ante, § 7), be proved by the production of a printed or written copy purporting to be signed by the town clerk of the city of London; and such copy "shall, without any other proof, be admitted as evidence of such bye-laws, and of the making, submission, allowance, and publication thereof, unless the contrary shall be proved." "*The Markets and Fairs Clauses Act*, 1847" (10 & 11 V. c. 14), §§ 42—49, also contains provisions respecting the making and proof of bye-laws. "*The Merchant Shipping Act*, 1894" (57 & 58 V. c. 60), § 362, enables harbour authorities, with the approval of a secretary of state, to make bye-laws for regulating the embarkation and landing of emigrants, and for licensing emigrant porters; but, unlike the repealed "Passengers Act, 1855" (18 & 19 V. c. 119, § 82), contains no provisions for proving such bye-laws. "*The Metropolis Local Management Act*, 1855" (18 & 19 V. c. 120), by § 203, provides that the production of a printed copy of the bye-laws made by the Metropolitan Board of Works (whose powers and duties are now vested in the London County Council), or by a district board or vestry, under that Act, "if authenticated by the seal of the board or vestry, shall be evidence of the existence, and of the due making, confirmation, and publication of such bye-laws, in all prosecutions under the same, without adducing proof of such seal, or of the fact of such confirmation or publication of such bye-laws." *Mines.*—Under "The Coal Mines Regulation Act, 1872" (35 & 36 V. c. 76), § 59, and "The Metalliferous Mines Regulation Act, 1872" (35 & 36 V. c. 77), § 30, the special rules which are established in any mine under either of those Acts may be proved by a copy certified under the hand of one of the government inspectors; and such copy is also evidence that the rules have been duly established. See, also, 27 & 28 V. c. 48, § 5. Under "*The Municipal Corporations Act*, 1882" (45 & 46 V. c. 50), § 24, the production of a written copy of a bye-law, made by the council under that Act, or under any former or present or future general or local Act of Parliament, if authenticated by the corporate seal, shall, until the contrary is proved, be sufficient evidence of the

§ 1659. In some cases the validity of bye-laws may, as we have seen, be inferred from long usage.[1]

§ 1660.[2] The admissibility and effect of public documents, as

due making and existence of the bye-law, and, if it is so stated in the copy, of the bye-law having been approved and confirmed by the authority whose approval or confirmation is required to the making, or before the enforcing, of the bye-law. As to pleading such bye-laws, see Elwood *v.* Bullock, 1844. See, also, "*The Irish Municipal Corporation Act*, 1840" (3 & 4 V. c. 108), §§ 125—127. "*The Public Health Act*, 1875" (38 & 39 V. c. 55), §§ 182—188, provides that bye-laws made under that Act by any local authority other than the council of a borough,—whether they relate to scavenging and cleansing (§ 44), or to the keeping of animals (§ 44), or to common lodging-houses (§§ 80, 90), or to offensive trades (§ 113), or to mortuaries (§ 141), or to new buildings (§ 157), or to public pleasure grounds (§ 164), or to markets (§ 167), or to slaughter-houses (§ 169), or to the licensing of horses, boats, &c., for hire (§ 172), or to hop pickers (§ 314), —may be proved by copies signed and certified by the clerk of such authority to be true copies, and to have been duly confirmed; and every such copy is to be evidence until the contrary is proved in all legal proceedings of the due making, confirmation (as to which see 47 V. c. 12), and existence of such bye-laws without further or other proof; and, by § 326, all bye-laws made under any of the Sanitary Acts, not inconsistent with this Act, "shall be deemed to be bye-laws under this Act." "*The Public Health (Ireland) Act*, 1878" (41 & 42 V. c. 52, Ir.), § 223, adopts the same mode of proof with respect to all bye-laws made by any sanitary authority under that statute. See, also, §§ 41, 54, 91, 100, 103, 105, 129, of same Act. "*The Public Parks (Scotland) Act*, 1878" (41 V. c. 8), § 20, also adopts that mode of proof with respect to bye-laws made under it by any local authority. "*The Salmon Fisheries Act*, 1873" (36 & 37 V. c. 71), contains, in § 45, provisions for facilitating the proof of bye-laws made by any board of conservators for a fishery district. "*The Slaughter Houses, &c. (Metropolis) Act*, 1874" (37 & 38 V. c. 67), § 8, enables any bye-law or order made by a local authority under the Act to be proved by a printed copy, purporting to be certified by the clerk of the local authority to be a true copy, or purporting to be sealed by the seal of the local authority; and any such bye-law or order shall, until the contrary is proved, be deemed to have been duly made and confirmed. *Thames Conservancy* bye-laws, made by the conservators since the commencement of the year 1865, are, by 27 & 28 V. c. 113, § 33, provable by copies purporting to be printed by direction of the conservators, and authenticated by the common seal and by the signature of their secretary; and every such copy is conclusive evidence of such bye-law, and of the due making and allowance thereof, without proof of such seal or signature. "*The Towns Improvement Clauses Act*, 1847" (10 & 11 V. c. 34), §§ 200—207, and "*The Town Police Clauses Act*, 1847" (*id.* c. 89), § 71, also contain provisions as to the making and proof of bye-laws. Under "*The Metropolis Water Act*, 1871" (34 & 35 V. c. 113), § 25, a printed copy of the regulations made by any metropolitan water company, for the purpose of preventing the waste, misuse, or contamination of water, if dated, and purporting to be made as in that Act is pointed out, and to be authenticated by the seal of such company, is "conclusive evidence of the existence, and of the due making, confirmation, and publication of such regulations in all prosecutions or proceedings under the same, without adducing proof of such seals, or of the fact of such confirmation or publication of such regulations, or of any of the requirements of the Act relative thereto having been complied with."

[1] See ante, § 128.

[2] Gr. Ev. § 491, in some part.

instruments of evidence, must next be considered. *Statutes, State Papers*, and other writings of a cognate character, will generally be admissible, either as primâ facie or as conclusive proof of the facts directly stated in them, if duly authenticated in some one of the modes before stated, and if their contents be pertinent to the issue. In many cases they will even be received as primâ facie evidence of matters stated in them by way of introductory *recital*. Thus, where certain *public statutes* recited that great outrages had been committed in a particular part of the country, and a public *proclamation* was issued, with similar recitals, and offering a reward for the discovery and conviction of the perpetrators, these recitals were held admissible and sufficient evidence of the existence of those outrages, to support the averments to that effect in an information for a libel on the Government in relation thereto;[1] and a recital of a state of war, in the preamble of a public statute, is good evidence of its existence, and the war will be taken notice of without further proof, whether this nation be or be not a party to it.[2] But even the recitals in a public Act are not conclusive evidence. Therefore, where the Schedule of the Municipal Corporation Act described a place as an existing borough, proof was admitted to show that this description was false.[3] Formerly a recital used never to be inserted in a private Act, unless its truth had first been ascertained by the judges, to whom the bill had been referred.[4] And consequently, when this was the practice, a recital of relationship, even in a *private* Act, was received as cogent evidence of pedigree. The evidence in support of private bills is, however, no longer submitted to the judges for approval, and, therefore, recitals inserted in them since this change in the practice appear to be now inadmissible.[5] And, as a general rule, a local or private statute, though it contains a clause requiring it to be judicially noticed, is not, as against *strangers*, any evidence of the facts recited;[6] neither does it affect the public with a knowledge of its contents.[7]

§ 1661.[8] The *Speech of the Sovereign* in opening Parliament, and

[1] R. *v.* Sutton, 1816.
[2] R. *v.* De Berenger, 1814.
[3] R. *v.* Greene, 1837.
[4] Wharton Peer., 1845, H. L.; Shrewsbury Peer., 1857, H. L.
[5] Shrewsbury Peer., 1857 (Ld. St. Leonards), H. L.
[6] Brett *v.* Beales, 1829; Taylor *v.* Parry, 1840; D. of Beaufort *v.* Smith, 1849; Cowell *v.* Chambers, 1856; Mills *v.* May. of Colchester, 1867 (Willes, J.); Polini *v.* Gray, and Starla *v.* Freccia, 1879, C. A.
[7] Ballard *v.* Way, 1836 (Ld. Abinger).
[8] Gr. Ev., § 491, slightly.

the Address of either House to the Crown, would seem to be evidence, in the nature of reputation, of the public matters they recite.[1] The *Journals*, also, of either House are the proper evidence of the action of that House upon all matters before it, whether legislative, ministerial, or, in the Lords' House, judicial.[2] Accordingly, a Lords' Committee of Privileges has even admitted an entry in their Journals as evidence of the limitations in a patent of peerage, without requiring the production of the patent;[3] a foreign declaration of war, transmitted by the British Ambassador to the Secretary of State's office, and produced by a clerk from that office, is sufficient evidence to prove the date of the commencement of hostilities between two foreign states.[4] How far *diplomatic correspondence* establishes the facts recited, does not in England clearly appear.[5] In America, such correspondence, communicated by the President to Congress, is sufficient proof of the acts of foreign governments and functionaries therein narrated;[6] and would seem to be there generally admissible, whenever the facts recited are not the principal points in issue, but are required to be proved, merely in order to support some introductory averment in the pleadings.[7]

§ 1662. The Government Gazette is, as already pointed out, at common law evidence of various acts of state, such as addresses received by the Crown, and the like.[8] But in regard to the acts of public functionaries, which have no relation, or only a slight relation, to the affairs of government,—such as the appointment of an officer to a commission in the army,[9] or the Queen's grant of land to a subject,[10]—the Gazette, unless rendered admissible by statute, cannot in general be read in evidence. Nevertheless, the Gazette is, by the Documentary Evidence Act, 1868,[11] as already pointed out,[12] primâ facie evidence of any proclamation, order,

[1] R. *v.* Francklin, 1731.
[2] Jones *v.* Randall, 1774; Root *v.* King, 1827 (Am.).
[3] Ld. Dufferin's case, 1837, H. L.; Saye and Sele Peer., 1848, H. L.
[4] Thellusson *v.* Cosling, 1803.
[5] See R. *v.* Francklin, 1731.
[6] Radcliffe *v.* Un. Ins. Co., 1810 (Am.); Talbot *v.* Seeman, 1801.
[7] Radcliffe *v.* Un. Ins. Co. (Am.), supra (Kent, C.J.).
[8] R. *v.* Holt, 1793; Att.-Gen. *v.* Theakstone, 1820; Pieton's case, 1806; Van Omeron *v.* Dowick, 1809; ante, § 15.
[9] R. *v.* Gardner, 1810 (Ld. Ellenborough); Kirwan *v.* Cockburn, 1805. But see now, by statute, ante, § 1638A.
[10] R. *v.* Holt, 1793 (Ld. Kenyon).
[11] 31 & 32 V. c. 37, § 5.
[12] Ante, § 1527.

or regulation issued by her Majesty, or by the Privy Council, or by any of the principal departments of the government.[1]

§ 1663. In one instance, at least, the Government Gazette has been made by statute "*sufficient proof*" of certain facts which are directed to be published in it.[2]

§§ 1663A—4. In some other cases the Gazette is, by statute, made conclusive evidence. The most important of such cases are enumerated in alphabetical order in the footnote.[3]

[1] 31 & 32 V. c. 37, § 2.

[2] See 29 & 30 V. c. 117, § 33; and 31 & 32 V. c. 59, § 29, Ir., cited ante, § 1611 n., title "*Reformatory Schools Act.*"

[3] Thus, as regards *Bank notes*, it is provided by the statutes 7 & 8 V. c. 32, § 15, and 8 & 9 V. c. 37, § 10, Ir., which respectively regulate the issue of bank notes in England and Ireland, and require the Commissioners of Stamps and Taxes to publish in the London and Dublin Gazettes respectively certificates containing certain particulars, that the Gazette in which such publication shall be made shall be conclusive evidence in all courts of the amount of bank notes which the banker named in the certificate is by law authorised to issue and have in circulation; the Irish Act adding, "exclusive of an amount equal to the monthly average amount of the gold and silver coin held by such banker as herein provided." *Bankruptcy proceedings* may, as already stated (ante, § 1549), be also conclusively proved by production of the copy of the Gazette in which they were published. Under "*The City of London Parochial Charities Act, 1883*" (46 & 47 V. c. 36, § 36), an Order in Council approving a scheme for the management of charity property, and duly gazetted, is conclusive that the scheme was one within the Act, and neither such scheme nor the order can be further questioned in any legal proceeding. Under "*The Extradition Act, 1870*" (see 33 & 34 V. c. 52), § 5, an Order in Council, on being published in the London Gazette, is made "conclusive evidence that the arrangement therein referred to complies with the requisitions of the Act, and that the Act applies in the case of the foreign State mentioned in the order." Again, similar provisions are contained in several statutes with regard to Ireland. Thus, by "*The County Boundaries (Ireland) Act, 1872*" (35 & 36 V. c. 48), § 3, the Dublin Gazette is conclusive evidence of any order published in it, which purports to have been made by the Lord Lieutenant in Council under the provisions of the Irish County Boundaries Acts. Under "*The General Prisons (Ireland) Act, 1877*" (40 & 41 V. c. 49, § 57, Ir.), all rules and special rules as to prisons (which are proved in England as shown ante, §§ 1527, 1595, and 1596–7, and notes, titles "Public Prisons,") may be conclusively proved by the production of a Dublin Gazette in which they have been published. Under "*The Lands Drainage (Ireland) Acts* of 1842, 1846, and 1847," respectively (being 5 & 6 V. c. 89, Ir.; 9 & 10 V. c. 4, Ir.; 10 & 11 V. c. 79, Ir.), by the last-mentioned Act (§ 4), final notices under such Acts may be conclusively proved by the production of the Dublin Gazette in which they are published. And under "*The Peace Preservation Acts*" for Ireland (19 & 20 V. c. 36, Ir.; 28 & 29 V. c. 118, Ir.; 38 V. c. 14, Ir.), the production of the Dublin Gazette, "purporting to be printed and published by the Queen's authority," and containing any proclamation, warrant, order, or notice under "The Irish Peace Preservation Acts," is made (by 28 & 29 V. c. 113, § 2; 34 & 35 V. c. 25, § 5; and see, also, "The Criminal Law and Procedure (Ireland) Act, 1887" (50 & 51 V. c. 20, especially § 12, subs. 3)) conclusive evidence of all the facts and circumstances necessary to authorise the issuing of any such instrument; and every such instrument shall be deemed in all courts to have been

§ 1665. Gazettes, even when they are not conclusive evidence, are, in common with all other *newspapers*, frequently offered in evidence with the view of fixing an adversary with *knowledge* of certain facts advertised therein; but here it is always advisable, and sometimes necessary,—unless the case is governed by a special Act of Parliament,—to furnish *some* evidence, from which the jury may infer that the party sought to be affected by the notice has read it. This doctrine applies even to cases where the notice published in the Gazette relates to some public matter, as, for instance, the blockade of a foreign port; for, although, as between nation and nation, the notification of a blockade may, from the moment it is made by one State to the government of another, bind all the subjects of the latter,[1] this rule will not extend to suits between private individuals. Therefore, where, in an action on a ship policy, the underwriters urged in defence, that the voyage was to a port which the master knew was blockaded, and that consequently the policy was void, the jury were held justified in negativing any knowledge on the part of the master, though it was proved that he was in this country some time after the publication of the Gazette in which the blockade was notified.[2]

§ 1666. A Gazette containing a *notice of dissolution of partnership* will, however, be admissible without any additional proof, as sufficient evidence that they were aware of it, against all persons who have had no previous dealings with the firm.[3] It will be admissible evidence to show that the partnership has been openly dissolved, even against persons who have had previous dealings with the firm, after formal proof of the actual dissolution, by producing the deed.[4] But to deprive the old correspondents of a firm of their right of action against a retiring partner, further evidence must be given than the mere production of the Gazette in which notice of dissolution has been inserted;[5] and if the defendant be not in a condition to prove that a circular was sent in due course to the plaintiff, he must at least show facts, from

issued in conformity with such Acts.

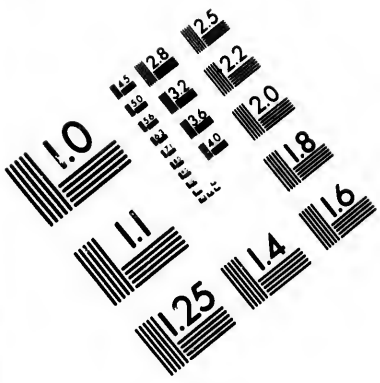
[1] The Neptunus, 1799 (Sir W. Scott); The Adelaide, 1799 (Id.).

[2] Harratt *v.* Wise, 1829.

[3] Godfrey *v.* Turnbull, 1795 (Ld. Kenyon); Newsome *v.* Coles, 1811 (Ld. Ellenborough); Wright *v.* Pulham, 1816; Hart *v.* Alexander, 1837 (Ld. Abinger).

[4] Hart *v.* Alexander, 1837 (Ld. Abinger).

[5] Graham *v.* Hope, 1793 (Ld. Kenyon).



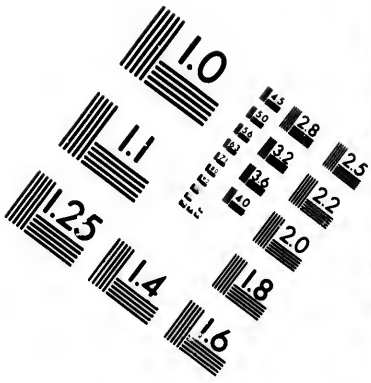
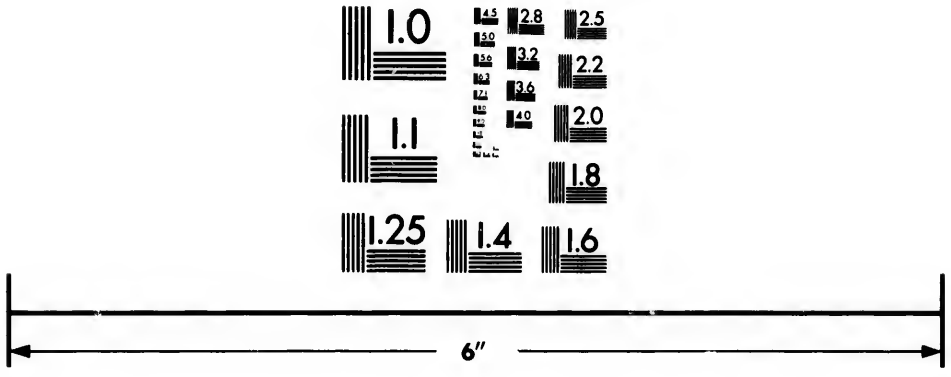
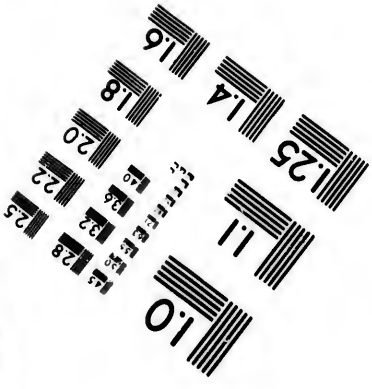


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

which an inference may be drawn that the plaintiff has seen the notice. This may be done in a variety of ways, as by proving that the plaintiff has been in the habit of taking in the Gazette or other newspaper, or has attended a reading-room where it was taken in, or has shown himself acquainted with other articles in the number containing the notice, or has evinced an unusual interest in the affairs of the partnership, and the like.[1] It seems not to be enough to prove that the newspaper was circulated in the immediate neighbourhood of the plaintiff's residence.[2]

§ 1667. The *admissibility and effect of judicial records* and documents must be considered in connection with this subject. The general principle is that the mere *existence of a judgment, its date, and its legal consequences* are conclusively proved, as against all the world, by the production of the record, or the proof of an examined copy, for a judgment being a public transaction of a solemn character, must be presumed to be faithfully recorded, but that it furnishes no proof whatever of *collateral* facts, even though as between the parties to such judgment themselves such facts must have been proved. On these principles, in an action for malicious prosecution, the record is only conclusive to establish the fact of acquittal[3]; a judgment against a master or principal for the negligence of his servant or agent, is, as against the servant or agent, nothing more than conclusive evidence of the fact, that the master or principal has been compelled to pay the amount of damages awarded[4]; and a judgment recovered against a surety will not be evidence on his behalf to show anything more than the amount which he has been compelled to pay for the prin-

[1] Godfrey *v.* Macauley, 1795; Jenkins *v.* Blizard, 1816 (Ld. Ellenborough); Hart *v.* Alexander, 1837; Leeson *v.* Holt, 1816. As to notices by carriers restricting their liability, see 11 G. 4 & 1 W. 4, c. 68 ("The Carriers Act, 1830"); Munn *v.* Baker, 1817; Rowley *v.* Horne, 1825. As to notices given by railway or canal companies in the Gazette, see 17 & 18 V. c. 31, § 7.

[2] Norwich and Lowestoft Navig. Co. *v.* Theobald, 1828 (Ld. Tenterden).

[3] Leggatt *v.* Tollervey, 1811. It is no evidence whatever that the defendant was the prosecutor—even though his name appear on the back of the bill (3 B. N. P. 14)—nor of either his malice, or the absence of reasonable and probable cause (Purcell *v.* Macnamara, 1808; Incledon *v.* Berry, 1805), nor does the verdict preclude defendant from proving that plaintiff was in truth guilty. (See B. N. P. 15).

[4] Green *v.* New River Co., 1792; Pritchard *v.* Hitchcock, 1843 (Creswell, J.); Tyler *v.* Ulmer, 1815 (Am.) (Parker, C.J.). But it is *not* evidence of the servant's misconduct. See id.

cipal debtor.[1] Similar principles are applicable to other cases where the party has a remedy over, as for contribution, or the like.[2] Thus, in an action against a surety, who set up the defence that the plaintiff had received certain moneys from the principal in satisfaction of his damages, on a traverse of this defence, the plaintiff was allowed to put in evidence a judgment recovered back from the plaintiff by the assignees of the principal for the very moneys which he was said to have received in satisfaction, as being money had to their use, not indeed as being conclusive against the surety, but as being explanatory of the whole transaction.[3]

§ 1668. Judgments inter alios are admissible as evidence where the *record is matter of inducement*, or merely introductory to other evidence. Thus, where it is proposed to discredit a witness, by proving that he gave different testimony on a former trial, the judgment in the former cause will (notwithstanding that the parties to it were strangers to the subsequent suit) be admissible for the purpose of *laying the foundation* for the evidence of the former statements.[4] Accordingly, upon an indictment for perjury committed on a trial of an action in the High Court, the production by the officer of the filed copy of the writ[5] and of the pleadings[6] will sufficiently prove the existence of the action;[7] if a party be indicted for aiding the escape of a felon from prison, the production of the record of conviction from the proper custody, will be conclusive evidence that the prisoner was convicted of the crime stated therein;[8] on an ejectment by an heir-at-law, who, to establish his legitimacy, had called his mother to prove her marriage before his birth, a statement by her on cross-examination, that she had never been before certain magistrates to affiliate her son, was allowed to be contradicted by the production of a bastardy order, which purported to have been made on her complaint in regard to the plaintiff by the magistrates in question;[9] in an action against a sheriff[10] for

[1] King *v.* Norman, 1847. And it furnishes no proof that plaintiff was legally liable to pay that amount owing to the principal's default. Id.

[2] Powell *v.* Layton, 1806 (Mansfield, C.J.); Kip *v.* Brigham, 1810 (Am.); Griffin *v.* Brown, 1824 (Am.).

[3] Pritchard *v.* Hitchcock, 1843.

[4] Charges *v.* Sherwin, 1698-9; Foster *v.* Shaw, 1821 (Am.).

[5] Filed under R. S. C. Ord. V. r. 7.

[6] Filed under R. S. C. Ord. XLI. r. 1.

[7] R. *v.* Scott, 1877.

[8] R. *v.* Shaw, 1823. A certificate of the conviction would also be evidence. See ante, §§ 1612–1614.

[9] Watson *v.* Little, 1860.

[10] A sheriff is no longer liable to

neglect in regard to an execution, it was usual to give in evidence judgments against third persons, to show the character in which the plaintiff claimed, and the amount of damage he had sustained[1]; if A. sue the sheriff for trespass to his goods, the latter may give in evidence a judgment against B., and show that he seized the goods by virtue of a fieri facias upon that judgment, and that the goods belonged to B[2]; a record,[3] where it constitutes one of the muniments of a party's title to land or goods,—as where a deed was made under a decree in Chancery,[4] or where goods were purchased at a sale made by a sheriff upon an execution,[5]—may be given in evidence against a party who is a stranger to it; and, in an action to recover lands, a decree in a suit between the defendant's father, and other persons unconnected with the plaintiff, which directed that defendant's father should be let into possession of the estate as his own property, is admissible, not, indeed, as proof of any of the facts therein stated, but to explain in what character the father, through whom defendant claimed, had taken possession of the estate.[6] Many other instances of the same principle might be given.

§ 1669. Adjudications are sometimes tendered in evidence for the purpose of *protecting* the magistrates who pronounced them, and the officers who enforced them, against an action of trespass. Here the rule of law is, that if the adjudication, when read in connexion with the other proceedings, shows, either expressly or by fair and necessary inference, that a judicial authority pronouncing it had jurisdiction over the subject-matter, it will furnish conclusive evidence of the truth of the facts stated in it, even if those facts are necessary to give such authority jurisdiction;[7] or, perhaps, the doctrine may be more correctly stated as being that the production of the judgment, and of the proceedings on which it is founded, will be a bar to all inquiry respecting the truth or

an action for an escape: 50 & 51 V. c. 55, § 16; 40 & 41 V. c. 49, § 43, Ir.

[1] Davies *v.* Lowndes, 1835 (Tindal, C.J.); Adams *v.* Balch, 1827 (Am.).

[2] 1 St. Ev. 255.

[3] Gr. Ev. § 539, as to three lines.

[4] Barr *v.* Gratz, 1819 (Am.).

[5] 1 St. Ev. 255; Witmer *v.* Schlatter, 1830 (Am.); Jackson *v.* Wood, 1829 (Am.); Fowler *v.* Savage, 1819 (Am.).

[6] Davies *v.* Lowndes, 1843.

[7] See and compare Taylor *v.* Clemson (Tindal, C.J., delivering the judgment of Ex. Ch.); Basten *v.* Carew, 1825 (Ld. Tenterden); Brittain *v.* Kinnaird, 1819 (Dallas, C.J., and Richardson, J.); Betts *v.* Bagley, 1832 (Am.) (Shaw, C.J.).

falsehood of those facts on the question which must have been in controversy before the adjudicating tribunal which are stated in it, and will conclusively establish the immunity of every person who has acted judicially with regard to such matters.[1] This doctrine is essential to the administration of the law,—since, without it, who would be found so bold as to act as a magistrate? It is even occasionally prayed in aid for the protection of judges of courts of record; for although by an excellent law of very great antiquity, no action will lie against such personages for an erroneous judgment, or for any other act done by them in the exercise of their judicial functions, and within the general scope of their jurisdiction,[2] the protection thus given does not extend to cases where a judge, either wilfully, or under a mistake not of fact but of law, acts wholly without jurisdiction.[3] But such doctrine is best illustrated by, and is usually applied to, cases in which justices of the peace are sued by parties who imagine themselves wronged by a conviction or order.

§ 1670. A leading authority[4] on this subject was an action of trespass against magistrates for taking and detaining a vessel which had been seized by them, as magistrates, under the now repealed Bum-boat Act,[5] in which the plaintiff sought to prove that such vessel was not a boat within the meaning of the Act; but was not permitted to do it, on the ground that the conviction was the only evidence of what the magistrates had determined and such conviction having been put in; and calling the vessel a boat was held to constitute a conclusive defence to the action. On a motion for a new trial, it was asked whether a justice could seize a seventy-four gun vessel, and then justify the legal detention by describing it in the conviction as a boat, to which the court answered that even supposing such a thing done, the conviction would still be conclusive, and the party would be without civil remedy, though so

[1] Aldridge *v.* Haines, 1831 (Parke, J.), 1 St. Ev. 255.

[2] Garnett *v.* Ferrand, 1827; Floyd *v.* Barker, 1607; Fray *v.* Blackburn, 1863; Scott *v.* Stansfield, 1868.

[3] Anderson *v.* Gorrie, (1894) C. A.; Houlden *v.* Smith, 1850. Calder *v.* Halket, 1839, P. C.

[4] Brittain *v.* Kinnaird, 1812. In Mould *v.* Williams, 1844, Coleridge, J., observed, "Brittain *v.* Kinnaird has been oftener recognised than almost any modern case." See Ayrton *v.* Abbott, 1849.

[5] 2 G. 3, c. 28; repealed by 2 & 3 V. c. 47 ("The Metropolitan Police Act, 1839"), § 24.

gross a decision would undoubtedly be good ground for a criminal proceeding against the justice;[1] Richardson, J., observing, "whether the vessel in question were a boat or not, was a fact on which the magistrate was to decide, and the fallacy is in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction. If a fact decided, as this has been, might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction."[2]

§ 1671. Further examples of the doctrine stated[3] and illustrated in the preceding paragraph are that where a justice, acting under the Highway Act, 1835,[4] issued an order for the removal of certain timber encumbering the highway, in an action for trespass brought against him by the owner of the timber, the plaintiff was allowed to prove, in contradiction to the order, that the place where the wood was lying was no part of the highway;[5] and also that where two magistrates were sued in trespass for having given the plaintiff's landlord possession of a farm as a deserted farm, under statutory powers, the production of the record of their proceedings setting forth the facts necessary to give them jurisdiction, was held conclusive, and the plaintiff was not permitted to prove that the farm was in fact not deserted.[6] Many other cases support the general proposition, that where (supposing the facts alleged to be true) a magistrate or other judicial personage has jurisdiction, his jurisdiction, and consequent immunity from an action, cannot be made to depend upon the truth or falsehood of those facts, or on the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them.[7]

§ 1672. It will, however, be noted that the doctrine under discussion[8] only *protects justices* and others who have acted in a *judicial* capacity. Therefore, at common law, in an action of trespass against magistrates for issuing a warrant of distress to enforce

[1] 1 B. & B. 438, 439; cited with approbation by Coleridge, J., in R. *v.* Buckinghamshire JJ., 1843.
[2] 1 B. & B. 442, cited by Ld. Denman as an admirable judgment in R. *v.* Bolton, 1841.
[3] Supra, § 1669.
[4] 5 & 6 W. 4, c. 50, § 73.
[5] Mould *v.* Williams, 1844.
[6] Basten *v.* Carew, 1825.
[7] Cave *v.* Mountain, 1840, cited with approbation in R. *v.* Bolton, 1841; In re Clarke, 1847; Anon., 1830; R. *v.* Walker, 1843 (Coltman, J.); Gray *v.* Cookson, 1812; R. *v.* Hickling, 1845.
[8] Set out supra, § 1669.

payment of a rate, they have no defence should the rate prove invalid; for the rate must be good in order to give them jurisdiction, but they cannot themselves give judicially any conclusive decision as to its validity, and consequently their warrant is not any evidence, still less conclusive evidence, of any fact on which the validity of the rate depends; and this whether the rate was a highway rate[1] or a borough rate, for which a warrant of distress has been issued.[2] As to distress warrants issued by justices to compel the payment of a poor-rate, it is provided that "where any poor-rate shall be made, allowed, and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the justice or justices who shall have granted such warrant, by reason of any irregularity or defect in the said rate, or by reason of such person not being liable to be rated therein."[3]

§ 1673. A judgment is often tendered in evidence, not merely to prove its existence and legal consequences, or to protect the party who pronounced it against legal proceedings, but also to *conclude an opponent* upon the *facts determined*. For this purpose, the rules which govern its effect will vary according to the nature of the judgment. If it be a *judgment in rem*, it will bind all persons whomsoever; and this too, probably, although it has not been pleaded.[4] If it be a *judgment inter partes*, it will, in general, bind only parties and privies thereto;[5] and even as against them, it will not, as it seems, be regarded as absolutely conclusive evidence, unless it be specially pleaded by way of estoppel.[6]

§ 1674. The best definition of a *judgment in rem* is that it is "an adjudication pronounced, as its name indeed denotes, upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose."[7] This definition would seem, however, to include convictions on criminal prosecutions, inquisitions

[1] Mould *v.* Williams, 1884 (Ld. Denman); Weaver *v.* Price, 1832; Morrell *v.* Martin, 1841 (Tindal, C.J.); Ld. Amherst *v.* Ld. Somers, 1788; Nicholls *v.* Walker, 1634.

[2] Fernley *v.* Worthington, 1840. See Newbould *v.* Coltman, 1851.

[3] 11 & 12 V. c. 44 ("The Justices Protection Act, 1848"), § 41.

[4] See 2 Smith, L. C. 854, 855; Hannaford *v.* Hunn, 1825 (Abbott, C.J.); Cammell *v.* Sewell, 1860; Magrath *v.* Hardy, 1838 (Tindal, C.J.).

[5] 2 Smith, L. C. 841.

[6] Ante, § 91; post, § 1684.

[7] 2 Smith, L. C. 838.

in lunacy, inquisitions post mortem, and several other species of judicial determinations, which, if they are judgments in rem at all, are at least not governed by the same rules of evidence as are generally applicable to adjudications of that nature. In general, a judgment in rem furnishes *conclusive* proof of the facts adjudicated, as well against *strangers* as against parties; but this rule does not extend either to criminal convictions, which are subject to the same rules of evidence as ordinary judgments inter partes,[1] or to inquisitions in lunacy, inquisitions post mortem, or other inquisitions, which though regarded as judgments in rem, so far as to be admissible in evidence of the facts determined against all mankind, are not considered as conclusive evidence.[2] An inquisition in lunacy, for instance,[3] though admissible against strangers, is not conclusive proof of what was the state of mind of the supposed lunatic at the time of the inquiry.[4] A similar rule also applies to most other inquisitions.[5]

§ 1675. For the reasons above appearing, the definition of a judgment in rem, which has just been given, cannot be considered as absolutely perfect. Yet it would be extremely difficult, if not impossible, to enunciate another which would be open to fewer

[1] R. *v.* Turner, 1832; R. *v.* Ratcliffe, 1832; R. *v.* Blakemore, 1852; Keable *v.* Payne, 1838; Blakemore *v.* Glamorg. Can. Co., 1835 (Parke, B., explaining Smith *v.* Rummens, 1807); and Hathaway *v.* Barrow, 1807. See post, § 1693.

[2] The Irish Society *v.* Bp. of Derry, 1846, H. L.

[3] See 53 V. c. 5 ("The Lunacy Act, 1890"), Part III.

[4] Faulder *v.* Silk, 1811 (Ld. Ellenborough); Hassard *v.* Smith, 1872 (Ir.); Dane *v.* Kirkwall, 1838 (Patteson, J.); Frank *v.* Frank, 1840; Sargeson *v.* Sealy, 1742; Bannatyne *v.* Bannatyne, 1852; Hume *v.* Burton, 1785, P. C.; Den *v.* Clark, 1828 (Am.); Hart *v.* Deamer, 1831 (Am.). See Prinsep and E. India Co. *v.* Dyce Sombre, 1856, P. C.; and the comparatively recent case of Roe v. Nix, 1892, as reported at Nisi Prius, Times Newspaper, 2nd December, 1892, and following days.

[5] Stokes *v.* Dawes, 1826 (Am.) (Story, J.). In Jones *v.* White, 1717, the court was divided as to whether a coroner's inquest, finding a person who had destroyed himself lunatic, was admissible at all as evidence of his insanity on an issue on that fact. An inquisition by a sheriff's jury, taken prior to "The Interpleader Act" (1 & 2 W. 4, c. 58), for the purpose of ascertaining to whom goods seized under a fi. fa. belonged, has been held wholly inadmissible, as not being an inquisition under the Queen's writ, but merely a proceeding by the sheriff of his own authority: Glossop *v.* Pole, 1814; Latkow *v.* Eamer, 1795. See Read *v.* Victoria St. and Pimlico Rail. Co., 1863; Horrocks *v.* Metropol. Rail. Co., 1863; Chapman *v.* Monmouths. Rail. and Can. Co., 1857; and R. *v.* Lond. & N. West. Rail. Co., 1854, as to the effect of an inquisition before a sheriff's jury under § 68 of "The Lands Clauses Consolidation Act, 1845" (8 & 9 V. c. 18).

objections. Without, therefore, attempting a hopeless task, such definition will be sufficient for all practical purposes, especially when supplemented by the list in the footnote.[1]

§ 1676. Judgments in rem are so far conclusive, not only against the parties who were the actual litigants in the cause, but against all others, that, unless it can be shown, either that the court had

[1] Judgments in rem include the following: — *Administration* grants (Bouchier *v.* Taylor, 1776; Prosser *v.* Wagner, 1856); *Admiralty* adjudications on the subject of prize (Le Caux *v.* Eden, 1781 (Buller, J.); Lindo *v.* Rodney, 1782 (Ld. Mansfield)), or for the enforcement of a maritime lien (The City of Mecca, 1880, the original action in which case was to recover damages for collision), and in some other proceedings in rem in the Court of Admiralty (see Harmer *v.* Bell, 1851; and see, also, Cammell *v.* Sewell, 1860; Simpson *v.* Fogo, 1860; Castrique *v.* Imrie, 1869; and Imrie *v.* Castrique, 1860 (Ex. Ch.), overruling Castrique *v.* Imrie, 1860); *Bankruptcy* adjudications (see post, § 1747); *Condemnations* of property as forfeited, whether such judgments were pronounced by the old Court of Exchequer (Geyer *v.* Aquilar, 1798 (Ld. Kenyon); Scott *v.* Shearman, 1775; Cooke *v.* Sholl, 1793), or now by the Queen's Bench Division on the Revenue side, or by the Commissioners or sub-commissioners of Excise, Inland Revenue (12 & 13 V. c. 1, § 3), or Customs (as to which latter, see Maingay *v.* Gahan, 1793 (Ex. Ch. Ir.). expressly overruling Henshaw *v.* Pleasance, 1777, a decision which, according to Fitzgibbon, C. (see Maingay *v.* Gahan, 1793), was reprobated by Ld. Mansfield in an undated case of Dixon *v.* Cock, and was frequently condemned by Lifford, C., while Roberts *v.* Fortune, 1742 (Lee, C J.); Terry *v.* Huntington, 1669; and Fuller *v.* Fotch, 1695, are also at variance with it); *Court-martial* sentences (see 2 Smith, L. C. 681; R. *v.* Suddis, 1801; Hannaford *v.* Hunn, 1825; Grant *v.* Gould, 1792); *Deprivation and Expulsion* sentences, whether delivered by the Spiritual Court, a visitor of a college (Phillips *v.* Bury, 1788 (Ld. Holt), as to which, see R. *v.* Grundon, 1775 (Ld. Mansfield)); "*The Legitimacy Declaration Act*, 1858": decrees made under that Act (21 & 22 V. c. 93), (as to which, see Shedden *v.* Att.-Gen., and Patrick, 1860); *Matrimonial suits* judgments, in which are included sentences of divorce a mensâ et thoro under the old law (R. *v.* Grundon, 1775; Day *v.* Spread, 1842 (Ir.)); decrees of judicial separation under the existing law (20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), §§ 7 and 16), decrees dissolving marriage (id. §§ 27 and 31), and also other decrees in matrimonial suits (Da Costa *v.* Villa Real, 1734; Bunting's case, 1585; Kenn's case, 1607; Perry *v.* Meadowcroft, 1846; Harrison *v.* Corp. of Southampton, 1853; but see Goodin *v.* Smith, 1831), provided that the status of the parties be affected thereby (Needham *v.* Bremner, 1866; Conradi *v.* Conradi, 1868), but not decrees in suits for jactitation of marriage, unless, perhaps, in cases where the defendant pleads a marriage, and the court decides on the truth of that plea (R. *v.* Duchess of Kingston, 1776); *Outlawry* judgments (Co. Lit. 352, b.), which in civil proceedings are now abolished by "The Civil Procedure Acts Repeal Act, 1879" (42 & 43 V. c. 59), § 3; *Probate* grants (Noel *v.* Wells, 1669; Allen *v.* Dundas, 1789); *Road* orders made by justices for dividing roads, under the Act of 34 G. 3, c. 64 (R. *v.* Hickling, 1845); and *Settlement* adjudications made by an order of justices, whether unappealed against (R. *v.* Kenilworth, 1788 (Buller, J.)), or confirmed by a Court of Quarter Sessions on appeal (R. *v.* Wick St Lawrence, 1833 (Ld. Denman)).

no jurisdiction,[1] or that the judgment was obtained by fraud or collusion,[2] no evidence can be generally admitted, at least, in any civil cause,[3] for the purpose of disproving the facts adjudicated. This rule rests partly upon the ground that every one who can possibly be affected by the decision has an opportunity of appearing and asserting his own rights, by becoming an actual party to the proceedings;[4] partly, upon the ground that judgments in rem not merely declare the status of the subject-matter adjudicated upon, but, ipso facto, render it such as they declare it to be;[5] and partly, perhaps (if not principally), upon the broad ground of public policy, that the social relations of every member of the community should not be left doubtful, but that, after having been once clearly defined by solemn adjudication, they should ever after remain at rest.

§ 1677. A judgment in rem is accordingly binding upon all the world as to the precise point directly decided, and cannot be impeached by showing that the facts on which it immediately rests are false. Yet, where these facts are themselves put directly in issue in a subsequent suit, the judgment does not,—with one exception, which will be presently mentioned,[6]—furnish *conclusive* evidence of their truth, however necessary it may have been for the court proceeding in rem to have determined that question before it adjudicated upon the principal point.[7] For instance, the Ecclesiastical Courts were not, and the existing Probate Division of the High Court is not, authorised to grant letters of administration, unless the intestate be *dead*. But such letters are not, in another court, conclusive evidence of the death.[8] But since

[1] Post, §§ 1714 et seq.

[2] R. *v.* Duch. of Kingston, 1776, H. L. See post, § 1713.

[3] As to the effect of judgments in rem in criminal trials, see post, § 1680.

[4] 1 St. Ev. 286. Yet this is not essential for the rule, since a sentence of nullity of marriage will be binding upon, and bastardize, a child of the parties, who at the time when the sentence was pronounced was en ventre sa mère: Perry *v.* Meddowcroft, 1846.

[5] 2 Sm. L. C. 829, 859.

[6] Post, § 1678.

[7] See Bailey *v.* Harris, 1849.

[8] See Thompson *v.* Donaldson, 1800; Moons *v.* De Bernales, 1856; French *v.* French, 1755. They even were, on one or two of the above occasions, held (sed qy.) not to be primâ facie evidence of the death. But the grant of probate by a foreign court of competent jurisdiction in the Probate Division in England raises a sufficient presumption of death for the English court to grant probate. See In the goods of Spenceley, 1892. And in an

probate cannot be granted until the Probate Division is satisfied of the genuineness of the will, the title of the executor, to whom probate has been granted, cannot be impeached in a civil court, by showing that the will was forged.[1] If, however, a party be indicted for forging a will, the probate of it will not be conclusive, if indeed it be primâ facie, evidence in his favour.[2] Neither will the production of a probate preclude a party from showing in a civil court, either that the testator was insane at the time when he executed the will,[3] or that his domicil was not then in England,[4] although, if the object of this evidence were to impeach the title of the executor, it would be inadmissible.[5]

§ 1678. An exception to the rule that a judgment in rem does not in general, in a subsequent and distinct action in a civil court, conclusively prove the truth of the facts on which such judgment in rem was founded, exists in cases where it appears on the face of the proceedings in rem that the very fact in dispute in the subsequent civil action was the one chiefly in dispute in the former suit, and that it was actually decided in such former proceedings. For if the same fact be again controverted between the *same parties*, or persons claiming under them,[6] whether in the same or in a different court, the judgment in rem will, almost universally,[7] be conclusive upon the question. For instance, if, in a suit for administration, the sole question be, which of two parties is next of kin to the intestate, the sentence of the Probate Division, declaring "that, as far as appears by the evidence, the defendant has proved himself next of kin," and directing that administration be granted to him as such, will, in a subsequent action between them for distribution, instituted in the Chancery Division, be conclusive evidence of the relative relationship of the parties.[8] The judgment in such a case

Irish court, where the question was whether a child had been born alive or dead, Sugden, L.C., held, that a grant of letters of administration to its effects was a fact from which, in the absence of evidence to the contrary, he was bound to presume that the child was born alive: Reilly *v.* Fitzgerald, 1843 (Ir.).

[1] Noel *v.* Wells, 1666-7.

[2] R. *v.* Buttery, 1818; R. *v.* Gibson, 1802 (Ld. Ellenborough, overruling R. *v.* Vincent, 1771-2).

[3] Marriot *v.* Marriot, 1725-6.

[4] Whicker *v.* Hume, 1858, H. L. (Ld. Cranworth); Bradford *v.* Young, 1884 (Pearson, J.).

[5] See cases in last two notes.

[6] See Spencer *v.* Williams, 1871.

[7] See post, § 1635.

[8] Barrs *v.* Jackson, 1845 (Ld. Lyndhurst); Bouchier *v.* Taylor, 1776; Doglioni *v.* Crispin, 1866, H. L.

would be equally conclusive on the parties, even if the question of kindred had been determined by the court as a point of law, not as a matter of fact.[1] On similar principles, the dismissal of a wife's petition for judicial separation charging cruelty, is a bar to a subsequent petition for a dissolution of the marriage charging the same cruelty coupled with adultery;[2] on appeal against an order removing three paupers as the children of A. and B., an order for the removal of "A. and *his wife* B." from the respondent to the appellant parish, which had been previously confirmed on appeal, was held to conclusively estop the appellants from showing that the children were illegitimate, in consequence of A. having committed bigamy in marrying B.;[3] and, in general, orders of removal unappealed against, or confirmed on appeal, are not merely evidence, but are conclusive, as to all the *facts mentioned* in them, which are *necessary steps* to the decision.[4]

§ 1679. If there be two judgments or orders which would be inconsistent if the same facts existed at the time when each of them was pronounced, the one which is founded upon the later state of facts will prevail.[5] In the case in which this was established, subsequently to an order having been made for the removal of a pauper and his wife and their six children, and confirmed on appeal, the Spiritual Court had declared the marriage of these paupers void as incestuous.[6] The Court of Queen's Bench decided that a *new state of facts* had arisen since the earlier order, inasmuch as the marriage which, when that was made, was only voidable, had since been declared by competent authority to be void.

§ 1680. A judgment in rem of a competent court is strong primâ facie evidence in a criminal case, on behalf of the person in whose favour such judgment was given: but it is not conclusive. Such a judgment was, indeed, at one time thought to be *conclusive* evidence in such person's favour, and it was considered that it could not be impeached even on the grounds of fraud or collusion.[7]

[1] Thomas *v.* Ketteriche, 1749 (Ld. Hardwicke, recognised by Ld. Lyndhurst in Barrs *v.* Jackson, 1845).
[2] Finney *v.* Finney, 1868.
[3] R. *v.* Woodchester, 1742-3; R. *v.* St. Mary, Lambeth, 1796.
[4] R. *v.* Wye, 1838 (Ld. Denman); R. *v.* Hartington, 1855.
[5] R. *v.* Wye, 1838.
[6] See now 5 & 6 W. 4, c. 54 ("The Marriage Act, 1835").
[7] See note to 2 Strange, 961, citing a case of Prudam *v.* Phillips, 1737-8.

Several old cases decided, for instance, that the probate of a will being produced from the proper court, afforded a conclusive defence against an indictment for forgery of that will;[1] and that a sentence of a competent ecclesiastical court as to whether a marriage had taken place or not, must be regarded as similarly conclusive.[2] In the latter half of the last century, however, the notorious Duchess of Kingston having succeeded in obtaining from a proper ecclesiastical court a sentence declaring a marriage, which was said to have been contracted by her in early life, to be invalid, triumphantly put it in evidence as being *conclusive* against the Crown, when she was subsequently indicted for committing bigamy by another marriage later in life. But in 1776, all the judges unanimously advised the House of Lords that the judgment in rem of a competent court, even if it be not impeachable on grounds of fraud or collusion, is not *conclusive* in a criminal case; and that even if it were otherwise conclusive, it might be impugned for fraud or collusion. This having been the very point for decision in the case, neither can the actual decision be doubted or disregarded, nor can any expressions of opinion as to the reasons for the conclusion established by the judgment be regarded as merely obiter dicta. The decision in the Duchess of Kingston's case no doubt overruled the earlier cases to which we have referred, so far as they were authorities for regarding a judgment in rem to be *conclusive* in a subsequent criminal case, and not to be liable to be impugned for fraud or collusion. Such decision was followed by Lord Ellenborough, some twenty-seven years later, in a case which arose at the Lancaster Summer Assizes, 1802,[3] when a man, who was indicted for forging a will, having tendered in evidence the probate of that will as establishing a defence to the indictment, it was held not to be conclusive, and the man was convicted; and a like conclusion was come to by nine of the judges, in a similar case, which arose some sixteen years later.[4] At first sight, however, the

[1] R. *v.* Vincent, 1720-1 (King, C.J.).

[2] Da Costa *v.* Villa Real, 1733-4.

[3] R. *v.* Gibson, 1802.

[4] R. *v.* Buttery, 1818. The general effect of this case would appear to be as stated in the text; but it, perhaps, may be contended that the case does not support the decision in the Duchess of Kingston's case, on the ground that the production of the probate would not be conclusive, even in a civil action in which it was not sought to dispute the title of the executor.

judgment in a much later case than any of these appears to be inconsistent with the Duchess of Kingston's case, as when, in 1845, the inhabitants of a parish were indicted for not repairing a road, an order of justices apportioning part of the locus in quo to the parish represented by the defendants for the purposes of repair, and made in pursuance of the statutory form for that purpose provided by a Highway Act then in force,[1] was held to be *conclusive* of the liability of the defendant parish to repair the locus in quo, and to prevent them from proving that it in fact was not within their parish.[2] But this last case appears entitled to no great weight, since, besides being apparently not in accord with the decision in the Duchess of Kingston's case, it assumes to follow the principle of the "Bumboat case," which has been already referred to on a previous page;[3] but the fact that the "Bumboat case" was an instance of a civil *action* and not of a criminal proceeding, was entirely overlooked.

§ 1681. No case, at any rate, has suggested that a previous judgment in rem deciding the substantial point again in issue, will not afford strong presumptive evidence in favour of the party for whose benefit it operates, or that if it be left unanswered, a jury will not, in the great majority of cases, certainly act upon it. At the same time, the majority of the cases previously referred to, as establishing a previous judgment in rem to be "conclusive" on a subsequent criminal trial, are for the most part only reported very shortly, and may probably be explained as instances in which a jury were, in *point of fact*, driven by the circumstances to a conclusion, which the language of the reporter is capable of being construed to have been a *conclusion of law* instead of, as it really was, a mere finding of fact, which had been rendered inevitable by the circumstances. Another case,[4] where on an indictment for an assault on a Cambridge undergraduate, by turning him out of the College garden, the production of a previous sentence of expulsion from the College by the College Visitor, was held to constitute a conclusive defence, may also be explained in the same way.

[1] Viz., 34 G. 3, c. 64.
[2] R. *v.* Hickling, 1845.
[3] Brittain *v.* Kinnaird, 1819, cited ante, § 1670.
[4] R. *v.* Grundon, 1775.

§ 1682. Judgments *inter partes*, or, as they are sometimes called, judgments *in personam*, are not,—with one exception,—admissible either for or against *strangers* in proof of the facts adjudicated.[1] They are not admissible against them, because it is an obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger, and over the conduct of which he could, therefore, have exercised no control; or, to express the same sentiments in technical language, res inter alios actæ alteri nocere non debent;[2] and they cannot be received in favour of strangers even as against a party thereto, because it is thought, with very questionable propriety, that a rule that they should afford any evidence might work injustice, unless its operation were *mutual*.[3]

§ 1683. The one *exception*, that judgments are not evidence against strangers, which has just been referred to, arises in the case of adjudications, such as verdicts, judgments, and others, upon subjects of a *public nature*,[4] like customs,[5] prescriptions,[6] tolls,[7] boundaries between parishes, counties, or manors,[8] rights of ferry,[9] liabilities to repair roads[10] or sea-walls,[11] moduses,[12] and similar things. In all cases of this nature, evidence of reputation being admissible, adjudications,—which for this purpose are regarded as a species of reputation,—will also be received, whether the parties in the second suit be those who litigated the first, or be utter strangers.[13] If the litigants in the second suit be strangers to the parties in the first, the judgment, however, will not be conclusive.[14] If the parties be the same to both suits the result of the first suit will, of course, bind them in the second.

§ 1684. A judgment inter partes is always,—save in one rare case, which will be mentioned in the next section,—admissible for

[1] See Shedden *v.* Att.-Gen. and Patrick, 1861.
[2] B. N. P. 232.
[3] Smith *v.* Rummens, 1807; Hathaway *v.* Barrow, 1807; Blakemore *v.* Glamorganshire, &c. Co., 1835 (Parke, B.); Co. Lit. 352a, cited and approved in Gaunt *v.* Wainman, 1836 (Tindal, C.J.); and in Doe *v.* Errington, 1839 (id.); ante, § 99. See, also, Greely *v.* Smith, 1846 (Am.).
[4] Mulholland *v.* Killen, 1874 (Ir.).
[5] Reed *v.* Jackson, 1801 (Ld. Kenyon); Berry *v.* Banner, 1792.
[6] Id.
[7] B. N. P. 233.
[8] Brisco *v.* Lomax, 1838; Evans *v.* Rees, 1839.
[9] Pim *v.* Curell, 1840; Hemphill *v.* M'Kenna, 1845 (Ir.).
[10] R. *v.* St. Pancras, 1794; R. *v.* Haughton, 1853.
[11] R. *v.* Leigh, 1840.
[12] Croughton *v.* Blake, 1843.
[13] Cases cited in last nine notes; ante, §§ 624—627.
[14] Reed *v.* Jackson, 1801; Croughton *v.* Blake, 1843.

or against *parties* or *privies*, where the same subject-matter is a second time in controversy between the same parties or persons claiming under them.[1] When it states a *debt* it is primâ facie evidence of such debt, but if there are circumstances of suspicion attending it, the court may require the person alleging it to prove such debt.[2] Probably, in no case will it be regarded as quite conclusive of the rights in dispute unless perhaps where it is pleaded as matter of estoppel;[3] but certainly it will furnish highly cogent evidence, which cannot be disregarded by a jury, excepting upon good and substantial grounds.[4] The conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom, that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination.

§ 1685. The one rare case referred to in the preceding section in which a judgment in a suit inter partes is not admissible in another suit against one who was a party to the original suit, arises in the unfrequent event of two suits being tried on principles which are different so far as relates to the admissibility of evidence. When this has occurred, the judgment obtained in the first suit, whether it be one inter partes or in rem, cannot be received as any evidence of the facts adjudicated thereby when they are again in dispute. For example, in a suit by a husband for dissolution of marriage on the ground of his wife's adultery, the wife could not, prior to the 9th of August, 1869,[5] in support of her answer charging cruelty and desertion, rely on a decree of judicial separation which she had already obtained on these grounds, after having been examined herself as a witness.[6] For in the second suit her

[1] Duch. of Kingston's case, 1776; B. N. P. 232; Ferrers *v.* Arden, 1599; Sopwith *v.* Sopwith, 1861; Houston *v.* Marquis of Sligo, 1885, C. A., showing the report of a judge in an Irish suit to be admissible.

[2] In re Tollemache, Ex parte Anderson, 1885.

[3] Ante, § 91, § 1673; Joly *v.* Swift, 1847 (Ir.); Nowlan *v.* Gibson, 1847, (Ir.) (Pigot, C.B.).

[4] Outram *v.* Morewood, 1803 (Ld. Ellenborough); R. *v.* Blakemore, 1852.

[5] When "The Evidence Further Amendment Act, 1869," 32 & 33 V. c. 68, passed. See ante, § 1355.

[6] Stoate *v.* Stoate, 1861; Bancroft *v.* Bancroft and Rumney, 1865. But in Sopwith *v.* Sopwith, 1861, the Judge Ordinary, while verbally recognising the exception as above stated, practically set it at nought. See, also, Bland *v.* Bland, 1866.

testimony was, under the old law, inadmissible; and to admit a decree which might have been obtained by the aid of such evidence, would in effect have been to admit the wife's evidence at second hand, and thus do indirectly what the law forbade to be done directly.

§ 1686. When the term "parties" is used in this connexion, the law includes under it *all* those as "*parties*" who are *individually named in the record*, and consequently entitled to prosecute or defend the cause, to adduce testimony, to cross-examine witnesses called on the other side, and to appeal from the judgment, should an appeal be allowable by law.[1] Even a party, sued as the public officer of a corporation, is amenable to this rule, though the judgment relied on was obtained en autre droit.[2] However, a prochein amy or next friend is not such a party, being considered simply as a person appointed by the court to look after the interests of the infant or lunatic, and to manage the suit for him.[3] But the infant himself is in such cases a party, and consequently bound by the judgment in any action brought in his name by any duly appointed prochein amy, even though the suit may have been instituted and conducted without his authority or knowledge.[4] Neither will the law, in such a case, recognise any distinction between infants of tender and of mature years. Therefore, where the wife of a minor committed adultery, whilst her husband was abroad in the East Indies, and his father, having procured himself to be appointed prochein amy, without his knowledge, commenced an action of crim. con. in the son's name, it was held that the son would be bound by the judgment in this action.[5] Generally, however, a person sui juris who has been made a party to a suit without his knowledge or consent, will not be bound by the proceedings. Therefore, if a plaintiff, instead of serving a defendant with process, thinks fit to accept the appearance of an unauthorised solicitor for him, he runs the risk of having the judgment subsequently set aside as irregular, with costs;[6] and a debtor, who, on action brought against him, pays his debt to a solicitor who was

[1] Duch. of Kingston's case, 1776.
[2] Spencer *v.* Thompson, 1856 (Ir.).
[3] Sinclair *v.* Sinclair, 1845; Vivian *v.* Little, 1883.
[4] Morgan *v.* Thorne, 1841.
[5] Id.
[6] Bayley *v.* Buckland, 1847.

suing him in the name, but without the authority, of the creditor, will not be thereby discharged,[1]—though the court will, on application by the debtor, stay an action brought without the authority of the plaintiff, and will compel the solicitor who has brought it to pay the costs incurred in the defence.[2]

§ 1687. Whether the term *parties* will also include persons not named in the record, but in *whose immediate and individual behalf the action has been brought or defended*, admits of some doubt. In an old case,[3] where an action was brought to recover penalties from a servant of one Cotton for fishing in the plaintiff's fishery, and the plaintiff produced no proof in support of his right to the fishery other than the record of a verdict and judgment recovered by him against another servant of Cotton, in a former action for a trespass committed on the same fishery, and both in the former action and in that then before the court the defendants had justified as servants acting by the orders of their master, who claimed a right to the fishery in question, Perryn, B., at Nisi Prius, considering Cotton as the real defendant in both actions, held the record to be conclusive, and directed the jury to find for the plaintiff.[4] A new trial was, however, subsequently granted, the court[5] intimating that the record, though admissible evidence, was not conclusive. Lord Ellenborough, too, in a well-considered judgment,[6] expressed astonishment that an estoppel in such a case could ever have been supposed possible; and (in the shape of a doubt) intimated a tolerably clear opinion that the record was wholly inadmissible, as the defendant was no party to the former action.

§ 1688. Nevertheless, under the old law of ejectment (and it was probably on a supposed analogy to this principle that the decision of Perryn, B., at Nisi Prius, in the case just cited, was founded), the lessor of the plaintiff and the tenant in possession were regarded as having been the real parties. Consequently, any judgment in such a case, whether upon verdict, or by default against the casual

[1] Robson *v.* Eaton, 1785.
[2] Hubbart *v.* Phillips, 1845.
[3] Kinnersley *v.* Orpe, 1780.
[4] In Simpson *v.* Pickering, 1834, Alderson, B., says obiter, "Kinnersley *v.* Orpe shows that the verdict may be given in evidence where the parties are *really* the same." See, also, 2 Ph. Ev. 9; and Doe *v.* E. of Derby, 1834 (Littledale, J.).
[5] Buller, J., being a member of it.
[6] In Outram *v.* Morewood, 1803. See Case *v.* Reeve, 1817 (Am.).

ejector, would be cogent, if not conclusive, evidence in any subsequent action to recover land between the same parties, brought respecting the same property.[1] So, in replevin, the landlord, or other person, in whose right a defendant has made cognizance, has been held to be a party to that suit.[2] It would certainly be convenient and reasonable if the rule,—in conformity with that which governs admissions,[3]—were extended to all persons who were *substantially* parties to the former action. Indeed, it is thought that, notwithstanding the absence of direct authority, the courts would now determine in favour of such extension, and the more so, as the rule undoubtedly applies to every person who claims under, or in privity with, the original parties.

§ 1689.[4] The term *privity* denotes mutual or successive relationship to the same rights of property; and the reason why persons standing in this relation to a litigant can rely upon, and are bound by, the proceedings to which he has been a party, is, that they are identified with him in interest.[5] Hence all privies, whether in blood, in estate, or in law, are estopped themselves, and can estop others, from litigating that which would be conclusive either against or in favour of him with whom they are in privity.[6] Thus, where a general right has been fairly contested, and established against a representative class, persons included in the class represented, though not actual parties to the suit, will be still bound by the decision.[7] Consequently, a verdict and judgment for or against the ancestor may be pleaded in bar, or will furnish cogent evidence, for or against the heir, the tenant in dower, the tenant by the curtesy, the legatee, the devisee, or any other person claiming under the ancestor;[8] if several successive remainders are limited in the same deed, a judgment for one remainderman is evidence for the next in succession;[9] a judgment of ouster in a

[1] Doe *v.* Huddart, 1835; Doe *v.* Seaton, 1835; Wright *v.* Doe d. Tatham, 1835; Doe *v.* Wellsman, 1848; Armstrong *v.* Norton, 1839 (Ir.); Aslin *v.* Parkin, 1758; Nowlan *v.* Gibson, 1847 (Ir.); Litchfield *v.* Ready, 1850; Matthew *v.* Osborne, 1853; Doe *v.* Challis, 1851. See post, § 1696.

[2] Hancock *v.* Welsh, 1816.

[3] Ante, § 756.

[4] Gr. Ev. in part, as to first eight lines.

[5] Ante, § 90, § 787.

[6] Ante, § 90.

[7] Comm. of Sewers of London *v.* Gellatly, 1876 (Jessel, M.R.).

[8] Lock *v.* Norborne, 1687; Outram *v.* Morewood, 1803; Whittaker *v.* Jackson, 1864.

[9] Pyke *v.* Crouch, 1696; Doe *v.* Tyler, 1830.

quo warranto, against the incumbent of an office, is conclusive against those who derive their title to office under him;[1] the conviction of a former owner of lands on an indictment for non-repair of a road ratione tenuræ, is cogent, if not conclusive, evidence of liability to repair, as against a subsequent purchaser of the same lands;[2] an executor or administrator will be bound by a verdict recovered against the testator or intestate;[3] a trustee in bankruptcy by a judgment against the bankrupt;[4] a husband and wife by a verdict recovered against the wife before her marriage;[5] and the same as to all grantees, mortgagees, and assignees, whose title has accrued *since* the judgment was pronounced.[6]

§ 1690. On the same principle, where a man brought an action against several persons for diverting water from his works, and had judgment; and afterwards he *and another* sued the same defendants for a similar injury to the same works; the former judgment was held cogent evidence for the plaintiffs, whose privity in estate with the former plaintiff was presumed from the fact that they were in possession of the property.[7]

§ 1691. In all the instances of privity above given, the privy has claimed, or been liable, *under or through* the original party; but the same rules of law apply, where two or more persons are subject to a *joint* or *concurrent* liability. For instance, if one be sued alone upon a *joint* note, debt, or tort, the judgment against him, even *without satisfaction*, may be pleaded and proved in bar of a second suit for the *same cause* of action,[8] whether brought against the other debtor or wrong-doer, or against the joint

[1] R. *v.* May. of York, 1792; R. *v.* Hebden, 1738-9.

[2] R. *v.* Blakemore, 1832.

[3] R. *v.* Hebden, 1738.

[4] In re Tollemache, Ex parte Anderson, 1885.

[5] Outram *v.* Morewood, 1803. But see 33 & 34 V. c. 93 ("The Married Women's Property Act, 1870"), § 12; and 37 & 38 V. c. 50 ("The Married Women's Property Act (1870) Amendment Act, 1874"), §§ 1 and 2. Where the parties married between 9th August, 1870, and 30th July, 1874, the former Act protects the husband from liability "for the debts of his wife contracted before marriage" (see Conlon *v.* Moore, 1875 (Ir.)), and renders the wife responsible for such debts. Where the parties married since the last-named date, 37 & 38 V. c. 50 has again imposed on the husband a limited liability, in the event of his wife having brought him any fortune. As to their respective rights and liabilities, where the parties have married since 31st December, 1882, see, also, 45 & 46 V. c. 75 ("The Married Women's Property Act, 1882"), §§ 14, 15.

[6] Doe *v.* E. of Derby, 1834 (Littledale, J.); Doe *v.* Webber, 1834; Adams *v.* Barnes, 1821 (Am.).

[7] Blakemore *v.* Glamorg. &c. Co., 1835; Strutt *v.* Bovingdon, 1803 (Ld. Ellenborough).

[8] See Brinsmead *v.* Harrison, 1871.

debtors or wrong-doers. The original cause of action has been changed into matter of record, which is of a higher nature, and the inferior remedy is thus merged in the higher.[1] Thus, where a party, having concurrent, that is, joint and several remedies against several persons, has obtained judgment against one, he, if the damages have been received, will certainly,[2] and, even if the judgment has not been satisfied, will probably,[2] be estopped from proceeding against the others, for, otherwise, he might recover damages twice over for the same thing, which would be repugnant to natural justice;[3] and in an action on a joint contract or trespass against two defendants, one of them may possibly be allowed to plead the pendency of another action against him for the same cause.[4] But if A. be sued on a contract, the pendency of an action against B. for the same cause cannot be pleaded, for in such case A. is not twice vexed; and, therefore, his proper course is either to plead the non-joinder of B., if B. is within the jurisdiction, or to apply to the court for a stay or consolidation of proceedings.[5]

§ 1692. Upon somewhat similar principles, any payment made by, or execution levied upon, a garnishee under any proceeding for the attachment of debts owing or accruing from him to a judgment debtor is made a valid discharge to the garnishee as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside or the judgment reversed.[6]

[1] King *v.* Hoare, 1844; Kendall *v.* Hamilton, 1879, H. L.; Lechmere *v.* Fletcher, 1833 (Bayley. B.); Broome *v.* Wootton, 1606; Ward *v.* Johnson, 1807 (Am.); overruling dictum (Ld. Tenterden) in Watters *v.* Smith, 1831.

[2] Buckland *v.* Johnson, 1854. See Phillips *v.* Ward, 1863.

[3] Bird *v.* Randall, 1762; recognised in Cooper *v.* Shepherd, 1846; King *v.* Hoare, 1844 (Parke, B.); Lechmere *v.* Fletcher, 1833 (Bayley, B.); U. S. *v.* Cushman, 1836 (Am.) (Story, J.); Farwell *v.* Hibbard, 1825 (Am.). See Godson *v.* Smith, 1818.

[4] E. of Bedford *v.* Bp. of Exeter, 1616-17; Rawlinson *v.* Oriel, 1688; Henry *v.* Goldney, 1846 (Alderson, B.). Formerly this was done by a plea in abatement; but such pleas are now abolished: R. S. C. 1883, Ord. XXI. r. 20.

[5] Henry *v.* Goldney, 1846; overruling dictum (Ld. Ellenborough) in Boyce *v.* Douglas, 1807. In Newton *v.* Blunt, 1846, two actions having been brought against two joint-contractors in respect of the same demand, and the debt and costs in one having been paid, it was held that a judge at chambers might stay the proceedings in the other without costs.

[6] R. S. C. Ord. XLV. r. 7; 17 & 18 V. c. 125, § 65, which, although repealed generally, is still applicable to the County Courts by Order in Council of 18 Nov. 1867. See Cy. Ct. R. O. & F. of 1892, Form 156,

§ 1693. Judgments inter partes being generally rejected as evidence either for or against *strangers* to prove the facts adjudicated, a *judgment in a criminal prosecution*,—unless admissible as evidence in the nature of reputation,[1] or, taken in conjunction with the prosecution, as an act of ownership,[2]—cannot be received in a civil action, to establish the truth of the facts on which it was rendered;[3] and a judgment in a civil action, or an award,[4] cannot be given in evidence for such a purpose in a criminal prosecution.[5] Again, a verdict for or against a tenant for life, will not be evidence for or against the reversioner, because the reversioner does not claim through the tenant for life, but enjoys an independent title.[6] So, a judgment obtained by or against a lessee, cannot, it is submitted,—notwithstanding some authorities to the contrary,[7]—be made available in a subsequent action by or against the lessor.[8] On the same principle, the record of the conviction of a principal cannot be received as any proof of his guilt on the trial of a subsequent indictment against the accessory.[9] But where, on an indictment for receiving stolen goods, a witness for the Crown who had said that he was the principal and had stolen the goods, admitted on cross-examination that he had been acquitted of the theft, the Irish judges held, that his acquittal, though not con-

and also C. C. R. of 1892, O. XXVIA, and Randall *v.* Lithgow, 1884. The same principle applies, even by common law, in the Mayor's Court: Westoby *v.* Day, 1853. See, also, Matthey *v.* Wiseman, 1865.

[1] See Petrie *v.* Nuttall, 1856; ante, § 624.

[2] Brew *v.* Haren, 1877 (Ir.).

[3] Smith *v.* Rummens, 1807; Hathaway *v.* Barrow, 1807, both explained (Parke, B.) in Blakemore *v.* Glamorganshire Can. Co., 1835, as reported 2 C. M. & R. 139; Justice *v.* Gosling, 1852; Jones *v.* White, 1717-18 (Eyre and Pratt, JJ.); B. N. P. 233; Hillyard *v.* Grantham, cited (Ld. Hardwicke) in Brownsword *v.* Edwards, 1750; Gibson *v.* M'Carty, 1736; Helsham *v.* Blackwood, 1851; Wilkinson *v.* Gordon, 1824 (Sir J. Nicholl); Jameson *v.* Leitch, 1842 (Ir.). See, also, 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 86, cited ante, § 1455.

[4] R. *v.* Fontaine Moreau, 1848.

[5] See § 1680, supra, and R. *v.* Duch. of Kingston, 1776; Acta facta in causâ civili non probant in causâ criminali. Masc. de Prob. Concl. 34.

[6] B. N. P. 232. See ante, §§ 757, 758.

[7] Com. Dig. Ev. A. 5; 2 Ph. Ev. 13. The passage in Comyn seems to apply to the old action of ejectione firmæ.

[8] Wenman *v.* Mackenzie, 1855; Rees *v.* Walters, 1838; Rushworth *v.* Countess of Pembroke, 1668. See ante, § 789.

[9] See R. *v.* Turner, 1832; R. *v.* Ratcliffe, 1832 (Parke, J.); Keable *v.* Payne, 1838 (Patteson, J.); R. *v.* Smith, 1783; which do not, indeed, directly establish the proposition in the text. But its soundness is clear on principle, unless a conviction be a judgment in rem, which it is submitted it is not.

clusive, was a fact which it was right to leave to the jury, together with the fact of his subsequent statement in court.[1]

§ 1694.[2] A record is, however, sometimes admitted in evidence, in favour of a stranger against one of the parties, as containing a *solemn admission* by such party in a judicial proceeding, with respect to a certain fact. But this is no real exception to the rule requiring mutuality, because, in such cases as these, the record is admitted, not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs.[3] Thus, in an action brought by the owner of lost goods against a carrier, the record in an action of trover previously brought by the same carrier against a person to whom he had misdelivered such goods, was held admissible, as amounting to a confession, by the carrier, in a court of record, that he had had the goods;[4] and a record of judgment in a criminal case, upon a *plea of guilty*, is admissible in a civil action against the party, as a solemn judicial confession of the fact.[5]

§ 1695. A judgment, to bind parties and privies, must have *directly decided the point* which is *in issue* in the *second action*;[6] and therefore, whenever it is pleaded by way of estoppel, or is offered in evidence, the question of the identity of the question in issue in it, and in the then present cause of action, must be determined by the Judge, or, if the facts are disputed, by the jury, upon the evidence. For the purpose of determining it, not only may the pleading in the former action be looked at,[7] but the actual words of the judgment may be proved by a shorthand note, verified by the affidavit,[8] either of the shorthand writer who took it, or, where such person is dead, of some one employed in the suit who can

[1] R. *v.* M'Cue, 1831 (Ir.).
[2] Gr. Ev. § 527 a, in part.
[3] Ante, §§ 772, 783, 821.
[4] Tiley *v.* Cowling, 1701 (Holt, C.J.); Robinson *v.* Swett, 1825 (Am.).
[5] Anon., 1808 (Wood, B.), cited 2 Ph. Ev. 29; R. *v.* Fontaine Moreau, 1848 (Ld. Denman); Bradley *v.* Bradley, 1834 (Am.).
[6] Ricardo *v.* Garcias, 1845, H. L.; Bainbrigge *v.* Baddeley, 1847; Toulmin *v.* Copland, 1848; Hunter *v.* Stewart, 1861; Langmead *v.* Maple, 1865; Moss *v.* Anglo-Egyptian Navig. Co., 1865; Dolphin *v.* Aylward, 1864 (Ir.); Flitters *v.* Allfrey, 1874.
[7] Hunter *v.* Stewart, 1861.
[8] Houston *v.* Marquis of Sligo, 1885, C. A.

verify the correctness of the note.[1] This question of the identity of the subject-matter of the dispute in each of the two controversies, however, always requires careful consideration; but if the questions in dispute are really the same it, on the one hand, is not necessary that the actions should be in the same *form*,[2] and on the other hand, it is not sufficient that the *writs* be *identical*, if the issues raised by the pleadings are different.

§ 1696.[3] Such being the broad rules, a recovery in an action for trespass against one who has wrongfully taken another's horse and sold it, and applied the money to his own use, is a bar to a subsequent action against the same person for the money received, or for the price, since the causes of action would be substantially the same;[4] if two wrong-doers jointly convert goods to their own use by selling them, a judgment in trover recovered against one constitutes a bar to a subsequent action against the other for money had and received—and this, even though the proceeds of the sale exceeded the amount of the damages awarded in the first action;[5] a verdict for the defendant in trover, on a plea denying the plaintiff's title to goods, is a bar to an action for the money arising from the sale of them, since here again, in both these actions, the same question of property must necessarily arise;[6] the recovery of judgment in replevin is a bar to an action of trespass in respect of the same taking of the same goods—since, although the damages actually recovered in replevin are usually assessed at the cost of the replevin bond, no law exists to deprive the plaintiff of the right to recover special damages in that form of action;[7] and a judgment in favour of a farmer in an action brought against him in the county court by a servant, for discharging such servant without reasonable cause, is a bar to a subsequent summons before justices against him to there recover the servant's wages—and this

[1] De Mora *v.* Concha, 1885, C. A.

[2] Krishna, &c. *v.* Brojeswari, &c., 1875, P. C. See, also, Symons *v.* Rees, 1876; Priestman *v.* Thomas, 1884, C. A.

[3] Gr. Ev. § 532, as to first five lines.

[4] 17 Pick. 13 (Am.) (Putnam, J.); Young *v.* Black, 1813 (Am.); Livermore *v.* Herschell, 1825 (Am.). Whether parol evidence would be admissible in such case to prove that the damages awarded in trespass were given merely for the tortious taking, without including the value of the goods, to which no evidence had been offered, quære; and see Loomis *v.* Green, 1831 (Am.).

[5] Buckland *v.* Johnson, 1854.

[6] Hitchin *v.* Campbell, 1771-2.

[7] Gibbs *v.* Cruikshank, 1873.

though the jurisdiction of the two courts is totally distinct, and the claim made in the one be different from that preferred in the other.[1] It is, however, doubtful whether in an action for mesne profits, in which the defendant relies on non-possession by the plaintiff, the latter may reply, by way of estoppel, a judgment for the recovery of land in his favour, obtained either by verdict or by default, and whether it has or has not been followed by the issue and execution of a writ of possession.[2] On the principle that, where the question raised in a second action is substantially the same as that which was raised in a previous one, the parties are bound by the result of the first action, a finding in previous proceedings in the County Court that a tenancy is yearly, estops every party to such proceeding from subsequently asserting, in an action in the High Court, that such tenancy is weekly;[3] in an action of replevin, if those claiming the goods deny that they were tenants to the landlord, a verdict against them binds them to admit the tenancy in a subsequent action against them for rent of the same premises;[4] and, under the usury laws,[5] a verdict of acquittal in an action for penalties for usury on the same bond, between the same parties, was evidence for the plaintiff on a defence alleging usury.[6] Moreover, a party who has either obtained a decree for a *divorce*, or whose suit for that purpose has been dismissed, cannot afterwards maintain a fresh suit for mere *judicial separation* on the same grounds.[7]

§ 1697. On the other hand, where the questions substantially in dispute in the two actions are not identical, the finding in the first action will have no effect on the second. Thus, the recovery of damages for injury to plaintiff's carriage through defendant's negligent driving, will not bar any second action

[1] Routledge *v.* Hislop, 1860. But see Hindley *v.* Haslam, 1878.

[2] See Wilkinson *v.* Kirby, 1854; and, also, Pearse *v.* Coaker, 1869; and Kenna *v.* Nugent, 1873 (Ir.), as to whether a judgment by default in ejectment is an estoppel, and, in an action for mesne profits, conclusive as to the time at which the plaintiff's title accrued. See, also, ante, § 1688.

[3] Flitters *v.* Allfrey, 1874.

[4] Hancock *v.* Welsh, 1816.

[5] Repealed by 17 & 18 V. c. 90, which came into operation 10th August, 1854.

[6] Cleve *v.* Powel, 1832 (Ld. Denman). For other examples, see Whittaker *v.* Jackson, 1864; Newington *v.* Levy, 1870.

[7] Ciocci *v.* Ciocci, 1860 (Cresswell, J.O.). See Green *v.* Green, 1873; and Evans *v.* Evans and Robinson, 1858.

claiming compensation for personal injuries caused by the same accident,—for the plaintiff, although he may have had an opportunity of recovering in the first action the damages claimed in the second, was not obliged to avail himself of it, but, in strict law, was entitled to discriminate between the damage done to his property, and that done to his person, and to treat each injury as a separate and distinct cause of action;[1] the prior recovery of damages in an action for false imprisonment, cannot be pleaded in bar to a subsequent action for malicious prosecution, even where, on the first trial, the jury were wrongly directed to take into their consideration the malicious conduct of the defendant;[2] a judgment recovered by a widow for compensation, *under Lord Campbell's Act*,[3] for the death of her husband, will not be a bar to a subsequent action by her, *as his administratrix*, to recover damages from the same defendants for an injury caused by the same accident to his personal property;[4] and where damage has been done by collision at sea, a proceeding in rem in the Admiralty Division will not be any bar to a proceeding in personam in the Queen's Bench Division.[5] However, in an action for detention of goods a verdict for the defendant on a defence setting up an authorised sale, will not prevent him from being liable to the plaintiff for the proceeds of the sale in an action for money had and received;[6] in an action for obst. acting a watercourse, where the plaintiff obtains a verdict on a defence denying the obstruction, the defendant is not thereby precluded from disputing the plaintiff's right to the watercourse in a second action;[7] and a tenant, sued for rent, who allows judgment to go by default, is not thereby estopped, in an action for subsequent rent, from pleading a defence, which, if pleaded in the first action, would have barred the then claim.[8]

§ 1698. On the same principle, if in an action for trespassing on

[1] Brunsden *v.* Humphrey, 1884, C. A.

[2] Guest *v.* Warren, 1854.

[3] 9 & 10 V. c. 93; 27 & 28 V. c. 95.

[4] Barnett *v.* Lucas, 1872 (Ir. Ex. Ch.).

[5] Nelson *v.* Couch, 1863; The Bengal, 1859; The John and Mary, 1859; Harmer *v.* Bell, 1851, P. C.

[6] Hitchin *v.* Campbell, 1771; as explained in Buckland *v.* Johnson 1854.

[7] Evelyn *v.* Haynes, 1782 (Ld. Mansfield); cited and explained (Ld. Ellenborough) in Outram *v.* Morewood, 1803.

[8] Howlett *v.* Tarte, 1861. See another illustration, Hall *v.* Levy, 1875.

a close, however described, the defendant states that the spot then in dispute is his own freehold, and obtains a verdict, this record will not estop the plaintiff from bringing a second action for a trespass committed on the same close, unless, indeed, it were proved (by the particulars or otherwise) that the trespasses alleged in each action were committed on the same spot; for otherwise, for all that appears, the defendant may not in the first action have proved his title to the *whole* close, but may have rested satisfied with showing that the *part* on which the trespass was committed belonged to him, so that the effect of the record in the first action in a subsequent action is only to prove that *some* part of the close was the defendant's property;[1] and where a defendant was *indicted* for causing a *nuisance* by keeping furnaces, his former *summary conviction* by justices *for an offence against a Smoke Consumption Act*, committed at the same place and in the course of the same trade, was rejected, as the statutable offence was not, of necessity, the doing any act which would constitute an indictable nuisance at common law.[2]

§ 1699. A judgment is, however, conclusive *inter partes* irrespectively of whether the plaintiff in the second action was the plaintiff or defendant in the first, provided the *point in dispute* be *the same* in both suits. Therefore, a verdict negativing any right which a defendant sets up in his defence, will estop him from asserting that right as plaintiff in a subsequent action against his former opponent;[3] if, to an action for a breach of contract, the defendant relies on a set-off or counterclaim, and the issue thereon is found against him, he cannot afterwards sue the plaintiff for the demand specified in that statement of defence;[4] and if in an action for goods sold and delivered with a warranty, or for work and labour done, or for goods supplied, under a contract, the defendant elect (as he may do) to show how much less the subject-matter of the action was worth, by reason of a breach of the warranty or contract, he will be considered as having recovered satisfaction for the breach, to the extent that he obtained, or was, after such

[1] Smith *v.* Royston, 1841 (Alderson, B.). See Whittaker *v.* Jackson, 1864.

[2] R. *v.* Fairie, 1857.

[3] 2 Smith, L. C. 666.

[4] Eastmure *v.* Laws, 1839. See Stanton *v.* Styles, 1850.

election, capable of obtaining, an abatement of price on its account, and will to that extent (but no further) be precluded from recovering in another action.[1]

§ 1700. Care must, however, be taken to distinguish between cases where the points in issue are *identical*, and those where both suits *merely relate to the same transaction or property*. In the latter case the recovery of a verdict by the plaintiff in one action will not estop the defendant from bringing a subsequent action against him. Thus, if the purchaser of articles, on being sued for the stipulated price, pays it into court, and it is accepted in satisfaction of the cause of action, he is not estopped from suing the maker for damages (if otherwise recoverable) arising from the construction of the articles.[2] He was not bound (though he might have done so) to claim these in the first action, and having omitted to do so, has a perfect right to maintain a separate action for the damage.[3] Moreover, in running down cases, it frequently happens that both parties commence proceedings against each other; but a verdict on the first trial is not necessarily (it depends on the pleadings) evidence on the second,[4] and it sometimes happens that different juries find verdicts in favour of both plaintiffs.[5]

§ 1701. A convenient and safe *test* for ascertaining whether or not the judgment in one action should be a bar to another, is to consider *whether the same evidence would or would not sustain both*;[6]

[1] Mondel *v.* Steel, 1841. See Thornton *v.* Place, 1832.

[2] Rigge *v.* Burbidge, 1846.

[3] Davis *v.* Hedges, 1871.

[4] See The Calypso, 1856.

[5] In a case of collision, in the old Court of Admiralty, where cross actions had been brought, Dr. Lushington,—after observing that the records of that court showed that scarcely ever was a case of collision tried in which a true statement of facts was made on both sides,—confessed that he was unable to come to any satisfactory decision on the conflict of evidence; and the Trinity Masters, being equally incapable of coming to a conclusion, the result was that both actions were dismissed: In re Maid of Auckland, 1848. The general rule of the Admiralty Division in cases of collision, when both parties are blamable in not having taken necessary precautions, is to apportion the damages equally between them: Vaux *v.* Sheffer, 1852, P. C.; The Milan, 1861; The Sylph, 1843-4. This rule, however, does not apply when the collision has in part been caused by the plaintiff's non-compliance with the regulations for preventing collision made under "The Merchant Shipping Acts"; for by § 419, subs. 4, of "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), the plaintiff in such case cannot maintain his suit: The James, 1856. See ante, § 206; also, as to the present regulations, ante, § 1604, n.

[6] Hitchin *v.* Campbell, 1771-2 (De Grey, C.J.); Martin *v.* Kennedy, 1800 (Ld. Eldon); Wadsworth *v.* Bentley, 1854 (Crompton, J.);

but if the statements of claim be framed in such a manner, that the causes of action *may* be identical in the two suits, the party bringing the second action must show that they are not the same, for he has no right to leave the question of identity to be determined on a nice investigation of the facts and pleadings.[1] Where a plaintiff has, in a previous action, omitted to press a part of his claim, but has done no act showing that he voluntarily, or even negligently, abandons it, he has sometimes, and under special circumstances, been allowed to, in a second action, both sue for and recover, the subject-matter of the claim which was not pressed on the former occasion, and on the merits of which, therefore, the court has pronounced no decision.[2]

§ 1702. On the other hand, it is a general rule, recognised in all courts alike, that, "where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter, which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."[3]

§ 1703. There are many cases in Chancery which illustrate the above rule.[4] It is also illustrated by common law decisions to the

Hunter *v.* Stewart, 1861; Dolphin *v.* Aylward, 1864 (Ir.).

[1] Ld. Bagot *v.* Williams, 1824 (Abbott, C.J.); Seddon *v.* Tutop, 1796 (Ld. Kenyon).

[2] Seddon *v.* Tutop, 1796; recognised (Bayley, J.) in Ld. Bagot *v.* Williams, 1824; and (Best, C.J.) in Thorpe *v.* Cooper, 1828; Hadley *v.* Green, 1832. See, also, Preston *v.* Pecke, 1858; cited ante, § 85. See acc. Bridge *v.* Gray, 1833 (Am.); Webster *v.* Lee, 1809 (Am.); Phillips *v.* Berrick, 1819 (Am.).

[3] Henderson *v.* Henderson, 1843 (Wigram, V.-C.). See, also, Srimut *v.* Katama, 1866, P. C.

[4] Farquharson *v.* Seton, 1828; Partridge *v.* Usborne, 1828; Chamley *v.* Ld. Dunsany, 1807 (Ir.) (Ld.

effect that if a plaintiff obtains an interlocutory judgment for his whole claim, but afterwards, to avoid delay, on attending before the officer of the court has his damages assessed on one item only, and enters a nolle prosequi as to the others, this will bar any future action for the last-mentioned items—a nolle prosequi as to part, entered up after judgment for the whole, being equivalent to a retraxit;[1] that if, on a reference of all matters in difference between two parties, one of them declines to bring before the arbitrator some claim which is included within the scope of the reference, he cannot make this claim the subject of a fresh action;[2] that if a plaintiff, who has declared on several causes of action, fails to establish some of them at the trial for want of evidence, he cannot bring a second action to recover damages for these last, unless he either be nonsuited,[3] or can induce the court, on the ground of mistake, surprise, or accident, to set aside the verdict he has obtained;[4] and that if a plaintiff sue for part only of an indivisible claim it is a bar to his subsequently claiming the whole,[5] so that if one serves another for a year under an hiring, and then brings an action for a month's wages, or if a plaintiff, knowing that he has an unliquidated claim against a defendant for a large amount, chooses to sue him for a less sum than is due, or if, having a demand for 60*l.*, in three sums of 20*l.*, he consents at Nisi Prius to take a verdict for 40*l.*, a second action for the residue cannot afterwards be brought.[6]

§ 1704. The County Court Act, 1888,[7] contains an important clause relative to this subject; for it enacts, "it shall not be lawful for any plaintiff to divide any *cause of action* for the purpose of bringing two or more actions in any of the [County] Courts,[8] but any plaintiff, having cause of action for more than" 50*l.*, "for

Eldon); M. of Breadalbane *v.* M. of Chandos, 1837 (Ld. Cottenham).

[1] Bowden *v.* Horne, 1831.

[2] Smith *v.* Johnson, 1812; Dunn *v.* Murray, 1829. See Ravee *v.* Farmer, 1791.

[3] See post, § 1719.

[4] Stafford *v.* Clarke, 1824 (Best, C.J.).

[5] Miller *v.* Covert, 1828.

[6] Ld. Bagot *v.* Williams, 1824.

[7] 51 & 52 V. c. 43, § 81. The Act of 14 & 15 V. c. 57 ("The Civil Bill Courts (Ireland) Act, 1851"), which regulates the practice in Irish Civil Bill Courts, contains similar provisions in § 36.

[8] "These words do not, in terms, prohibit the splitting a demand, for the purpose of bringing one suit in the County Court, and another in the Superior Court" (Maule, J., in Vines *v.* Arnold, 1849). Such a course would, however, probably be punished by the way the costs were dealt with.

which a plaint might be entered if not for more than " 50*l.*, " may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding " 50*l.*; " and the judgment of the court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." The term " cause of action," here employed, is one of indefinite import; but the courts have fixed its meaning to a certain extent, by holding, first, that it is not limited to a cause of action on *one separate entire contract*, but that it extends to tradesmen's bills, where the dealing is intended to be continuous, and where the items are so far *connected* with each other, that if they be not paid, they form one entire demand;[1] and next, that it does not preclude the plaintiff from bringing distinct plaints, whenever the claims are of such a nature as would justify the introduction of two or more counts in the statement of claim, if the action were brought in the High Court.[2] In conformity with this last rule, a landlord has been allowed to sue his tenant in one plaint for rent, and in another for double value, in consequence of the premises being held over after the expiration of a notice to quit;[3] and it appears that the holder of a promissory note, whereby the maker has specially undertaken to pay a particular rate of interest, may first sue for the interest, and afterwards recover the principal in a second action.[4]

§ 1705. The rule that for an adjudication in prior litigation to be conclusive, there must be an *identity* in the *points at issue*, in the first and second litigation, although there may be a *diversity in the forms* of proceeding, has hitherto been illustrated by referring to civil cases, where a judgment recovered in one action has, or has not, been regarded as a bar to a second action. The same rule, however, also prevails in *criminal prosecutions*. Here again, although, to warrant a prisoner in pleading autrefois acquit, or autrefois convict, the form of the two indictments, or even the nature of the charges need not be identical, yet, unless the first indictment were one upon which the prisoner might have been convicted by proof of the facts necessary to support the second indictment, an acquittal

[1] In re Aykroyd, 1847.
[2] Wickham *v.* Lee, 1848 (Erle, J.).
[3] Id.
[4] Morgan *v.* Rowlands, 1872 (Blackburn, J.).

or conviction on the first trial will be no bar to the second.[1] Thus, if a prisoner, indicted for burglariously breaking and entering a house, and stealing therein certain goods of A., be acquitted, he cannot plead this acquittal in bar of a subsequent indictment for burglariously breaking and entering the same house, and stealing the goods of B.;[2] a prisoner's acquittal on a charge of burglary and stealing will not avail him as a defence against an indictment for burglary with intent to steal;[3] if a prisoner be indicted[4] for unlawfully uttering counterfeit coin after a previous conviction for a like offence, and acquitted of that felony, such acquittal cannot be pleaded in bar if he be afterwards indicted for the simple misdemeanor of uttering counterfeit coin;[5] and an acquittal for the larceny of goods would seem to be no bar to an indictment for obtaining the same goods under false pretences.[6]

§ 1706. Further examples of the principle that a previous acquittal will not afford a defence unless the prisoner could, on his trial upon the first indictment, have lawfully been convicted of the offence with which he is charged by the second indictment, are as follow:—Upon an indictment for the statutable felony of administering poison with intent to murder, a previous acquittal on an indictment for murder, founded on the same facts, cannot be pleaded in bar;[7] an acquittal upon an indictment for wounding with intent to kill, will not protect the accused from being subsequently indicted for murder upon the death of the person assaulted;[8] a prisoner, who has been acquitted upon a charge of rape, may still, should the facts warrant such a course, be indicted either for an assault with *intent* to commit that crime,[9] or for a common

[1] R. *v.* Gilmore, 1882.

[2] Per Buller, J., delivering the opinion of all the judges in R. *v.* Vandercomb, 1796; and overruling Turner's case, 1664; and Jones and Beaver's case, 1665.

[3] R. *v.* Vandercomb, 1796.

[4] Under "The Coinage Offences Act" (24 & 25 V. c. 99), § 12.

[5] R. *v.* Thomas, 1875.

[6] This latter point is not free from doubt, as under either of the Acts of 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 12, cited post, § 1707, n., or 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 88, the prisoner might be convicted of the misdemeanor on the second indictment, though the evidence were to establish the fact that a felony had been committed. See R. *v.* Henderson, 1841.

[7] R. *v.* Connell, 1853 (Williams and Talfourd, JJ.).

[8] R. *v.* de Salvi, 1857, referred to in R. *v.* Morris, 1867, C. C. R.

[9] R. *v.* Gisson, 1847 (Pollock, C.B.). But not for an *attempt* to commit the crime. See ante, § 269.

assault;[1] where two or more persons have committed successive rapes upon the same woman, though one of them be acquitted when charged as a principal in the first degree, he may still be indicted for being present aiding and abetting the others to commit the crime;[2] although a prisoner be acquitted of receiving stolen goods from A. B., knowing them to have been *so* feloniously stolen, he may still, as it seems, be indicted for the substantive felony of receiving stolen property with a guilty knowledge, and the record of his former acquittal will not avail him, unless it be proved that the goods, if received by him at all, were received from A. B., by whom they were taken from the original owner;[3] and the acquittal or conviction, upon that charge, of a bankrupt who has been indicted for omitting certain goods out of his schedule, will be no bar to a second prosecution against him for omitting other goods, though as such a course of proceeding savours of oppression, it would under ordinary circumstances be discountenanced by the judge.[4] In the cases previously mentioned, however, and in many others of a similar nature, the ancient maxim of the common law, that no man shall be twice brought into jeopardy for the same crime,[5] is in no respect contravened by the second trial.

§ 1707. Where, however, a prisoner might on the first indictment have been lawfully convicted of the charge made against him by the second, an acquittal on the first indictment affords a defence against the second. Thus, an acquittal on an indictment charging the prisoner as a principal felon, will now[6] be a bar to an indictment against him as an accessory before the fact, because,[7] "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law, or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon;" a person tried for any misdemeanor is not liable, unless the jury have been

[1] R. *v.* Dungey, 1864.
[2] See R. *v.* Parry, 1837.
[3] R. *v.* Woolford, 1834 (Patteson, J.); R. *v.* Dann, 1835. But see 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 91, which throws much doubt on this law. See, also, R. *v.* Huntley, 1860.
[4] R. *v.* Champneys, 1837 (Patteson, J).
[5] See R. *v.* Murphy, 1859.
[6] The law was formerly otherwise. See R. *v.* Plant, 1836.
[7] Under 24 & 25 V. c. 94 ("The Accessories and Abettors Act, 1861"), § 1.

discharged from giving a verdict, to be afterwards prosecuted for felony on the same facts,[1] because, as stated in a former section,[2] he may be convicted of the misdemeanor, though a felony be proved; a person tried for obtaining by any false pretence any chattel, money, or valuable security, is, for a similar reason, not liable to be afterwards prosecuted for larceny upon the same facts;[3] a person tried for embezzlement, or fraudulent application or disposition, as a clerk or servant, or as a person employed in either of those capacities, or as a person employed in the public service, or in the police, or as a partner, or a joint beneficial owner,[4] cannot be afterwards indicted for larceny upon the same facts; and no person tried for larceny is liable to a second prosecution for embezzlement, or for fraudulent application or disposition.[5]

§ 1708. On principles similar to those which we have just been considering, a man who has been indicted for a compound crime, and wholly acquitted, cannot be afterwards indicted for any minor offence identical with one which was included in such crime, of which, though acquitted of the more serious charge, he might have been found guilty on such indictment.[6] For instance, one who

[1] 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 12, enacts, that, "If upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor." In R. *v.* Shott, 1851, where a prisoner was indicted for the misdemeanor of carnally knowing a girl between the ages of ten and twelve, and it turned out at the trial that the girl was under ten, and that consequently a felony had been committed, Maule, J., is reported to have held that the above section did not apply, and that the prisoner was entitled to an acquittal. According to his lordship's view, "the section only applies to cases of *merger*; e.g., the case of false pretences, where the facts prove that the false pretences have been effected by a forgery." Sed quære, as this, seems to be a very unwarrantable limitation of the language of the Legislature. The proper course in such a case would appear to be, to discharge the jury from giving any verdict upon the trial for the misdemeanor, and to direct a fresh bill to be preferred for felony.

[2] Ante, § 1705, ad fin.

[3] 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 88.

[4] 30 & 31 V. c. 116, § 1; R. *v.* Rudge, 1874.

[5] 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 72. For other illustrations of this rule, see "The Corrupt and Illegal Practices Prevention Act, 1883" (46 & 47 V. c. 51), § 52.

[6] But the offence must be the same; consequently, if a man be acquitted

has been acquitted on an indictment for murder, is protected against a second prosecution for manslaughter;[1] if a party charged with any felony or misdemeanor be wholly acquitted, he cannot be subsequently indicted for an attempt to commit the same crime, since the jury may now, on the first indictment, acquit of the felony or misdemeanor therein charged, and, if the evidence shall warrant such finding, find a verdict of guilty of the attempt;[2] an acquittal on a charge of administering poison, so as to endanger life, or to inflict grievous bodily harm, is a bar to an indictment for administering poison with intent to injure, aggrieve, or annoy any one;[3] an acquittal of a person on an indictment for robbery, for stealing in a dwelling-house, for burglary in breaking into a house and stealing goods, for larceny as a servant,[4] or for stealing from the person, will be a bar to a subsequent indictment against him for the simple larceny;[5] and a man who has been tried for robbery, and acquitted, will be protected from a second prosecution for assaulting with intent to rob.[6]

§ 1709. The rule that a previous acquittal on a charge of a composite crime is a defence to any subsequent indictment, for a crime of which the prisoner might have lawfully been convicted on the first indictment, also holds good in the converse case—that is, when an accused has been convicted of an offence which, though a less serious one, forms an essential ingredient in a graver offence with which he is subsequently charged. Thus, to explain a little: all *killing* of a human being is in itself felonious. To kill another by *negligence* is manslaughter; to kill another of "malice aforethought" is murder; but in both cases the *killing* is a necessary ingredient of the offence. Therefore, if a prisoner be acquitted or convicted of manslaughter, or of simple larceny, he cannot be afterwards indicted for the murder of the same person,[7] or for com-

of a burglary in which it is laid that he intended to steal the goods of *A.* and *B.* (i.e., their joint property), he may be subsequently indicted for stealing the goods of A. See 2 Hale, P. C. 302.

[1] 2 Hale, 246.

[2] 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 9, cited ante, § 269. See, also, 14 & 15 V. c. 19 ("The Prevention of Offences Act, 1851"), § 5; also R. *v.* Miller, 1879.

[3] 24 & 25 V. c. 100, § 25.

[4] R. *v.* Jennings, 1858.

[5] See 1 Russ. C. & M. 837, 838, n. by Mr. Greaves. See R. *v.* Compton, 1828.

[6] 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 41. See R. *v.* Mitchell, 1852.

[7] 2 Hale, 246; Holtcroft's case, 1577-8; Fost. C. L. 326. See R. *v.* Tancock, 1876.

pound larceny with respect to the same property.[1] Consequently, if through mistake, ignorance, or inattention, a bill be preferred for manslaughter or larceny, and it come out in evidence, that the offence amounted to murder, robbery, burglary, stealing in a dwelling-house, or stealing from the person, the judge should not direct the jury to acquit; but if the circumstances be of an aggravated nature, he should discharge the jury of that indictment, and order a fresh one to be preferred.[2]

§ 1710. The doctrine embodied in the above rules has been recognised and adopted by the Legislature on several occasions. For instance, a summary conviction in respect of *any offence* thus punishable under the Acts of 1861, respectively relating to larcenies, and to malicious injuries to property,[3] or under the Seamen's Clothing Act, 1869,[4] is a bar to any other proceeding for the same cause; a person who has been convicted of a common assault on a married woman and has paid the penalty imposed, cannot afterwards be sued by the husband of the woman for the loss which he, as such husband, has sustained by the assault on his wife;[5] if a magistrate, on hearing a summons against a cabman for furious driving, award compensation to the party aggrieved, such party is barred by such award from bringing any subsequent action in respect of any injury sustained by him, either against the cabman or his employer, unless, indeed, he had, from the first, refused to submit himself to the magistrate's jurisdiction;[6] and a person, who has been charged before justices with a common assault, or with an aggravated assault on a woman or child, and has obtained either a certificate of dismissal, or been summarily convicted, is released "from all further or other proceedings, civil or criminal, for the same cause."[7] A divided court has, however, determined that, in spite of this latter Act, a summary conviction for assault

[1] R. *v.* Berigan, 1841 (Ir.) (Crampton, J.).

[2] See Fost. C. L. 327, 328.

[3] 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 109; 24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 67.

[4] 32 & 33 V. c. 57, § 6.

[5] Masper *v.* Brown, 1875.

[6] Wright *v.* Lond. Omnibus Co., 1877; 6 & 7 V. c. 86 ("The London Hackney Carriages Act, 1843"), § 28.

[7] 24 & 25 V. c. 100 ("The Offences against the Persons Act, 1861"), § 45. The word "cause" here used is sufficiently ambiguous, as it may mean either "act" or "charge," and its legal effect will materially vary according to which of these two interpretations shall prevail. See, also, ante, § 1616.

is no bar to an indictment for manslaughter, when the party assaulted has subsequently died from the effects of the blows.[1] On the other hand, a man who has been either acquitted or convicted before justices of an assault, cannot afterwards be indicted for felonious wounding in the same transaction.[2] A conviction, to satisfy the statute, must be followed by fine or imprisonment, and be proved by the record or an examined copy.[3]

§ 1711. The distinction which exists between the admissibility and effect of judgments in rem and of judgments inter partes having now been pointed out, it will be expedient to refer shortly to some rules which equally govern them both. And first, it is an unquestionable rule of law, that neither a judgment in rem, nor a judgment inter partes, is *evidence of any matter which may or may not have been controverted*, or which came *collaterally* in question or which was *incidentally cognizable*, or which can only be *inferred by argument* from the judgment.[4] For instance, on an appeal against an order of removal, where the respondents relied on a derivative settlement from the pauper's father, they were not allowed to put in a previous order for the removal of the pauper's brother to the appellant parish, together with the examinations on which it was founded, though these examinations clearly proved that the brother's settlement was derived from the father;[5] the actual order for removing the brother being silent as to the ground of removal and the examinations, being no part of the record.[6]

§ 1712. Further examples of the same principle are, that where in an action of trover against a woman's administrator, by a man who claimed to be her widower, the defendant relied on the letters of administration, insisting that they could only have been granted to him upon the supposition that the plaintiff and the intestate had never been married, it was held that it could not be inferred, from the grant of administration, that the parties were

[1] R. *v.* Morris, 1867 (Martin, B., and Byles, Keating, and Shee, JJ.; Kelly, C.B., diss.).
[2] R. *v.* Walker, 1843; R. *v.* Stanton, 1851; R. *v.* Ebrington, 1862. See, also, Wemyss *v.* Hopkins, 1875.
[3] Hartley *v.* Hindmarsh, 1866.
[4] R. *v.* Duch. of Kingston, 1776. See R. *v.* Hutchins, 1880, C. A.
[5] R. *v.* Sow, 1843; R. *v.* Knaptoft, 1824; explained in R. *v.* Hartington, 1855.
[6] 4 Q. B. 98 (1843). See ante, § 809, ad fin.

unmarried;[1] the probate of a will, purporting to have been made by a married woman in pursuance of a power, furnishes no evidence whatever that the power has been duly executed—the Probate Division having simply to determine on the validity of the instrument as an ordinary will of an ordinary person, and to grant probate of it in case no valid objection can be taken to it, when regarded in this light,—leaving the question whether or not the power has been duly executed to be decided by the Chancery Division;[2] and where—before usury was legalised[3]—a defendant had, on being sued upon a bond, pleaded that the bond was given in pursuance of a usurious agreement between the plaintiff and himself, and had succeeded in that action in establishing the defence, the plaintiff was not estopped, in a subsequent action on a collateral security for the same debt, from disproving the usurious agreement, inasmuch as the existence of such agreement had not been directly in issue in the action on the bond.[4]

§ 1713. Wherever a judgment is offered in evidence against a *stranger*, he may avoid its effects, by furnishing distinct proof that it was obtained by *fraud* or *collusion*. To borrow the language of Lord Chief Justice De Grey, "Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal."[5] In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior tribunal, or by the highest court of judicature in the realm; but in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.[6] Fabula, non judicium,

[1] Blackham's case, 1708 (Ld. Holt); cited and explained (Ld. Lyndhurst) in Barrs *v.* Jackson, 1845.

[2] Barnes *v.* Vincent, 1846; Chatelain *v.* Pontigny, 1859; Parkinson *v.* Townsend, 1875. See Ward *v.* Ward, 1848; Noble *v.* Phelps and Willock, 1871.

[3] By 17 & 18 V. c. 90.

[4] Carter *v.* James, 1844.

[5] R. *v.* Duch. of Kingston, 1776; Brownsword *v.* Edwards, 1750-1 (Ld. Hardwicke); Philipson *v.* Ld. Egremont, 1844 (Ld. Denman); Meddowcroft *v.* Huguenin, 1844, P. C.; Perry *v.* Meddowcroft, 1846; Harrison *v.* Corp. of Southampton, 1853; Ochsenbein *v.* Papelier, 1873.

[6] Shedden *v.* Patrick, 1854, H. L. See Eyre *v.* Smith, 1877, C. A.

hoc est; in scenâ, non in foro, res agitur.[1] Whether an *innocent party* would be allowed to prove in one court that a judgment against him in another court was obtained by fraud, is a question not equally clear, as it would be in *his* power to apply directly to the court which pronounced the judgment to vacate it;[2] but, however this point may be ultimately determined, thus much is evident, that a *guilty party* would not be permitted to defeat a judgment, by showing that, in obtaining it, he had practised an imposition on the court; for it would be an outrage to justice and common sense, if a person could thus avoid the consequences of his own fraudulent conduct.[3]

§ 1714. Again, every species of judgment will be rendered inadmissible in evidence, on proof being given that the court which pronounced it had no *jurisdiction*.[4] For instance, a probate or administration might formerly have been defeated by showing that the metropolitan, and not the ordinary who purported to do so, had jurisdiction to grant it,[5] though it cannot now be defeated on this ground.[6] But it may still be defeated by proving that the supposed testator or intestate is alive, since, in this event, the Probate Division can have had no jurisdiction, nor its sentence any effect;[7] and if a prisoner be tried before Quarter Sessions, on a day to which the court was not duly adjourned,[8] or for an offence which the justices or recorders are by statute restrained from trying,[9] his acquittal or conviction would be no bar to a future

[1] Per Wedderburn, S. G., in R. *v.* Duch. of Kingston, 1776; cited (Ld. Cranworth) in Shedden *v.* Patrick, 1854, II. L.

[2] Prudham *v.* Phillips, 1737-8; R. *v.* Duch. of Kingston, 1776; Shedden *v.* Patrick, 1854, H. L. See Ex parte White *v.* Tommey, 1853, H. L.

[3] Prudham *v.* Phillips, 1737-8. See Doe *v.* Roberts, 1819; Bessey *v.* Windham, 1844.

[4] R. *v.* Bp. of Chester, 1747-8 (Lee, C.J.), as to sentences of visitors; R. *v.* Washbrook, 1825, as to awards by public commissioners; Mann *v.* Owen, 1829, as to sentences of courts-martial. See, also, Briscoe *v.* Stephens, 1824; Abp. of Dublin *v.* Ld. Trimleston, 1849 (Ir.); and Linnell *v.* Gunn, 1867.

[5] Marriot *v.* Marriot, 1725-6; Stokes *v.* Bate, 1826. See, also, Huthwaite *v.* Phaire, 1840; Whyte *v.* Rose, 1842; Easton *v.* Carter, 1850.

[6] 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), § 86; 20 & 21 V. c. 79, § 91, Ir.

[7] Allen *v.* Dundas, 1789 (Ashhurst and Buller, JJ.).

[8] R. *v.* Bowman, 1834.

[9] The Act 5 & 6 V. c. 38, gives a list of offences not triable at quarter sessions. In the following list that enactment must, unless some other statute is specifically mentioned, be taken to be that containing the prohibition against trying at quarter sessions, even if no express mention of it be made (as has in cases falling under it for the most part been

done). Moreover, in construing 5 & 6 V. c. 38, it must be remembered that, although the Act speaks of "transportation for life," and at the time when it was passed (1842) many offences were punishable by such transportation, some fifteen years later, penal servitude was (by "The Penal Servitude Act, 1857" (20 & 21 V. c. 3), amended by 55 & 56 V. c. 19 ("The Statute Law Revision Act, 1892")), substituted for transportation. The offences not triable at quarter sessions are the following:—*Abduction* of women and girls (5 & 6 V. c. 38). *Abortion.*—Administering drugs or using instruments to procure miscarriage (24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 58). *Agents*, frauds by, see *Frauds*. *Arson.*—Unlawfully and maliciously setting fire to any place of divine worship (24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 1); or to any dwelling-house, any person being therein (id. § 2); or to any house, stable, outhouse, shop, &c., with intent to injure or defraud any person (id. § 3); or to any building belonging to any railway, dock, harbour, or canal (id. § 4); or to any public building (id. § 5); or to any stacks of corn, coal, wood, &c. (id. § 17); or to any coal mine (id. § 26); or to any ship (id. § 42); or to the same with intent to prejudice the owner or underwriters (id. § 43); or to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern (5 & 6 V. c. 38); burning or otherwise destroying ships of war, dockyards, arsenals, military or naval stores, &c. (12 G. 3, c. 24 ("The Dockyards, &c. Protection Act, 1772")). *Assault.*—Attempting to choke, &c. in order to commit any indictable offence (24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 21); using or attempting to use chloroform, &c. to commit any indictable offence (id. § 22); unlawfully wounding, or shooting or attempting to shoot any person with intent to do grievous bodily harm or prevent lawful arrest (id. § 18). *Bankers*, frauds by, see *Frauds*. *Bigamy* and offences against the laws relating to marriage (5 & 6 V. c. 38). *Blasphemy* and offences against religion (id.). *Bribery* (id.); corrupt practices within the meaning of "The Corrupt and Illegal Practices Prevention Act, 1883" (46 & 47 V. c. 51), § 3, not triable at quarter sessions under id. § 53, and "The Corrupt Practices Prevention Act, 1854" (17 & 18 V. c. 102), § 10. *Burglary* (24 & 25 V. c. 96 ("The Larceny Act, 1861"), §§ 51, 52); breaking and entering or breaking out of a church or chapel, and committing any felony (id. § 50). *Coin.*—Counterfeiting gold or silver current coin (24 & 25 V. c. 99 ("The Coinage Offences Act, 1861"), § 2); colouring coin or metal with intent to make them pass for gold or silver coin, or for a higher coin (id. § 3); buying or selling, &c., counterfeit gold or silver coin for lower value than its denomination (id. § 6); importing counterfeit coin from beyond the seas (id. § 7); making, mending, or having possession of any coining tools (id. § 24); and conveying tools or moneys out of the Mint without authority (id. § 25). *Combinations and Conspiracies, unlawful*, except conspiracies or combinations to commit any offence, which the justices or recorder respectively have or has jurisdiction to try when committed by one person (5 & 6 V. c. 38). *Concealment of Birth* (id.). *Directors*, frauds by, see *Frauds*. *Embezzlement* by officers of the Bank of England or Ireland (24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 73). *Escape.*—Rescuing murderers (4 G. [illegible] c. 37, § 9; 7 W. 4 & 1 V. c. 91); assisting escape of prisoners of war (56 G. 3, c. 156). *Explosives.*—Causing bodily injury by explosion (24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 28); causing gunpowder to explode, or sending to any person any explosive substance, or throwing at any person any corrosive or explosive substance with intent to do grievous bodily harm (id. § 29); destroying, &c., house or building by gunpowder, &c., so as to endanger life (24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 9); causing explosion likely to endanger life or property (46 V. c. 3 ("The

Explosive Substances Act, 1883"), § 2). *Extortion.*—Letter demanding money, &c., with menaces (24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 44); sending letter threatening to accuse, or accusing or threatening to accuse, of crime, with intent to extort (id. §§ 46, 47); inducing person by violence or threats to execute deeds, &c., with intent to defraud (id. § 48). *Factors*, frauds by, see *Frauds*. *Firing* dwelling-houses, &c., see *Arson*. *Forgery* (5 & 6 V. c. 38). *Frauds* by agents, bankers, directors, factors, trustees, &c., under §§ 75—86 of "The Larceny Act, 1861" (24 & 25 V. c. 96); not triable at quarter sessions under id. § 87. *Libel.*—Composing, printing, or publishing blasphemous, seditious, or defamatory libels (5 & 6 V. c. 38). *Malicious Injury.*—Destroying goods in process of manufacture, certain machinery, &c. (24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 14); destroying any sea or river bank, &c. (id. § 30); injuries to bridges (id. § 33). *Manslaughter* (24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 5. *Murder* (5 & 6 V. c. 38); attempts to murder (24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), §§ 11—15). *Mutiny*, inciting to (37 G. 3, c. 70, § 1); as to the punishment, see 7 W. 4 & 1 V. c. 91, § 52. *Oaths.*—Administering or taking unlawful oaths (5 & 6 V. c. 38). *Parliament.*—Offences against either House of Parliament (id.). *Perjury* or subornation of perjury (id.); making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanour (id.). *Personation.*—Falsely personating any person, or the heir, executor, administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any property (37 & 38 V. c. 36 ("The False Personation Act, 1874")); not triable at quarter sessions (id. § 3), except in cases within 44 & 45 V. c. 58 ("The Army Act, 1881"), § 142, subs. 3. *Piracy.*—This offence is created by 11 & 12 W. 3, c. 7, §§ 8—10; 8 G. 1, c. 24, § 1; 18 G. 2, c. 30; and 7 W. 4 & 1 V. c. 88 ("The Piracy Act, 1837"), § 2; as to punishment (id. §§ 2, 3); piratical slave trading (5 G. 4, c. 113 ("The Slave Trade Act, 1824"), § 9), and is not triable at quarter sessions. *Poaching.*—Three or more persons entering land by night to take game, being armed (9 G. 4, c. 69 ("The Night Poaching Act, 1828"), § 9); not triable at quarter sessions (id.). *Post Office.*—Stealing post letter-bags, or stealing post letters from post letter-bags, or post offices, or from a mail, or stealing any chattels, money, or valuable securities from or out of a post letter, or stopping a mail with intent to rob or search the same (7 W. 4 & 1 V. c. 36 ("The Post Office (Offences) Act, 1837"), §§ 27, 28, 41, 42). *Præmunire.*—Offences subject to the penalties of præmunire (5 & 6 V. c. 38). *Queen.*—Offences against the Queen's title, prerogative, person, or government (id.). *Railways.*—Acts done with intent to obstruct or injure any engine, &c., using railway (24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 35); acts done with intent to injure passengers (24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), §§ 32, 33). *Rape* (id. § 48); defilement of girls under age of thirteen years (48 & 49 V. c. 69 ("The Criminal Law Amendment Act, 1885"), § 4). *Records.*—Stealing or fraudulently taking or injuring or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein (5 & 6 V. c. 38). *Riot.*—Preventing reading of proclamation, and continuing to riot after proclamation (1 G. 1, st. 2, c. 5 ("The Riot Act"), §§ 1, 5); riotous demolition of houses, &c. (24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 11). *Robbery* or assault with intent to rob by a person armed, or by two or more, or robbery with violence (24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 43). *Ship.*—Burning, casting away, or otherwise destroying any ship (24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), §§ 42, 43); acts tending to immediate loss or destruction of any ship (id. § 47). *Sodomy* (24 & 25 V. c. 100 ("The Offences against the

indictment for the same offence, because the former proceedings, being coram non judice, would be a mere nullity.

§ 1715. Questions of jurisdiction most frequently arise with regard to summary convictions by magistrates, orders of justices, inquisitions found by sheriff's juries, and other judicial proceedings of inferior tribunals; and here,—although, as already explained,[1] an adjudication of this kind cannot be impeached by disproving the facts stated in it, not excepting those which are necessary to give jurisdiction,—yet still, the parties against whom it is offered in evidence may establish its invalidity, either by proving any extrinsic facts, which show that the person or court pronouncing it had no authority *to enter into the inquiry*,[2] or by pointing out the circumstance that the adjudication itself does not disclose facts sufficient to give jurisdiction.[3] Thus, the fact that they have done so may be shown by evidence, but the order will be bad if justices have acted in a matter not regularly before them, as if, for example, they have proceeded to remove a pauper without any complaint being made by the parish officers.[4] Where, too, a justice had convicted a baker by four separate convictions of selling bread upon the same Sunday, in an action for trespass subsequently brought against him in consequence, it was held that he could not rely upon the convictions as a defence, since he had exceeded his authority in imposing more than one penalty for the same day, and, therefore, three of the convictions were of necessity void.[5] Every order made in pursuance of a statutory authority must contain, on the face of it, a statement of all facts which are requisite to show jurisdiction,

Person Act, 1861"), § 61. *Solicitors*, frauds by, see *Frauds*. *Title Deeds*.—Stealing or fraudulently destroying any document or written instrument being or containing evidence of the title to any real estate or any interest in lands, tenements, or hereditaments (5 & 6 V. c. 38). *Treason* (id.); misprision of treason (id.); treasonable felonies (11 V. c. 12). *Trustees*, frauds by, see *Frauds*. *Wills*.—Stealing or fraudulently destroying any wills or testamentary papers (5 & 6 V. c. 38).

[1] Ante, §§ 1669—1672.

[2] R. *v.* Bolton, 1841; R. *v.* Somersetshire JJ., 1826; cited (Patteson, J.) in In re Clarke, 1842.

[3] In re Clarke, 1842 (Patteson, J.); ante, § 147. See Ayrton *v.* Abbott, 1849; Brunwell *v.* Penneck, 1827; Ex parte Bailey, and Ex parte Collier, 1854; R. *v.* St. George, Bloomsbury, 1855; Staverton *v.* Ashburton, 1855.

[4] R. *v.* Buckinghamshire JJ., 1843 (Ld. Denman, explaining R. *v.* Bolton, 1841); Welch *v.* Nash, 1807.

[5] Crepps *v.* Durden, 1776-7; recognised (Dallas, C.J.) in Brittain *v.* Kinnaird, 1819.

and this whether the order be made by a magistrate or by the Lord Chancellor.[1]

§ 1716. The judicial proceedings of inferior tribunals have been quashed or otherwise treated as nullities, because they did not set forth sufficient facts to found jurisdiction in, amongst others, the following cases:—where justices had jurisdiction only if the servant was a servant in husbandry, an order of justices discharging a servant from her service was held bad, because it did not state that she was a servant in husbandry;[2] convictions have been quashed[3] for not showing that the justices were of a certain district, where an Act gave jurisdiction only to the magistrates of such district; where magistrates only possess jurisdiction over a dispute[4] when the applicant is a member of a friendly society entitled to money, and the party against whom the application is made was an officer of the society, if these facts be not mentioned in it, an order as to the dispute is bad;[4] and inquisitions have on several occasions been quashed where certain preliminary notices, which it was the duty of the sheriff or the trustees to give, did not appear on the face of the proceedings to have been given.[5]

§ 1717. In all the cases just cited, the facts, the omission of averments of which on the face of the proceedings was held to make the order bad, were preliminary matters *cognizable by the authority* whence the proceedings emanated. Had not this been the case, it would seem that no objection on the ground of their omission could have prevailed. This at least has been intimated by Cottenham, L.C.[6]

§ 1718. The case,[7] in which this opinion was expressed, at all events distinctly decides that no judicial proceeding of an inferior tribunal shall be deemed defective for not stating facts that are *necessarily implied* from those which are alleged. In the case in

[1] Christie *v.* Unwin, 1840 (Ld. Denman, C.J., and Coleridge, J.).
[2] R. *v.* Hulcott, 1796.
[3] Kite and Lane's case, 1822. See, also, R. *v.* All Saints, Southampton, 1828.
[4] Day *v.* King, 1836.
[5] R. *v.* May. of Liverpool, 1768; R. *v.* Bagshaw, 1797; R. *v.* Norwich Road Trustees, 1836. See, also, R. *v.* Worcestershire JJ., 1854, though that case would seem to be overruled by R. *v.* Harvey, 1874.
[6] In Taylor *v.* Clemson, 1844, H. L., questioning a contrary doctrine suggested (Ld. Mansfield) in R. *v.* Croke, 1774, and (Ld. Denman) in R. *v.* South Holland Drainage, 1838.
[7] Taylor *v.* Clemson, 1844, H. L.

question—a Railway Act having directed that if any landowner should not agree with the company as to the purchase-money, or should refuse to accept the sum offered by the company, or should, after notice, neglect to treat, or should not agree with the company for the sale of his interest, the company might issue a warrant to the sheriff to summon a compensation jury—a warrant was issued, *purporting to be under the Act*, a jury was summoned, and an inquisition was recorded which purported to be taken "pursuant to the Act, on the oaths of jurors, duly impanelled in pursuance of the warrant to the inquisition annexed, who assessed the sum to be paid, &c.;" but neither the warrant nor the inquisition stated that the owner had neglected to treat, or had had notice served on him, or had not agreed to sell. It was contended that these omissions were fatal to the proceedings; but the House of Lords (affirming the Exchequer Chamber) held that the warrant and inquisition stated sufficient facts to show the jurisdiction of the sheriff and jury; for the impanelling a jury and the assessment by them, being facts inconsistent with an agreement between the company and the landowner, necessarily implied non-agreement.

§ 1719.[1] A judgment in a prior suit or legal proceeding is, moreover, a bar to a second suit or legal proceeding only where the point in issue has been actually *determined* in the first. Therefore, if an action has been discontinued or withdrawn,[2] or has ended in a nonsuit,[3] either prior to the 2nd November, 1875,[4] or since the 23rd October, 1883,[5] or if between those dates the plaintiff has been nonsuited, with the special leave of the court to proceed again,[6] or if an action has been dismissed for want of prosecution under R. S. C., 1883, Ord. XXXVI., r. 12,[7] or if for any other cause[8] no

[1] Gr. Ev. §§ 529, 530, in some part.

[2] R. S. C. 1883, Ord. XXVI. r. 1; 3 Bl. Com. 296.

[3] A judge cannot nonsuit upon the opening of counsel and without hearing evidence. See Fletcher *v.* L. & N. W. Rail., 1892, C. A.

[4] When the Judicature Acts came into operation. See 3 Bl. Com. 296, 376, 377; R. *v.* St. Anne, Westminster, 1847 (Ld. Denman); Greely *v.* Smith, 1846 (Am.); Bevan *v.* Bevan, 1860.

[5] On the next day after this the Rules of 1883 came into operation.

[6] As to this, see R. S. C. 1875, Ord. XLI. r. 6 (tacitly ignored in the Rules of 1883, so that the old practice again prevails). See 51 & 52 V. c. 43, §§ 88, 93, as to costs on suing in a second action after a nonsuit in the County Courts.

[7] Re Orrell Colliery Co., 1879 (Jessel, M.R.); Joly *v.* Swift, 1847 (Ir.).

[8] See Langmead *v.* Maple, 1865.

final judgment of the court has been pronounced upon the matter in issue, the proceedings are not conclusive.[1] The withdrawal of a juror, or the discharge of a jury, by consent, would seem to constitute no legal defence to a second action.[2] Yet this is so far regarded as putting a final end to the litigation, that, if the plaintiff were to sue again for the same cause, the court, on the application of the defendant, would stay the proceedings, and make the plaintiff pay the costs incurred.[3]

§ 1719A. A judgment is, moreover, not conclusive if it appears that the decision did not turn *upon the merits;*[4] as, for instance, if the trial went off on a technical defect,[5] or for faults in the pleadings,[6] or because the action was misconceived,[7] or because the debt was not then due,[8] or because of a temporary disability of the plaintiff to sue,[9] or the like.

§ 1720. In some cases the question, what constitutes a decision upon the merits, may be one which it is difficult to determine. It was at one time frequently before the Court of Queen's Bench, in cases of *appeals* against *orders of removals* being allowed by Quarter Sessions.[10] In these cases, if the order has been quashed for informality,[11] or merely because the pauper was not chargeable[12] or removable[13] at the time when it was made, the allowance of the appeal will not preclude the respondent parish from obtaining a second order of removal. Moreover, unless it appear on the face of the former proceedings that the order of justices was quashed "not on the merits," parol evidence will be admissible to explain the particular ground upon which it was quashed.[14] In the absence of

[1] Knox *v.* Waldoborough, 1827 (Am.); Hull *v.* Blake, 1816 (Am.); Sweigart *v.* Berk, 1822 (Am.); Bridge *v.* Sumner, 1823 (Am.).

[2] Sanderson *v.* Nestor, 1826; Everett *v.* Youells, 1832.

[3] Gibbs *v.* Ralph, 1845.

[4] See Gillespie *v.* Russel, 1859, H. L.; Commiss. of Leith Hr., &c. *v.* Inspector, &c., 1866, H. L.

[5] Lepping *v.* Kedgewin, 1675; Lane *v.* Harrison, 1820 (Am.); M'Donald *v.* Rainor, 1811 (Am.).

[6] Hitchin *v.* Campbell, 1771-2 (De Grey, C.J.).

[7] Id.

[8] New Eng. Bank *v.* Lewis, 1829 (Am.).

[9] Dixon *v.* Sinclear, 1832 (Am.).

[10] See R. *v.* Lancashire, 1843; R. *v.* Evenwood Barony, 1843; R. *v.* Charlbury, 1843; R. *v.* Kingsclere, 1843; Ex parte Pontefract, 1843; Ex parte Ackworth, 1843; R. *v.* Perrenzabuloe, 1844; R. *v.* Clint, 1841; R. *v.* St. Mary, Lambeth, 1845; R. *v.* Ellel, 1845.

[11] R. *v.* Penge, 1793; R. *v.* Cottingham, 1834; R. *v.* Great Bolton, 1845.

[12] Osgathorpe *v.* Diseworth, 1745-6; R. *v.* Wheelock, 1826.

[13] R. *v.* Wick St. Lawrence, 1833.

[14] R. *v.* Wheelock, 1826; R. *v.* Wick St. Lawrence, 1833; R. *v.*

such evidence it will, however, be presumed that the order of Quarter Sessions for quashing it was an adjudication upon the settlement.[1] If, however, the Quarter Sessions, in quashing an order of removal, make an entry that it is quashed "not on the merits," this will conclusively prevent such order from operating as an estoppel between the parishes; and, on the hearing of an appeal against a subsequent order respecting the same settlement, the appellants will not be allowed to show that the former order was, in fact, quashed on the merits.[2] Where an application is made to justices out of sessions and dismissed, such dismissal is seldom, if ever,—unless the case be governed by some special statute,[3]—regarded as a final adjudication, so as to operate as a bar to further inquiry.[4]

§ 1721. A party, against whom a judgment is offered in evidence, may, of course, always defeat its effect by showing that it has been *reversed*.[5] This rule applies to all courts alike. Therefore the title of an executor or administrator may be successfully disputed, by proof that the probate or letters have been revoked;[6] and a prisoner who has been found guilty upon an indictment, which, on a case reserved for the judges, has been pronounced bad in law, may again be put upon his trial for the same offence, because he has never yet been in real jeopardy.[7] The *pendency of proceedings in error* or an appeal will not, however, prevent a judgment from operating as a bar.[8] It, à fortiori, follows that no objection can be taken to the binding effect of a judgment as evidence, on the ground that the statement of claim is so defective that it would have been adjudged bad had the point of law been raised by the pleading.[9]

Widecombe-in-the-Moor, 1847; R. *v.* Leeds, 1847; R. *v.* Macclesfield, 1849.

[1] R. *v.* Wick St. Lawrence, 1833 (Parke, J.); R. *v.* Yeoveley, 1838 (Ld. Denman).

[2] R. *v.* St. Anne, Westminster, 1847.

[3] As to the effect of a dismissal of an information by a court dealing summarily with an indictable offence, see ante, §§ 1615—20.

[4] R. *v.* Machen, 1849; R. *v.* Hutchins, 1881, C. A. See post, § 1757.

[5] 2 Smith, L. C. 659; Hynde's case, 1592-3, cited in Doe *v.* Wright, 1839; Nowlan *v.* Gibson, 1847 (Ir.); R. *v.* Drury, 1849; Wood *v.* Jackson, 1831 (Am.).

[6] B. N. P. 247.

[7] R. *v.* Reader, 1830; cited in R. *v.* Bowman, 1834.

[8] Doe *v.* Wright, 1839; Scott *v.* Pilkington, 1862.

[9] Hughes *v.* Blake, 1818 (Am.) (Story, J.).

§ 1722. In some few cases the *effect of a judgment will materially vary*, according as it has been pronounced *in favour of the one or the other* party. Thus, an order of Sessions *confirming* an order of removal is conclusive against all the world, that the pauper, at the date of the first order, was settled in the parish to which he was sent; but an order of Sessions *quashing* an order of removal is only conclusive between the contending parties, and only as to the exact point thereby decided, namely, that at the time when it was made, the appellant parish was not bound to receive the pauper.[1] If, too, the inhabitants of a parish be indicted for the non-repair of a road, and *convicted*, this will furnish conclusive evidence of their liability to do the repairs, on a subsequent indictment against them; but an *acquittal* on such an indictment will not establish the non-liability of the defendants, because it might have proceeded on the ground that the road was not out of repair, and thus the question of liability might not have been decided.[2] It has never been expressly decided whether an acquittal on an information in rem on the Revenue side of the Queen's Bench Division will be conclusive proof of the illegality of the seizure as against strangers, in the same way as a judgment of condemnation is conclusive in favour of its legality. Lord Kenyon seems on one occasion, however, to have considered that it was conclusive.[3] As an acquittal does not, like a conviction, ascertain any precise fact, but may be occasioned by the laches of the prosecutor, it would certainly seem reasonable to contend that strangers should not thereby be conclusively bound.[4]

§ 1723. In an action[5] brought for necessaries supplied to the defendant's wife, while living separate from her husband, in support of the plaintiff's claim, witnesses were called to prove that the separation was justifiable on the wife's part, as it was owing to the cruel and violent treatment of her husband, and it was held that the defendant, to rebut this case, and also to prove that the

[1] R. *v.* Wick St. Lawrence, 1833 (Ld. Denman); Id. (Parke, J.); Heston *v.* St. Bride, 1853.
[2] R. *v.* St. Pancras, 1793-4; R. *v.* Haughton, 1853; R. *v.* Nether Hallam, 1854.
[3] Cooke *v.* Sholl, 1793.
[4] B. N. P. 245; 2 Ph. Ev. 38, 39.
[5] Day *v.* Spread, 1842 (Ir.) (diss Perrin, J.).

wife had been guilty of adultery, might give in evidence a sentence of the Ecclesiastical Court, *dismissing* a suit instituted by the wife against her husband for a divorce on account of cruelty, in which suit the husband had made a counter allegation of adultery, but that it was entitled to very little weight; whereas, had the Ecclesiastical Court divorced the parties, its sentence would, doubtless, have been conclusive in favour of the plaintiff.

§ 1724. The rules which generally govern the admissibility and effect of foreign judgments are, in many respects, similar to those which prevail on the same subject with regard to home judgments. Foreign judgments include judgments, decrees, and other adjudications, whether strictly of record or not, emanating from Irish, Scotch, colonial, or foreign tribunals.[1] Foreign judgments, like home judgments, are always admissible, whether for or against strangers or parties, in proof of their existence;[2]—they are divisible into judgments in rem and judgments inter partes, and the former are evidence of the facts adjudicated as against all the world, while the latter are only admissible for and against parties and privies;[3]—they furnish no evidence whatever of matters collaterally or incidentally noticed in them, still less of matters to be inferred by argument from them;[4]—they must, in order to be received, finally determine the points in dispute, and be adjudications upon the actual merits;[5]—and they are open to be impeached on the ground, either of fraud[6] or collusion,[7] or of want of jurisdiction, whether over the cause, over the subject-matter, or over the parties.[8]

[1] Houlditch *v.* M. of Donegal, 1834, H. L. (Ld. Brougham); Ferguson *v.* Mahon, 1839; Harris *v.* Saunders, 1825, as to Irish judgments; Cowan *v.* Braidwood, 1840; Russell *v.* Smyth, 1842, as to Scotch judgments; Henderson *v.* Henderson, 1848, as to colonial decrees.

[2] Tarleton *v.* Tarleton, 1815; ante, § 1667.

[3] See ante, § 1673.

[4] See ante, § 1711.

[5] Plummer *v.* Woodburne, 1825; Smith *v.* Nicolls, 1839 (Tindal, C.J.); Sadler *v.* Robins, 1808; Garcias *v.* Ricardo, 1844; Ricardo *v.* Garcias, 1845, H. L.

[6] Ochsenbein *v.* Papelier, 1873; Abouloff *v.* Oppenheimer, 1882, C.A.

[7] Price *v.* Dewhurst, 1838 (Shadwell, V.-C.), S. C. on appeal (Ld. Cottenham); Don *v.* Lippmann, 1837, H. L (Ld. Brougham); Magoun *v.* N. Engl. Ins. Co., 1840 (Am.); Bradstreet *v.* Neptune Ins. Co., 1838 (Am.).

[8] Price *v.* Dewhurst, 1838 (Ld. Cottenham); Rose *v.* Himely, 1808 (Am.) (Marshall, C.J.).

§ 1725. In an action brought upon a foreign judgment, a *plaintiff* need not allege in his statement of claim, either that the foreign court had jurisdiction over the parties or the cause,[1] or that the proceedings had been properly conducted.[2] A *defendant*, however, when he pleads such a judgment by way of estoppel or of justification,[3] is apparently bound to state all these particulars.

§ 1725A. The cases in which foreign judgments have been rejected as having emanated from a court having no jurisdiction are very numerous. Thus, sentences of foreign *prize* courts have repeatedly been held invalid by English judges, as having been pronounced by a court having no jurisdiction, when it appeared that the court had sat in a neutral country under a commission from a belligerent power,[4]—a country being, for this purpose, considered neutral, where its independence was only preserved in form, since one of the belligerents had poured into it such a body of troops, as to, in reality, possess the sovereign authority.[5]

§ 1726. With regard to marriages, the principle would seem to be that the courts of a country have no jurisdiction over marriages, except they derive such jurisdiction either from both (or possibly from one[6]) of the parties to the marriage, having, at the time when a divorce is sought, been domiciled within the territorial limits over which such courts exercise control, or from both (or possibly one[6]) of the parties having acquired a bonâ fide domicile within such limits subsequently to the marriage. At all events (and the decision would appear to rest upon some such principle as that just stated) no foreign court has jurisdiction to dissolve a marriage of persons, who are of English domicile and who were married in England,[7] unless, at the date when

[1] Robertson *v.* Struth, 1844.
[2] Cowan *v.* Braidwood, 1840 (Maule, J.).
[3] Collett *v.* Ld. Keith, 1802; Gen. St. Navig. Co. *v.* Guillou, 1843. See Ricardo *v.* Garcias, 1845, H. L.
[4] The Flad Oyen, 1799; Havelock *v.* Rockwood, 1799. These cases virtually overrule a doubt thrown out, by Ld. Kenyon, in Smith *v.* Surridge, 1801.
[5] Donaldson *v.* Thompson, 1808 (Ld. Ellenborough).
[6] See infra, note [2] to § 1726A.
[7] Shaw *v.* Att.-Gen., 1870; R. *v.* Lolley, 1812; Briggs *v.* Briggs, 1880; Tovey *v.* Lindsay, 1813; In re Wilson's Trusts, 1865. See Harvey *v.* Farnie, 1880.

its courts pronounce a judgment (either of dissolution or otherwise) with regard to such a marriage, both parties are (or one at least of them is[1]) bonâ fide domiciled in the foreign state.[2] On this principle it would seem that two American citizens, who were married in America, cannot become validly divorced by a court in Rome merely by going to that city for the purpose of obtaining such a divorce.[3]

§ 1726A. Domicile, however, would appear to always confer jurisdiction over parties.[4] Therefore, parties domiciled in Scotland, who have been married in England, may always be lawfully divorced by a Scotch court, and this even though the woman prior to the wedding was an English subject, and was divorced on grounds which in England would not have justified a dissolution of the marriage.[5] Apparently a divorce by the tribunals of any country in which the parties are domiciled would be good.[6]

§ 1726B. Whether a foreign tribunal has jurisdiction to pronounce a decree which would be binding in an English court, with regard to a marriage celebrated within the limits of the territorial jurisdiction of such court, between strangers to such jurisdiction,

[1] See infra, note [4].

[2] Conway *v.* Beazley, 1831 (Dr. Lushington); Tollemache *v.* Tollemache, 1861; Robins *v.* Dolphin, 1858; Dolphin *v.* Robins, 1859, H. L.; Shaw *v.* Gould, 1868, H. L.; Dorsey *v.* Dorsey, 1838 (Gibson, C.J.); Story, Confl. § 230 a.

[3] See this discussed in Connelly *v.* Connelly, 1850.

[4] The domicile of the husband will always give jurisdiction to the courts of the country in which it exists to dissolve a marriage. The domicile of the wife, as a rule, necessarily follows, and is the same as that of her husband. But after a *judicial* separation between the husband and wife has been formally pronounced, the wife becomes capable of acquiring a separate domicile for herself: Dolphin *v.* Robins, 1859; Le Sueur *v.* Le Sueur, 1876. But whether a separation de facto by *mutual consent*, even for a long period, is sufficient to enable the wife to acquire a separate domicile is not clear. Ld. Romilly, in Re Daly's Settlement, 1858, held that such a separation, even for thirty years, was insufficient to confer an independent domicile on a married woman. But Ld. Cranworth, in Dolphin *v.* Robins, 1859, said:—"There may be exceptional cases to which, even without judicial separation, the general rule would not apply—as, for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported. It may be that in these and similar instances the nature of the case may be considered to give rise to necessary exceptions." See, also, Tovey *v.* Lindsay, 1813, H. L.; and Le Sueur *v.* Le Sueur, 1876.

[5] Harvey *v.* Farnie, 1882, H. L. This case overrules M'Carthy *v.* De Caix, 1831. See Warrender *v.* Warrender, 1834; and Geils *v.* Geils, 1852, H. L.

[6] See Ryan *v.* Ryan, 1816.

or celebrated outside those limits, between parties only one of whom is subject to its jurisdiction, depends upon whether such court can or cannot be considered to have jurisdiction with regard to the marriage which is the subject-matter and foundation of the proceedings by reason merely of its having taken place within their territorial jurisdiction.[1] This is an undetermined and difficult question, which depends upon principles of international law respecting jurisdiction which have not been yet definitely settled.[2] On principle, however, a judgment with regard to any given marriage ought either to be wholly inadmissible, or else conclusive, in other countries, according to whether, when the facts are investigated, the tribunal which pronounced it appears to have possessed jurisdiction or no jurisdiction with regard to the marriage.[3] The doctrines applicable to judgments of divorce pronounced by the court of a foreign country, when the marriage had not been celebrated, and the parties were not domiciled, in that country, would be similar.[4]

§ 1727. It is very doubtful whether a foreign court can exercise any jurisdiction over *real property* situate in another country, even by a judgment inter partes. Clearly, it cannot exercise any such jurisdiction *immediately*, since its judgment cannot directly bind the land.[5] Accordingly, a decree by the Court of Chancery in Ireland, after verdict upon an issue devisavit vel non, that the instrument set up as a will was not an operative devise of certain Irish estates, cannot be pleaded in bar to a suit between the same parties in the Court of Chancery in England, instituted for the purpose of establishing the will, so far as it related to English property.[6] But a foreign court may apparently *indirectly* affect land in this country by acting in personam, that is, through the medium of its power over the person entitled to the property. If, therefore, an Irish, colonial, or foreign court were, by a valid decree, to appoint a receiver in this country, the party, on whose behalf the appointment was made, might probably, by action in

[1] See Doglioni *v.* Crespin, 1866, H. L.

[2] Sinclair *v.* Sinclair, 1798 (Ld. Stowell). See Connelly *v.* Connelly, 1850.

[3] See Doglioni *v.* Crespin, 1866.

[4] See Story, Confl. §§ 203 et seq.

[5] Burnham *v.* Webster, 1816 (Am.).

[6] Boyse *v.* Colclough, 1854 (Wood, V.-C.).

the English Chancery Division, get his foreign decree carried into execution. At any rate, the converse of this was decided by the House of Lords a few years back.[1]

§ 1728. If a party liable upon a foreign judgment was not, at the time of the proceedings against him, either resident within the territories of the foreign state, or the subject of such state, such foreign court has no jurisdiction. To establish such want of jurisdiction first, the statement of defence must contain every allegation which is necessary to render the judgment invalid, and must, in short, be good *in omnibus*:[2] next, such defence must contain allegations that the defendant was not a subject of the foreign state, or resident, or even present, in it, at the time when the proceedings were instituted, so that he could not be bound, by reason of allegiance, or domicil, or temporary presence, by the decision of its courts:[3] and it must further state that the defendant is not the owner of real property in such state, for otherwise, since his property would be under the protection of its laws, he might be considered as virtually present, though really absent.[4] It will also generally be advisable, if not necessary, to add, that the defendant has had no notice or knowledge of the proceedings.[5]

§ 1729. Besides the rules which have been stated in a preceding paragraph,[6] to govern foreign as well as domestic judgments, there are other rules which are far more frequently applied by our courts to judgments of foreign tribunals than to judgments of courts in this country,—though *all* tribunals are equally bound to observe these latter rules. For instance, the effect of a foreign judgment will be wholly neutralized if it be apparent either upon the face of the proceedings, or by extrinsic proof, that such foreign judgment is contrary to the law of nations,[7] or is repugnant to

[1] Houlditch *v.* Donegal, 1834, H. L. (Ld. Brougham).

[2] Cowan *v.* Braidwood, 1840; Becquet *v.* MacCarthy, 1831; explained in Don *v.* Lippmann, 1837, H. L. (Ld. Brougham); Maubourquet *v.* Wyse, 1867 (Ir.).

[3] Gen. St. Navig. Co. *v.* Guillou, 1843; Cowan *v.* Braidwood, 1840 (Tindal, C.J.); Russell *v.* Smyth, 1842; Reynolds *v.* Fenton, 1846; Rousillon *v.* Rousillon, 1880 (Fry, J.).

[4] Cowan *v.* Braidwood, 1840; Douglas *v.* Forrest, 1828.

[5] Cowan *v.* Braidwood, 1840; see Maubourquet *v.* Wyse, 1867 (Ir.).

[6] Ante, § 1724.

[7] Baring *v.* Clagett, 1802 (Ld. Alvanley); Wolff *v.* Oxholm, 1817; Simpson *v.* Fogo, 1862.

natural justice,[1] or is founded on a mistaken notion of the court's jurisdiction,[2] or is obviously or admittedly[3] opposed to the law of the country where it was pronounced,[4] or is so grossly defective as to render it doubtful what point, if any, was actually determined,[5] or is manifestly erroneous, as professing to be made upon particular grounds, which plainly do not warrant the decision.[6]

§ 1730. Examples of the meaning of the statement that a judgment must be disregarded whenever it is *repugnant to natural justice*, are afforded by a case[7] in which a judgment pronounced in the Danish island of St. Croix was disregarded on it appearing that one of the litigating parties had himself acted as judge, and had decided the dispute in his own favour; and by several cases (American as well as English) in which a defendant has defeated the effect of a foreign judgment by pleading and proving, that in the court from which it proceeded no suit can be instituted without issuing process, and yet that he was never arrested, or served with, or had notice or knowledge of, any process. The common justice of all nations requires that no condemnation should be pronounced behind the back of a man,[8] who has had no opportunity to appear and defend his interest, either personally or by his proper representatives.[9]

[1] Ferguson *v.* Mahon, 1839 (Ld. Denman, citing Becquet *v.* MacCarthy, 1831); Henderson *v.* Henderson, 1844 (Ld. Denman); Buchanan *v.* Rucker, 1808 (Ld. Ellenborough); Cowan *v.* Braidwood, 1840 (Maule, J.); Sims *v.* Thomas, 1841 (Ir.) (Brady, C.J.); Messina *v.* Petrococchino, 1872, P. C.

[2] Schibsby *v.* Westenholz, 1870; Novelli *v.* Rossi, 1831; as explained in Castrique *v.* Imrie, 1870 (Blackburn, J.), in answer to the House of Lords. See, also, Godard *v.* Gray, 1870, deciding that a foreign judgment could not be impugned as proceeding on a mistake as to English law.

[3] Meyer *v.* Ralli, 1876.

[4] Sims *v.* Thomas, 1841 (Ir.).

[5] Obicini *v.* Bligh, 1832.

[6] Calvert *v.* Bovill, 1798; Pollard *v.* Bell, 1800; Reimers *v.* Druce, 1857; Simpson *v.* Fogo, 1862; Messina *v.* Petrococchino, 1872, P. C.

[7] Price *v.* Dewhurst, 1838. See Gd. Junct. Can. Co. *v.* Dimes, 1850.

[8] Where a man had been expelled from a club without being heard in his own defence, the court, considering that the committee of the club had been exercising quasi-judicial functions improperly, declared their resolution void, and granted an injunction: Fisher *v.* Keane, 1880 (Jessel, M.R.). See, also, Dawkins *v.* Antrobus, 1879.

[9] Ferguson *v.* Mahon, 1839; Buchanan *v.* Rucker, 1808; Cavan *v.* Stewart, 1816; Houlditch *v.* Donegal, 1834, H. L. (Ld. Brougham); R. *v.* Abp. of Canterbury, 1859; Vallée *v.* Dumerque, 1849; In re Brook and De'comyn, 1864; Copin *v.* Adamson, 1875, C. A.; Story, Confl. § 592; Sawyer *v.* Maine Fire and Mar. Ins. Co., 1815 (Am.); Bradstreet *v.* Neptune Ins. Co., 1839

§ 1731. A statement of defence, seeking to get rid of the effect of a judgment, on the ground that it is contrary to the principles of natural justice, must carefully negative every combination of facts on which the judgment can be supported. If it merely deny that defendant has had notice of any *process*, and do not allege that without process the suit in a foreign court would be a nullity, such allegation will be bad; unless, perhaps, in the event of its containing a distinct averment that he has had no notice or knowledge whatever of the *suit*.[1]

§ 1732. The most difficult point connected with foreign judgments is, to determine when they are *conclusive*, and when merely *primâ facie* evidence of the facts adjudicated by them.

§ 1733. First, we must consider when *foreign judgments in rem* will be conclusive. The most important of these are sentences

(Am.); Magoun *v.* New Eng. Ins. Co., 1840 (Am.); Rangeloy *v.* Webster, 1840 (Am.), recognised in Burnham *v.* Webster, 1846 (Am.). In Dr. Bentley's case, 1735-6, Fortescue-Aland, J., says, "I have heard it observed by a very learned man, "that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam,' says God, 'where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also." The above passage was cited with approbation by Maule, J., in Abley *v.* Dale, 1850; and by Byles, J., in Cooper *v.* Wands. Bd. of Works, 1863. The author observed that it was not strictly in point; for that, though our first parents were certainly asked what they had to say why judgment should not pass against them, the same question was as certainly not put to the serpent; and that as he was at *that* time endowed with miraculous powers of speech, it seems strange that, before he was "cursed above all cattle," and was sentenced to "go upon his belly, and eat dust," he was not asked whether he had *really* "beguiled Eve" for the alleged offence. The Editor would add that the passage certainly is neither "strictly in point," nor even at all apposite, because, as the Fathers pointed out centuries ago (see, *e. g.*, S. Irenæus [A.D. 176], Adv. Haer. lib. iii., cap. xxxv. § 2), while a human tribunal only acts upon an accumulation of evidence, and even after it has obtained this, only acquires a knowledge which is but imperfect and uncertain, the Divine Tribunal possesses an absolute, complete, and infallible knowledge; so that God, being omniscient, put His questions to our first parents, not to obtain knowledge, but for their own sakes, and in order that they, by urging how they had been "beguiled," might obtain the promise of the Redemption; but did not question the serpent, because He *knew* the latter to possess no excuse, and to have transgressed deliberately and wilfully.

[1] Reynolds *v.* Fenton, 1846; Sheehy *v.* The Profess. Life Assur. Co., 1853; Maubourquet *v.* Wyse, 1867 (Ir. Ex. Ch.). The decision in Ferguson *v.* Mahon, 1839, in which a defence of this nature was held good, though it merely denied notice of any *process*, must be supported (if it can be at all) on the ground that an English court will take judicial notice that an action in an Irish court must be commenced by process.

of condemnation by foreign Courts of Admiralty on questions of *prize*. Lord Thurlow and Lord Ellenborough thought that the practice of receiving these in evidence at all rested upon an overstrained comity, and was often productive of cruel injustice.[1] But it is now too late to dispute the rule, which is, that such sentences, if not impeachable upon some one of the grounds before stated,[2] will be conclusive against all persons, and in all countries, as to the fact upon which the condemnation proceeded, where such fact is stated on the face of the sentence, free from ambiguity.[3] But the ground of condemnation may be contested in an English court of law, when the language of the sentence, by setting out several reasons for the judgment, leaves it uncertain whether the ship was condemned upon a ground which would warrant its condemnation by the law of nations, or upon another ground, which amounts only to a breach of the municipal regulations of the condemning country.[4]

§ 1734. Lord Mansfield, and several other eminent judges of the last century, thought that a sentence, which, without stating any ground of decision, should condemn a vessel as lawful prize, would be *conclusively presumed* to have been pronounced on some just ground.[5] But subsequently, Tindal, C. J., declared that, in order to bind strangers, the ground of the decision must appear clearly upon the face of the sentence, and that it will not suffice for it to be collected by *inference* only.[6] At all events, if, in an action upon a policy of insurance containing a warranty of neutrality, the underwriter were to rely upon a general sentence of condemnation, the assured might still show that in fact the judgment had proceeded upon some ground other than that of an infraction of neutrality;[7] although, in the absence of such proof, the court

[1] Fisher *v.* Ogle, 1808; Donaldson *v.* Thompson, 1808.

[2] Ante, §§ 1724, 1725, 1729.

[3] Dalgleish *v.* Hodgson, 1831 (Tindal C.J.); Bolton *v.* Gladstone, 1804 (Ld. Ellenborough); Lothian *v.* Henderson, 1803 (Le Blanc, J.); Kindersley *v.* Chase, undated. See Caminell *v.* Sewell, 1860.

[4] Dalgleish *v.* Hodgson, 1831; Hobbs *v.* Henning, 1864; Bernardi *v.* Motteux, 1781; Calvert *v.* Bovill, 1798; Baring *v.* Clagett, 1802.

[5] Saloucci *v.* Woodmass, undated (Ld. Mansfield); recognised (Ld. Alvanley) in Baring *v.* Clagett, 1802; and (Lawrence, J.) in Lothian *v.* Henderson, 1803; Pollard *v.* Bell, 1800 (Grose and Le Blanc, JJ.).

[6] Dalgleish *v.* Hodgson, 1831; Fisher *v.* Ogle, 1808 (Ld. Ellenborough).

[7] Calvert *v.* Bovill, 1793 (Lawrence, J.).

would certainly feel bound to pronounce that the ship was condemned as enemies' property.[1]

§ 1735. Sentences concerning *marriage*, and sentences of *divorce*, form another important class of foreign judgments in rem.[2] These, when pronounced in the country where the marriage was solemnised, or (probably) where the parties are bonâ fide domiciled, will be regarded in the courts of England as conclusive of the facts adjudicated, unless they be open to some of the objections before stated;[3] for otherwise, as Lord Hardwicke once observed, "the rights of mankind would be very precarious."[4]

§ 1736. Foreign jurists strongly contend, that a similar doctrine should prevail in favour of *all* judgments in rem; and that the decree of a foreign court, declaring the *status* of a person, and placing him under guardianship as an idiot, or a minor, or a prodigal, should be of universal authority and obligation. So it doubtless would be deemed, in regard to all acts done within the territories of the sovereign whose tribunal pronounced the sentence. But, in this country, as also in America, the rights and powers of *guardians* are considered as strictly local; and no guardian is here admitted to have any right to receive the profits, or to assume the possession, of the real estate of his ward, or to control his person, or to maintain any action for his personalty, without having received a due appointment from the proper English authority.[5]

§ 1737. The decisions of foreign courts of *bankruptcy* and *insol-*

[1] For American authorities respecting proceedings in rem in foreign Courts of Admiralty, see Croudson *v.* Leonard, 1808 (Am.); Williams *v.* Armroyd, 1813 (Am.); Hudson *v.* Guestier, 1848 (Am.); The Mary, 1815 (Am.); Braulstreet *v.* Neptune Ins. Co., 1839 (Am.); Grant *v.* M'Lachlin, 1809 (Am.); Burnham *v.* Webster, 1846 (Am.).

[2] The whole subject of foreign divorce is ably discussed in Story, Confl. §§ 200—230 b.

[3] Ante, §§ 1724, 1725, 1729.

[4] Roach *v.* Garvan, 1748; Ex parte Cottington, 1678; cited in Boucher *v.* Lawson, undated; Sinclair *v.* Sinclair, 1798.

[5] Dawson *v.* Jay, 1854; Ex parte Watkins, 1752; Story, Confl. §§ 499, 504, 504a, 594; Morrell *v.* Dickey, 1814 (Am.); Kraft *v.* Wickey, 1832 (Am.). In Grimwood *v.* Bartels, 1877, Hall, V.-C., however, allowed a foreign curator ad bona of a lunatic to receive the income from the lunatic's real estate in this country, though he would not allow the estate itself to be conveyed to him. See, also, In re Garnier, 1872 (Malins, V.-C.); and Scott *v.* Bentley, 1855, where Wood, V.-C.,—apparently misled by an erroneous reference (see (1877) 46 L. J. Ch. 789)—held, that a curator bonis of a lunatic's estate appointed by a Scotch court might sue in England for debts due to the lunatic. Sed qu.

vency must be regarded in the same way as decrees appointing guardians. Therefore, although the discharge of a debtor under the bankrupt or insolvent laws of a foreign State will so far be recognised in this country, that it will be held of binding authority with respect to all contracts made in such State, it cannot be pleaded here to an action, brought on a contract made or to be performed in any other State.[1]

§ 1738. A similar rule also applies to *executors* and *administrators*. In order to sue or be sued in any court in England, in respect of the personal rights or property of a testator or intestate, the plaintiff,[2] or defendant,[3] as the case may be, must appear to have obtained a probate, or letters of administration, in the proper court of *this* country. A foreign or colonial probate or letters, granted by the court of the country where the deceased was domiciled, may, indeed, be brought under the notice of the English Court of Probate, with the view of inducing that tribunal to clothe the foreign executor or administrator with proper English powers; but until he be so clothed, an executor, under either a foreign or colonial probate, cannot sue in this country.[4] But a man who is so clothed may sue without showing, in addition to his English title, that any probate or letters have been granted to him by the foreign court.[5] If, however, an executor or administrator, under a valid foreign probate or grant, has received and given a release for a debt due to the deceased in that foreign country, this will bar any demand against the debtor on the part of an executor or administrator appointed in England; since, to this extent, and for this purpose only,[6] the English tribunals will recognise and give effect to foreign probates and grants.[7]

§ 1739. Secondly,[8] we must consider the question as to when

[1] Towne *v.* Smith, 1845 (Am.) (Woodbury, J., fully discussing this question).

[2] Whyte *v.* Rose, 1842; Spratt *v.* Harris, 1833; Price *v.* Dewhurst, 1838 (Ld. Cottenham); Lasseur *v.* Tyrconnel, 1846. But see M'Mahon *v.* Rawlings, 1848. See, also, Vanquelin *v.* Bouard, 1863.

[3] Silver *v.* Stein, 1852 (Kindersley, V.-C.).

[4] Price *v.* Dewhurst, 1838; Enohin *v.* Wylie, 1862, H. L.; Miller *v.* James, 1872; Limehouse Board of Works, Ex parte Vallance, 1883.

[5] Whyte *v.* Rose, 1842; Carter and Crost's case, 1585.

[6] See Tighe *v.* Tighe, 1877 (Ir.); Lightfoot *v.* Bickley, 1830 (Am.); Story, Confl. § 522.

[7] Daniel *v.* Luker, 1571; recognised and explained in Whyte *v.* Rose, 1842.

[8] See supra, § 1732.

foreign *judgments inter partes* will or will not be conclusive, if set up by way of *defence* to an action in a domestic court. Such a judgment, when pronounced *adversely* to the party who brings the second action, will be conclusively binding upon him if properly pleaded by way of estoppel.[1] The statement of defence, setting up the answer to such an action which is afforded by a foreign judgment, need not set forth the proceedings and judgment at length;[2] but it must contain averments, either that the plaintiff was, at the commencement of the foreign suit, subject to the jurisdiction of the foreign country, by reason of allegiance, domicil, or temporary presence,[3] or that the foreign court had jurisdiction over the subject-matter of the suit, or that, by the law of the foreign country, the judgment recovered was final and conclusive, so as to be an absolute bar to a fresh action;[4] and also an averment that the matters in issue in the foreign court were identical with those sought to be put in issue in the present suit.[5] If there be no such averment, as just mentioned to be necessary, contained in a defence, such defence will be bad if this point of law be duly raised by the plaintiff's reply. Should the defendant, instead of *pleading* the judgment, content himself with *putting it in evidence*, it will then—like a domestic judgment under similar circumstances—be merely cogent, but not conclusive, evidence in his behalf.[6]

§ 1740. Where the foreign judgment was pronounced *in favour* of a party who brings in this country a second suit, the defendant cannot avail himself of such judgment as a defence. For a foreign judgment does not change the nature of the debt or damage sought to be recovered: the plaintiff has no higher remedy in consequence of it, and cannot issue immediate execution upon it in this country.[7] Consequently, he may either bring an action of assumpsit upon the foreign judgment, or again sue in this country upon the original cause of action. He has his election as to which of these courses he will take; but obviously his only mode of enforcing his rights is to, in some form, bring a fresh action.[8]

[1] Philips *v.* Hunter, 1795 (Eyre, C.J.); Plummer *v.* Woodburne, 1825; Ricardo *v.* Garcias, 1845, H. L.
[2] Ricardo *v.* Garcias, 1845, H. L.
[3] Gen. St. Navig. Co. *v.* Guillou, 1843.
[4] Plummer *v.* Woodburne, 1825; Frayes *v.* Worms, 1861.
[5] Ricardo *v.* Garcias, 1845, H. L.
[6] Ante, §§ 91, 1673.
[7] Hall *v.* Odber, 1809.
[8] Smith *v.* Nicolls, 1839; Wilson *v.* Lady Dunsany, 1854.

§ 1740A. If the foreign action was by the same plaintiff, and a judgment recovered in it has had satisfaction entered up, it will then, if properly pleaded, be conclusive in favour of the defendant.[1] Moreover, a man who has been tried and acquitted in a foreign country by a court having competent jurisdiction, may plead and prove such acquittal in bar of any indictment proferred against him in this country for the same offence.[2]

§ 1741. Thirdly,[3] a foreign judgment inter partes *may be enforced* by an action upon it by the successful party to whom any money is due under it in the Queen's Bench Division of the High Court of Justice, whether it is a judgment by a court of record, or one not of record, from a superior or inferior court, from a court of common law, or from one exercising equitable jurisdiction; whenever a clear balance has been ascertained, and a final[4] decision on the merits has been bonâ fide pronounced.[5] Even costs awarded by a decreet of the Court of Session in Scotland in a suit for a divorce, have been recovered by an action brought against the defendant while resident in this country;[6] and it seems that, were litigation to arise in France relating to real property there, and costs to be given against a party who should afterwards come to this country, an action for such costs might be maintained here.[7] The decrees of foreign courts of equity might, indeed, in some instances, not be enforceable in the English Common Law Division, because they might involve collateral and provisional matters, to which such court could not conveniently give full effect; but even then the English Chancery Division would entertain an action founded on such a foreign decree, for the purpose of giving effect to it in regard to English property.[8] So much, then, as to the subject-matter of foreign judgments which may be enforced in this country. No action will lie upon a foreign judgment which is on the face of it

[1] Barber *v.* Lamb, 1860.
[2] R. *v.* Roche, 1775.
[3] See supra, § 1732.
[4] If the decree or judgment be not final, the action upon it is not maintainable: Patrick *v.* Shedden, 1853; Paul *v.* Roy, 1852.
[5] Henderson *v.* Henderson, 1844; Sadler *v.* Robins, 1807 (Ld. Ellenborough); Henley *v.* Soper, 1828, as to decrees of colonial courts of equity; Harris *v.* Saunders, 1825, as to a judgment of one of the superior courts in Ireland; Arnott *v.* Redfern, 1826, as to a judgment of a Court of Admiralty in Scotland.
[6] Russell *v.* Smyth, 1842.
[7] Id. (Ld. Abinger).
[8] Henderson *v.* Henderson, 1844 (Ld. Denman); Houlditch *v.* M. of Donegal, 1834, H. L.

defective.[1] But, on the other hand, in an action in this country upon a judgment of a foreign court, it may be[2] the English courts will not entertain a defence which could have been set up in such foreign court but was not then advanced.[3] With regard to procedure on such a judgment, it should be noted that as a foreign judgment is only primâ facie evidence of a debt, persons who hold property as trustees for the debtor cannot be joined as defendants in such an action.[4]

§§ 1742—43. It is, however, admitted on all sides that foreign judgments are *primâ facie evidence* in support of the plaintiff's claim, and are to be deemed right until the contrary is established.[5] But the question whether such judgments are to be deemed *conclusive*, or whether the defendant, by going at large into the *original merits*, can dispute the propriety of the decisions, is a rather vexed one.[6]

§ 1744. On the one hand it has been held that foreign judgments are so far conclusive that the defendant is not at liberty to raise any defence to them which could have been raised (though it in fact was not) in the foreign court. This view has been taken several times by the Court of Queen's Bench,[7] once by the Court of Common Pleas,[8] and once by the Court of Exchequer;[9] and has been also advanced by Lord Nottingham,[10] Lord Kenyon,[11] Lord Ellenborough,[12] Sir L. Shadwell,[13] Lord Wensleydale,[14] and the Court of Exchequer in Ireland.[15] On the other hand, Lord Hard-

[1] Buchan *v.* Rusher, 1807.

[2] This, however, is rather a vexed question; as to the conflicting views on which, see post, § 1744.

[3] Henderson *v.* Henderson, 1844; Sadler *v.* Robins, 1807.

[4] Hawksford *v.* Giffard, 1886, P. C.

[5] Sinclair *v.* Fraser, 1771, H. L., cited in 20 How. St. Tr. 468, 469, and in 1 Doug. 4, n.; recognised in Arnott *v.* Redfern, 1826, and in Robertson *v.* Struth, 1844; Cowan *v.* Braidwood, 1826 (Maule, J.).

[6] The arguments on either side are well put in the note to the Duch. of Kingston's case, in 2 Smith, L. C. at p. 878. Mr. Justice Story, in his Conflict of Laws, § 607, argues in favour of the conclusiveness of such judgments. See, also, some remarks by the late Ld. Campbell, C.J., in Bank of Australasia *v.* Nias, 1851.

[7] Henderson *v.* Henderson, 1844; Ferguson *v.* Mahon, 1839; Bank of Australasia *v.* Nias, 1851; Scott *v.* Pilkington, 1862.

[8] Vanquelin *v.* Bouard, 1863.

[9] De Cosse Brissac *v.* Rathbone, 1861.

[10] Gold *v.* Canham, 1678-9; cited in note to Kennedy *v.* Cassillis, 1818.

[11] Galbraith *v.* Neville, 1755-6.

[12] Turleton *v.* Turleton, 1815.

[13] Martin *v.* Nicolls, 1830.

[14] Citing Martin *v.* Nicolls, 1830 in Becquet *v.* MacCarthy, 1831.

[15] Sims *v.* Thomas, 1841 (Ir.).

wicke,[1] Lord Mansfield,[2] Chief Baron Eyre,[3] Mr. Justice Buller,[4] Mr. Justice Bayley,[5] and in particular Lord Brougham,[6] have strenuously contended that foreign judgments, when actions are brought upon them, are not conclusive, but are merely primâ facie evidence on behalf of the plaintiff. This latter rule also prevails in America, though the extent to which it should be carried is certainly not yet definitely settled in that country.[7] The arguments, if not the authorities, in support of the conclusiveness of foreign judgments, perhaps on the whole preponderate over those in favour of a contrary doctrine.

§ 1745. It at any rate appears to be acknowledged law, both in England and America,[8] that, when a foreign judgment,—instead of being itself the consideration of the promise declared on,—merely comes *incidentally* or *collaterally* in question, it cannot be disputed. Thus, in an action on a covenant to indemnify, given on a dissolution of partnership, the plaintiff, in order to prove the damnification, put in a judgment recovered in a foreign court by a creditor of the firm against himself and the defendant, in consequence of which his property had been seized; and the defendant was not allowed to show that the proceedings were erroneous.[9]

§ 1746. Another rule as to foreign judgments (and one which, as already stated, is clear[10]), is, that a foreign judgment does not occasion a *merger* of the original cause of action. Therefore, when it becomes necessary to enforce the plaintiff's demand in this country, he may either resort to such original cause of action, or bring an action upon the judgment.[11] If he again sue on the original cause of action the defendant may, notwithstanding the production of the judgment in the former action, again dispute the

[1] Isquierdo *v.* Forbes, 1750-1; cited (Ld. Mansfield) in 1 Doug. 6.
[2] Walker *v.* Witter, 1778.
[3] Philips *v.* Hunter, 1795.
[4] Galbraith *v.* Neville, 1755-6; Messin *v.* Ld. Massareene, 1791.
[5] Tarleton *v.* Tarleton, 1815.
[6] Houlditch *v.* M. of Donegal, 1834, H. L.; Don *v.* Lippmann, 1837, H. L.
[7] Story, Confl. § 608, and cases there cited; Burnham *v.* Webster, 1846.
[8] See cases cited in Cowen's notes to 1 Ph. Ev. 353, Am. ed.
[9] Tarleton *v.* Tarleton, 1815; recognised, by Ld. Brougham, in Houlditch *v.* M. of Donegal, 1834, H. L.
[10] Ante, § 1740.
[11] Hall *v.* Odber, 1809 (Bayley, J.); Smith *v.* Nicolls, 1839 (Tindal, C.J.); Bk. of Australasia *v.* Harding, 1850; Kolsall *v.* Marshall, 1856.

plaintiff's demand, for the plaintiff has himself courted a reinvestigation of the merits.[1]

§ 1747. Such being the general rules governing the admissibility and effect of domestic and foreign judgments, one or two statutes, by which the receipt in evidence of the adjudications and proceedings of particular tribunals is regulated, must now be pointed out. Proceedings in *Courts of Bankruptcy*—such as adjudications and others—may, in some instances, be proved by production of the Gazette in which they were published,[2] and *all* are capable of proof by producing either the original documents, or copies of them, provided such originals or copies be either sealed with the seal of a bankruptcy court, or signed by a judge in bankruptcy, or, in the case of copies, be certified as true by any registrar of the court.[3]

§ 1747A. It remains to inquire what the *effect* of such documents is after they have been proved. Now, the Bankruptcy Act, 1890,[4] enacts that "a copy of the London Gazette containing any notice inserted therein in pursuance of this Act[5] shall be evidence of the facts stated in the notice," and also provides[6] that "the production of a copy of the London Gazette, containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be *conclusive* evidence in all legal proceedings of the order having been duly made, and of its date."

§ 1748. Again,[7] "a certificate of the official receiver," that a composition, or a scheme of arrangement, has been duly accepted and approved by the court, "shall, in the absence of fraud, be *conclusive* as to its validity." Again, another section of the Bankruptcy Act, 1883,[8] makes the certificate granted by the Board of Trade declaring any person to be a trustee in bankruptcy "*conclusive* evidence of his appointment;" yet another section of the same Act[9] provides, that the appointment "shall take effect as

[1] See 2 Smith, L. C. 869.
[2] Ante, § 1549.
[3] Ante, § 1548.
[4] 46 & 47 V. c. 52. By § 132, subs. 1.
[5] § 13, as to receiving order; § 20, subs. 2, as to order of adjudication; § 35, subs. 3, as to order annulling adjudication. See, also, Bkptcy. Rules, 1883, F. 127, containing, as sub-forms, six other notices. All these notices must be gazetted by the Board of Trade: r. 203.
[6] By § 132, subs. 2.
[7] By 53 & 54 V. c. 71, § 3, subs. 13.
[8] § 134, of 46 & 47 V. c. 52.
[9] § 21, subs. 4, of 46 & 47 V. c. 52.

from the date of the certificate." In short, an order of adjudication is thenceforth to be regarded (as it ought to be) as a judgment in rem.[1]

§ 1749. The order of the Board of Trade releasing the trustee of a bankruptcy, operates, by the Bankruptcy Act, 1883,[2] to "discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee; but any such order may be revoked on proof that it was obtained by fraud, or by suppression or concealment of any material fact."

§ 1750. The order of discharge of a bankrupt,[3] which the Court of Bankruptcy is, under certain circumstances, empowered to grant, operates as a discharge of the bankrupt from all debts provable in bankruptcy, save as otherwise provided by the Bankruptcy Act, 1883,[4] and, moreover, it will be "conclusive evidence of the bankruptcy, and of the validity of the proceedings thereon."[5] When an order of discharge has been granted, the court, if it thinks fit, may award to the bankrupt "a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part;" and this certificate will remove the disqualifications to which he would otherwise be subjected under sect. 32 of the Bankruptcy Act, 1883.[6]

§ 1751. While proof of particular bankruptcy documents is thus provided for by special sections of the Bankruptcy Act, 1883, the same Act also contains[7] a general provision, that "all documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders or

[1] Revell *v.* Blake, 1873; Ex parte Learoyd, In re Foulds, 1878, C. A.

[2] § 82, subs. 3. See, also, 35 & 36 V. c. 58, § 116, Ir.

[3] As to which see Bkptcy. Rules, 1886, 1890, F. 62. See, also, as to the form and effect of a "certificate of conformity" granted to a bankrupt by the Irish Court of Bankruptcy, 35 & 36 V. c. 58, §§ 57 and 58, Ir., amended by 53 & 54 V. c. 71, § 10; and of a certificate in arrangement cases granted in Ireland, id. § 64, Ir.

[4] 46 & 47 V. c. 52, § 30, subs. 1 and 2. See Jakeman *v.* Cook, 1879.

[5] Id. § 30, subs. 3.

[6] See § 32, subs. 2; Bkptcy. Rules, 1886, 1890, F. 66.

[7] In subs. 1 of § 140, of 46 & 47 V. c. 52.

certificates, without further proof unless the contrary is shown." It also provides,[1] that "a certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade, shall be *conclusive* evidence of the fact so certified."

§ 1752. The proof of such notices as are by the Bankruptcy Act, 1883, required to be gazetted or advertised in local papers, is moreover facilitated by the registrar of each court being empowered[2] to file with the proceedings a memorandum referring to and giving the date of each advertisement; and by such memorandum being made[3] "primâ facie evidence that the advertisement in question was duly inserted in the issue of the Gazette or paper to which the memorandum refers."

§ 1753. Little need be said respecting the admissibility and effect of other judicial documents. *Answers* in Chancery, put in under the old system of Chancery pleading, and such *pleas* as were under that system, put in upon oath, are, as we have seen,[4] receivable against the party by whom they were sworn, as cogent admissions of the allegations which they contain; but, as has also been pointed out,[5] *demurrers* in equity are not so receivable, since *they* were merely hypothetical statements, which, *assuming* the facts to be as alleged, denied that the defendant was bound to answer. *Bills* in Chancery, whether for relief or for discovery, are alike inadmissible, excepting to prove their own existence, or the institution of a suit, or that certain facts were in issue between the parties: their exclusion for other purposes resting upon the ground that they contained nothing more than mere suggestions of counsel, made for the purpose of obtaining an answer upon oath.[6] It seems to follow, by parity of reasoning, that pleadings at common law under the old system are also inadmissible as evidence of the truth of the facts stated therein;[7] unless they were pleadings requiring to be verified by affidavit.[8]

[1] By subs. 2 of § 140, of 46 & 47 V. c. 52.

[2] See Bkptcy. Rules, 1886, 1890, r. 17 (1), F. 175; and r. 17 (2) and F. 175.

[3] By Bkptcy. Rules, 1886, 1890, r. 17 (4).

[4] Ante, § 727.

[5] Ante, § 828.

[6] Boileau *v.* Rutlin, 1848; Doe *v.* Sybourn, 1796 (Ld. Kenyon); Taylor *v.* Cole, 1799; ante, § 859.

[7] Boileau *v.* Rutlin, 1848 (Parke, B.).

[8] See 15 & 16 V. c. 76, §§ 80, 81, now repealed.

§§ 1754—5.[1] *Depositions*, though informally taken, are receivable, like any other admissions, against the deponent whenever he is a party;[2] or they may be used to contradict and impeach him, when he is afterwards examined as a witness.[3] But before they will be available *as secondary evidence*, and as a substitute for vivâ voce testimony, they must be proved to have been regularly taken, under legal proceedings duly pending, or on some other occasion sanctioned by law.[4] It must in addition also appear—unless indeed the case be one provided for by statute, or by a rule of court—that the witness himself cannot be personally produced.[5] The depositions of deceased witnesses will in some cases be admissible even against strangers: as, for instance, if they relate to a custom, prescription, or pedigree, where reputation would be evidence; for, as the unsworn declarations of persons deceased would be here received, their declarations on oath are à fortiori admissible.

§ 1756. The effect as a judgment of a refusal of an application at chambers will vary according to the words in which the refusal was made. If the words "no order" be indorsed upon the summons, the judge will, in general, be held to have pronounced no decision upon the merits—so much so, that the party who failed will be allowed to make a second application—but if the indorsement be "application dismissed," this will be regarded as a judgment, so much so, that if he wishes to get rid of it the applicant must, within the time limited by the Rules of Practice, move the court to rescind it.[6]

§ 1757. In many cases an unsuccessful application to a police court does not bar other proceedings. Thus, a person who has applied to a metropolitan police magistrate under the Metropolitan Police Courts Act, 1839,[7] for an order for the delivery up of certain goods of less value than £15, which, after inquiry, has been refused, is not thereby estopped from bringing an action of trover for the same property.[8]

§ 1757A. Moreover, a refusal by justices in petty sessions to make

[1] Gr. Ev. §§ 552, 555, in part.
[2] Ante, § 727.
[3] Ante, §§ 1426, 1446 et seq.
[4] Ante, §§ 464 et seq.
[5] Ante, §§ 472 et seq.
[6] R. *v.* Machen, 1849 (Erle, J.); R. *v.* Herrington, 1864.
[7] 2 & 3 V. c. 71, § 40.
[8] Dover *v.* Child, 1876.

an order for maintenance of a bastard, even when made on the merits, is no bar to a second application by the mother, even after a hearing upon the merits, though the justices at the second hearing may take into consideration the fact of the former dismissal, as a material element in guiding their judgment.[1] An order in bastardy drawn up in such a form as to be void in law is, too, no bar to a second summons in the same matter between the same parties, even though the first order has never been formally set aside on appeal.[2] And an order of quarter sessions, quashing an order of affiliation as being "bad in form,"[3] or in the absence of the applicant, owing to bonâ fide mistake,[3] will not be regarded as a decision on the merits, so as to preclude the woman from applying to the petty sessions for a fresh order.[4] When, however, on appeal to quarter sessions, an order of affiliation is quashed on the ground of the insufficiency of the corroborative evidence,[5] such order of quarter sessions is final, and no further proceedings can be taken before justices.[6]

§ 1758. The law as to the admissibility and effect of *awards*, as being judgments between the parties, is as follows. The decision of an arbitrator, who has been duly appointed, is as conclusive as the judgment of any other competent tribunal upon the subject-matter referred to him;[7] and whether he be a professional or non-professional man,[8] the court will not interfere with his award on the ground of any alleged error either in law or in fact, provided,[9] first, that he has not exceeded, or fallen short of, the authority conferred upon him;[10] next, that the award is final,[11] and certain,[12] and not admitted by the arbitrator to have been made under a mistake;[13] and lastly, that it does not prescribe what is either illegal[14]

[1] R. *v.* Machen, 1849; R. *v.* Grant, 1867; 35 & 36 V. c. 65, § 4; 8 & 9 V. c. 10 ("The Bastardy Act, 1845").
[2] R. *v.* Brisby, 1849.
[3] Ex parte Harrison, 1852; R. *v.* Glynne, 1871 (Blackburn, J.).
[4] R. *v.* May, 1880.
[5] 8 & 9 V. c. 10 ("The Bastardy Act, 1845"), § 6.
[6] R. *v.* Glynne, 1871.
[7] Doe *v.* Rosser, 1802; Commings *v.* Heard, 1869. But see Newall *v.* Elliot, 1863. See, also, Rhodes *v.* Airdale Drain. Com., 1876.
[8] Fuller *v.* Fenwick, 1846 (Wilde, C.J.); In re Brown and Croydon Can. Co., 1839 (Ld. Denman).
[9] Toby *v.* Lovibond, 1848 (Wilde, C.J.); Barrett *v.* Wilson, 1834; Johnson *v.* Durant, 1831; Phillips *v.* Evans, 1843.
[10] In re Stroud, 1849 (Maule, J.).
[11] Bhear *v.* Harradine, 1852.
[12] Williams *v.* Wilson, 1853.
[13] Dinn *v.* Blake, 1875.
[14] East Union Rail. Co. *v.* East. Cos. Rail. Co., 1853 (Ld. Campbell); Alder *v.* Savill, 1814.

or impossible. But an award, unlike a verdict or judgment, cannot be received as evidence in the nature of reputation;[1] though it may occasionally be admissible, in conjunction with the submission to arbitration, as an act of ownership.[2] An award, moreover, is not evidence of an account stated between the parties to the submission;[3] unless, perhaps, in the single event of there being no regular agreement to refer, and, consequently, no award capable of being enforced in law. In such a case, as the arbitrator is not a judge, he might possibly be deemed the agent of the parties for the purpose of settling their accounts.[4]

§ 1759. The law with respect to the admissibility and effect of probates, and of letters of administration with wills annexed, as being in the nature of judgments, has been much altered by the Court of Probate Act, 1857.[5] Formerly such documents were uniformly rejected, whether tendered as primary or as secondary evidence of the contents of a will, on the trial of any cause relating to *real* estate;[6] and so absurdly jealous were the temporal courts of spiritual interference, that even when a will of lands was irretrievably lost, nothing would induce them to look at the probate,[7] though had the inquiry related to personalty, such a document would have furnished conclusive evidence,[8] and though they readily received the testimony of a witness, who undertook to state the contents of the will, having heard it once read before the testator's family on the day of his funeral.[9] This anomaly has to a great extent been remedied. The Court of Probate Act of 1857[10] provides[11] that where a will affecting real estate is proved in solemn form, or is otherwise the subject of a contentious proceeding in the Probate Division, the heir, devisees, and other persons interested in the real estate shall, as a general rule, be cited to see

[1] Evans *v.* Rees, 1839; R. *v.* Cotton, 1813; Wenman *v.* Mackenzie, 1855; ante, § 626.

[2] Brew *v.* Haren, 1877 (Ir.).

[3] Bates *v.* Townley, 1848.

[4] Keen *v.* Batshore, 1794 (Eyre, C.J.); commented on in Bates *v.* Townley, 1848.

[5] 20 & 21 V. c. 77 (as amended by "The Statute Law Revision Act, 1892," or 55 & 56 V. c. 19); and 20 & 21 V. c. 79, Ir.

[6] Doe *v.* Calvert, 1810 (Ld. Ellenborough).

[7] Id.

[8] Allen *v.* Dundas, 1789.

[9] 2 Camp. 390, n., citing Anon case, 1810, coram Wood, B.

[10] 20 & 21 V. c. 77.

[11] By § 61. See, also, corresponding enactment in the Irish Act, 20 & 21 V. c. 79, § 65.

proceedings, or to become parties,[1] and it also enacts,[2] that "Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a *copy thereof* respectively *stamped* with the *seal* of" [the Probate Division] "shall in all courts, and in all suits and proceedings affecting real estate of whatever tenure, (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as *conclusive evidence of the validity and contents of such will*, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons, against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders." § 63[3] empowers the Probate Division, at its discretion, to proceed in any case without citing the heir or other persons interested in real estate; but it provides that the probate, decree, or order of the court shall not affect any such person, "unless he has been cited or made party to the proceedings, or derives title under or through a person so cited or made party."

§ 1760. The same Act further provides,[4] that in any action

[1] See Reg. 78 of Rules of 1862 for Court of Probate in contentious business, and Form No. 4.

[2] By § 62. See, also, corresponding enactment in the Irish Act, 20 & 21 V. c. 79, § 66.

[3] See, also, 20 & 21 V. c. 79, § 67, Ir.

[4] By § 64. By § 65, the presiding judge at the trial has power to direct by whom the costs of proof, under § 64, are to be borne. The corresponding provision to § 64 in the Irish Act is 20 & 21 V. c. 79, § 68, Ir., in which, however, the intervals allowed for giving notice are respectively *seven* and *three* days (instead of *ten* and *four* days, as in the English Act). See, further, 14 & 15 V. c. 57, § 108, Ir., as to a somewhat similar practice in the Civil Bill Courts, excepting that no notice is required to be given; and Jackson *v.* Jackson, 1842 (Ir.).

"where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party, *ten days* at least before the trial or other proceeding in which the said proof shall be intended to be adduced, *notice* that he intends, at the said trial or other proceeding, to give in evidence as proof of the devise or other testamentary disposition the *probate* of the said will, or the *letters of administration with the will annexed*, or a *copy thereof stamped* with any *seal* of" [the Probate Division]; "and in every such case such probate or letters of administration, or copy thereof respectively stamped as aforesaid, shall be *sufficient* evidence of such will and of its validity and contents, *notwithstanding the same may not have been proved in solemn form*, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within *four days* after such receipt, give *notice* that he disputes the validity of such devise or other testamentary disposition."

§ 1761. The notice required by the last cited enactment need not specify the purpose for which the evidence is wanted.[1] Next, though the Act directs that the notice shall be given "to the opposite party," that direction will be satisfied by giving it to his solicitor or agent; and, indeed, under ordinary circumstances, this will be the more convenient course to pursue.[2] Thirdly, in stating that the probate shall be "sufficient evidence" of the will, the Legislature meant, that it shall be primâ facie, as contradistinguished from conclusive, evidence.[3] Fourthly, the stamp mentioned in the Act is not required for the probate or letters of administration, but only for the copy of those documents;[4] and lastly, notwithstanding the statute, a probate will not be evidence to prove the appointment of testamentary guardians.[5]

§ 1762. The admissibility and effect of orders made by the Local Government Board,[6] on questions touching the settlement,

[1] Cope *v.* Mooney, 1862 (Ir.); Irwin *v.* Callwell, 1860 (Ir.).
[2] Barraclough *v.* Greenhough, 1867.
[3] Id.
[4] Rippon *v.* Priest, 1863 (Keating, J.).
[5] Cope *v.* Mooney, 1862 (Ir.).
[6] Constituted by 34 & 35 V. c. 70, § 2, out of what was formerly the Poor Law Board.

removal, and chargeability of paupers is governed by the following enactment,[1] "the guardians of any two unions or parishes, or the guardians of a union and the guardians of a parish, or the guardians of a union or parish and the overseers of any parish, or the overseers of any two parishes, between whom any question affecting the settlement, removal, or chargeability of any poor person shall arise, may, if they think fit so to do, by agreement in writing executed in respect of any guardians by sealing with their common seal, and in respect of overseers by the signatures of a majority of them, submit such question to the board for their decision; and the board may, if they see fit, entertain such question, and by an *order* under their *seal* determine the same; and every such order shall be in all courts, and for all purposes, final and conclusive between the parties submitting such question, as to the question therein determined."

§ 1763. An order adjudicating the amount of the stamp which a document ought to bear may be rendered conclusive by compliance with the following enactment. By the Stamp Act, 1891, the Commissioners of Inland Revenue may be required by any person to express their opinion with reference to any executed instrument as to whether it is chargeable with any stamp duty, and if so, with what amount.[2] Persons dissatisfied with their decision may appeal to the High Court of that part of the kingdom where the case has arisen.[3] They must then impress upon the document a particular stamp, *denoting* either that no duty is chargeable, or that the proper duty has been paid; and in either event, the document so stamped "shall be admissible in evidence, and available for all purposes, notwithstanding any objection relating to duty."[4] The adjudication of the commissioners under these provisions operates as a judgment in rem, and is conclusive on strangers as well as on parties, but must be pronounced before objection has been taken to the reception of the document in evidence.[5]

§ 1764. No precise rule can be laid down as to how far *judicial documents* will be evidence of the *facts recited* in them. This must,

[1] 14 & 15 V. c. 105 ("The Poor Law Amendment Act, 1851"), § 12.
[2] See 54 & 55 V. c. 39, § 12.
[3] Id. § 13.
[4] Id. § 12, subs. 5.
[5] Prudential Mutual Assur. Assoc. v. Curzon, 1852.

in each case, depend upon the language of the particular Act of Parliament under which the question arises.[1]

§ 1765. Proof of the existence of facts may be sometimes afforded by documents. Thus the production of a writ of supersedeas is sufficient evidence both of the issuing of the fiat against a bankrupt, and of the fact of such fiat having been superseded.[2] A warrant of commitment, and a conviction,[3] are each to a certain extent evidence of the facts recited therein; and if, therefore, in an action against a justice for false imprisonment, either be put in by the plaintiff reciting the information on oath on which it purports to have been founded, such recital will relieve the defendant from the necessity of formally proving the information.[4]

§ 1766. The existence alike of the judgment on which it was founded, and of the action in which such judgment was recovered, are, in cases in which the judgment debtor sues the sheriff, sufficiently proved by the production of the writ of fi. fa., and the sheriff may in such an action justify under such writ; but if the action be brought by a stranger, both the writ and the judgment must be proved.[5] The rule applies as well to a case where the vendee of the sheriff is a party, as where it is the sheriff

[1] For example, on the one hand, under § 26 of "The Trustee Act, 1893" (56 & 57 V. c. 53), a "vesting order" may, under certain circumstances, be made by the High Court for the purpose of conveying or assigning lands, or of releasing or disposing of contingent rights, such vesting orders being founded on allegations as to the incapacity, absence, survivorship, death, or intestacy of any trustee or mortgagee, and any vesting order made under the provisions of the Act, by § 32 of the same Act, has the same effect as if all necessary conveyances had been duly executed by all necessary parties. On the other hand, an order under § 43 of the old Irish "Incumbered Estates Act" (12 & 13 V. c. 77, Ir., now repealed by 38 & 39 V. c. 66), though, by § 49 of the former Act, it is per se conclusive evidence that the court have power to make it, that all necessary parties were present, that a proper petition was presented, and that due application was made, is no proof whatever either as to the title of parties stated in it to have been owners of the property (Blake *v.* Jennings, 1861 (Ir.)), or of deeds, wills, or other documents executed therein: Id.

[2] Gervis *v.* Gd. West. Canal Co., 1816; Wright *v.* Colls, 1849. But apparently the existence of a warrant of attorney cannot be so proved as to render its production unnecessary merely by putting in a rule of court by which it is set aside: Compton *v.* Chandless, 1801 (Ld. Kenyon). And see Yorke *v.* Brown, 1842.

[3] Ante, §§ 1369 et seq.

[4] Hayloc[illegible] *v.* Sparke, 1853, seemingly overruling Steven *v.* Clark, 1842 (Cresswell, J.). See ante, § 728.

[5] Doe *v.* Murless, 1817 (Bayley, J.). The reason for this distinction seems to be, that, in the former case, the plaintiff, having been a party to the original action, must be aware of the existence of the judgment, and might have moved to set it aside, if it be open to objection: Id.

himself, and where he is plaintiff as well as where he is defendant.[1] It, however, possibly may not apply where the execution creditor is himself the purchaser from the sheriff.[2]

§ 1767. Inquisitions are generally admissible as primâ facie evidence of the facts stated in them. This admissibility rests upon the ground that they contain the result of inquiries made under competent authority, concerning matters in which the public is interested.[3] As such, they are receivable even against strangers, though, as before observed, they are far from being conclusive evidence.[4] These documents, since the abolition of writs of right, and the passing of the modern statutes of limitation, have become of much less importance as evidence than they formerly were, but still are occasionally of value, especially in matters of pedigree,[5] in questions respecting the right of church patronage, or the existence or amount of a modus, and in peerage claims.

§ 1768. Among the most important of inquisitions is *Domesday-book*.[6] This is the most ancient inquisition extant, and was compiled a few years after the Conquest by commissioners, styled the Justiciaries of the King, upon the oaths of the sheriffs, the lords of the manors, the presbyters of every church, the reves of every hundred, and the bailiffs and six villans of every village. It contains a general survey of all the counties of England, except the four northern, and specifies the name and local position of each place; its possessor in the time of King Edward the Confessor; its possessor at the time of the survey; how many hides in the manor; how many carrucates in demesne; how many homagers, cotarii, servi, freemen, and tenants in socage; what quantity of wood, meadow, and pasture; what mills and fish-ponds; what the gross value in King Edward's time, and at the time of the survey; and how much each freeman or sockman had at these respective periods.[7] It is not often available as practical evidence, owing to

[1] Doe *v.* Murless, 1817 (Bayley, J.); ante, § 729.
[2] Doe *v.* Smith, 1817.
[3] 2 Ph. Ev. 125.
[4] Ante, § 1674.
[5] See De Roos Peer., 1805, H. L.
[6] Now deposited in the Record Office. See ante, § 1435, n. As to the mode of proving entries therein, see ante, § 1533.
[7] Those who wish for further information on this subject are referred to Sir H. Ellis's Introd. to Domesday, in two vols.; Ingulphus, ed. Gale, pp. 79, 80; Brady, Hist. of Eng. 205—208; Miss Strickland's Lives of Queens of England, vol. i. pp. 91—93.

the frequent changes of name which the hundreds and other places described in it have undergone since the eleventh century;[1] though this defect has, to a certain extent, been remedied by the learned labours of our antiquaries.

§ 1769. Other inquisitions which are admissible in evidence to support or defeat peerage claims, or other claims founded on pedigrees,[2] are the Visitation Books, deposited at the Heralds' College. They contain the pedigrees and coats of arms of the nobility and principal gentry in England, and were compiled during the 16th and 17th centuries by heralds, acting under commissions from the Crown.[3] Occasionally the House of Lords has required the production of the commission under which the visitation was made.[4] Copies of these visitations have, morover, been uniformly rejected;[5] though it is difficult to see on what ground, if the originals can be regarded as public official documents.[6]

§ 1769A. The report of a committee appointed by a public department in a foreign State, though addressed to that department and acted on by the Government, is not necessarily admissible in the courts here, as evidence of all the facts stated therein.[7]

§ 1770. In Ireland, the Down Survey, which was made during the reign of Charles II., is by statute[8] rendered conclusive as to the boundaries of what are called "the old and new interests,"—that is, of the lands apportioned between the aboriginal inhabitants of Ireland and the English and Scotch settlers. It is also admissible in evidence as a public document on all questions between any persons respecting the matters stated in it.[9]

[1] Sir A. Ellis's Introd. vol. i. p. 34.

[2] Matthews *v.* Port, 1687; Pitton *v.* Walter, 1719; Leigh Peer. (1829), H. L. part. 2, 138; De Lisle Peer., 1826, H. L., Min. Ev. 12; Tracy Peer., 1839, H. L., Min. Ev. 18.

[3] Hubb. Ev. of Suc. 541, 542. See ante, § 657.

[4] Hubb. Ev. of Suc. 546 et seq., and cases there cited. See, also, Shrewsbury Peer., 1857, H. L.

[5] Matthews *v.* Port, 1687; Ld. Thanet *v.* Forster, 1683; Hubb. Ev. of Suc. 548.

[6] See ante, §§ 1598, 1599. As to the admissibility of other books kept at the Heralds' College, see Hubb. Ev. of Suc. 538—566.

[7] Sturla *v.* Freccia, 1880, which deserves attention as containing able judgments on an interesting branch of law.

[8] 14 & 15 C. 2, c. 2, Ir.; 17 & 18 C. 2, c. 2, § 5, Ir.

[9] Abp. of Dublin *v.* Ld. Trimleston, 1849 (Ir.); Tisdall *v.* Parnell, 1863 (Ir.).

§ 1770A. The Books of Distributions, too, though they are only abstracts of the survey mentioned in the last paragraph, will be received in evidence, as having been compiled under public authority, and being preserved among the records of a public office.[1]

§ 1770B. But the Irish Ordnance Survey, though notoriously drawn up with great care and accuracy, is, like the English one, not regarded by the courts of law as a public document, and it is consequently inadmissible.[2] Still, though not evidence of title, it may sometimes be admissible on other questions—such, for example, as disputes as to boundary.[3]

§ 1770C. Moreover, all surveys and maps, even when they cannot be treated as public documents, will occasionally be received in evidence, as admissions of persons in privity with those against whom they are tendered.[4]

§ 1771. In Ireland every order made by the Lord Lieutenant and Council under any of the modern statutes for defining the boundaries of Irish Counties, and other divisions and denominations of land, is in itself "conclusive evidence of every fact and circumstance necessary to authorise the making thereof," and must be taken to have been made in conformity with the provisions of the Acts.[5] It may be conclusively proved by any copy "purporting to be certified as a true copy" by the clerk of the Privy Council, or by a printed copy published in the Dublin Gazette.[6] A copy, too, of any map referred to in any such order, or of any part of such map, purporting to be certified as a true copy by such clerk, is conclusive evidence of the original map or the part thereof of which it purports to be a copy.[7]

§ 1772. Old ecclesiastical *terriers* are returns of the temporal

[1] Poole *v.* Griffith, 1865 (Ir.); confirming Knox *v.* Ld. Mayo, 1858 (Ir.) (Napier, C.); and Speight *v.* Twiss, 1868 (Ir.); and overruling on this point Abp. of Dublin *v.* Ld. Trimleston, 1849 (Ir.); which see generally, as to the admissibility of decrees of the Court of Claims.

[2] As to the Irish Survey, see Swift *v.* M'Tiernan, 1848 (Ir.) (Brady, C.); Tisdall *v.* Parnell, 1863 (Ir.) (Pigot, C.B.); as to English Ordnance Survey, see Bidder *v.* Bridges, 1885 (Kay, J.); also, Beaufort (Duke of) *v.* Smith, 1849, as to a Public Survey by order of Cromwell.

[3] Caton *v.* Hamilton, 1889.

[4] Earl *v.* Lewis, 1801; Pollard *v.* Scott, 1791; Wakeman *v.* West, 1836; Doe *v.* Lakin, 1836.

[5] 35 & 36 V. c. 48 ("The County Boundaries (Ireland) Act, 1872"), § 2.

[6] Id. § 3.

[7] Id. § 4.

possessions of the church in every parish, made from time to time by virtue of the 87th canon, and deposited in the bishop's registry, or the registry of the archdeacon of the diocese, or, occasionally, in the chest of the parish church. Such "terriers" are receivable in evidence, when proved to have come from the proper repository.[1] Their admissibility rests partly upon the official character of the statements they contain, but principally, upon the ground that they are admissions by persons who stood in privity with the litigants.[2]

§ 1772A. Returns made by the incumbents of livings in answer to queries sent to them by the bishop of the diocese, for the information of the Governors of Queen Anne's Bounty, are also admissible in evidence, on the same principle as inquisitions, where the question relates to the rights of the Church.[3]

§ 1773. Copies of Court Rolls, and especially presentments of manor courts, are,—as already pointed out,[4]—admissible in evidence, to prove either the customs or bounds of a manor, or any other matters of public and general interest connected with a manor, which are capable of being proved by evidence of reputation. Moreover, copies of court rolls, purporting to be surrenders of property by a person proved to be then in possession, and admittances accordingly, will, in an action by the surrenderee wherein his ownership is disputed, be good evidence of the existence of the manor, and of such property being within it.[5] As between surrenderor and surrenderee, a presentment of an admittance upon a surrender out of court is primary evidence of the surrenderee's title, without producing the original surrender.[6]

§ 1774.[7] The principles on which *official registers* are admitted as evidence to prove the principal fact which they record, *e. g.*, a marriage or a death, have already been explained.[8] But they are also admissible as competent evidence of other facts only where such facts are required by law to be recorded in them for the public benefit, and are necessarily within the knowledge of the registering

[1] 1 St. Ev. 238, 239; B. N. P. 248. The repository need not be the *most proper* place of deposit. See, ante, §§ 659 et seq., and Croughton *v.* Blake, 1843.

[2] 2 Ph. Ev. 120.

[3] Carr *v.* Mostyn, 1850.

[4] Ante, § 623; and see also §§ 612, 613.

[5] Standen *v.* Chrismas, 1847.

[6] Doe *v.* Olley, 1840. See, also, Doe *v.* Hall, 1812; Doe *v.* Mee, 1833; R. *v.* Thurscross, 1834.

[7] Gr. Ev. § 493, in some part.

[8] Ante, § 1591.

officer.[1] Thus, on the one hand, a marriage register is evidence, not only of the fact of the marriage, but of the time of its celebration; for both these facts must have been known to the clergyman making the entry, and it was his duty to state them correctly in the register.[2] But, on the other hand, a register of baptism while evidence of that fact, and of its date, furnishes, even if it state the date of his birth, no proof of the age of the party, further than that the person to whom it relates was born at the date of the ceremony;[3] neither, taken per se, is it any evidence of the place where the child was born—although, if other circumstances be proved, as that the child at the time of baptism was very young, or had since been removed to the parish where the register was kept, or relieved by such parish while living beyond its limits, it may then, in connexion with these facts, afford presumptive evidence of the place of birth.[4] In one case, however, it is said that a register may be slight proof of a collateral fact mentioned in it. For if the register contains a statement that the child was illegitimate, it seems that it may be read as *some* proof of that fact, being regarded as evidence of the reputation in the parish.[5]

§ 1775. Registers of births and deaths, under the Births and Deaths Registration Act, 1836,[6] as amended by the Births and Deaths Registration Act, 1874,[7] are not admissible in evidence at

[1] Lyell *v.* Kennedy, 1884, C. A.

[2] Doe *v.* Barnes, 1834 (Ld. Denman). As to certified copies of it under seal of General Registry Office being evidence, see 6 & 7 W. 4, c. 86, § 38, cited ante, § 1601, n., title "Birth, &c. Registers"; R. *v.* Hawes, 1847. As to Quaker marriages, see 35 & 36 V. c. 10 ("The Marriage (Society of Friends) Act, 1872").

[3] Ryan *v.* Ring, 1890 (Ir.); Glenister *v.* Harding, In re Turner, 1885 (Chitty, J.); R. *v.* Clapham, 1829 (Ld. Tenterden); Burghart *v.* Angerstein, 1834 (Alderson, B.); Wihen *v.* Law, 1821 (Bayley, J.).

[4] R. *v.* North Petherton, 1826; R. *v.* Lubbenham, 1834; R. *v.* St. Katharine, 1831. See R. *v.* Crediton, 1858.

[5] Cope *v.* Cope, 1833 (Alderson, J.).

[6] 6 & 7 W. 4, c. 86, § 38, cited ante, § 1601, n., under title "Birth, &c. Registers."

[7] 37 & 38 V. c. 88, § 38, enacts, that "an entry or certified copy of an entry of a birth or death in a register under 'The Births and Deaths Registration Acts, 1836 to 1874,' or in a certified copy of such a register, shall not be evidence of such birth or death, unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is required by law at the date of such entry to give to the registrar information concerning such birth or death, or purports to be made upon a certificate from a coroner, or in pursuance of the provisions of this Act with respect to the registration of births and deaths at sea. When more than three months have intervened between the day of the birth and the day of the registration of the birth of any child, the entry or certified copy of the entry, made after the commencement of this Act, of the

all, unless the entries purport to be signed in accordance with the prescribed rules. On proof, however, that the requirements of the Acts have been duly complied with, the entries, or certified copies of them, become evidence,[1] not only of the births[2] and deaths to which they relate, but of the place where these events occurred, whenever by the direction of the Registrar-General that fact has been added to the entry;[3] but the register books kept under the Registration of Burials Act, 1864, are simply "evidence of the burials entered therein."[4]

§ 1775A. The Register of Patents,[5]—which is kept at the Patent Office, and which contains "the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licenses under patents, and of amendments, extensions and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed,"—is primâ facie evidence of any matters by the Patents,

birth of such child in a register under 'The Births and Deaths Registration Acts, 1836 to 1874,' or in a certified copy of such a register, shall not be evidence of such birth, unless such entry purports, (a) ... appear that not more than twelve months have so intervened, to be signed by the superintendent registrar as well as by the registrar; or, (b) if more than twelve months have so intervened, to have been made with the authority of the Registrar-General, and in accordance with the prescribed rules. Where more than twelve months have intervened between the day of a death or the finding of a dead body and the day of the registration of the death or the finding of such body, the entry or certified copy of the entry, made after the commencement of this Act, of a death in a register under 'The Births and Deaths Registration Acts, 1836 to 1874,' or in a certified copy of such register, shall not be evidence of such death, unless such entry purports to have been made with the authority of the Registrar-General, and in accordance with the prescribed rules."

[1] A certificate of death is sufficient evidence of a death, without a certificate of burial also: Re Vater's Trust, 1887.

[2] In re Wintle, 1870, Ld. Romilly is reported to decide that a birth register is not evidence of the date of birth; but this would be a dangerous ruling to follow implicitly.

[3] By 7 W. 4 & 1 V. c. 22 ("The Births and Deaths Registration Act, 1837"), § 8, "it shall be lawful for the Registrar-General, if he shall think fit, to direct that the place of birth or death of any person, whose birth or death shall be registered under the said Act for registering births, deaths, and marriages, shall be added to the entry, in such manner as the Registrar-General shall direct; and such addition, when so made, shall be taken to all intents to be part of the entry in the register."

[4] 27 & 28 V. c. 97, § 5.

[5] By § 114 thereof, registers of patents and proprietors, or of designs and trade marks, kept under any enactment repealed by "The Patents, Designs, and Trade Marks Act, 1883," are to be deemed part of the register kept under that Act (46 & 47 V. c. 57).

Designs, and Trade Marks Act, 1883,[1] directed or authorised to be inserted therein.[2]

§ 1775B. The law is the same as to the Register of Designs, and the Register of Trade Marks,[1] which are respectively kept in the same office;[3] and the Register of Trade Marks Act further provides, that the registration of a person as proprietor of such mark shall, for the first five years, be primâ facie evidence, and, after that date, be conclusive evidence, of his right to its exclusive use, subject to the provisions of the Act.[4]

§ 1776. Registers required by law to be kept are in all cases (as well as in the case of baptism and other registers),[5] evidence of the facts required to be recorded in them, but not of facts voluntarily also recorded therein. In accordance with this principle, the time of a prisoner's committal or discharge[6] may be proved by the daily books of a public prison, but the cause of his commitment cannot be so proved;[7] the time of a vessel's sailing, and the general movements of the fleet of which it forms part, may be primâ facie proved[8] by the log-book of a convoy man-of-war, transferred from the Admiralty to the Record Office;[9] the books of the Sick and Hurt Office, and the muster-books of the Navy Office (now under the custody of the Master of the Rolls),[10] are admissible to prove the death of a sailor, and the time when it occurred,[11] and the latter books may also be read to show what ship the sailor belonged to, and the amount of wages due to him;[12] and lighthouse journals are admitted by the Court of Admiralty to prove the state of the wind and weather as registered therein.[13] In all cases like the above, the register does not prove the identity of the parties there named with the parties in question; but that fact must be established by other proof, though slight evidence will in most cases suffice.[14]

[1] 46 & 47 V. c. 57, amended by 48 & 49 V. c. 63.
[2] Id. § 23.
[3] Id. §§ 55, 78.
[4] Id. § 76.
[5] Supra; § 1774.
[6] R. *v.* Aickles, 1784.
[7] Salte *v.* Thomas, 1802.
[8] D'Israeli *v.* Jewett, 1795; Watson *v.* King, 1815.
[9] See ante, § 1485, n.
[10] Id.
[11] Wallace *v.* Cook, 1804; R. *v.* Rhodes, 1742; Barber *v.* Holmes, 1800. See Heathcote's Divorce, 1851, H. L., where the Lords required other evidence than a log-book to prove that an officer of a ship was at a certain place at a given time.
[12] R. *v.* Fitzgerald, 1741; R. *v.* Rhodes, 1742.
[13] The Maria das Dores, 1863 (Dr. Lushington).
[14] Birt *v.* Barlow, 1779; Bain *v.*

§ 1777. On the same broad principle that registers required by law to be kept are primâ facie evidence of the facts which the law says shall be recorded in them, land tax assessments are admissible, to prove the assessment of the taxes upon the individuals and for the property therein mentioned; and, perhaps, taken in connection with other facts, are some evidence of occupation or seisin.[1] Again, as to the *value* of property—the valuation lists of property in the Metropolis are, for many purposes, conclusive, and they are also taken as showing that all requisite hereditaments have been inserted;[2] poor law valuations in Ireland have also been received on one or two occasions as some evidence on the point,[3] and are now by statute sufficient proof of the "annual value" of such lands in all cases in which that question may be raised before the Civil Bill Court.[4] Under the Representation of the People Act, 1867, the rate-book has been held to be some, but not conclusive, evidence of the "rateable value" of premises sufficient to qualify an occupier to be registered as a voter;[5] the rate-books of an Irish poor-law union are primâ facie, but not conclusive, evidence of the liability of a person rated therein as immediate lessor;[6] the books of the Bank of England are admissible, and indeed the best evidence, to prove the transfer of stock;[7] the books kept by the Metropolitan Board of Works for consolidated stock,[8] and the registers kept in pursuance of the Colonial Stock Act, 1877,[9] are respectively evidence of all matters therein severally entered, and of the title of the owners of any such stock; some of the official documents relating to parliamentary or municipal elections are, under specified restrictions, rendered, by the Ballot Act, 1872, admissible in evidence of certain particulars;[10] an entry in a vestry-book, stating the election of a treasurer of the parish at a

Mason, 1824; Barber *v.* Holmes, 1800; Wedgwood's case, 1831 (Am.).

[1] Smith *v.* Andrews, 1891; Doe *v.* Seaton, 1834; Doe *v.* Arkwright, 1833; Doe *v.* Cartwright, 1824; Ronkendorff *v.* Taylor, 1830 (Am.).

[2] 32 & 33 V. c. 67, § 45. See, also, "The Local Government Act, 1888" (51 & 52 V. c. 41).

[3] Swift *v.* M'Tiernan, 1848 (Ir.) (Brady, C.); Welland *v.* Ld. Middleton, 1844 (Ir.) (Sugden, C.). See 23 & 24 V. c. 4, § 9, Ir., ante, § 1063, n.

[4] See 40 & 41 V. c. 56, §§ 31, 32.

[5] Cooke *v.* Butler, 1872.

[6] Castlebar Guardians *v.* Ld. Lucan, 1849 (Ir.).

[7] Breton *v.* Cope, 1791; Marsh *v.* Colnett, 1798.

[8] 32 & 33 V. c. 102, § 13.

[9] 40 & 41 V. c. 59, § 17.

[10] 35 & 36 V. c. 33, Sched. 1, Part 1, rr. 38—43, and Part 2, r. 64. See R. *v.* Beardsall, 1876.

vestry duly held in pursuance of notice, is evidence of the election, and of its regularity;[1] and an old entry in the vestry-book, signed by the churchwardens, stating that a pew claimed in right of a messuage had been repaired by a former owner of the messuage, in consideration of his using it, has been held to be evidence in support of the plaintiff's right, as owner of such messuage, when made by the churchwardens within the scope of their official authority.[2]

§ 1777A. On the other hand, in accordance with the principle that voluntary entries in a register, as to matters which the law does not require to be recorded there, are *not* evidence, old entries in a vestry-book, made by a churchwarden apparently not in the discharge of any public duty, and by which he has not charged himself, have been rejected.[3]

§§ 1778—80. Besides the instances given above, the Legislature has on many occasions interposed, and expressly made official registers evidence.[4]

[1] R. *v.* Martin, 1809; Hartley *v.* Cook, 1832.

[2] Price *v.* Littlewood, 1812 (Ld. Ellenborough); questioned, however, in House of Lords (Ld. Blackburn): Sturla *v.* Freccia, 1880.

[3] Cooke *v.* Banks, 1826.

[4] For instance, "*The Companies Act*, 1862" (25 & 26 V. c. 89), § 37, makes registers of members kept in pursuance thereof primâ facie evidence of any matters by that Act directed or authorised to be inserted therein: that is, among other particulars, of the names, addresses, and occupations of the members,—of the shares or amount of stock held by each member, distinguishing each share by its number,—of the amount paid, or agreed to be considered as paid, on the shares of each member, of the date at which the name of any person was entered in the register as a member, and of the date at which any person ceased to be a member (see §§ 25, 29). "*The Copyright Act*, 1842" (5 & 6 V. c. 45, § 11, cited ante, §§ 1504-21, n.); "*The International Copyright Act*, 1844" (7 & 8 V. c. 12, § 8); and "*The Fine Arts Copyright Act*, 1862" (25 & 26 V. c. 68, § 5), make registers of copyright "primâ facie proof of the proprietorship or assignment of copyright or licence as therein expressed," and "in the case of dramatic or musical pieces, are primâ facie proof of the right of representation or performance." "*The Country Bankers Act*, 1826" (7 G. 4, c. 46, §§ 4, 6; ante, § 1601, n., title "Banking Copartnerships"), makes certified copies of the memorials filed at the Office of Inland Revenue by banking copartnerships receivable in evidence, "as proof of the appointment and authority of the public officers named in such account or return, and also of the fact, that all persons named therein as members of such corporation or co-partnership, were members thereof at the date of such account or return"; though if these memorials have not been filed within the time limited by the Act, they cannot be received in evidence (Prescott *v.* Buffery, 1845), and when they are admissible, they by no means preclude parties from having recourse to other proof of the facts contained in them (Edwards *v.* Buchanan, 1832; R. *v.* Carter, 1845). Under "*The Diseases of Animals Act*, 1894" (57 & 58 V. c. 57), § 10, subs. 5, "An order

§ 1781. The admissibility of the *books of corporations* depends, at common law, on the nature of the acts recorded. If these are obviously of a public character, and the entries have been made by the proper officer, they will be received in evidence either for or against the corporations;[1] but if they relate to the private transactions of the corporate body, they will be inadmissible, except, perhaps, in actions between their own members.[2] At common law, these books, whatever be the nature of the entries, can seldom be adduced by the corporation, in support of its own claims against a stranger,[3] but such books are, however, frequently rendered admissible by statute. Thus, under the Companies Act, 1862,[4] the minutes of all resolutions and proceedings of general meetings of

of the board or of a local authority declaring a place to be an infected place or area, or declaring a place or area, or a portion of an area, to be free from disease, or cancelling a declaration, shall be conclusive evidence to all intents of the existence or past existence or cessation of the disease, or of the error, or of any other matter whereon the order proceeds." "*The Local Loans Act*, 1875" (38 & 39 V. c. 83), §§ 23, 24, renders the registers of nominal securities, which are provable by certified copies or extracts, "evidence of any matters authorised to be inserted therein." So, under "*The London Hackney Carriages Act*, 1843" (6 & 7 V. c. 86, § 16, cited ante, § 1601, n., title "Public Conveyances." See, also, 16 & 17 V. c. 112, § 12, Ir), registers of licences granted in respect of metropolitan public carriages appear to be sufficient proof of all things therein contained. "*The Merchant Shipping Act*, 1894" (57 & 58 V. c. 60), § 64, makes every register of a British ship, and every examined or certified copy of such a register and endorsements thereon, and every declaration made thereunder, as to a British ship, receivable in evidence as primâ facie proof of all matters contained or recited therein (see Myers *v.* Willis, 1856; The Princess Charlotte, 1863; and, also, Leary *v.* Lloyd, 1860), and consequently, of the fact that the ship registered is a British vessel (R. *v.* Bjornsen, 1865), and of the ownership of such vessel (Hibbs *v.* Ross, 1866), and under § 239, subs. 6, all entries made in any official log-book, as directed by the same Act, are receivable in evidence (see §§ 239, 241 of the Act; also The Henry Coxon, 1878). "*The Oyster Fishery (Ireland) Amendment Act*, 1866" (29 & 30 V. c. 97, § 12, Ir.; see, also, "The Fisheries (Ireland) Act, 1869" (32 & 33 V. c. 92, Ir.), § 14, makes a licence granted for the formation of an oyster bed, certified under the hand of the clerk of the peace, with whom the original is lodged, evidence that such licence was duly granted, and that all preliminary matters were rightly performed. So, in certain proceedings under "*The Sea Fisheries Acts*, 1868 *and* 1883" (31 & 32 V. c. 45; 46 & 47 V. c. 22), it is enacted by "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), §§ 373, 374, that the register of sea-fishing boats "shall be conclusive evidence that the persons entered therein at any date as owners of the boat were at that date owners thereof, and that the boat is a British sea-fishing boat."

[1] R. *v.* Mothersell, 1718; Thetford's case, 1707.

[2] Marriage *v.* Lawrence, 1819; Gibbon's case, 1734.

[3] London *v.* Lynn, 1789; Corp. of Waterford *v.* Price, 1846 (Ir.); Com. *v.* Woelper, 1817 (Am.); Highland Turnp. Co. *v.* McKean, 1813 (Am.).

[4] 25 & 26 V. c. 89, § 67, cited ante, §§ 1596-7, n., under title "Books of Companies."

companies registered under the Act, and of the directors or managers of such companies, provided they purport to be signed, either by the presiding chairman, or by the chairman of the next succeeding meeting, are primâ facie evidence, not only of the facts therein entered, but of the meetings having been duly held and convened. Another section[1] of the same Act enacts, that "where any company is being wound up, all books, accounts, and documents of the company, and of the liquidators [appointed under the Act], shall, as between the contributories of the company, be primâ facie evidence of the truth of all matters purporting to be therein recorded."[2] So under "The Companies Clauses Consolidation Act, 1845,"[3] the registers of shareholders in companies, subject to the provisions of that Act, furnish primâ facie evidence of the defendant being a shareholder, and of the number and amount of his shares, in all actions for calls brought by the company.[4] "The Elementary Education Act, 1870," contains provisions[5] with respect to the minutes of meetings held by a school board under that statute similar to those contained in the section of the Companies Act, 1862, first referred to above. Besides the examples given above, there are a great variety of semi-public books and documents, the admissibility and effect of which depend upon special legislative enactment, the most important of which have already been incidentally noticed while discussing the mode of proving public documents. Parliament having in all such instances as these, disregarded the common-law rule, which prohibits a man from producing his own books as evidence for himself, the courts will take care, before they permit a company to avail itself of such an exceptional privilege, that the provisions of the statute conferring the privilege have been strictly complied with.[6]

§ 1782. The *mode of signing books* which contain entries of the proceedings of commissioners, directors of companies, public trustees, and the like, at their general meetings, must now be considered.

[1] 25 & 26 V. c. 86, § 154.

[2] See, also, Fox's case, Re Moseley Green Coal and Coke Co., Lim., 1863.

[3] 8 & 9 V. c. 16, § 28.

[4] See Waterford Rail. Co. *v.* Wolsely, 1851 (Ir.).

[5] 33 & 34 V. c. 75, § 30, subs. 4.

[6] Bain *v.* Whitehaven, &c. Rail. Co., 1850, H. L. (Ld. Brougham); Birkenhead Rail. Co. *v.* Brownrigg, 1849; Lond. & N. W. Rail. Co. *v.* McMichael, 1850; West Cornwall Rail. Co. *v.* Mowatt, 1850. See Inglis *v.* Gt. North. Rail. Co., 1852, H. L.; Waterford, Wexf. Wickl. & Dubl. Rail. Co. *v.* Pidcock, 1853.

By a great variety of statutes, such books are rendered admissible as evidence of the proceedings entered in them, and, in general, even an unsigned minute of proceedings under the charters, &c., of incorporation of a society will, if produced from the proper custody, be admissible in evidence.[1] Even in a penal action, the minute book of a vestry, which has been kept in accordance with the provisions of the Metropolis Local Management Act,[2] is, at all events when coupled with its attendance book, good evidence;[3] but it not unfrequently happens that the Act contains a clause directing the chairman to subscribe his name to the minutes at each meeting. Notwithstanding this clause, the courts have held, that the fact of the signature being attached *at the meeting*, is not a condition precedent to the admissibility of the entry, provided it has been signed at some future time by the person who actually presided as chairman.[4] This ruling has at least the advantage of being highly convenient, and (probably for this reason) was, in 1873, and again in 1882, almost entirely adopted by the Legislature, in the enactments respectively passed for facilitating the proof of proceedings of Municipal Corporations.[5]

§ 1783. The last-mentioned Act enacts,[6] that "a minute of proceedings at a meeting of the council, or of a committee, signed at the same or *the next* ensuing meeting, by the mayor, or by a member of the council, or of the committee, describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof;" and it further enacts,[7] that "until the contrary is proved, every meeting of the council or of a committee, in respect of the proceedings whereof a minute has been so made, shall be deemed to have been duly convened and held, and all the members of the meeting shall be deemed to have been duly

[1] Lauderdale Peer. case, 1885, H. L.

[2] Contained in § 60, of 18 & 19 V. c. 120.

[3] Hemmings *v.* Williamson, 1883, C. A.

[4] Southampton Dock Co. *v.* Richards, 1840; Miles *v.* Bough, 1842; In re Jennings, 1851 (Ir.). See 33 & 34 V. c. 75, § 30, subs. 4. See, also, Inglis *v.* Gt. North. Rail. Co., 1852, H. L., in which it was held, that, where a meeting of a Scotch railway company's finance committee was adjourned, it was sufficient that the *minutes* of the *adjourned* meeting were signed; though § 101, of 8 & 9 V. c. 17, requires that "*every entry* shall be signed by the chairman of such meeting."

[5] 36 & 37 V. c. 33, § 3; now repealed by 45 & 46 V. c. 50 ("The Municipal Corporations Act, 1882").

[6] 45 & 46 V. c. 50, § 22 (5).

[7] Id. s. 22 (6).

qualified; and, where the proceedings are proceedings of a committee, the committee shall be deemed to have been duly constituted, and to have had power to deal with the matters referred to in the minutes." The Public Health Act, 1875, contains two similar clauses, and extends this facility of proof, not only to minutes of proceedings at meetings of local boards, committees, or joint boards, but to "*copies* of any orders made or resolutions passed" at such meetings.[1]

§ 1784. While treating of the mode of proving certificates, reference has been made to a considerable number of documents which are rendered by statute admissible evidence of the particular facts certified therein.[2] To these no further allusion is necessary; but with respect to certificates generally,[3] it may be observed, that, at common law, a certificate of a mere matter of fact, not coupled with any matter of law, cannot be received as evidence, even though given by a person in an official situation.[4] If the person was bound to record the fact, then the proper evidence is a copy of the record duly authenticated. But as to matters which he was not bound to record, his certificate, being extra-judicial, is merely the unsworn statement of a private person, and will therefore be rejected.[5] So, where an officer's certificate is made evidence by statute of certain facts, he cannot extend its effect to other facts, by stating those also in the certificate; but such parts of the certificate will be suppressed.[6] Even the certificate of the Sovereign, under the sign-manual, cannot be received.[7]

§ 1784A. However, the judge of the Probate Division has, on two occasions, apparently held, that the certificate of the ambassador in England of a foreign country, bearing the seal of the legation, was admissible to prove *the law* of that country.[8] But the point was not argued in either of these cases, and, moreover,

[1] 38 & 39 V. c. 55, Sched. 1, r. 1, subr. 10, and r. 2, subr. 8. As to the minutes of meetings of creditors in bankruptcy, see *ante*, § 1552.

[2] *Ante*, § 1611, n.

[3] Gr. Ev. § 498, in part.

[4] Omichund *v.* Barker, 1774.

[5] Sowell *v.* Corp. 1824; Drake *v.* Marryat, 1823; Roberts *v.* Eddington, 1801; Waldron *v.* Coombe, 1810; R. *v.* Sowell, 1845; Oakes *v.* Hill, 1833 (Am.); Wolfe *v.* Washburn, 1826 (Am.); Jackson *v.* Miller, 1827 (Am.); U. S. *v.* Buford, 1850 (Am.).

[6] Johnson *v.* Hooker, 1789; Governor *v.* Bell, 1819 (Am.); Governor *v.* Jeffreys, 1820 (Am.); Stewart *v.* Alison, 1821 (Am.).

[7] Omichund *v.* Barker, 1774. See further, § 1381.

[8] In the goods of Prince Peter Oldenburg, 1884; In the goods of Klingeman, 1862.

the mere question was, whether or not letters of administration to a foreigner, limited to the property of the deceased in England, should be granted.

§ 1785.[1] *Books and chronicles of public history* may be here mentioned, as partaking in some degree of the nature of public documents, and as being entitled, on the same principle, to a certain degree of credit. Any approved public and general history, therefore, is admissible to prove ancient facts of a public nature, and the general usages and customs of this or of any foreign country.[2] But in regard to matters not of a public and general nature, such as the custom of a particular town, a descent, the nature of a particular abbey, the boundaries of a county, and the like, they are not admissible.[3] A fortiori, peerages, navy lists,[4] clergy lists, court guides, directories, university calendars, and other non-official publications of a similar nature, cannot be received in evidence, however useful they may be to the genealogist, in aiding his researches, and directing him to the sources from which the information contained in them was derived.[5]

[1] Gr. Ev. § 497, in part.

[2] See Read *v.* Bishop of Lincoln, 1892, P. C., and cases there collected and discussed; B. N. P. 248, 249; case of Warren Hastings referred to by Ld. Ellenborough, in Picton's case, 1804; Ld. Bridgewater's case, undated; Morris *v.* Harmer, 1833 (Am.); Ld. Bromker *v.* Atkyns, 1682; St. Catherine's Hospital case, 1672; Neale *v.* Fry, 1684; S. C. nom. Neal *v.* Jay; S. C. nom. Lady Ivy and Neal's case. In all the three reports, generally recognised as being reports of the last-named case, it is distinctly stated that certain Chronicles were admitted in that case to prove on behalf of the plaintiff that King Philip did *not* assume the style of King of Spain before a certain time; but, on turning to the report of a case reported under the name of Mossom *v.* Ivy, 1684, which seems to be the same case as that just referred to, under another name, no Chronicles appear to have been offered in evidence for such a purpose. A history, indeed, was tendered by the defendant to prove when Charles the Fifth resigned, but this was rejected by Jeffreys, C.J., who, after styling the book in his characteristic manner, "a little lousy history," asked with evident irritability, "Is a printed history, *written by I know not who*, an evidence in a court of law?" P. 625. It is impossible to reconcile these conflicting reports. See Pea. Ev. 82, 83.

[3] Steyner *v.* Droitwich, 1696; Piercy's case, 1682; Lee Peer., undated, Min. Ev. 155; Evans *v.* Getting, 1834 (Alderson, B.); 2 Ph. Ev. 123, 124; Hubb. Ev. of Suc. 699—701.

[4] Army lists are admissible, see ante, § 1638A.

[5] Marchmont Peer., 1838-43, Min. Ev. 62, 77; Hubb. Ev. of Suc. 700—703. As to "Medical Registers," see ante, § 1638; and as to "Law Lists," see ante, § 1639.

AMERICAN NOTES.

Public Documents. — The definition of public documents given by the learned author at § 1479, *supra*, as the "acts of public functionaries, in the executive, legislative, and judicial departments of government, including, under this general head, the transactions which official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation," seems sufficiently accurate when qualified by the additional statement that foreign acts of state and the judgments of foreign courts are included within the definition. Under this definition, a list of the officers and soldiers of the Commonwealth of Massachusetts in the late civil war, and designating the name of the town or city upon whose quota said soldiers were credited, published under authority of the legislature, is a public document. "The facts collected in it were public facts." Worcester *v.* Northborough, 140 Mass. 397 (1886).

The records of the observations of a signal-service weather observer at Chicago have been held to be public documents. Evanston *v.* Gunn, 99 U. S. 660 (1878).

On the other hand, a record of baptisms kept in a Roman Catholic church, not in pursuance of a legal requirement, but in discharge of an ecclesiastical duty, was held not to be a public document. Kennedy *v.* Doyle, 10 All. 161 (1865). But see, *contra*, by statute, Feron *v.* Donelly, 14 L. Can. Reports, 50 (1863).

The *effect* of public documents is part of the doctrines of substantive law. Their *admissibility* presents no peculiar features. It is governed, so far as relates to the rules of evidence, by the ordinary principles applying to all writings.

Method of Proof. — The proof of public documents is, however, of importance in the law of evidence. Speaking generally, such proof is either by production of the original or the use of a copy duly authenticated, by some one entitled by law to do so. "Whenever a book is of such a public nature as to be admissible in evidence on its mere production from the proper custody, its contents may be proved by an authentic copy." Traction Co. *v.* Board of Works, 57 N. J. L. 313 (1894).

So of any other record, *e. g.* a mechanic's lien. Van Riper *v.* Morton, 61 Mo. App. 440 (1895).

Acts of State. — The acts of state in strictness may be proved by copy certified under the seal of state, affixed by a proper officer. Courts will take judicial notice of the great seal of state.

So the copy of a statute of Massachusetts, verified by the seal of state, was received in the courts of Maine. "We are satisfied, upon the reason of the thing, as well as upon authority, that the public

seal of a State, affixed to the exemplification of a law, proves itself. It is a matter of notoriety, and will be taken notice of as part of the law of nations, acknowledged by all." Robinson *v.* Gilman, 20 Maine, 299 (1841); Watson *v.* Walker, 23 N. H. 471 (1851).

So of proof of the acts of state of a foreign country. "It seems to be settled law that the certificate and seal of the department of foreign affairs of such a government proves itself, and is a sufficient authentication of any public record of such country made and kept in obedience and conformity to its laws." Stanglein *v.* State, 17 Oh. St. 453 (1867).

And equally so of its colonies. Church *v.* Hubbart, 2 Cranch, 186, 237 (1804); U. S. *v.* Wiggins, 14 Peters, 334, 345 (1840).

The seal of state itself need not be proved. "The seal proves itself, and imports absolute verity." Coit *v.* Milliken, 1 Denio, 376 (1845); Lincoln *v.* Battelle, 6 Wend. 475 (1831).

So of the seal of a court of admiralty. Thompson *v.* Stewart, 3 Conn. 171 (1819).

"Until the contrary appears, the presumption is that 'the seal of state' was affixed by the proper officer." Coit *v.* Milliken, 1 Denio, 376 (1845).

And "it cannot be presumed that an application to authenticate an edict by the seal of the nation would be rejected. . . . Nor can it be presumed that any difficulty exists in obtaining a copy." Church *v.* Hubbart, 2 Cranch, 186, 237 (1804).

But certification of foreign acts of state under the great seal of state is not the exclusive mode of certification. Other certificates by proper public officers have been received.

A certified copy of a land grant under the hand of a Spanish colonial government secretary in East Florida has been held competent when accompanied by evidence of the secretary's signature, "and that it was one of the ordinary duties of the secretary to make certified copies" of such decrees. "It follows, in this case, as in all others where the originals are confined to a public office, and copies are introduced, that the copy is (first) competent evidence by authority of the certificate of the proper officer: and (second) that it proves, *prima facie*, the original to have been of file in the office, when the copy was made. And for this plain reason: the officer's certificate has accorded to it the sanctity of a deposition: he certifies 'that the preceding copy is faithfully drawn from the original, which exists in the secretary's office, under my charge.'" U. S. *v.* Wiggins, 14 Peters, 334, 346 (1840).

Various methods are competent for proving executive papers, not of record, in departments of the government. A convenient method is by the use of a sworn copy. For example, official letters from the Commissioner of the General Land Office to a person claiming title under a warrant and survey, may be proved by copies verified

by the oath of the person who, as a clerk in that division of the Land Office at that time, had charge of the letters relating to the subject. Coan *v.* Flagg, 123 U. S. 117 (1887).

The records of the executive departments of the government are, however, usually certified under § 882 of the Revised Statutes, which provides that: "Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof."

Under these provisions it has been held that a certificate by a Commissioner of Pensions that an accompanying paper "is truly copied from the original in the office of the Commissioner of Pensions," taken together with a certificate signed by the Secretary of the Interior and under the seal of that Department, certifying to the official character of the Commissioner of Pensions, was a substantial compliance with the law. "The records of the Pension Office constitute part of the records of the Department of the Interior, of which Executive Department the Pension Office is but a constituent." Ballew *v.* U. S., 160 U. S. 187 (1895).

So certified copies of correspondence between the Secretary of War and the Secretary of the Interior relating to a relevant matter, are admissible. Johnson *v.* Drew, 34 Fla. 130, 143 (1894).

An additional method of proof is by the use of official printed copies. In an early New York case it was held that a printed copy of a diplomatic letter from the British government to that of the United States should have been received to establish the fact of a blockade. "The letter of Mr. Canning to Mr. Pinkney, of the 8th of January, 1808, would have still further corroborated the proof of the blockade, as it was decisive evidence of the intention of the English government to include St. Lucar in the blockade of Cadiz, and to carry the blockade, at the entrances of those ports, into 'the most rigorous' effect. This letter, I think, ought to have been admitted in evidence. It appears to have been printed at the city of Washington, by persons whom the defendants offered to show were printers to congress, and to have composed part of a set of public documents transmitted to congress, by the president of the United States. A greater strictness of proof, in respect to such public matters of state, and when they are introduced collaterally, and not as matter of fact in issue, would be inconvenient, and is not now, in practice, required. Thus in the case of The King *v.* Holt (5 Term Rep. 436.) the K. B. held that the London Gazette was *prima facie* evidence of matters of state; and in Talbot *v.* Seaman, (1 Cranch, 38.) a French decree was allowed by the supreme court of the United States to be read, upon no higher proof than that which attended the letter in question." Radcliff *v.* United Ins. Co., 7 Johns. 38, 50 (1810).

So the American State Papers, printed by order of Congress, may be read in evidence, without further authentication, as to any relevant documents therein contained. Bryan *v.* Forsyth, 19 Howard, 334 (1856); Watkins *v.* Holman, 16 Peters, 25, 56 (1842); Dutillet *v.* Blanchard, 14 La. Ann. 97 (1859); Nixon *v.* Porter, 34 Miss. 697, 707 (1858). "The very highest authenticity attaches to these state papers published under the sanction of Congress." Watkins *v.* Holman, 16 Peters, 25, 56 (1842). "In the progress of the trial in the Circuit Court, the plaintiff offered in evidence the printed report of Edward Coles, the register of the land office at Edwardsville, as found in the American State Papers, vol. 3, from pages 421 to 431, inclusive, to which the defendant objected, because it was not, without proof of its authenticity, legal evidence. But the court overruled the objection, and the report was given in evidence to the jury, to which ruling the defendants excepted. These State Papers were published by order of Congress, and selected and edited by the Secretary of the Senate and Clerk of the House. They contain copies of legislative and executive documents, and are as valid evidence as the originals are from which they were copied; and it cannot be denied that a record of the report of Edward Coles, as found in the printed journals of Congress, could be read on mere inspection as evidence that it was the report sent in by the Secretary of the Treasury. The competency of these documents as evidence in the investigation of claims to lands in the courts of justice has not been controverted for twenty years, and is not open to controversy." Bryan *v.* Forsyth, 19 How. 334 (1856).

For the same reasons, a copy, printed by authority of the Senate of the United States in a volume purporting to be printed by the government printer, of a public document communicated to the Senate by the President, is as competent evidence as the original document could be. "Acts of Congress, and proclamations issued by the secretary of state in accordance therewith, are the appropriate evidence of the action of the national government. Taylor on Ev. (5th ed.) § 1473; 1 Greenl. Ev., § 491. And the volume of public documents, printed by authority of the senate of the United States, containing letters to and from various officers of state, communicated by the President of the United States to the senate, was as competent evidence as the original documents themselves. The King *v.* Holt, 5 T. R. 436, and 2 Leach (4th ed.) 593; Watkins *v.* Holman, 16 Pet. 25, 55, 56; Bryan *v.* Forsyth, 19 How. 334; Gregg *v.* Forsyth, 24 How. 179; Radcliff *v.* United Insurance Co., 7 Johns. 38, 50." Whiton *v.* Albany, &c., Ins. Co., 109 Mass. 24, 30 (1871). But an official publication is not evidence of facts of a private nature. So the residence of A. cannot be proved by the mention of it in an official gazette. Brundred *v.* Del. Hoyo, 20 N. J. L. 328 (1844).

Books, maps, and reports, printed and published at the Govern-

ment Printing Office at Washington, are competent. U. S. *v.* Beebe, 2 Dakota, 292 (1880).

Many executive documents, however, are not officially printed. In such cases, duly certified copies are most frequently used, as being a simpler form of proof than copies authenticated under oath.

In Florida, it has been held that, even without a statutory provision, exemplifications from the General Land Office, under the hand of the commissioner and the seal of his office, are competent evidence. Liddon *v.* Hodnett, 22 Fla. 442 (1886).

So in Illinois. Gormley *v.* Uthe, 116 Ill. 643 (1886).

In Gilman *v.* Riopelle, 18 Mich. 145, 158 (1869), it was held that "The mode of authenticating the documents, records and proceedings of any of the departments or courts of the United States, is governed by the laws of the United States, and by the practice of such departments and courts, and not by the statutes of the State." The court proceed to hold that, where an authentication of the Commissioner of the General Land Office is attached to several documents, but covers in terms only certain of them, that the certificate is good so far as it extends. *Ibid.* This case is confirmed in Tillotson *v.* Webber, 96 Mich. 144 (1893), which holds that the certificate of the commissioner, if executed according to the rules of his office, though not in accordance with the statutes of Michigan, need extend only to such portion of the record as may relate to the matter under investigation. *Ibid.*

A certificate by an "acting commissioner" is good, — not showing on its face a vacancy in the office. Murray *v.* Polglase, 17 Mont. 455 (1896).

The certificate of the commissioner must state the facts of record, and not the commissioner's conclusion from them. "To be admissible under this statute, the certificate must either be to a copy of a paper, or a statement of a fact contained in a paper, which is a record of that office, and the original of which would be evidence in the case. We understand the statement in the certificate offered, that this land certificate 'was never sold by said Toby as agent of the Republic of Texas,' to be a conclusion of the Commissioner, and not a statement of a fact which appears in a record of his office, the original of which would be admissible in evidence; and we also regard the other statements in this certificate as being conclusions of the Commissioner, rather than statements of facts evidenced by documents which are parts of his records. The statement that the Land Office had regarded this land certificate as void and no claim against the State, we regard as immaterial. Buford *v.* Bostick, 58 Texas, 65." Fisher *v.* Ullman, 3 Tex. Civ. App. 322 (1893); Byers *v.* Wallace, 87 Tex. 503 (1895).

So an adjutant-general is not authorized to certify that certain

facts appear, by the records of his office, to have happened. "We find no law which authorized the Adjutant-General to give such a certificate as that offered in evidence. It was hearsay, and properly excluded." Byers *v.* Wallace, 87 Tex. 503 (1895). In a similar case, the supreme court of Connecticut say: "It became important during the trial for the plaintiff to prove the date when Leonard E. Madison, who had been a soldier during the civil war in a Massachusetts regiment, was discharged from the service. For this purpose a certificate was offered in evidence, dated in 1884, from the Adjutant General of Massachusetts, under the seal of his department, that this name was borne upon the muster roll of a certain Massachusetts regiment, and which gave the date of enlistment and discharge, both being in the year 1865. This paper was properly excluded. It was not a copy of a record, but at most only an unsworn statement of certain of the contents of a record, and would have been inadmissible, even had it been properly authenticated." Enfield *v.* Ellington, 67 Conn. 459 (1896).

A commissioner of the Land Office is not, however, limited in making copies to the language of the record. Copies of maps and sketches of surveys are equally competent when duly authenticated. "The sketch contained in Atlas G should be treated as an archive of the land office. The surveyors who surveyed lands granted by the former governments returned, with their reports, sketches or maps of the lands surveyed, to be kept among the archives of the land offices. It is to be presumed that such sketches of the surveys delineated in that in question were returned with the reports of surveys to the land office at Nacogdoches, and became archives of that office. The report of the Aguilera survey states that a map of the land accompanies it. After the revolution it was made the duty of all persons having custody of archives to return them to the general land office, and this readily explains the presence of this sketch there. Hart. Dig. arts. 1814–1827, 1835. Its authenticity and genuineness should be presumed from the facts that it was the duty of persons having possession of archives to return them to the land office, and of the commissioner to obtain and receive them, and that it is found there in proper custody. If it was not returned there, in its present form, from some office in which it had been deposited as an archive, but was compiled in the land office, from sketches and surveys that were so returned, it is still an archive and public map of that office; for by law it has always been the duty of the commissioner to prepare and keep maps showing the location of all land which had been appropriated, and such maps are evidence of such fact. Smith *v.* Power, 2 Tex. 70; Guilbeau *v.* Mays, 15 Tex. 410." Rogers *v.* Mexia, (Tex.) 36 S. W. 825 (1896).

So a copy of a portion of a map found among the archives of the war department, duly certified by the custodian of such papers, is

competent if the certification is authorized by the state statute. Galvin *v.* Palmer, (Cal.) 45 Pac. 172 (1896). It is to be noted that "The official character of the officer as the legal custodian of the document, and therefore authorized to certify a copy of it, is proved, *prima facie*, by the certificate itself." *Ibid.*

A copy of the register of a vessel from the Treasury Department of the United States, where it was deposited after condemnation, certified by the register of the department, and verified by the certificate of the Secretary of the Treasury, under the seal of the department, is admissible evidence. Catlett *v.* Pacific Ins. Co., 1 Wend. 561 (1828).

There is usually no difficulty in deciding what officer is legally entitled to certify copies. It is the legal custodian of the document in question.

Where the records, including analyses of fertilizers of the South Carolina Department of Agriculture, were deposited with the trustees of a certain college, and they were given authority to certify copies of the records, it was held that a duly attested copy of a chemical analysis, on file with these records, was admissible. Ober *v.* Blalock, 40 S. C. 31 (1893).

"Necessarily, the terms of the law must be fully and exactly complied with, in order to obtain the benefit of its provisions." Jones *v.* Cordele Guano Co., 94 Ga. 14 (1893). So, where a state chemist is authorized to make official analyses of samples of fertilizers taken by the state inspectors, copies of which are to be admissible in evidence, his analyses of samples submitted by *private parties*, though recorded in the same way, cannot be proved by copies. Jones *v.* Cordele Guano Co., 94 Ga. 14 (1893).

So a letter of the assistant land commissioner to A., cancelling a homestead entry, exemplified from the records of the general land office, and made evidence by statute, is competent. Holmes *v.* State, (Ala.) 18 So. 529 (1895).

It is necessary, to secure admissibility, that the document should be relevant. Recent reports made by one of the corps of United States engineers, transmitted by the secretary of war to the United States senate, and by that body ordered to be printed, were rejected when offered in evidence for the purpose of showing the position of the roadbed of a certain railroad and its effect in protecting land from the wash of the sea. "The contents of papers in any of the executive departments of the United States are usually proved by a copy authenticated under the seal of the department. U. S. Rev. Sts. § 882. We are not required to determine whether the printed document offered in this case would be admissible in evidence, if a copy thus authenticated would be; see Whiton *v.* Albany City Ins. Co., 109 Mass. 24; because we think that the reports themselves are inadmissible for the purpose of proving, as between these parties, the facts stated in the reports.

The acts of Major Raymond and Assistant-Engineer Bothfield, in surveying the headland in the town of Hull, cannot be called acts of state, nor are the facts stated in the reports public facts, in the sense that they are facts which the United States have, under the authority of law, undertaken to ascertain and make public for the benefit of all persons who may be interested to know them; but they are facts which have been ascertained in the course of preliminary surveys made for the purpose of determining what action, if any, the national government may thereafter take for the purpose of protecting Boston Harbor. The engineers who made the surveys can be called as witnesses in the same manner as other persons who have knowledge of the facts. There is no necessity for the admission of unsworn written statements, and the facts do not bring the case within any known exception to the rule that evidence 'must be given on oath by persons speaking to matters within their own knowledge and liable to be tested by cross-examination.' Sturla *v.* Freccia, 12 Ch. D. 411, 425; S. C. 5 App. Cas. 623." Cushing *v.* Nantasket Beach R. R., 143 Mass. 77 (1886).

The State Register, being made by law the public paper in which the official acts of the governor required to be made public are published, is correctly admitted in evidence to prove the existence of facts stated in the governor's proclamation. Lurton *v.* Gilliam, 2 Ill. 577 (1839).

Legislative Acts. — Under the system of government existing in the United States, laws are of three kinds: — foreign, interstate, and domestic. Proof of each presents differences in detail. "The written foreign law may be proved, by a copy of the law properly authenticated. The unwritten must be by the parol testimony of experts. As to the manner of authenticating the law, there is no general rule, except this: that no proof shall be received, 'which presupposes better testimony behind, and attainable by the party.' They may be verified by an oath, or by an exemplification of a copy, under the great seal of a State, or, by a copy, proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer, properly authorized, by law, to give the copy; which certificate must be duly proved. But such modes of proof as have been mentioned, are not to be considered exclusive of others, especially of codes of laws and accepted histories of the law of a country." Ennis *v.* Smith, 14 How. 400, 426 (1852); Watson *v.* Walker, 23 N. H. 471, 496 (1851).

In American Life Ins. & Trust Co. *v.* Rosenagle, 77 Pa. St. 507 (1875), an attempt was made to prove the common and statute laws of the Grand Duchy of Baden by a certificate declaring "'that the sections of the common and statute laws of the Grand Duchy of Baden, and of the statute of the grand duke, passed on the 29th of May 1811, contained in the above extracts, agree verbally with

the copies of these laws as they are recognised by the courts.' The extracts themselves are not on the paper books. At the foot of the paper are the words, 'The Circuit and Supreme Court of the Grand Duchy: Section of the Common Pleas. Berger;' and the seal of the court is affixed. Another endorsement follows in this form: 'I certify the above document. Carlsruhe, October 31st, 1868. Ministerium of the Exterior, Grand Duchy of Baden. Borkh. Yost.' The seal of the secretary of foreign affairs is added to this remarkable paper. And then the United States consul certifies that Mr. Leopold Yost, whose name is subscribed to the paper annexed, is chief clerk of the department of foreign affairs for the Grand Duchy of Baden, duly commissioned to execute such acts, and that his signature is genuine. This answers to fix the status of Mr. Yost, but it does not help to explain the authority of 'Berger,' nor what the document which he signed was certified by Yost to be. The exemplification proves nothing except certain peculiarities of official form." *Ibid.*

The state of the early authorities on this subject is carefully given in a New York case where an attempt was made to prove the written laws of Denmark by a copy of a copy of a record. "That the laws of a foreign country must be proved, must be considered well settled. In Fremoult *v.* Dedin, 1 P. W. 431, Lord Chancellor Parker held that the laws of Holland must be proved. Peake's Cases, 18. This has been often so decided, and is not disputed; but the manner of proof is the point now particularly requiring attention. In Boehtlinck *v.* Schneider, 3 Esp. 58, it was decided by Lord Kenyon, that the laws of a foreign country must be proved by documents properly authenticated from that country. This is undoubtedly correct as to the written or statute laws; the unwritten laws must also be proved as facts; but that proof may be by parol. The language of Chief Justice Marshall, in Church *v.* Hubbart, 2 Cranch, 236, has been cited in this court by Mr. Justice Sutherland. 6 Cowen, 429. 'Foreign laws are well understood to be facts which must, like other facts, be proved to exist, before they can be received in a court of justice.' 'The rule,' he says, 'is applicable to them, that the best testimony shall be produced; and that such testimony as presupposes better testimony attainable by the party, shall not be received, but no testimony shall be required which is shewn to be unattainable. They should be authenticated by the authority of the foreign state under its seal; or it should be shewn that such evidence could not be procured.' A sworn copy seems to be considered also competent testimony; but a copy certified by a consul, has been held to be insufficient. It was said on the argument, and I think with propriety, that foreign laws must be proved like private acts. Public laws of our own state are permitted to be read from the statute book, not because that is evi-

dence, for no evidence is necessary, as the judges are presumed to know the law, but the book is read to refresh their memory. Lord Ellenborough so decided in Clegg *v.* Levy, 3 Camph. 166. The law being in writing, an authenticated copy ought to be produced. 2 Starkie's Ev. 568, 9. The cases in our own court are to the same effect. In Kenney *v.* Van Horne, 1 Johns. R. 394, Spencer, justice, takes the distinction between the common law of a foreign country and its statutes; the one may be proved by parol, the other not. In Smith *v.* Elder, 3 Johns. R. 105, the point was raised and argued. There Reeve's Law of Shipping was read to shew what was the statute law of Great Britian relating to the revenue. The court do not say what was proper evidence of the law, but they impliedly say the book was not sufficient, for they rely upon the fact that the defendant had concluded himself, by confessing that the goods were shipped contrary to the laws of the country to which they were sent. A similar decision was made in Packard *v.* Hill, 2 Wendell, 411, that the statute of a foreign country must be proved by an exemplification. In Consequa *v.* Willings, 1 Peter's C. C. R. 229, Washington, J. says, the written or statute laws of foreign countries are to be proved by the laws themselves, if they can be procured; if not, inferior evidence of them may be received." Lincoln *v.* Battelle, 6 Wead. 475, 482 (1831).

Constantly recurring difficulties attending proof of foreign legislative acts by copies under the great seal of state have forced a relaxation of the strict rules of proof in the direction of admitting printed copies, apparently issued officially, as sufficient proof of foreign laws.

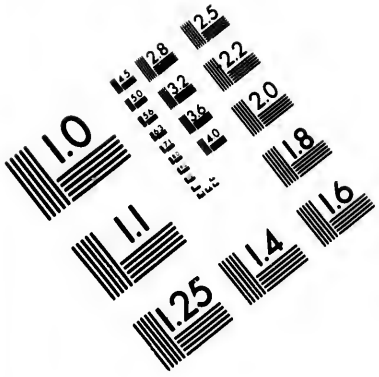
This relaxation of the strict rule exists as a statutory permission. Stewart *v.* Swanzy, 23 Miss. 502 (1852).

And the same result has often been attained by the action of the courts. Kean *v.* Rice, 12 S. & R. 203 (1824); the Pawashick, 2 Lowell, 142 (1872).

Thus, in Vermont, on a case involving the legal effect in Canada of a discharge obtained under the bankrupt law of the Province, the court (by Redfield, J.) say: — "Some copy of the law, which the witness could swear was recognized in the Province, as authoritative, should have been produced." Spaulding *v.* Vincent, 24 Vt. 501 (1852).

A copy of the French Civil Code sent to the supreme court of the United States by the government of France in the course of an international exchange of laws with that country apparently coming from the official press and endorsed "per Garde des Sceaux de France à la Cour Suprême des États Unis" is sufficiently authenticated. Ennis *v.* Smith, 14 How. 400, 429 (1852).

Laws of Sister State. — Strictly speaking, the laws of one state of the American Union are, in the courts of another, foreign laws.



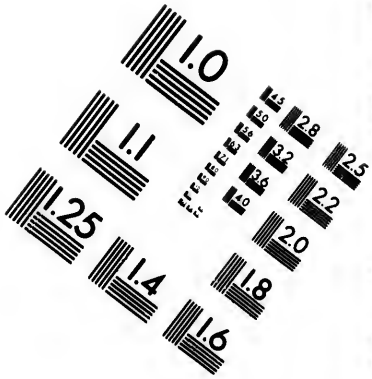
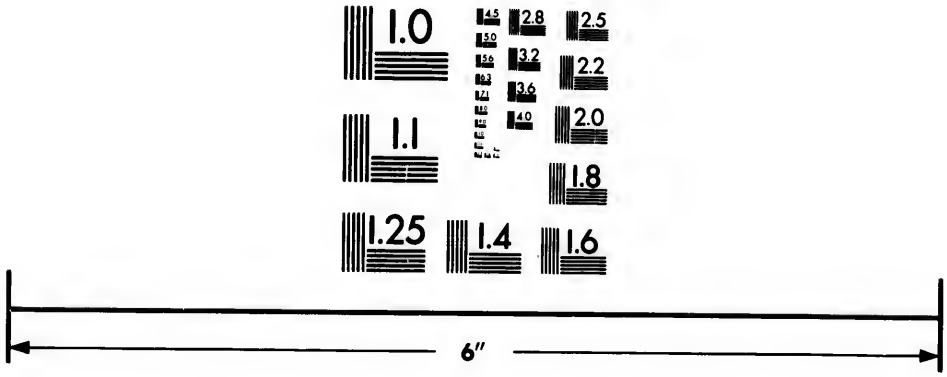
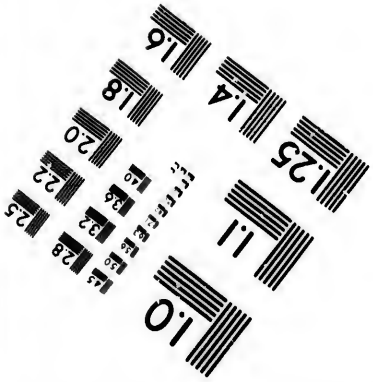
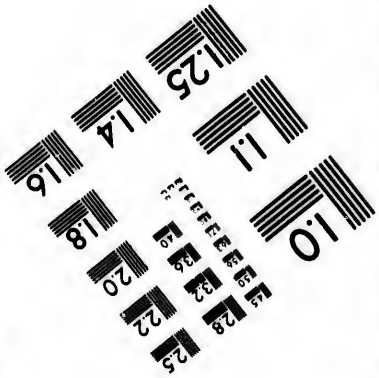


IMAGE EVALUATION
TEST TARGET (MT-3)







Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Hempstead *v.* Reed, 6 Conn. 480 (1827); State *v.* Twitty, 2 Hawks', 441 (1823).

A form of certification of the statutes of one state for use in another has been provided by Congress. Under the authority to legislate conferred by Art. 4, § 1, of the Constitution, the Congress of the United States has provided that: — "The acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto." Stat. May 26th, 1790, 1 Story's U. S. Laws, 93; Van Buskirk *v.* Mulock, 18 N. J. Law, 184 (1840); McClerkin *v.* State, (Ala.) 17 So. 123 (1895); Robinson *v.* Gilman, 20 Me. 299 (1841); Watson *v.* Walker, 23 N. H. 471 (1851).

This form of certification, it will be noticed, unlike the provisions relating to the certification of other documents of one state for use in another does not require the attestation of any public officer. As is said in U. S. *v.* Johns, 4 Dall. 412 (1806), "There is a good reason for the distinction. The seal is in itself, the highest test of authenticity; and leaving the evidence upon that alone, precludes all controversy, as to the officer entitled to affix the seal, which is a regulation very different in the different states." *Ibid.*

But the seal is a necessary prerequisite to admissibility. Pabst Brewing Co. *v.* Smith, 59 Mo. App. 476 (1894).

To be available, the method of certifying the legislative acts of a sister state provided by the Act of Congress of May 26th, 1790, must be carefully followed.

Where, instead of a certificate of the secretary of state under the seal of state, the legislative act of Ohio was certified by the secretary of state as being "a correct copy of the original roll thereof remaining on file in this office," and the governor certified, under the great seal of state, to the official character of the person signing himself as secretary, and that full faith and credit were to be given to his official acts, the copy was held inadmissible as not being in compliance with the act of congress. La Fayette Bank *v.* Stone, 2 Ill. 424 (1837); Turner *v.* Waddington, 3 Wash. C. Ct. 126 (1811).

Where a statute of a sister state is authenticated under the act of congress it admits without further proof a statute referred to in the authenticated statute. Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208 (1876).

And only the relevant portion of a statute need be authenticated. Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208 (1876).

The statutory method of authenticating the legislative acts of sister states does not exclude all other evidence to the same effect. Kean *v.* Rice, 12 S. & R. 203 (1824). "That act is only affirmative, and does not abolish such modes of authentication as were used here before it passed." Ellmore *v.* Mills, 1 Hayw. (N. C.) 359 (1796); Martin *v.* Payne, 11 Tex. 292 (1854).

To the contrary, see State *v.* Twitty, 2 Hawks', 441 (1823); Craig *v.* Brown, 1 Peters C. Ct. 352 (1816).

Proof of the law may be made by a sworn copy. Van Buskirk *v.* Mulock, 18 N. J. Law, 184 (1840).

The statutes of certain states provide that a copy of state laws good in the courts of the state which enacted them shall be equally admissible in the courts of the forum. U. S. Vinegar Co. *v.* Foehrenbach, 74 Hun, 435 (1893).

A still easier method of authenticating the legislative enactments of one state for use in another is to regard the official printed publications, purporting to be issued under state authority, as constituting *prima facie* proof. Young *v.* Bank of Alexandria, 4 Cranch, 384, 388 (1808). "The most satisfactory evidence, undoubtedly, is an authentication according to the act of congress. But in practice less evidence has been received. A sworn copy compared with the record of the statute, in the secretary of state's office, is always the very best evidence. So too, the authorized statute book of the state is ordinarily sufficient." Smith *v.* Potter, 27 Vt. 304 (1855); Thompson *v.* Musser, 1 Dall. 458, 463 (1789); Mullen *v.* Morris, 2 Barr, 85 (1845); Taylor *v.* Bank of Illinois, 7 Monr. (Ky.) 576, 585 (1828); Allen *v.* Watson, 2 Hill (S. C.), * 319 (1834); Emery *v.* Berry, 28 N. H. 473, 486 (1854); Raynham *v.* Canton, 3 Pick. 293 (1825); Comparet *v.* Jernegan, 5 Blackf. 375 (1840); Rothrock *v.* Perkinson, 61 Ind. 39 (1878); Biddis *v.* James, 6 Binney, 321 (1814); Hanrick *v.* Andrews, 9 Porter (Ala.), 9 (1839); Hale *v.* Ross, Pennington (New Jersey), 590 (1811). To the effect that, "The written laws of other states must be proved by an exemplification, and not by the printed statute books of such states," see Packard *v.* Hill, 2 Wend. 411 (1829).

It is not sufficient that an attorney-at-law of the state of whose laws proof is being offered testifies that a printed book containing a copy of the statute was universally received in his state. Van Buskirk *v.* Mulock, 18 N. J. Law, 184 (1840).

"I admit, that this printed copy of an act of assembly, though it purports to have been printed by the law printers of Virginia, is not such good evidence as a sworn copy, compared with the rolls, or an exemplification under the Great Seal; but these modes of authentication are, likewise, inferior to the original law itself. If the Plaintiff in Error had been sued in Virginia, this printed book of the acts of Assembly would there, unquestionably, have been good evidence; and I can discern no satisfactory reason, why, as he is sued here, the same evidence should not be received, at least *prima facie;* for, although it were a forgery, and the proof in that respect could not on a sudden, during the short period of a trial, be produced; yet, in case of any reasonable suspicion, the Court might reserve the point, and give the party leave upon establishing the

fact, to move for a new trial." Thompson *v.* Musser, 1 Dall, 458 (1789).

"In the Supreme Court of the United States, and I believe in every state of the Union, in accordance with the connection and constitutional ties binding them together, the rule has been relaxed, which requires foreign laws to be verified with the sanction of an oath: hence printed volumes, purporting to be on the face of them the laws of a sister state, are admissible as *prima facie* evidence, to prove the statute laws of that state." Mullen *v.* Morris, 2 Pa. St. 85 (1845); Clarke *v.* Bank of Mississippi, 10 Ark. 516 (1850).

The varying value of the different forms of authentication is well stated in an early Vermont case.

"The laws of the other States, printed under authority, have been constantly admitted in the Courts of this State, and such has been the practice of some, at least, of the neighbouring States. If such act be proved, agreeably to the provisions of the act of Congress, the Courts are bound to admit it — they may admit it, although not so proved." State *v.* Stade, 1 D. Chip. (Vt.) 303 (1814).

But it is necessary that the printed book should appear on its face to have been printed by official authority. The lack cannot be supplied by parol evidence of attorneys practising in the state whose laws are to be proved, that the laws are correctly stated and that the compilation is currently received in the courts as law. Martin *v.* Payne, 11 Tex. 292 (1854).

For to permit such evidence would practically amount to proving the written laws of a sister state by parol, — a thing not permitted. Martin *v.* Payne, 11 Tex. 292 (1854).

This relaxation of the strict rule of proof is frequently statutory. Merrifield *v.* Robbins, 8 Gray, 150 (1857).

Domestic Laws. — Laws passed by the sovereignty under which the court is organized are the subject of required judicial cognizance. The authentication, when needed, must be in accordance with the state requirements.

When the secretary of state is authorized, by state law, to certify the promulgation of a law, and also to appoint an assistant, and the latter is "fully authorized to perform all or any of the duties or official acts required by law of the Secretary of State," it was held that the certificate of promulgation by the Assistant Secretary of State is sufficient. State *v.* Clark, 46 La. Ann. 1409 (1894).

A frequent statutory provision makes a printed copy of state statutes admissible as evidence of the domestic legislation. And so of town or village ordinances. Atchison, &c. R. R. *v.* Cupello, 61 Ill. App. 432 (1895).

In a similar manner the printed journals of either house of a legislature, published in obedience to law, are competent evidence of its proceedings. Post *v.* Supervisors, 105 U. S. 667 (1881);

Happel *v.* Brethauer, 70 Ill. 166 (1873); Root *v.* King, 7 Cowen, 613, 636 (1827).

The acts of a city government are analogous to those of a legislature of a state. "When the citizen wishes to shew these acts, he must resort to the authentic record of them, which is the original minutes of the corporation." Denning *v.* Roome, 6 Wend. 651 (1831); Cheatham *v.* Young, 113 N. C. 161 (1893).

Records of Foreign Courts. — The action of foreign courts of necessity comes before domestic tribunals with considerable frequency. "The best proof of the proceedings of a foreign court, are the original records. But that cannot ordinarily be produced. The testimony usually produced, is either a sworn copy, by one who has compared it with the original proceedings, or an exemplified copy, certified by the clerk and the presiding judge, and the seal of the court, with the broad seal of the province or kingdom, to the appointment of the judge, with the proper certificate from the office of appointment. The more usual mode, is, a sworn copy." Spaulding *v.* Vincent, 24 Vt. 501 (1852). Of such proof by original record, the supreme court of California say: "a record proves itself." Wickersham *v.* Johnston, 104 Cal. 407 (1894).

In an early Massachusetts case of assumpsit upon a judgment recovered in an inferior court in Nova Scotia, the reputed clerk of the court affixed the seal of the court upon a copy of the record of judgment, and attested the same by putting his name to it. An affidavit of one John Davis was appended, stating that he had applied to the clerk for a copy; had assisted the clerk in comparing the copy with the record, and in affixing the seal of the court to the copy, and saw the clerk attest the copy. Held: "The verification of the record is sufficient for the purpose for which it is produced." Buttrick *v.* Allen, 8 Mass. 272 (1811).

In Canada, it has been held that in case of a foreign judgment, "The mere exemplification, without any evidence of examination, would of course be sufficient if properly proved to be under the seal of the court. That is the common proof given of foreign judgments." Warener *v.* Kingsmill, 7 Q. B. U. C. 409 (1850). In that case the evidence of an attorney of the province that he "went to the office of the clerk in question, and there saw the seal affixed to the exemplification, which is the material fact to be proved," was regarded as sufficient proof of sealing. *Ibid.*

In the courts of New Hampshire, a copy of a judgment recovered in Canada was offered, certified by a Mr. Bell, and purporting to be under the seal of the court. "The seal was proved by a witness, who testified that it was genuine, that he had long known Mr. Bell to act in the capacity of clerk, and that he read the record while the clerk looked over the copies." Held: that the copy was sufficiently authenticated. Pickard *v.* Bailey, 26 N. H. 152 (1852).

An early case in the supreme court of the United States has become classic upon this branch of the law.

"Foreign judgments are authenticated, 1. By an exemplification under the great seal. 2. By a copy proved to be a true copy. 3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated.

These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony inferior in its nature might be received. But it does not appear that there was any insuperable impediment to the use of either of these modes, and the court cannot presume such impediment to have existed. Nor is the certificate which has been obtained an admissible substitute for either of them. If it be true that the decrees of the colonies are transmitted to the seat of government, and registered in the department of state, a certificate of that fact under the great seal, with a copy of the decree authenticated in the same manner, would be sufficient *prima facie* evidence of the verity of what was so certified; but the certificate offered to the court is under the private seal of the person giving it, which cannot be known to this court, and of consequence can authenticate nothing." Church *v.* Hubbart, 2 Cranch, 186, 237 (1804); Stewart *v.* Swanzy, 23 Miss. 502 (1852); Calhoun *v.* Ross, 60 Ill. App. 309 (1895).

Courts of admiralty, being of international cognizance, judicial notice is taken of its seal. When the seal of such a court is affixed to a decree, the case is assimilated to that of an act of state, and the seal of the court, like the national seal, proves itself.

Therefore, where the record of a decree of the court of vice-admiralty in Bermuda, purporting to be signed by the deputy registrar, under the seal of the court, was offered in evidence, without other proof of authenticity, it was held admissible. Thompson *v.* Stewart, 3 Conn. 171 (1819).

"By common consent and general usage, the seal of a court of admiralty has been considered as sufficiently authenticating its records. No objection has prevailed against the reception of the decree of a court acting upon the law of nations, when established by its seal. The seal is deemed to be evidence of itself, because such courts are considered as courts of the whole civilized world, and every person interested, as a party." *Ibid.*

In case of a judgment recovered in Havana, in the island of Cuba, "It was shewn that a document, purporting to be a copy of the judgment, was signed by the clerk of the court, who was keeper of the records of that court; and that his signature validated all its proceedings; that the court has no seal; that the seal used to the certificate, is the seal of the royal college of notaries; and that the document is authenticated in the customary way in which records

are authenticated, to be sent to foreign countries." Held: "This evidence is certainly sufficient." Packard *v.* Hill, 7 Cowen, 434 (1827).

In the case of Gardere *v.* Columbian Ins. Co., 7 Johns. 514 (1811), the decree of the court of vice-admiralty at Antigua, certified by the actuary, in the absence of the deputy registrar in admiralty, was offered. Proof was given by deposition annexed to the sentence of the seal affixed to the same, and of the signature and official character of the person signing and certifying the decree. This was held sufficient.

On the other hand, it has been held that an exemplification of the proceedings of a tribunal at Havre was not evidence of itself; but that such proceedings must be established like other matters of fact, and subject to the same rules of evidence. Delafield *v.* Hand, 3 Johns. 310 (1808).

It is essential that the certification should be by the officer having charge of the records certified. Accordingly a copy of proceedings of condemnation certified under the seal of arms of the secretary of state cannot be received in evidence in the absence of evidence that the secretary of state has custody of records of that description. Vandervoort *v.* Columbian Ins. Co., 2 Caines, 168 (1804).

Other Foreign Documents. — It is not only essential that the certification of a foreign public document should be by one who is legally charged with the custody of the document certified. It is, in the first place, fundamentally essential that the document certified should itself be a *public document*, — *i. e.* kept by virtue of some legal requirement in the country where it is recorded. Unless proof is offered to this effect, no ground exists for admitting the copy. However certified, it is mere hearsay.

An excellent illustration of this limitation on the effect of certification of foreign documents is found in Stanglein *v.* State, in the supreme court of Ohio, reported in 17 Ohio State Reports, 453, 462 (1867). The defendant in the court below had been indicted for bigamy. To prove the former marriage, the government offered a document, elaborately certified, purporting "to be a transcript from the records of marriages at Seibeldingen, in the Palatinate, in the Kingdom of Bavaria, reciting that Joseph Stanglein and Louisa Nagele were united in marriage on January 7th, 1862, before one Philip Jacob Wiederoll, burgomaster, officer of the civil service of the commune and mayoralty of Seibeldingen." No evidence was offered that the laws of Bavaria authorized or required the making of such a record. The supreme court held that, in the absence of such evidence, the copy was inadmissible, and set aside a verdict of guilty, not because the document was not sufficiently authenticated, if competent, but because it had not been shown to be competent, however authenticated. "If it had been proved, or if

we were authorized to presume, that this record was made under the authority of, and in conformity to, the laws of the country where made, we have no doubt that it is well and abundantly authenticated. First we have the certificate of the correctness of the transcript under the hand and official seal of 'the officer of the civil service' of the commune and mayoralty of Seibeldingen, in the canton and district of Landau, in the Palatinate, Kingdom of Bavaria; then comes the certificate and seal of the President of the Royal District Court verifying the signature of the 'officer of the civil service;' and so on we have the certificates and seals of the President of the Royal Bavarian Court of Appeals, of the Royal Private Secretary of the Royal State Department of Justice, and of the Secretary General of the Royal House of Foreign Affairs of the kingdom; each in succession verifying the signature of the one immediately preceding. Now, Bavaria is an independent and sovereign kingdom, long recognized by the civilized world as such, and it seems to be settled law that the certificate and seal of the department of foreign affairs of such a government proves itself, and is a sufficient authentication of any public record of such country made and kept in obedience and conformity to its laws. 1 Greenleaf's Ev., secs. 4 and 479; The Estrella, 4 Wheat. R. 298.

The difficulty is not in the want of due authentication of the record, but in the absence of proof that the Seibeldingen record was made in conformity with the laws of Bavaria; or, in other words, in the want of proof that those laws require and authorize such records of marriages to be made and kept. No such proof was given, and we are unable to see how we can presume the existence of such laws. And the books are uniform to the effect that it is essential to the official character of any record, and to its competency as evidence, that it has been made and kept by a person whose duty it was to make and keep it. 1 Greenleaf's Ev. sec. 485. And before an instrument, made in a foreign country, which derives a legal effect and operation from the laws of that country, can be admitted in evidence, the existence of the law itself must be proved." Stanglein *v.* State, 17 Oh. St. 453, 462 (1867).

In case of a record of marriage in Ireland purporting to be a copy of a certain numbered entry in a marriage register book in the office of the superintendent registrar of births, deaths, and marriages for the district of Mohill, signed by one Woodward as such registrar, it was held that the document was "not authenticated in any respect whatsoever." "It does not appear in the case that the law of Ireland required the registration of marriages; nor does it appear that Woodward was the superintendent registrar at the time the certificate was given, if there was such a record; neither does it appear that his signature is genuine, if he was such an officer. Indeed nothing appears tending to authenticate the instrument in any way.

For aught that appears it may have been a forgery, got up by some designing person for the occasion." State *v.* Dooris, 40 Conn. 145 (1873).

"Ordinarily, the entries in registers, duly made, kept by a person bound to record the fact, in any foreign country, makes full proof when properly authenticated by the consular officer of that country. The proper evidence in that case is a copy of the record." Succession of Justus, 47 La. Ann. 302 (1895).

It is not competent for the certifying officer simply to state that certain facts appear by his record. So where a catholic priest of Gr. Starsin certified "upon the basis of the registry of baptisms of this place" to the birth and baptism of a child of certain named parents, his signature being verified by the consul, it was held that the evidence was inadmissible. "That the originals of these parish registers were admissible, or that the actual contents of the registers, when duly proved by an authenticated copy, might be received, is, we think, established by Hunt *v.* Order of Chosen Friends, 64 Mich. 671. But we think the circuit judge ruled correctly in excluding the certificates here offered upon the ground stated by him, which was: 'Because the papers that were offered were not themselves either sworn or certified copies of the entries in the books, but simply, so far as I can judge of their contents on the translation which was offered, certificates which were based upon some entries in books, but not copies of the entries themselves.'" Tessmann *v.* United Friends, 103 Mich. 185 (1894).

The apparent principle of the exclusion is the same as where a school committee, having certified that a teacher had made a report to them of certain educational statistics, the court, in excluding it, say: "Their certificate is not made in pursuance of any duty imposed on them by law. It is a merely voluntary statement, made by third persons, who could be witnesses, and is essentially hearsay evidence." School District in Moultonborough *v.* Tuttle, 26 N. H. 470 (1853).

In case of a foreign document kept in obedience to a legal requirement, proof may still be made, as in case of any other relevant document, by the evidence of a witness that he has made the copy offered, and that the same is correct. "Where the proof is by a copy, an examined copy duly made and sworn to by any competent witness is always admissible." American Life Ins. Co. *v.* Rosenagle, 77 Pa. St. 507, 515 (1875). In that case the proof was made by deposition.

Records of Courts of Other States. — Under the constitutional provision (Const. U. S., art. iv. § 1) requiring that "full faith and credit" be given the records of other states of the American Union, and empowering Congress to legislate to that end, a method of authenticating state records has been provided, which, while not

exclusive of other recognized forms of authentication, is commonly employed in practice. The provision (Stat. U. S. May 26, 1790; 1 U. S. Stat. at Large, L. & B.'s edition, 122; 2 U. S. Stat. at Large, 298) is as follows: "The records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief-justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." By the second section of a supplementary statute (Stat. U. S. March 27, 1804) this enactment was extended to the territories of the United States, and all countries subject to its jurisdiction. Mills *v.* Duryee, 7 Cranch, 481 (1813); Christmas *v.* Russell, 5 Wall. 290 (1866); Bissell *v.* Briggs, 9 Mass. 461 (1813); Bank of U. S. *v.* Merchants Bank, 7 Gill (Md.), 415 (1848); Friend *v.* Miller, 52 Kans. 139 (1893); Smith *v.* Kander, 58 Mo. App. 61 (1894).

Where the proceedings authenticated purport to be those of a court of record, the presumption is that the proceedings have been by competent authority and in conformity to the local law. Houze *v.* Houze, 16 Tex. 598 (1856). "The records are evidence, not only of the acts of the court but of its jurisdiction." *Ibid.:* Bowman *v.* Hekla Fire Ins. Co., 58 Minn. 173 (1894). And no mere informality in complying with a rule of practice will affect the validity of the certification. McFarland *v.* Fricks, (Ga.) 24 S. E. 868 (1896).

In this connection, a probate court is regarded as a court of record. Houze *v.* Houze, 16 Tex. 598 (1856); Melvin *v.* Lyons, 10 Sm. & M. 78 (1848); Thrasher *v.* Ingram, 32 Ala. 645 (1858); Smith *v.* Redden, 5 Harr. (Del.) 321 (1848); Brown *v.* Mitchell, (Tex.) 31 S. W. 621 (1895).

There is, however, no such presumption of regularity in favor of the proceedings of inferior courts, not of record, as is indulged in the case of courts of wider jurisdiction. For example, in the case of justices' courts no presumption of regularity is indulged. Houze *v.* Houze, 16 Tex. 598 (1856).

It may be doubted whether, in point of fact, this so-called "presumption" is anything more than a statement of the burden of proof, *i. e.* that he who assails a judgment must show facts impugning it.

These provisions as to certification of interstate records do not apply to the federal courts. Such courts are domestic tribunals *quoad* the courts of the several states. Turnbull *v.* Payson, 95 U. S. 418 (1877); Adams *v.* Way, 33 Conn. 419 (1866); Jenkins *v*

Pepoon, 2 Johns. Cases, 312 (1801); Williams *v.* Wilkes, 14 Pa. St. 228 (1850).

But where this form of certification was employed, apparently by inadvertence, in case of the record of a federal court, it was held sufficient. Stephens *v.* Bernays, 119 Mo. 143 (1893).

The congressional provisions as to certification apply as well to decrees in chancery as to judgments at law. Barbour *v.* Watts, 2 A. K. Marsh. (Ky.) 683 (1820). "It appears to be the decree of a Court exercising Chancery jurisdiction in the State of Mississippi. And it is held that a decree of a Court of Chancery is within the Constitution and Act of Congress, respecting the mode of authentication, and the effect of the records and judicial proceedings of the Courts of the respective States, when offered in evidence in the Courts of any other State." Patrick *v.* Gibbs, 17 Tex. 276 (1856).

And may be used in case of probate proceedings. Houze *v.* Houze, 16 Tex. 599 (1856); Washabaugh *v.* Entriken, 34 Pa. St. 74 (1859); Settle *v.* Alison, 8 Ga. 201 (1850); Case *v.* McGee, 8 Md. 9 (1855); Spencer *v.* Langdon, 21 Ill. 192 (1859); Melvin *v.* Lyons, 10 Sm. & M. 78 (1848); Thrasher *v.* Ingram, 32 Ala. 645 (1858).

But the probate of a will in another state means the order admitting it to probate. A certified copy of the evidence upon which the will was admitted to probate is not sufficient. Green *v.* Benton, 3 Tex. Civ. App. 92 (1893).

"Where courts of justices of the peace are courts of record, they come within the act of congress." Bissell *v.* Edwards, 5 Day, 363 (1812). In this case, however, a strong minority were "of opinion, that congress did not mean to include the records, or judicial proceedings of justices of the peace, who, in most of the states, are not considered as courts of record." Bissell *v.* Edwards, 5 Day, 363 (1812).

The form of certification provided by the act of congress is not exclusive of other common law forms. Stewart *v.* Swanzy, 23 Miss. 502 (1852); Bissell *v.* Edwards, 5 Day, 363 (1812); Kingman *v.* Cowles, 103 Mass. 283 (1869); Goodwyn *v.* Goodwyn, 25 Ga. 203 (1858). And the states are quite at liberty to prescribe other forms of certification in addition to those declared sufficient by Congress which will be acceptable to their courts. Karr *v.* Jackson, 28 Mo. 316 (1859); *In re* Ellis' Estate, 55 Minn. 401 (1893).

"Neither the Constitution nor the statutes forbid the states from authorizing the proof of records in other modes, in their own courts. The statute of Massachusetts, Gen. Sts. c. 131, § 61 (Re-enacted Pub. Stats. Chap. 169, sect. 67), has provided another mode. It is not in conflict with the law of the United States, but simply omits one requisite which that law prescribes. It does not require a certificate of the judge that the attestation of the clerk to a copy of a record of the court is in due form. . . . The authenti-

cation conforms in all respects to the requirements of our statute." Kingman *v.* Cowles, 103 Mass. 283 (1869); Ordway *v.* Conroe, 4 Wisc. 45 (1855); Garden City Sand Co. *v.* Miller, 157 Ill. 225 (1895).

And of course the act of congress leaves entirely unimpaired the right of the several states to prescribe their own forms of keeping and certifying records. When the judge certifies that the clerk's attestation is in due form, the copy is entitled to full faith and credit. Ordway *v.* Conroe, 4 Wisc. 45 (1855).

The requirements of the state statute, when relied on instead of that prescribed by Congress as a method of authentication must be carefully followed.

Thus, where a statute of Michigan authorized proof of a judgment rendered by a justice of the peace in another state by an official certificate by such justice and the certificate of the clerk of any court of record of his county or district, attested by his official seal, that the signature of the justice is genuine and that he was a justice at the time of the judgment: it was held that the clerk's certification was void, unless the certificate of the county clerk showed that he was the clerk of a court of record. Howard *v.* Coon, 93 Mich. 442 (1892).

The court intimate that the fact could have been supplied by other evidence. *Ibid.*

Certificate of Judge. — This certificate is essential to admissibility as an authentication under the act of congress. "The instrument not so certified cannot be noticed." Drummond *v.* Magruder, 9 Cranch, 122 (1815).

Where the judge also acts as clerk, he must certify as required by the act of congress, and add that he is both clerk and also presiding judge in that court. Stewart *v.* Swanzy, 23 Miss. 502 (1852); Spencer *v.* Langdon, 21 Ill. 192 (1859); Bissell *v.* Edwards, 5 Day, 363 (1812); Roop *v.* Clark, 4 Green (Ia.), 294 (1854); Welder *v.* McComb, (Tex.) 30 S. W. 823 (1895); Keith *v.* Stiles, (Wisc.) 64 N. W. 860 (1895).

It is not sufficient for A. to sign the certificate as "Judge and Clerk of the Court of Ordinary," there being no separate certificate of a clerk. "These documents were clearly not authenticated according to the act of congress, which requires both the attestation of the clerk and the certificate of the presiding judge of the court that the attestation is in due form. This is not obviated by the fact that, by the laws of South Carolina, the office of clerk and that of judge were held by the same person. It is still necessary that there should be the attestation by the clerk, in his proper capacity, and the certificate of the judge as to the due form of the attestation." Sherwood *v.* Houston, 41 Miss. 59 (1866).

The rule, however, that when a judge is his own clerk he must

certify in both capacities is by no means universally followed. In certain states it is regarded as sufficient if there is merely a certification by the judge himself, and it appears, in some affirmative manner, that there is no clerk. "Another matter in the case relied upon as error is the introduction in evidence of a copy of a will to show title in the plaintiff to the premises injured. It was probated in Ohio, and it is said that it is insufficiently authenticated in the fact that, though certified as a full, true copy by the probate judge, it wants the clerk's certificate, both being required by section 19, c. 130, Code. By the constitution of Ohio and its statute law, the probate judge is also clerk of the probate court, and keeper of its books and papers. This same person could make two certificates, but that would seem useless. The object of the statute in requiring two certificates is to double the probability of truthful certification; but this cannot be done where one man fills both places, the statute requiring the judge of the same court to certify that the clerk's certificate is in due form. It has been held that, where one person is clerk and judge both, it is sufficient. Cox *v.* Jones, 52 Ga. 438. We have the right, under section 4, c. 13, Code, to take judicial notice of the law of another state, this being a change from the former law (1 Rob. Prac. 249; 1 Greenl. Ev. § 5, note 1; Id. § 489), and, in exercising this power, can consult the statutes of Ohio, or any other book, to learn that the probate judge is by its law *ex officio* clerk of the probate court. Goodrich's Case, 14 W. Va. 840; Manufacturing Co. *v.* Bennett, 28 W. Va. 16." Wilson *v.* Phœnix, &c. Co., 21 S. E. (W. Va.) 1035 (1895).

The mere fact that the judge certifies with no attestation of a clerk is not sufficient to enable the court to presume that there is no clerk or seal. Bissell *v.* Edwards, 5 Day, 363 (1812).

The terms of the act of congress must be followed with considerable strictness. Thus, in case of a record purporting to be from "the County Court of Mecklenburg County," in Virginia, where the presiding magistrate certified that he was "the presiding magistrate of the *County of Mecklenburg*," but did not certify that he was the presiding magistrate of the county court of Mecklenburg, it was held that an objection to the admission of the evidence should have been sustained. Settle *v.* Alison, 8 Ga. 201 (1850).

But many subsidiary matters may be judicially recognized. "The court can take notice of the constitutions of other states constituting courts, and it can also take notice of the acts of congress providing for the organization of territories, and the creation of courts therein, so far as the jurisdiction of such courts is known." Friend *v.* Miller, 52 Kans. 139 (1893).

Where the presiding judge failed to certify that the attestation of the clerk of the court (in Connecticut) was in the usual form prescribed by the laws of that state, the record was rejected. Smith *v.* Blagge, 1 Johnson's Cases, 239 (1800).

On the contrary, where the proper certificate is given, the court is "precluded from receiving any other evidence to show that the attestation was not in due form of law." Ferguson *v.* Harwood, 7 Cranch, 408 (1813). "Each state has a form of its own for authenticating records, prescribed either by positive law, or by practice; and to make those records evidence in the other states, Congress has thought proper to declare, that the attestation must be, not according to the form used in the state where it is offered, or to any other form generally observed, but to that of the state or of the court from whence the record comes; and the only evidence of this fact, is the certificate of the presiding judge of that court." Craig *v.* Brown, Pet. C. Ct. 352 (1816); Edwards *v.* Jones, 113 N. C. 453 (1893); Dean *v.* Stone, 2 Okl. 13 (1894); McFarland *v.* Fricks. (Ga.) 24 S. E. 868 (1896).

The supreme court of Missouri, in an early case, speak of the certificate of the presiding judge as being "good evidence" — whatever that may mean — of the fact. Hutchison *v.* Patrick, 3 Mo. 48 (1831).

A party will not be allowed to set up a technical irregularity for noncompliance with a statute requiring certain signatures in the certifying state against an otherwise proper authentication. Dean *v.* Stone, 2 Okl. 13 (1894).

The clerk's attestation must be certified by the judge to be "in due form of law." Grover *v.* Grover, 30 Mo. 400 (1860).

It is not sufficient that the certificate of the presiding judge of the court of the state of Louisiana should set forth that the person whose name is signed to the attestation of a record is clerk of the court, and that the signature is in his own handwriting. This is not in conformity with the act of congress. Craig *v.* Brown, Peters C. Ct. 352 (1816). The use of the phrase "certificate in proper form" has been held as "substantially a compliance with the act of congress." Thrasher *v.* Ingram, 32 Ala. 645 (1858).

"The Act of Congress requires, that the presiding magistrate of the Court shall certify, that the person, who attests the transcript, is the clerk of the Court, and that 'the attestation is in due form;' instead of which, the certificate here is, that Wilson was then, in August, 1845, clerk — and it is utterly silent as to the attestation. As the transcript was not proved in any other manner, nor authenticated in conformity to the Act of Congress, it was properly rejected; and the judgment must be affirmed." Shown *v.* Barr, 11 Ired. 296 (1850). The certificate of the governor of the state under the great seal of state will not supply the place of the judge's certificate. Goodman *v.* James, 2 Robinson (La.), 297 (1842).

The certificate of the judge must contain intrinsic evidence of the official capacity of the person who certifies as judge. "The act of

congress, 1790, ch. 11, requires the certificate of the Judge, Chief Justice, or presiding Magistrate, as the case may be. The certificate does not appear to have been given by a Chief Justice or presiding Magistrate — It should therefore appear to have been given, according to the words of the law by the judge, *i. e.*, the judge of the court, in which the judgment was given. The use of the definite article implies the idea of a judge, who alone constitutes the court. If the court has more than one member, none can certify, but the Chief or presiding one. In the certificate before us, it does not appear that the person, who certifies, was a judge of the court, in which the judgment was rendered, and if this did appear, it would not suffice, for *non constat*, that he was the sole, chief, or presiding judge." Kirkland *v.* Smith, 2 Mart. N. S. 497 (1824).

Where *two* judges certified the record to be in due form, — one judge stating himself to be the judge "that presided, and one of the judges of the superior courts of law of said state," and the other setting forth that he was "the senior judge of the courts of law of said state,"— it was held that the authentication was not sufficient to entitle the record to be used as evidence. "By the constitution of the United States, Congress has power to prescribe the manner in which the public acts, records and judicial proceedings in the several states shall be proved in any other state; and by an act of May, 1790, Congress has declared that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court in the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form.

It cannot be admitted that under this act, any judge of any court of the state may certify a record. It must be the judge, if there be but one, or if there be more then the chief justice or presiding judge or magistrate of the court from whence the record comes, and he must possess that character at the time he gives the certificate. If this be the correct construction of the act (and it is clearly susceptible of no other), it is obvious that neither of the judges who have certified the record in question, has given to himself the character which would authorise him to authenticate the record by his certificate.

The statement in the first certificate, that the judge who gave it was the judge 'that presided,' implies rather that he was not, than that he was the presiding judge of the court from whence the record came, at the time he gave the certificate; and the statement 'that he was one of the judges of the superior courts of law,' certainly cannot import that he was a judge, much less the sole judge, chief justice, or presiding judge of that court. The certificate of the other judge 'that he was the senior judge of the courts of law'

of his state, so far from implying that he possessed the character which would authorise him to give such a certificate, does not even indicate that he had any relation to the court from whence the record came.

"Cases no doubt may occur, as was supposed in the argument, in which no judge can with truth or propriety, except at particular times, be denominated the judge, chief justice, or presiding judge or magistrate of a particular court; as where different judges constitute the same court at different times by rotation, an instance of which is to be found in the organization of the general court of this state. But it does not follow that any judge of a court thus organized may certify a record when he is not the judge, chief justice or presiding judge, because he had been before, or might be thereafter, possessed of that character. The only inconvenience that results from cases of that kind, is the delay that in some instances must occur in waiting until some judge is qualified by his situation to give the requisite certificate. This inconvenience, though perhaps of more frequent occurrence, is not greater than may be produced in other cases by the absence, death, resignation or removal of a judge; and these are cases evidently not provided for by the act of congress. Whether they were not foreseen, or were intentionally omitted, cannot be certainly told, nor is it material for in neither case is it competent for a court to supply the defect." Stephenson *v.* Bannister, 3 Bibb, 369 (1814).

A signature by A. B., as "Chairman and presiding justice of the Court of Pleas and Quarter Sessions, for the County aforesaid," has, however, been held to be "substantially a compliance with the act of Congress." Thrasher *v.* Ingram, 32 Ala. 645 (1858). Indeed, the word "judge" need not appear in the certificate at all, if it appear from the whole certificate that the provisions of the act of May 26th, 1790, have been complied with. Accordingly, the form "I, A. B., Esq., president of the district court, &c.," has been held sufficient. Gavit *v.* Snowhill, 26 New Jersey Law, 76 (1856).

Where the judge of a district court of the United States certified to a record of the circuit court of the United States, that the attestation of the clerk was in due form, it was held that such a certificate was, "in the absence of the circuit judge and the associate judge, sufficient." Stephens *v.* Bernays, 119 Mo. 143 (1893).

Possibly any lack of certainty in the certificate of the judge may "be eked out by other evidence": — as was suggested in Kirkland *v.* Smith, 2 Martin, N. S. 497 (1824); Stephenson *v.* Bannister, 3 Bibb (Ky.), 369 (1814).

In this connection, as in others, the law of a sister state is a question of fact. Stephenson *v.* Bannister, 3 Bibb (Ky.), 369 (1814).

ATTESTATION OF THE CLERK. — As only a single judge can cer-

tify, so only one person, the person designated in the act itself, can legally satisfy the provisions as to attestation. The attestation must be by the clerk himself. The signature of a deputy clerk is not sufficient. "The attestation is directed to be by the clerk, and not by any person acting as a substitute for the clerk, or possessing like power under the State laws. In making the certificate, which is made evidence under the act of Congress, the clerk derives his authority from the Federal and not from the State laws, and the certificate has vitality and effect, not by reason of the official character of the officer making it under the laws of the State, but in virtue of the act of Congress prescribing it as the mode of proof in this particular case. The certificate of the judge is as to the form of the attestation; that is, that, in the attestation the forms in use in the State from which the record comes have been observed. (Ferguson *v.* Harwood, 7 Cranch, 408; Conk. Treat., 2 Ed., p. 240.) It is made necessary, because the courts of one State cannot officially know the forms of another State. (Smith *v.* Blagge, 1 Johns. Ca., 239.) The certificate of the judge as prescribed by the act of Congress, is, that the attestation of the clerk is in due form, and he is not authorized to certify that the certificate of any other person is of equal validity with that of the clerk in the State when made. The form of the attestation is one thing, the person by whom it is made quite another; the certificate of the judge determines the sufficiency of the former, the statute alone declares the latter. Prof. Greenleaf lays down the rule that the clerk alone can certify under this statute, and that the certificate of his under-clerk in his absence is incompetent (1 Greenl. Ev., § 506); and to this he cites Sampson *v.* Overton (4 Bibb, 409). The certificate of the judge as to the authority of any person other than the clerk to make the certificate, is of no more force than would be a like certificate as to the effect of the judgment. Again, if a deputy clerk or other person could make the certificate by reason of the power conferred upon him by the State laws, and thus satisfy the act of Congress, such law should be proved as other facts are proved or as other laws are proved, and not by the certificate of the judge, which is not made evidence of any such fact. The records were not competent evidence, and were improperly admitted." Morris *v.* Patchin, 24 N. Y. 394 (1862); Williams *v.* Williams, 53 Mo. App. 617 (1893).

Where, "as proof of the bankruptcy of plaintiff, were offered copies of all the papers made by the applicant to the District Court of Massachusetts, the orders and decrees of the Court, appointment, bond and account of the assignee and the marshal's certificate, tacked together by a ribbon, to which was prefixed the certificate of the clerk of that District Court, that it contained the copies of the whole record in that case, with the seal of the Court affixed, but on

several of the papers thus tacked together, was also his certificate that they were true copies: It was held, that the document thus offered, was not duly authenticated as a copy of a record, and was rightfully rejected." Pike *v.* Crehore, 40 Me. 503 (1855).

A clerk cannot make a record out of certain papers by simply attesting a copy of them and calling them a "record." "The form of the record of a judgment is regulated by the practice of the Court in which the action is prosecuted." Woodbridge, &c. Co. *v.* Ritter, 70 Fed. Rep. 677 (1895).

In other particulars, it has been held that a substantial compliance with the terms of the act is sufficient.

Thus a certificate from a clerk that "the foregoing is a true transcript from the records of the court" of which he is clerk, is sufficient. Case *v.* McGee, 8 Md. 9 (1855).

Where the clerk in certifying judicial papers goes further than required by the law of May 26, 1790, and, using the inappropriate form of the act of March 27, 1804, "under his official seal and signature certifies that the said presiding judge was duly commissioned and sworn as such," this is "a superfluous addition to the authentication, which, being sufficient without it, cannot of course be vitiated or impaired by it." Young *v.* Chandler, 13 B. Monr. 252 (1852); Thrasher *v.* Ingram, 32 Ala. 645 (1858); Gavit *v.* Snowhill, 26 N. J. Law, 76 (1856).

Where a court is abolished by statute, the clerk of a court which has been given legal custody of the records of the abolished court is the proper officer to attest the record of such prior court by a certificate that he is the keeper of such records, accompanied by a proper certificate of the judge of his court. Strode *v.* Churchill, 2 Litt. (Ky.) 75 (1822); such a clerk "of necessity must certify them, or their testimony could never thereafter be heard." *Ibid.* Roop *v.* Clark, 4 Greene (Ia.), 294 (1854).

The function of the clerk is limited to attesting copies. He is neither called upon nor authorized to certify to the conclusions which he draws from the records as facts.

Accordingly the Supreme Court of South Dakota, in rejecting the certified statement of the clerk of a Wisconsin county court to the effect that A. was dead, and that certain named persons were his heirs, say: "Whether such certificate purported to be made by the judge or clerk does not appear, and is probably not important. An *ex parte* certificate is only evidence when made so by some statute or rule of court. Meyer *v.* School District (S. D.), 57 N. W. 70, and cases cited. It would have been competent to prove by authenticated copies the recorded proceedings of the Wisconsin county court, but it was not competent for the judge or any officer of the court to certify what was their result or legal effect. Tessman *v.* Supreme Commandery (Mich.), 61 N. W. 261; Lansing *v.* Russell,

3 Barb. Ch. 325." Billingsley *v.* Hiles, (S. D.) 61 N. W. 687 (1895).

Still, the certificate of a county clerk, in New York, under the seal of the county, is competent evidence in a New Hampshire court to show that A., who had acted as a magistrate, in taking a deposition in that state, was in fact a justice of the peace. "The evidence of the due appointment of a justice, and that he has taken the oaths, is, of course, in that State, found in the office of the County Clerk, and he is the proper certifying officer to these facts." Dunlap *v.* Waldo, 6 N. H. 450 (1833).

SEAL. — If the clerk's certificate, attached to a copy of a record of a court of another state, have not the seal of the court or proper officer affixed thereto, the copy is not admissible under the act of congress. Allen *v.* Thaxter, 1 Blackf. 399 (1825).

Where there is no seal of the court, the presiding justice or clerk should certify to that fact, and also to the fact that he has therefore used his private seal, and that the attestation is in due form. Stewart *v.* Swanzy, 23 Miss. 502 (1852); Torbert *v.* Wilson, 1 Stew. & P. 200 (1831).

Such an attestation and certificate by the clerk will be good. Torbert *v.* Wilson, 1 Stew. & P. 200 (1831).

A clerk may also use his private seal in attesting a copy upon certifying that there is no seal of the court, and this certificate being in turn certified by the presiding justice to be in due form of law. Strode *v.* Churchill, 2 Litt. (Ky.) 75 (1822).

RELEVANCY ESSENTIAL. — Relevancy is a test of admissibility underlying that of proper authentication. Thus, where a plaintiff relies upon the record of another court in a different case and state, he is not bound to introduce the whole record, but only so much as sustains the issues on his behalf. "The next point urged is that it was error to admit in evidence what purported to be a transcript of proceedings had in the chancery court of the city of Richmond in the case of Glenn's Adm'r *v.* Express Co., because it did not appear that the same contained the entire record in that cause. All parts of the proceedings in that case which were essential to support the issues on behalf of the trustee in this cause were included in the transcript objected to, and we can conceive of no good purpose that would have been subserved by the introduction of wholly irrelevant matter. If there were portions of the record of value to the defendant below, it was open to him to introduce the same; and therefore the objection urged to the record introduced, that it was partial only, cannot be sustained, when it is not pointed out that any part of the record omitted was necessary to sustain the issues on behalf of the plaintiff below." Priest *v.* Glenn, 51 Fed. 400 (1892).

Where the only facts to be proved are the existence and contents

of a judgment, a certified copy of the judgment entry is sufficient. "It is well recognized as a general rule, that where a judgment is relied on as an estoppel, or as establishing any particular state of facts of which it was the judicial result, it can be proved only by offering in evidence a complete and duly authenticated copy of the entire proceedings in which the same was rendered. But where the only direct object to be subserved is to show the existence and contents of such judgment, this rule does not apply, and a certified copy of the judgment entry of a court of record possessing general original jurisdiction is admissible, by itself, to prove rendition and contents. 2 Black, Judg. § 604; 1 Greenl. Ev. § 511. Such entry will be *prima facie* evidence of a valid judgment, and on being admitted, all the legal incidents attach which the law annexes to judgments of that class. It will not, however, be conclusive either of jurisdiction of the parties, service, or of any other matter material to the rendition of a valid judgment; and of course, if the party against whom it is offered can derive any benefit from proving the antecedent or subsequent proceedings, or the want of any legal essential, he is still at liberty to introduce the entire record." Gibson *v.* Robinson, 90 Ga. 756, 763 (1892).

But where the plaintiff claimed rights under a will probated in England, it was held, in California, that a complete record should have been produced. "We think, however, that appellant is right in contending that the judicial record introduced by respondent in this case is entirely insufficient to support any right asserted under it by respondent. It includes merely a transcript of a short order of the foreign court, to the effect that on a certain day the will of Lancaster, deceased, was proved and registered, and that administration of the personal estate was granted to John and George Granville Lancaster, sons, and executors named in the will, who had been sworn to well and faithfully administer the same. It contains no previous proceedings upon which the order rested, no petition, no pleadings, no judgment-roll other than said order. This was not sufficient in the absence of proof of a procedure in the foreign country different from that of our own. The pleadings, petitions, or proceedings which led up to the order and gave jurisdiction to make it, should have been introduced so as to have made the record complete." Wickersham *v.* Johnston, 104 Cal. 407 (1894).

Interstate Records not Judicial. — In case of records other than judicial kept in pursuance of law in another state, proof may be made, as in other cases of public documents, by a sworn copy. Richmond *v.* Patterson, 3 Ohio, 368 (1828). It is, however, essential that it should be proved that the original record is kept in pursuance of some legal requirement. Richmond *v.* Patterson, 3 Ohio, 368 (1828).

A satisfactory method of certifying the records, other than legisla-

tive or judicial, of one state for use in another has been provided by Congress under the constitutional power so to do conferred by Art. 4, § 1, of the Constitution. "All records and exemplifications of office books, which may be kept in any public office of any State, not appertaining to a court, shall be proved or admitted into any other court or office in any other State, by the attestation of the keeper of such records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is, or may be kept; or of the governor, the secretary of state, the chancellor or keeper of the great seal of the state, that such attestation is in due form, and by the proper officer; and such certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of said court, who shall certify, under his hand and the seal of his office, that the presiding justice is duly commissioned and qualified; or if the certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the certificate is made. And the records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the State from whence the same are, or shall be taken.

All the provisions of the acts of 1790 and 1804, shall apply, as well to the public acts, records, office books, judicial proceedings, courts, and offices, of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices, of the several States. Stat. March 27, 1804; 2 Story's U. S. Laws, 947.

The act of Congress above referred to, does not require the attestation of any public officer, in order to authenticate copies of the legislative acts of the several States; but the Seal of the State affixed by an officer having the custody thereof, to a copy of the law sought to be proved, will be conclusive evidence of the existence of such law; no other formality is necessary; and in the absence of all evidence to the contrary, it must be presumed that the seal was annexed by an officer having competent authority to the act. (United States *v.* Amadey, 11 Wheat. Rep. 392; United States *v.* Johns, 4 Dall. Rep. 412; s. c., 1 Wash. C. C. Rep. 363; Henthorn *v.* Doe, 1 Blackf. Rep. 157; State *v.* Carr, 5 N. Hamp. Rep. 367; Warner *v.* The Commonwealth, 2 Virg. Cas. 95.) 3 Phillips Ev., Cowen and Hill's notes, 1141." La Fayette Bank, &c. *v.* Stone, 2 Ill. 424 (1837).

Where the record of marriages was required by law to be returned to the county clerk "the law requires an exemplification of

this certificate and not an exemplification of the note or memorandum made by the clerk in his records." Niles *v.* Sprague, 13 Ia. 198 (1862).

The statute of March 27, 1804, applies to records of deeds. Brown *v.* Edson, 23 Vt. 435 (1851).

But while the act of congress prescribes a method of certifying the records of one state for use in another, the method is not exclusive of other methods.

Nor is the certificate of the state official conclusive as to what the record in his custody says. The party to whose case it is relevant is at liberty to prove, in any competent method, what the record says even against the duly certified copy. "Appellant introduced in evidence a certified copy of the town records of East Machias, Me., which stated the date of the birth of George W. Baker as March 11, 1845, and appellee, over objection, was permitted to prove by witnesses who had examined this record, and by photographic copies thereof, that this date, as written therein, had more the appearance of 1855 than 1845. In this we find no error. The certificate of the custodian, when authorized by law, is ordinarily the best evidence of the contents of a record, but when there is a controversy as to which word or figure is meant by a particular character found therein, we cannot assent to the proposition that the statutory certificate of the custodian must be accepted by the parties as a conclusive solution of the question. In such cases expert witnesses should be allowed to give their opinions, and if the record can be produced in court, this should be done, and the judge and jury afforded an opportunity to inspect it for themselves, as in ordinary cases involving disputed handwriting, etc. If the record cannot be produced, witnesses should be allowed to make, by the use of instruments or otherwise, copies or pictures thereof, and to explain to the jury the points of similarity or difference between these and the original as it appears to them. It is manifest the art of photography can be made to render valuable assistance to the jury in solving such questions, and, we think, was properly called into requisition in this case. We regard the evidence of the witnesses in explanation of the pictures so made and introduced as sufficient to authorize their consideration by the jury for what they were worth, regardless of whether they were made with a first or second class instrument. In McCamant *v.* Roberts (Tex. Civ. App.), 25 S. W. 732, we held that, where the commissioner of the general land office was in doubt as to a name in an instrument, in certifying a copy thereof it was proper for him to make the character as nearly like the original as possible, and leave the ultimate solution of the question to the jury." Ins. Co. *v.* Baker, 31 S. W. (Tex.) 1072 (1895).

The statute applies to an authentic act done before a notary public. Watrous *v.* McGrew, 16 Tex. 506 (1856).

It is frequently provided by state legislation that copies of public documents admissible in evidence by the law of their own state shall, when certified by the proper officer, be admissible in the courts of the legislating state. Davis *v.* Rhodes, 39 Miss. 152 (1860); New York Dry Dock *v.* Hicks, 5 McLean, 111 (1850); Secrist *v.* Green, 3 Wall. 744 (1865); Slaughter *v.* Bernards, 88 Wisc. 111 (1894); Long *v.* Patton, 154 U. S. 573 (1870).

And may fix the method of establishing whether the requisite facts exist to entitle the copy to be received in evidence. Dunlap *v.* Daugherty, 20 Ill. 397 (1858).

Such statutes may even confer the right to record the copy of the public record of another state in the legislating state, and give to the officer having custody of the records the same right to certify copies of the recorded copy that he would have in case of domestic records. Secrist *v.* Green, 3 Wall. 744 (1865).

But the mere certification is no evidence that the document certified was legally entitled to registry under the laws existing in the certifying state. Stevens *v.* Bomar, 9 Humph. 546 (1848).

But in the absence of evidence to the contrary, the court of the forum will, it is said, presume that the law of the state of the certifying officer is the same as its own. Slaughter *v.* Bernards, 88 Wisc. 111 (1894); Wickersham *v* Johnston, 104 Cal. 407 (1894).

The rule of presumption applies to England as well as the states of the American Union. Wickersham *v.* Johnston, 104 Cal. 407 (1894).

Unless the form of certification prescribed by congress is followed, "Where certified copies of records are offered, it should appear that the officer by whom they purport to be certified had the right to the custody of the records, and was the person who had authority to furnish authenticated copies. The statute of Vermont, to the evidence of which no objection was taken, shows that town clerks there have the lawful custody of such records in certain cases, but it did not appear that this was such a case.

"Where proprietary records are evidence, copies, certified by the officer having the lawful custody of them, have been admitted here; and there seems to be no reason for a different rule in relation to proprietary records which exist out of the State." Woods *v.* Banks, 14 N. H. 101, 109 (1843).

The right to registration under the laws of a sister state must be proved as a fact. Stevens *v.* Bomar, 9 Humph. 546 (1848).

But where the Code of North Carolina confers upon the probate courts of other states full right to probate deeds, judicial cognizance will be taken of the seals of such courts. Barcello *v.* Hapgood, 118 N. C. 712 (1896).

Where a statute authorizes the use of certified copies of certain land records certified by the United States Land Surveyor, it is not

necessary that the handwriting of the surveyor should be proved. "It seems as unreasonable to require proof of the handwriting of the surveyor, as it would to require proof of the seal of a court attached to a record of one of the States of this Union, made evidence by the laws of the United States, and therefore wrong." Bryan *v.* Wear, 4 [illegible] (1835).

Relevancy equally Requisite. — No public document is admissible in evidence merely because properly authenticated. It is admissible only if competent under ordinary rules. The most immaculate certification under the act of congress does not suffice to insure admissibility to the interstate record certified. Such certification merely places the interstate record on the same footing as a domestic one; leaving its admissibility to depend on the same pertinent rules of evidence as would determine the admissibility of a domestic record. Ordway *v.* Conroe, 4 Wisc. 45 (1855).

Thus, where the interstate "writing produced did not purport to be a record; but a mere transcript of minutes extracted from the docket of the court," the paper, though authenticated with entire accuracy, was rejected; the supreme court of the United States saying, "There is no foundation laid to show its admissibility in the cause." Ferguson *v.* Harwood, 7 Cranch, 408 (1813).

It is hardly necessary to add that only such portion of a public document as is relevant need be certified or introduced in evidence. Whitehouse *v.* Bickford, 29 N. H. 471 (1854); Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208 (1876).

And the best evidence rule applies to the case of attempted proof of an interstate document.

So the record of a chattel mortgage of another state cannot be proved by the testimony of the register of deeds in whose office it was filed, but only by an authenticated copy, as provided by Rev. Stats. U. S. § 906, or by an examined copy, made and sworn to by a competent witness.

"It was not competent to prove by Brown, the register of deeds, the records of his office. They might have been shown by a certified copy thereof, authenticated as required by the laws of congress, or by an examined copy, duly made and sworn to by any competent witness. The best evidence must be resorted to, and secondary evidence is not admissible, until it is shown that the primary evidence cannot be obtained." Jones *v.* Melindy, 36 S. W. (Ark.) 22 (1896).

Records of Domestic Tribunals. — The primary proof of the record of one court for the use of another in the same state is production of the record itself. Harper *v.* Rowe, 53 Cal. 233 (1878); Odiorne *v.* Bacon, 6 Cush. 185 (1850); Day *v.* Moore, 13 Gray, 522 (1859).

And where the original papers of another court are produced, it is no objection to their admissibility that they are not produced by the

proper officer, if they are identified by the clerk of the court whose papers they are. Garrigues *v.* Harris, 17 Pa. St. 344 (1851).

Neither is it any objection to the reception of the records of another domestic tribunal that such records have been illegally taken from the office where they belong. "The prosecution, for the purpose of contradicting and impeaching the appellant, who had testified as a witness, was allowed to introduce, over appellant's objection, an original judgment roll in a case which had been tried and decided in the county of Santa Clara; and counsel for appellant argues that this was error, because, as he contends, this record was illegally taken from the office of the county clerk of Santa Clara county, as no order of court allowing its removal was shown, — contrary to the provision of section 1950 of the Code of Civil Procedure. This position is not tenable. Whether or not the record was removed from Santa Clara county to San Francisco without authority, may, perhaps be a question of some consequence to the person who removed it, but is of no consequence in the case at bar. Its competency as evidence in the San Francisco court in no way depended upon the means by which it was brought there." People *v.* Alden, 45 Pac. (Cal.) 327 (1896).

In a case where "the plaintiff objected to the reception of the papers in evidence, because they were not copies instead of original documents." The supreme court of Connecticut in sustaining a ruling admitting the evidence say: "The object being to lay before the triers the real contents of the record, it would be absurd to hold that the best possible evidence, when adduced, should be excluded, because inferior evidence, by copy, would be admissible." Gray *v.* Davis, 27 Conn. 447 (1858); State *v.* Bartlett, 47 Me. 396 (1860).

So of the record of tax commissioners. The original books are admissible, though the law makes certified copies competent evidence. Miller *v.* Hale, 26 Pa. St. 432 (1856). So the record of a court-martial may be proved in a state court by production of the original record wherever a copy certified according to the statute would be admissible. Vose *v.* Manly, 19 Me. 331 (1841).

"It is scarcely necessary to cite authorities in support of a proposition so elementary, as that the original documents and records containing the proceedings in the Probate Courts of the State, when produced, are admissible in evidence. Being documents of a nature, which there may be an inconvenience in removing, and which, because they are records of a Court, the keeper thereof cannot ordinarily be required to produce, or remove into another Court, they may be proved by means of a copy duly authenticated. But when the originals are actually produced, they undoubtedly are admissible as evidence, and are the best evidence of their contents. An original supposes no better evidence in existence." Houze *v.* Houze, 16 Tex. 598 (1856).

Copies of the original papers duly authenticated are competent where the originals have not been extended into a complete record. Tillotson *v.* Warner, 3 Gray, 574 (1854). And a valid judgment may be proved by the memoranda of the magistrate before whom it was recovered upon his docket and upon the original writ, and by the production of the original papers in the case, verified by the testimony of the magistrate; — if these, when taken together, show clearly all the essential particulars of a valid judgment, and no extended record has been made. McGrath *v.* Seagrave, 2 All. 443 (1861). "In some instances, before the final record of the judgment is entered, we do not see how otherwise a judgment could be established." Gay *v.* Rogers, (Ala.) 20 So. 37 (1896).

But no superiority attaches to the original papers over a duly authenticated copy of the judgment roll; and where the final record in an attachment suit was offered to prove the fact of replevin and an objection was made based on the ground that the original replevin papers were not produced, the ruling sustaining such objection was held erroneous. "The final record had been made up, and it, and not the original papers in the case, was the legal evidence to establish what the record contained." Duncan *v.* Freeman, (Ala.) 19 So. 433 (1896).

It is not essential, where the original papers of an insolvency were separately certified, that the papers should all be attached together and the whole certified as one record. Goldstone *v.* Davidson, 18 Cal. 41 (1861).

In Kilgore *v.* Stoner, (Ala.) 12 So. 60 (1892), the Supreme Court of Alabama intimate a doubt as to whether an original decree of the Probate Court "would be self proving."

In a well-reasoned case in the New Jersey supreme court the state of the common law as to copies of judicial records is summarized as follows: "There is a difference in the methods by which judicial records and by which public records are provable. Judicial records are provable by exemplified copies. An exemplified copy at common law was obtained by removing the record into the Court of Chancery by *certiorari*. The great seal was attached to a copy, which was transmitted by a mittimus to the court in which it was to be used as evidence.

In this country, says Professor Greenleaf, the great seal being usually if not always kept by the secretary of state, a different course prevails; and an exemplified copy under the seal of the court is usually admitted, even upon a plea of *nul tiel record*, as sufficient evidence. Greenl. Ev., § 502.

In addition to copies exemplified by the great seal, or seal of a court, there were certified copies made by the officer in custody of the judicial records, and known as office copies. These were admissible only in the same cause and in the same court. 2 Phil. Ev., marg. p. 347.

The third kind of authenticated copy is an examined or sworn copy, which is proved by producing a witness who has compared the copy with the original record, word for word, or who has examined the copy while another person read the original.

These are the various methods of proving judicial records by a copy. Therefore, a paper certified by the secretary of state, under the appropriate seal, as clerk of the Court of Errors and Appeals, or of the Court of Impeachment, or of the Prerogative Court, to be a true copy of a record in one of these courts, would be receivable in evidence." Traction Co. *v.* Board of Works, 57 N. J. L. 313 (1894).

But while the primary proof of the records of one court in trials before another of the same state is by production of the original, undoubtedly the more usual proof is by a copy certified by the clerk to be a true copy. "The Court are of opinion, that a copy of the proceedings of any court of record in this Commonwealth, certified to be a true copy of the record of such court, by the clerk of such court, under the seal thereof, is competent evidence of the existence of such record in every other judicial tribunal in the Commonwealth." Shaw, C. J., in Com. *v.* Phillips, 11 Pick. 27 (1831); Tillotson *v.* Warner, 3 Gray, 574 (1854); Gilmore *v.* Baker Co., 12 Wash. 468 (1895).

Where a secretary of state certified to a copy of a record in his office not legally there, the certification confers no admissibility. Rousey *v.* Wood, 57 Mo. App. 650 (1894).

In Massachusetts "to render a copy of a record of a court in this commonwealth competent evidence in another court within this state, it is not necessary that it should be an exemplified copy under the seal of the court. The rule is otherwise in many of the United States. But in Massachusetts it is sufficient if the copy is attested by the clerk. This rule of evidence is founded on immemorial usage." Chamberlin *v.* Bail, 15 Gray, 352 (1860).

The act of congress providing for certification of the records of one state for use in the courts of another state does not apply to the records of domestic tribunals. "Records of State courts, in order that they may be admissible in the courts of other States, must be authenticated as required in that provision; but the act of Congress does not apply to the courts of the United States, nor to the public acts, records, or judicial proceedings of a State court to be used as evidence in another court of the same State. Conclusive support to that proposition is found in many decided cases in addition to those to which reference has already been made. Jenkins *v.* Kinsley, 3 Johns. (N. Y.) Cas. 474; Adams *v.* Lesher, 3 Blackf. (Ind.) 241; Murray *v.* Marsh, 2 Hayw. (N. C.) 290.

Circuit and district courts of the United States certainly cannot be considered as foreign in any sense of the term, either in respect to the State courts in which they sit, or as respects the Circuit or

District Court of another circuit or district. On the contrary, they are domestic tribunals, whose proceedings all other courts of the country are bound to respect, when authenticated by the certificate of the clerk under the seal of the court, the rule being that the Circuit Court of one circuit or the District Court of one district is presumed to know the seal of the Circuit or District Court of another circuit or district, in the same manner as each court within a State is presumed to know and recognize the seal of any other court within the same State. Womack *v.* Dearman, 7 Port. (Ala.) 513." Turnbull *v.* Payson, 95 U. S. 418 (1877).

To constitute the official certificate of a clerk of the court his seal of court must be affixed. McCarthy *v.* Burtis, 3 Tex. Civ. App. 439 (1893).

But the certificate of the clerk is limited to *copies*. He is not at liberty to state under his certificate what he thinks is the effect of the record. So where a clerk certified that certain actions had been dismissed "as appears from the dockets of said court," it was held that the admission was error. "In the case of Miller *v.* Reinhart, 18 Ga. 259, it was held erroneous to admit in evidence a certificate from the clerk of the superior court that a named person was duly naturalized. This court, speaking through Benning, J., said: 'The certificate does not give the words of any part of the record. The certificate seems to be a statement of what, in the clerk's opinion, is the legal import or effect of the different particulars of which the record may consist.' So, in the case at bar, the certificate objected to does not pretend to furnish any part of the dockets or records of the court, but certifies to the clerk's opinion as to the effect of entries which are within his custody. It would be unsafe, to the last degree, for one court to act upon the clerk's opinion as to the effect of records in another court; and if the decision in 18 Ga., *supra*, was correct, as we are satisfied it was, the court below erred in admitting the certificate objected to in this case. See, also, Dillon *v.* Mattox, 21 Ga. 113; Martin *v.* Anderson, Id. 301." Lamar *v.* Pearre, 90 Ga. 377 (1892).

In the case of domestic courts of record the presumption is that their proceedings were in all respects regular and legal. King *v.* Duke, (Tex. Civ. App.) 31 S. W. 335 (1895).

Inferior Domestic Tribunals. — The normal proof of the record of a court of inferior jurisdiction is by production of the original or a sworn copy. State *v.* Bartlett, 47 Me. 396 (1860).

The transcript by a justice of the peace of his records is not evidence in Pennsylvania, in the absence of an enabling statute. Magee *v.* Scott, 32 Pa. St. 539 (1859).

On the contrary, in Massachusetts, a certificate or a copy of a record of a case before a justice of the peace, though it omits the words "of the peace," is still sufficient. Com. *v.* Downing, 4 Gray, 29 (1855).

When a justice of the peace authenticated a copy of his record, this was held by the supreme court of Maine to be competent. State *v.* Bartlett, 47 Me. 396 (1860). But his certificate that a certain fact appears by his records is rejected. English *v.* Sprague, 33 Me. 440 (1851).

To the effect that where a record of a justice of the peace is collaterally involved, and the statute requires such a magistrate to keep a record, the files and minutes are not proper evidence in the lifetime of the justice, but that the only appropriate evidence is the record, or a copy of it, certified by the justice, see Strong *v.* Bradley, 13 Vt. 9 (1841).

But where a justice of the peace has deceased without making a formal record, minutes of a judgment rendered by him, made on the writ, if they show a judgment rendered and the amount, will be received. Story *v.* Kimball, 6 Vt. 541 (1834).

Federal Courts. — So far as relates to authentication, the records of the federal courts are not regarded by the courts of the several states as those of a foreign tribunal, — as are the records of a sister state of the Union, — but as the records of a domestic tribunal, and are proved in the same manner as are the records of other courts in the same state. Accordingly, the records of a federal court are not within the provisions of the statute regulating authentication of records of one state in the courts of another. Speaking of the contrary contention, the supreme court of Pennsylvania say: "The Supreme Court of the United States is our court; the Circuit Court is part and parcel of that court. In the establishment of the judicial hierarchy, one circuit embraced several States. It is indissolubly connected with the Supreme Court of the Union. An appeal lies in certain cases, and writs of error in others. In cases of difference between the circuit judge and the district judge, the point is certified into the Supreme Court for decision; and in many cases the jurisdiction of the Circuit Court is concurrent with that of the State court. What would be said of a decision that the Circuit Courts of the United States for the Eastern or Western Districts, in this State, were foreign tribunals? Other circuits and districts are established by the same word of power, for the same purposes, and are of like proportions, with the same animating spirit in them, all proceeding from the same source — the Constitution of the United States, connected indissolubly with the Supreme Court of the United States, whose power and jurisdiction overshadows and protects us all, and where the States, like giants, may enter into controversy. In short, the Circuit Court of the United States, wherever it sits, is native here, and its seal proves itself in our courts, just as the seal of our own courts do. It is a seal of the paramount and paternal sovereignty, and, like the seal of the king's courts of common law jurisdiction in England, as, for

instance, the King's Bench, proves itself. This seal is received in all the courts of the Union, as evidence proving itself." Williams *v.* Wilkes, 14 Pa. St. 228 (1850); Turnbull *v.* Payson, 95 U. S. 418 (1877).

The same rule applies to the records of courts established by act of congress in the territories of the United States as applies to the constitutional courts of the United States established within the limits of the several states. Womack *v.* Dearman, 7 Porter (Ala.), 513 (1838).

State Records in Federal Courts. — Conversely, "Beyond all doubt, the certificate of the clerk and the seal of the court is a sufficient authentication of the record of a judgment rendered in a State court, when offered in evidence in the Circuit Court sitting within the same State where the judgment was rendered. Mewster *v.* Spalding, 6 McLean, 24. Held, also, that such an authentication would be sufficient in the State court; and, if so, that it would also be good in the Circuit Court." Turnbull *v.* Payson, 95 U. S. 418 (1877).

Records of Court itself. — Here the primary proof is the production of the record itself. Adams *v.* State, 11 Ark. 466 (1850).

It has been held to be error to admit an exemplified copy under such circumstances. "The court below clearly erred in permitting the plaintiff in that court to read an exemplification of the record and proceedings described in the declaration. The record set out in the declaration was of the same court and in such case it is not sufficient to read a certified copy, but the original record itself must be produced and inspected." Adams *v.* State, 11 Ark. 466 (1850).

Where the original records are relied on, "they cannot be produced and authenticated by persons having no official custody of them." Miller *v.* Hale, 26 Pa. St., 432 (1856).

It is, however, "quite competent for the parties to admit their authenticity." Miller *v.* Hale, 26 Pa. St. 432 (1856).

Instead of using the record of a court in the same court, "It is a very common practice for gentlemen of the bar, for the convenience of themselves and their clients, to use, as evidence, the original documents and minutes, instead of the record as finally made up or supposed to be made up from them, or a copy from it, as enrolled. When the evidence is offered in the same Court in which the proceedings were had, no difficulty can occur; because the Court knows its own proceedings and records, and can *instanter* order the enrolment, and give the parties the benefit of it, in its complete state." Ward *v.* Saunders, 6 Ired. 382 (1846).

The practice of using the original minutes instead of the actual record obtains merely in the court whose papers they are. "When the proceedings are in one Court, and they are offered as evidence in

another, regularly the original documents or minutes, which may need evidence to identify them, are not evidence, but only the record made up or a copy from it, authenticated by the seal of the Court." Ward *v.* Saunders, 6 Ired. 382 (1846).

But, on the other hand, the original papers of an inferior court may be used on a trial before a superior court. "The presumption is, that the records of inferior courts are regularly made up, and, though such records, or duly authenticated copies thereof, are deemed evidence of the highest character, and cannot be explained or contradicted by parol testimony or extraneous documents, that fact does not exclude the original papers on which such records are founded. Either are competent evidence." State *v.* Bartlett, 47 Me. 396 (1860); Day *v.* Moore, 13 Gray, 522 (1859). "It was in the plaintiff's option to offer which he pleased." *Ibid.*

It is proper to observe that in many courts "the original papers constitute in themselves the only record and are not extended on a roll." Warener *v.* Kingsmill, 7 Q. B. U. C. 409 (1850).

Only such part of the entire record need be certified as is relevant to the case. McClaugherty *v.* Cooper, 39 W. Va. 313 (1894).

Other Domestic Public Documents. — As in the case of other public documents, non-judicial domestic records may be proved by the production of the original record. Gay *v.* Rogers, (Ala.) 20 So. 37 (1896).

And it is by no means a fact impairing the admissibility of such an original record that it is presented from its appropriate place of keeping without warrant of law.

So the book of records of mortgages of the probate court may be received in evidence, though no provision of law exists for taking the records from the probate court. "On the trial of the cause, as is shown by the bill of exceptions, the plaintiff offered in evidence a large volume, which was marked on the back, 'Record of Mortgages, No. 115, Montgomery County,' and, in connection with said book, introduced as a witness one David Allen, who was shown to be a clerk in the office of the judge of probate, and who testified that the book was one of the books kept in the office of the judge of probate of Montgomery county, in which mortgages were recorded; and, in connection with the offer of said book, plaintiff's attorney testified that he had made a written demand on defendants to produce at the trial of this cause the original mortgage, on the margin of the record of which the plaintiff had notified them to enter the record of the partial payments, and the defendants had refused to produce said mortgage. The plaintiff then offered to introduce before the jury certain pages of this book, on which were purported to be copied a mortgage from J. D. Brooks to Gay, Hardie & Co., which was the mortgage referred to in this suit. The defendants objected to the introduction of said book, or any pages thereof,

on the ground 'that the original records of the probate court cannot be taken from the office, where they belong, and introduced as evidence in another court,' and on further grounds that said record was not verified, because the witness Allen testified that the record of the mortgage was not made by him, and that he did not know by whom it was made, and that the contents of the record of the probate court cannot be proved, except by a certified transcript thereof under the seal of the court. The court overruled this objection, and admitted said pages of the record book to be introduced in evidence, and submitted to the jury as evidence, and to this action of the court the defendant duly excepted. . . . The appellants insist that the court erred in admitting in evidence the record book of mortgages. It is urged that this book was introduced to prove the execution of the mortgage. An examination of the record, to which we are referred by the counter abstract, does not sustain the contention. The objection taken before the court was 'that original records of the probate court could not be taken from that office,' and 'that the record was not verified.' The clerk of the probate court identified and verified that it was the record of mortgages. The record book was competent evidence in the case. Steiner *v.* Snow, 80 Ala. 46;" Gay *v.* Rogers, (Ala.) 20 So. 37 (1896).

The inconvenience and risk, however, of producing the original from public offices, make it natural and necessary that duly authenticated *copies* should be received in evidence.

Common law authentication under the oath of a witness is still competent.

"The same rule which has been adopted in the case of judicial documents appears to be generally applicable to public writings not judicial which cannot be removed on the ground of inconvenience to the public service, namely, that whenever an original would be admissible, an examined copy will equally be admitted." Traction Co. *v.* Board of Works, 57 N. J. L. 313 (1894).

For example, a record of baptisms and marriages may be proved in this way. Jackson *v.* King, 5 Cowen, 237 (1825). So of a record of the enrolment of a vessel at a custom house within the state. Hacker *v.* Young, 6 N. H. 95 (1833).

At common law the minutes of trustees of a town in Kentucky should be proved by a copy verified under oath. "There is no provision authorizing their verification by the Clerk. It would then seem to follow, that they ought to be verified by oath, and proved to be true copies from the real book of the trustees, kept by the proper officer and recognised by the board as such. Owings *v.* Speed, 5 Wheat. 420; 1 Stark. on Evidence, 299, and authorities there cited." Dudley *v.* Grayson, 6 Monr. 259 (1827).

So it has been held in Canada that any public document filed in a public office of the government, may be proved by an *examined* copy.

So, where the chief clerk in the executive council office, in which the original was filed, brought into court a copy of the original memorial, which he swore was correct, the evidence was held admissible. "Robinson, C. J. — we find, that in books on evidence, this principle is laid down: 'Wherever the original is of a public nature, an exemplification of it (if it be a record), or a sworn copy, is admissible in evidence, because documents of a public nature cannot be removed without inconvenience, and danger of being lost or damaged, and the same document might be wanted in two places at the same time.' Memorials are sometimes required as secondary evidence of lost deeds, and in such cases it is usual to admit copies of the memorials, without insisting on the production of the original. This must depend on the same principle." McLean *v.* McDonell, 1 Q. B. U. C. 13 (1844).

"It is well settled that where the proof is by a copy, an examined copy, duly made and sworn to, is always admissible." Whitehouse *v.* Bickford, 29 N. H. 471 (1854).

"In respect to public documents or entries not of a judicial character, proof may be made by examined or sworn copies. State *v.* Hutchinson, 5 Halst. 242; State *v.* Clothier, 1 Vroom, 351." Traction Co. *v.* Board of Works, 57 N. J. Law, 313 (1894).

The original, however, is still competent. Garneau *v.* Port Blakely Mill Co., 8 Wash. 467 (1894); Greenwood *v.* Fontaine, (Tex. Civ. App.) 34 S. W. 826 (1896).

In determining whether a document is, in fact, an original public document, many circumstances in addition to the place of custody may be considered by the court. So where, on a question of the settlement of a pauper, a book was offered containing a record purporting to admit the pauper as an elector in 1858, the supreme court of Connecticut say: "If this book was an original record, it should have been received in evidence; and in determining whether it was such, its general appearance, the place where it was found, and the length of time during which it was known to have been there, were all matters entitled to weight. If the entries looked as if they had been made by public officials, contemporaneously with the facts which they recorded, the book would be supported by the ordinary presumptions attaching to ancient documents, which have been in existence for thirty years." Enfield *v.* Ellington, 67 Conn. 459 (1896).

Where no legal requirement directed the keeping by a tax-collector of a stub-book of certificates, the original stub-book, although verified as being found in a suitable place, is incompetent. Noble *v.* Douglass, 56 Kans. 92 (1895).

Office Copies. — While the competency of sworn or examined copies is not impaired, office copies are as a rule so much more convenient, that in most, if not all, the states, statutes have been passed

enabling the legal custodian of public documents to give, on application, official copies, which are made by statute equally competent with the originals. But where the statute authorizes a copy under oath or under seal, a certified copy by a proper officer, under his "hand," is not sufficient. Chambers *v.* Jones, 17 Mont. 156 (1895). And where the certificate required by statute is a "true and complete" copy, a certificate as a "true" copy is insufficient. Naanes *v.* State, 143 Ind. 299 (1895). Such enabling statutes do not make the original papers any less competent. Miller *v.* Hale, 26 Pa. St. 432 (1856).

So office copies of deeds are competent to make out a chain of title. Smith *v.* Cushman, 59 N. H. 27 (1879).

So of office copy of a chattel mortgage. Howard *v.* Gemming, 10 Wash. 30 (1894).

And personal property statements, made for purposes of taxation, which have been signed and verified by the listing parties and preserved in the office of the county clerk, where the originals would be competent and are not in possession of the person offering the copy, follow the same rule. Bowersock *v.* Adams, 55 Kans. 681 (1895).

"Best Evidence Rule." — The case of an office copy made admissible by statute is not an instance of the "best evidence" rule. The copy may be quite as primary evidence as the original would be.

So of a sworn copy. Crawford *v.* Branch Bank, 8 Ala. 79 (1845).

Therefore, in the absence of a statutory requirement, it is not necessary to account for the non-production of the original. Canfield *v.* Thompson, 49 Cal. 210 (1874); Curry *v.* Raymond, 28 Pa. St. 144 (1857).

But it is said that such is the rule in case of deeds only in favor of one who claims through the deeds. Loomis *v.* Bedel, 11 N. H. 74 (1840).

Such a requirement that the non-production of the original must be accounted for is sometimes made. Brown *v.* Griffith, 70 Cal. 14 (1886); Davis *v.* Rhodes, 39 Miss. 152 (1860); Eby *v.* Winters, 51 Kans. 777 (1893); Bowersock *v.* Adams, 55 Kans. 681 (1895); Greenwood *v.* Fontaine, (Tex. Civ. App.) 34 S. W. 826 (1896); Farrow *v.* Nashville, &c. R. R., (Ala.) 20 So. 303 (1896).

That an office copy made admissible by statute is primary evidence is by no means the same thing as saying that the "best evidence rule" has no application to public documents.

Where the original public document is not produced, and the public record is destroyed, secondary evidence becomes admissible in proof of the contents of the instrument.

Whether there are degrees in such secondary proof is disputed.

That there are, see Cornett *v.* Williams, 20 Wall. 226 (1873);

Ellis *v.* Huff, 29 Ill. 449 (1862); Cook *v.* Wood, 1 McC. 139 (1821); Lyons *v.* Gregory, 3 H. & Munf. 237 (1808); Hilts *v.* Colvin, 14 Johns. 182 (1817); Hall *v.* Manchester, 40 N. H. 410 (1860).

That there are no such degrees, see Smith *v.* West, 64 Ala. 34 (1879).

Parol evidence, however, is not competent to prove the contents of a public record, while the original record or an authenticated copy is procurable. Platt *v.* Haner, 27 Mich. 167 (1873); Kennedy *v.* Reynolds, 27 Ala. 364 (1855); Alexander *v.* Foreman, 7 Ark. 252 (1847); Smith *v.* Smith, 43 N. H. 536 (1862).

It is then admissible, *ex necessitate rei.* Simpson *v.* Norton, 45 Me. 281 (1858); Hall *v.* Manchester, 40 N. H. 410 (1860); Burton *v.* Driggs, 20 Wall. 125 (1873); Stockbridge *v.* West Stockbridge, 12 Mass. 399 (1815); Eaton *v.* Hall, 5 Metc. 287 (1842).

What is sufficient search for the original will depend on the circumstances of each case in the discretion of the court. Simpson *v.* Norton, 45 Me. 281 (1858).

Office Copies. How attested. — Office copies may not only be attested by the custodian but by his legal deputy. Com. *v.* Hayden, 163 Mass. 453 (1895).

An attestation by a mere clerk in the office is, however, not sufficient in the absence of statutory authority. So the supreme court of Kentucky, speaking of a register of deeds, say: "There can be no doubt that the register may act by deputy, and that an attestation of a copy by his deputy would be sufficient; but there is a wide difference between a deputy and a mere clerk. The former, we apprehend, must, before he can act in that character, take an oath of office; whereas the latter is required to take no such oath before he can act. In legal estimation, therefore, the acts of the former are entitled to greater credence than those of the latter. We are of opinion therefore, that the court below erred in deciding that the copy attested in the handwriting of the clerk was admissible evidence." Sampson *v.* Overton, 4 Bibb, 409 (1816).

So an office copy made by an officer not legally authorized to make copies of the papers in question has no validity as evidence. For example, where the clerk of the Council of Maryland came into possession of certain papers belonging to A., under a vote of the council, and undertook to give attested copies of such papers, it was held that the admission of the copies was error. Schnertzell *v.* Young, 3 H. & McH. 502 (1796).

The mere fact, therefore, of legal custody, though important in this connection, by no means of itself confers the right to certify copies of the papers in question. Strother *v.* Christy, 2 Mo. 119 (1829); State *v.* Cake, 24 N. J. Law, 516 (1854).

An instance of this rule is presented in a late New Jersey case where a paper, certified by the secretary of state, under his seal, to

be an actual copy of a description of routes of a trolley line, filed in his office, was rejected on the ground that the law gave no authority to the secretary to make copies of such papers. "A paper purporting to be a certified copy of a public document, although certified by the officer in whose custody it is placed, whether under seal or not, is not receivable in evidence unless such certification is enjoined or permitted by statute. Notes to 2 Phil. Ev. (5th Am. ed.), marg. p. 444; 1 Stark. Ev. 154.

It is true that Mr. Greenleaf, in the text of the original edition of his work on evidence, section 485, says that the weight of authority seems to have established the rule that a copy given by a public officer, whose duty it is to keep the original, ought to be received in evidence.

Of two cases cited by him in one the copy received was a sworn copy, and in the other the copy was rejected because it certified facts and not the record; and the remarks of the judge in respect to the efficacy of the certified copy as evidence were obiter. Two or three other cases are cited which were based upon the remarks of Chief Justice Marshall in the case of United States *v.* Perchеman, 7 Pet. 51, who, after holding that the copy then in question was authorized by federal statutes, said that on general principles such copies ought to be received.

In the last edition of Mr. Greenleaf's work it is admitted that the earlier cases were opposed to the reception of certified copies unless authorized by statute.

It is profitless to consider the question of the weight of American authorities, for it is believed that no English case can be found in which such certificates have been received, and their incompetency has been asserted in at least two cases in this state. It was so held by Judge Dayton in the case of New Jersey Railroad and Transportation Co. *v.* Suydam, 2 Harr. 25, 61. This was reaffirmed in the case of The State *v.* David Cake et al., 4 Zab. 516.

The existence of this general rule of evidence accounts for and is evidenced by the number of special statutes empowering officers to certify copies of papers which are enrolled or on file in their offices. Thus, the secretary of state is by the legislature empowered and enjoined to give copies of bills and joint resolutions on file in his office, which copies, when certified under his hand and seal to be true copies, are to be receivable in evidence. Rev., p. 1094, § 7.

So certified copies of contracts of sale, of leases, or franchises of corporations recorded in his office, are to be received as evidence. Rev., p. 1096, § 15.

My inquiries have brought to light no statute which commands or authorizes copies of this class of filed papers to be made by the secretary of state, so the conclusion is that proof of the facts which were essential to give the prosecutors a footing as such, are

here absent." Traction Co. *v.* Board of Works, 57 N. J. L. 313 (1894).

Record must be Authorized. — Unless, moreover, the document is entitled to registry, a copy of it is not competent evidence. "Where the law does not require or authorize an instrument to be recorded, an office copy of the record is not, in general, admissible in evidence." Wendell *v.* Abbott, 43 N. H. 68 (1861); Mitchell *v.* Bridgers, 113 N. C. 63 (1893); Parker *v.* Cleveland, 37 Fla. 39 (1896); Battle *v.* Baird, 118 N. C. 854 (1896).

So where a copy of a recorded deed is offered, it must affirmatively appear that the land was so situated as to entitle it to registry in that particular registry. League *v.* Thorp, 3 Tex. Civ. App. 573 (1893).

So a deed with two witnesses, recorded under a law requiring three witnesses for recording, cannot be proved by office copy. Clark *v.* Perdue, (W. Va.) 21 S. E. 735 (1895).

And a power of attorney recorded in a county where the land conveyed does not lie cannot be proved by a certified copy. Grant *v.* Hill, (Tex. Civ. App.) 30 S. W. 952 (1894).

Record — not Facts — required. — The right of the official custodian of records to certify even by statute, is limited to certifying *copies* of the record. He is not competent to summarize the effect of the record, and state, as the result of his examination, that a certain fact exists or is shown by his records. Thus where, instead of certifying a copy of the record showing the fact, the adjutant-general of the state of Maine undertook to certify the fact itself as shown by the records of his office, it was held that the fact could not be shown in that way. "The law does not permit a recording or certifying officer to make his own statement, of what he pleases to say appears by the record. What the record itself does declare is to be made known to the Court by a duly authenticated copy of it; and upon it, and not upon what the officer may say, that it declares, does the law authorize a Court of justice to rely. The certificate in this case states the existence of a record; and yet instead of a duly authenticated copy, there is only a statement of what the officer says will appear by an inspection of it. The law requires, that the Court, before whom it is produced, should inspect and decide, what it contains and proves, and not intrust that duty to a certifying officer. Such testimony was illegally admitted, and for this cause the judgment must be reversed." McGuire *v.* Sayward, 22 Me. 230 (1842).

Record as Proof of Execution, &c. — In case of office copies of deeds, it is still necessary in many states that the execution of the original should be proved. Musick *v.* Barney, 49 Mo. 458 (1872); Rollins *v.* Henry, 78 N. C. 342 (1878).

But this requirement is frequently removed by statute. "An

office copy being *prima facie* evidence, there is no necessity of calling the attesting witness." Webster *v.* Calden, 55 Me. 165, 171 (1867); Chamberlain *v.* Bradley, 101 Mass. 188 (1869).

So of chattel mortgages duly recorded. Howard *v.* Gemming, 10 Wash. 30 (1894).

And the requirement of proof of execution of the original deed or other instrument is frequently removed by judicial decisions. Kelsey *v.* Hanmer, 18 Conn. 311 (1847). "A party is not entitled to put in evidence copies of everything he may find upon the records. It is only when he claims title through deeds which have been recorded, that he is entitled to offer copies in evidence, without an effort first to produce the original." Loomis *v.* Bedel, 11 N. H. 74 (1840).

So a registry copy of a deed has been received as "*prima facie* evidence of the delivery as well as of the execution of the deed." Gragg *v.* Learned, 109 Mass. 167 (1872); Fenton *v.* Miller, 94 Mich. 204 (1892).

And when the register of deeds, himself the grantor, places a deed on record, it is evidence of a delivery. Fenton *v.* Miller, 94 Mich. 204 (1892).

The statutes of the different states present various provisions on this subject. Strict proof of execution is frequently excused, at least conditionally. Younge *v.* Guilbeau, 3 Wall. 636 (1865).

In case of a certified office copy proof of execution and delivery of the original may be excused in the case of all persons with certain exceptions, *e. g.* that of the grantee himself. Knox *v.* Silloway, 10 Me. 201, 216 (1833); Kelsey *v.* Hanmer, 18 Conn. 311 (1847). "The 34 Rule of this Court, established April Term, 1822, is in these words, 'in all actions touching the realty, office copies of deeds, pertinent to the issue, from the registry of deeds, may be read in evidence without proof of their execution, where the party offering such office copy in evidence is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs.' This Rule is in unison with immemorial usage in Massachusetts. The Courts of this State have uniformly observed it; and it is believed that a similar practice has long prevailed in most, if not in all the New-England States. It is a departure from the principle and practice in England, occasioned by a well known distinction in respect to the custody of title deeds. In that country, title deeds accompany the title which they pass. The purchaser receives the documentary evidence of his title, and is entitled to hold it, while he continues to hold the estate. Having the original conveyances in his possession, he has no occasion to make use of copies. But with us the universal practice is for every man to retain possession of his own title deeds. Our rule above-mentioned and our practice conforming to it, are founded upon the presumed fact that none of

the deeds under which a party claims, except the deed from his immediate grantor, are in his possession or under his control; hence he may give in evidence copies duly certified by the register of deeds, except in the cases specially named in our rule." Knox *v.* Silloway, 10 Me. 201, 216 (1833).

The recording of a deed may be considered as evidence, *inter alia*, on the question of execution. Burleson *v.* Collins, (Tex. Civ. App.) 29 S. W. 688 (1895).

And an office copy is admissible upon proof of the execution of the original. Cox *v.* Rust, (Tex. Civ. App.) 29 S. W. 807 (1895).

The statutory provision admitting office copies of recorded deeds also, in case of the deed of a corporation executed in its name by its president, dispenses with proof of the authority of the president to execute. "Between natural persons the production of such a copy is evidence of the execution of the deed by the person whose deed it purports to be; of its delivery; of its due acknowledgment; and, in the absence of other evidence, of the seisin of the grantor. This involves the presumption or inference of fact, (1) that the seal was the seal of the grantor; (2) that it was affixed by him or by his authority; (3) that he signed his name or authorized it to be signed for him in his presence; (4) that it was the grantor who made the acknowledgment; (5) that the certificate of the magistrate is genuine; and (6) that the grantor was seised of the land which the deed purports to convey. There is nothing to be inferred, in case of the admission of an office copy of the deed of a corporation, which goes farther than this. It is presumed to be the deed of the corporation, which it purports to be. The seal is presumed to be the seal of the corporation, affixed by its authority, as in the case of a private person. The authority to execute the deed is of course essential to its validity; but so is the genuineness of the signature of the grantor in any case; and there seems to us as much reason to infer the one from the existence of the record copy as the other. The copy was admissible, because it purported to be the duly executed deed of the corporation, and was therefore presumed to be so; and the existence of all the facts necessary to make it so, is presumed as a consequence." Chamberlain *v.* Bradley, 101 Mass. 188 (1869).

"The certificates of acknowledgment were, we think, properly received in evidence. The objections to them, if all allowed, would destroy almost entirely the utility of the statutes, which declare a probate or certificate of acknowledgment endorsed by certain officers upon a deed, to be *prima facie* evidence of its execution. If their official character, their signatures, and that they acted within their territorial jurisdiction must be shown by extrinsic evidence, the party may as well, and in general perhaps with more convenience to himself, procure the common law proof. The practice is to take a certificate which appears on its face to be in conformity with the

statutes, as proof of its own genuineness. It need only be produced. There is no need of extrinsic proof, such as showing by whom it was made, any more than of a notary's certificate when received under the commercial or civil law, Chitty on Bills, Am. ed. 1839, p. 642 a; 2 Dom. tit. 1, § 1, pl. 29; or a clerk's certified rule of the court in which the cause is pending. Cowen & Hill's 1 Phil. Ev. 388. Accordingly, where the certificate describes the proper officer, acting in the proper place, it is taken as proof both of his character and local jurisdiction. Rhoades' lessee *v.* Selin, 4 Wash. C. C. R. 718; Willink's lessee *v.* Miles, 1 Pet. C. C. R. 429. Vid. Morris *v.* Wadsworth, 17 Wendell, 103, 112, 113. He is like an officer authorized to take testimony *de bene esse* under various statutes. Vid. Ruggles *v.* Bucknor, 1 Paine's C. C. R. 358, 362. Thompson, J., there said, *prima facie* the officer is to be presumed, *de facto* and *de jure*, such as he is described to be. Indeed the certificate stands much on the same ground as the return to a special commission for taking testimony. There it would be deemed a singular objection, that the commissioners must be identified and shown to have proceeded regularly, by evidence collateral to the return." Thurman *v.* Cameron, 24 Wend. 87 (1840).

And it is not necessary that the party offering public documents certified by the official having charge of the original or its record should explain a rasure or alteration visible upon its face and appearing to have been made at the same time and by the same hand as the obliterated letters and figures. So held in case of election returns. People *v.* Minck, 21 N. Y. 539 (1860).

It may be important to observe, however, "an office copy is not evidence that a paper, of which it is a transcript, was a genuine paper." White *v.* Dwinel, 33 Me. 320 (1851).

The rule admitting office copies applies to records of marriages. Wedgwood's Case, 8 Greenl. 75 (1831).

And when the record and certification are legally required, and an assistant is legally appointed with the powers of the principal as to certification, the certificate of the assistant is sufficient. Com. *v.* Hayden, 163 Mass. 453 (1895). The power to certify office copies applies to records of deaths, where the registration and certification were done under some provision of law. Woolsey *v.* Trustees, 84 Hun, 236 (1895).

And to the record of the enrolment of a vessel at the federal custom house within the state certified by the deputy collector of customs. Sampson *v.* Noble, 14 La. Ann. 347 (1859).

And to the doings of a town meeting as certified by the clerk. Hickok *v.* Shelburne, 41 Vt. 409 (1868); Com. *v.* Chase, 6 Cush. 248 (1850).

If properly attested, it is not necessary that the clerk's signature should be verified. Com. *v.* Chase, 6 Cush. 248 (1850).

"The clerk of a city or town is the proper certifying officer of all votes, ordinances, or by-laws of such city or town; and copies thereof duly attested by the clerk are competent evidence to go to the jury, without any special verification of the genuineness of the signature, such as would be required in proof of ordinary instruments, where notice had been given requiring such proof. Of course, copies so authenticated are *prima facie* evidence only, which may be controlled by any circumstances tending to show a forgery." Com. *v.* Chase, 6 Cush. 248 (1850).

CHAPTER V.

PRIVATE WRITINGS.

§ 1786.[1] The only class of *written Evidence* which remains to be considered, is that of PRIVATE WRITINGS. In discussing this subject, separate mention will not be made of each description of document[2] comprised in this class; but the principles which govern the *inspection*, *production*, *proof*, *admissibility*, and *effect* of them all will be stated. And, first, as to the means of obtaining *before or at the hearing* an INSPECTION or copy of such documents as are referred to either in the *pleadings* or in the *affidavits* of the adverse party. By the Rr. S. C.[3] "wherever the contents of any document are material, it shall be sufficient in any pleading to state the *effect* thereof as *briefly* as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material." Now, while this rule is highly valuable as affording a check to needless prolixity in pleadings, it is obviously, when standing alone, open to the objection that it affords facilities for shrouding intentions, and taking opponents by surprise; and a subtle draughtsman might under it adopt as his cardinal maxim the bugbear of the Roman bard, "brevis esse laboro, obscurus fio," and treat pleading, like diplomatic speech, as the means of concealing thoughts and purposes.

§ 1787. To render this evil impossible it is further provided,[4] that each party shall before trial, on giving notice to his opponent in a form provided for the purpose, be entitled to inspect any

[1] Gr. Ev. § 557, in part as to first six lines.

[2] But see West of Eng. Bk. *v.* Canton Ins. Co., 1877; and China St. Ship Co. *v.* Comm. Ass. Co., 1881, as to the discovery of documents relating to marine insurance.

[3] Ord. XIX., r. 21.

[4] Ord. XXXI., rr. 15 and 17.

document referred to in the latter's pleadings or affidavits,[1] and that on failure to comply with such notice the party to whom it is given shall not be entitled to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse, which the court or judge shall deem sufficient, for not complying with such notice; in which case the court or judge may allow the same to be put in evidence, on such terms as to costs, and otherwise, as the court or judge shall think fit.

§§ 1788—9. The consideration of the machinery for obtaining such inspection, and of the practice under the rules on the subject of inspection, more properly belongs to a book of Practice than to one on the subject of evidence.

§ 1790. So also do the provisions as to costs by which the rules as to inspection are guarded, and by which it has been deemed necessary to control the powers conferred by such rules, and has been sought to prevent their being perverted into an easy means of swelling costs and of harassing opponents.

§ 1791. The rules under which such discovery may be obtained are exclusively confined to documents to which reference is made in the *pleadings* or *affidavits* of the litigants. The question as to when other documents relating to any cause or matter are or are not liable to production and inspection is one of substantive Law and not of mere Practice, and as such may properly be considered in this work. To enable this to be completely done, it should be stated that at present the right to inspection and discovery of documents, other than those referred to in pleadings or affidavits, is conferred by an Order,[2] which provides, that "it shall be lawful for the court or a judge, *at any time during the pendency* of any cause or matter, 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 cause or matter, as the court or judge shall think right; and the court may deal with such docu-

[1] Documents referred to in answers to interrogatories are within this latter term. See Moore *v.* Peachey, 1891.

[2] Viz., R. S. C. Ord. XXXI., r. 14.

ments, when produced, in such manner as shall appear just." Identical provisions were formerly contained in an enactment,[1] of which the above Rule is substantially a re-enactment, and the judicial interpretation placed upon the enactment must be regarded in construing such Rule.[2]

§ 1792. Moreover, the present Rule—in common with all the other Rules relating to discovery and inspection, to be found in Ord. XXXI.—does not apply to criminal proceedings, or to proceedings on the Crown side, or the Revenue side, of the Queen's Bench Division, or to proceedings for divorce or other matrimonial causes.[3] Under it, too, there exists *no discretion* enabling the refusal of inspection, unless the documents fall within some known rule of protection or privilege acted upon by the old Court of Chancery.[4]

§ 1793. For these reasons it is necessary to consider under what circumstances the old Court of Chancery usually enforced the production of papers. In considering this question, it recognised no distinction between public and private documents, or between deeds and other less formal writings.[5] Moreover, it would seldom, if ever,—unless specially empowered by the legislature so to do,[6]—enforce discovery where such discovery would, as stated by the defendant on oath,[7] subject him to any criminal proceeding, penalty, or forfeiture,[8] or would violate the rules which relate to professional privilege.[9] Subject to these exceptions,[10] any party to an action, whether he were plaintiff or defendant,[11] was in the old Court of Chancery—and consequently now is in the High Court—entitled to exact from his opponent a discovery of the evidences, and to inspect and take copies[12] of the writings relating

[1] The Rule is substantially a re-enactment. § 18 of "The Chancery Procedure Act, 1852" (15 & 16 V. c. 86), repealed by 44 & 45 V. c. 59.

[2] As pointed out in Bustros *v.* White, 1876 (Jessel, M.R.).

[3] See Ord. LXVIII.

[4] Bustros *v.* White, 1876, C. A., best reported 45 L. J. Q. B. 642, virtually overruling Lane *v.* Gray, 1873.

[5] Wigr. Disc. § 400.

[6] See ante, § 1456.

[7] Webb *v.* East, 1879: "In every such case the objection must be taken by the party himself, and be supported by his oath" (Kelly, C.B.); See also S. C. on app., 1880.

[8] Ante, §§ 1453—1458, 1464; Wigr. Disc. §§ 127—147, 442. See Hill *v.* Campbell, 1875, C. P.; Atherley *v.* Harvey, 1877.

[9] Ante, §§ 911 et seq.; Wigr. Disc. §§ 136—138, 442; May. of Bristol *v.* Cox, 1884 (Pearson, J.).

[10] In the case of the Don Francisco, 1862, a further exception was sought to be introduced by a party who objected to produce letters, on the ground that their production would divulge the *secrets of his trade.* This objection, however, was overruled.

[11] Wigr. Disc. § 87.

[12] Pratt *v.* Pratt, 1882.

either to his case alone,[1] or to his case *in common* with that of his opponent;[2] also to a discovery of everything enabling him to defeat the case or title that he expects his opponent to set up;[3] and has a right to know what that case or title will be.[4] But a party to an action in the old Court of Chancery had—and consequently a party to an action in the High Court now has—no right whatever to a discovery of the evidences,[5] or to an inspection of the writings, either relating exclusively to his adversary's case,[6] or not material to the issues to be tried.[7]

§ 1793A. Discovery, we have seen, could not formerly be enforced in the Court of Chancery, and therefore cannot now be enforced in the High Court, where making it would necessitate a breach of professional confidence. In an earlier part of this work[8] "the rules which relate to professional privilege" have been discussed and illustrated at some length. Both the general rules as to what communications are privileged, and the especial bearing and effect of these rules in connection with discovery, were much considered by the Court of Appeal in a case[9] which arose in 1881, and has been previously[10] cited, as containing a valuable statement of the law on the question of what communications are privileged. In the same case the bearing of the rules and principles prevailing on this subject upon the practice of discovery were also stated. The question in that case was whether, in an action for specific performance of an agreement to grant a building lease to the plaintiff, the defendants were bound to produce letters in their custody, which had passed between their solicitors and their surveyors in relation to the property in question before any dispute had arisen between the parties. In giving his judgment in the Court of Appeal, allowing the order for production of these letters,

[1] Wigr. Disc. §§ 23, 26, 284.

[2] Smith *v.* D. of Beaufort, 1842; Burrell *v.* Nicholson, 1833; Earp *v.* Lloyd, 1857; Jenkins *v.* Bushby, 1866; Bolton *v.* Corp. of Liverpool, 1833; Att.-Gen. *v.* Lambe, 1838; Wigr. Disc. §§ 325, 367; Combe *v.* Corp. of London, 1842; Att.-Gen. *v.* Emerson, 1882, C. A.; Att.-Gen. *v.* Thompson, 1849; Stainton *v.* Chadwick, 1851. See Gomm *v.* Parrott, 1857.

[3] Att.-Gen. *v.* Corp. of London, 1850; Stainton *v.* Chadwick, 1851.

[4] Id.

[5] Comm. of Sew. of Lond. *v.* Glasse, 1873.

[6] Bolton *v.* Corp. of Liverpool, 1833; Smith *v.* D. of Beaufort, 1842; Glover *v.* Hall, 1848; Ingilby *v.* Shafto, 1863; Owen *v.* Wynn, 1878, C. A.; May. of Bristol *v.* Cox, 1884.

[7] Wigr. Disc. §§ 224—237; Hough *v.* Garrett, 1875.

[8] Ante, §§ 911 et seq.

[9] Wheeler *v.* Le Marchant, 1881.

[10] Ante, Vol. I. § 916, n.

the then Master of the Rolls, the late Sir George Jessel, said,[1] "What we are asked to protect here is this. The solicitor, being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, and it is said that the information given ought to be protected because it is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that to give such protection would not only extend the rule beyond what has been previously laid down, but beyond what necessity warrants."

§ 1794. According to the practice of the old Court of Chancery, the fact that a party had a lien[2] upon the entries in dispute, or that they are so intermingled with other entries in the book, which his opponent is not entitled to see, as to be incapable of being separated or sealed up,[3] was no ground of valid objection to an order for the production of memoranda, admitted to relate to the matters in dispute, and to be in the possession of the person from whom discovery is sought.[2] In one case,[4] a party was ordered to produce the whole of an agreement, though in his affidavit he had set out only two clauses of it, and had sworn that they alone assisted his opponent's case, or related to the matter in dispute. But where a document,—such, for example, as a pedigree,—consists of several separate parts, some of which relate to the question at issue, while others do not, the party producing the document is not bound to show the whole of it, but he will be allowed to close up or conceal such portions as he can undertake to swear are wholly irrelevant.[5]

§ 1795. The rules for regulating inspection and discovery at present in force, are, as has been seen, based on the practice which prevailed in the old Court of Chancery prior to the passing of the Judicature Acts. In any case, however, in which discovery and inspection would have been granted according to the old practice in the Common Law Courts, it will, of course, be granted under the present practice. It may, therefore, be pointed out that under the old common law system it was never deemed necessary that

[1] As reported L. R. 17 Ch. D. 682.
[2] Lockett *v.* Cary, 1864; Pratt *v.* Pratt, 1882.
[3] Carew *v.* White, 1842.
[4] Luscombe *v.* Steer, 1867.
[5] Kettlewell *v.* Barstow, 1872; Hunt *v.* Hewitt, 1852; Forshaw *v.* Lewis, 1855.

the inspection should be demanded exclusively with the view of establishing the original case of the applicant; but the court would always entertain the motion, if the object were to obtain material evidence to answer the opponent's case.[1] Accordingly, where to an action of detinue for a deed the defendant pleaded a general lien for work done by him as solicitor for plaintiff, plaintiff, on an affidavit stating that he had never retained the defendant, and that the bill of costs was due not from himself, but from a third party whom he named, was permitted to inspect such entries in the solicitor's books as related to the costs in question;[2] where the defence to an action brought by a Gas Light Company for the price of gas supplied under contract, was that the gas was deficient in quantity and defective in quality, inspection by plaintiffs of certain papers in the possession of the defendants, which contained the results of experiments made by the defendants with the view of testing the illuminating power of the gas was granted;[3] where, in an action by an architect to recover his commission for superintending the erection of certain buildings for defendant, the defendant's affidavit, in support of an application to inspect plaintiff's day-book or journal, alleged that the work was never done, and that, if it was, the charge was excessive, the defendant was held entitled to an inspection to see if there were any entries relating to the work, and what price was therein charged.[4] The general rule on this subject would appear to be that documents prepared *in the ordinary course of a man's duty or business* are not privileged. Thus, in an action by a consignee of goods against a shipowner for damage caused by the ship's unseaworthiness, and in which no question arose respecting the solicitor's privilege, inspection by the plaintiff with liberty to take copies was ordered of certain surveys made on the ship in a foreign port, a general average statement, the shipwright's bill for repairs done to the ship, the captain's protest, and the log-book; for all these documents,—if not strictly evidence in themselves,—had an immediate tendency to advance the plaintiff's case, and were proximately

[1] Goodman *v.* Harvey, 1864.
[2] Scott *v.* Walker, 1853. See, also, Rayner *v.* Allhusen, 1851 (Erle, J.); and Galsworthy *v.* Norman, 1851 (id.).
[3] London Gas Light Co. *v.* Chelsea Vestry, 1859.
[4] Hunt *v.* Hewitt, 1852. See Ricard *v.* Inclosure Commiss., 1854.

connected with the issue to be tried.[1] On the other hand, it equally appears to be a general rule that *documents created in the course of*, or with a view to, litigation, are privileged and protected from production. Thus, in an action against a railway company for injuries sustained on their railway, plaintiff may inspect reports, descriptive of the accident, *made in the ordinary discharge of duty by different servants of the company to their general manager*,[2] though he will not be allowed to inspect reports made to the defendants by scientific persons, whom they had consulted in confidence *in view of litigation, and for the purpose of ascertaining how the accident had occurred.* Similarly, in two other cases, where railway companies were sued for injuries caused to passengers by an accident, reports by medical men, who had examined the complainants at the instance of the companies' solicitors, and *for the purpose of advising them confidentially on the nature and extent of the injuries*, were protected from inspection as privileged communications.[3] It has, indeed, been laid down broadly, that documents which have been prepared by the agent of a party for the *purpose of being submitted to his solicitor* for advice in reference to an intended action, are privileged from inspection; and this, too, though they have not, at the time when the inspection is sought, been actually submitted to the solicitor; and, moreover, though they have been drawn up, not at the solicitor's instance, but simply at the spontaneous suggestion of the client himself.[4] Shorthand notes of the evidence taken in a former trial against third persons, in which the questions to be tried were substantially identical with those in dispute in the action in which the application was made, which were in the possession of plaintiff's solicitor, have also been protected from inspection.[5]

§ 1795A. As we have seen,[6] a party to a cause is not compelled

[1] Daniel *v.* Bond, 1861. See Baker *v.* Lond. & S. W. Rail. Co., 1867; Fraser *v.* Burrows, 1877.

[2] Woolley *v.* N. Lond. Rail. Co., 1869; Cossey *v.* Lond. Bright., &c., Rail. Co., 1870. See, also, on this subject, the varying decisions in Mahony *v.* Widows' Life Ass. Fund, 1871; Richards *v.* Gellatly, 1872; Fenner *v.* Lond. & S. East. Rail. Co., 1872; Malden *v.* Gt. North. Rail. Co., 1874; Skinner *v.* Gt. North. Rail. Co., 1874; and M'Corquodale *v.* Bell, 1876.

[3] Friend *v.* Lond. Chat. & Dov. Rail. Co., 1877, C. A.; Pacey *v.* Lond. Tramways Co., 1877, C. A. See 31 & 32 V. c. 119, § 126.

[4] The Southwark Water Co. *v.* Quick, 1878, C. A., affirming Q. B. See, also, The Theodor Korner, 1878.

[5] Nordon *v.* Defries, 1882. See, also, The Palermo, 1883.

[6] Supra, § 458.

to produce title deeds which exclusively relate to his own title, and in no way support that of the plaintiff.

§ 1796. There is a right to inspect books kept in obedience to the requirements of an Act of Parliament, e. g., the books kept in asylums pursuant to the Lunacy Act—and also letters passing before litigation between a person and a statutory authority whose duty it is to look after that party's interest.[1]

§ 1797. The right to inspection is not limited to documents which may be *made evidence* in the action, but it extends to all which may throw light on the case. Accordingly, where the plaintiff had shipped on board the defendant's vessel some goods which were afterwards damaged by a collision between that ship and another, and cross suits, brought by the owners of the two vessels in respect of the collision, had ended in a deed of compromise, which plaintiff sought to inspect, the court, in the absence of objection by the owner of the other ship, granted an application to inspect this deed made by the plaintiff (suing as owner of the goods), holding that it clearly related to the *matter in question*, and that it *might* contain an admission of the defendant's liability;[2] and where defendant had resold to the plaintiff some timber bought by him abroad, and the plaintiff, having complained on its delivery that it was not according to contract, the defendant wrote to his original sellers, and a long correspondence thereupon ensued, which resulted in a great abatement of price on the part of the original vendors, the plaintiff was held entitled to an inspection of the correspondence just mentioned.[3]

§ 1798. It would be altogether foreign to a book on the principles of the law of evidence to discuss, in any detail, at what stage of an action discovery can be obtained either as to documents or as to interrogatories, both of which subjects will be found adequately dealt with in the ordinary works as to Practice.[4] An order for the production of documents may still be made[5] by the judge who has directed the reference, after a cause or matter has been referred to an official or special *referee* under the Judicature Act, 1873.[6] Subject to any such order, the referee himself may exercise a

[1] Hill *v.* Philp, 1852.
[2] Hutchinson *v.* Glover, 1875; Bustros *v.* White, 1876 (Jessel, M.R.)
[3] English *v.* Tottie, 1875.
[4] See, e. g. the Annual Practice for 1895, pp. 603, 651.
[5] Under R. S. C. Ord. XXXI. r. 14.
[6] 36 & 37 V. c. 66, §§ 56, 57.

similar authority.[1] When, however, an action has by consent been referred, with all matters in difference, *to an ordinary arbitrator*, apparently neither the judge nor the arbitrator has any power to order the inspection of documents,—the judge, because the suit, in such case, is no longer pending before the court;[2] the arbitrator, because the order of reference, as given in the Forms, confers on him no such power.[3]

§§ 1799—1808. It would, again, not be relevant to this work to say more, as to the machinery which the present practice provides for obtaining discovery of documents, than that there are two stages in obtaining such discovery. The first stage is to obtain from the opponent an affidavit stating on oath what documents are or have been in his possession. A party is, in the High Court, enabled[4] to accomplish this first stage on paying into court a sum of at least five pounds,[5] as a Rule of the Supreme Court provides that "any party may, without filing any affidavit, apply to a court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein. On the hearing of such application the court or judge may either refuse or adjourn the same if satisfied that such discovery is not necessary, or make such order either generally or limited to certain classes of documents as may in their or his discretion be thought fit," and in the affidavit in answer, the person who is directed to make discovery must "specify which, if any, of the documents therein mentioned, he objects to produce." The second stage in obtaining discovery of documents is to obtain the actual inspection of the documents disclosed, and as to this, it is provided,[6] that "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 cause or matter,[7] or that for any other

[1] Under R. S. C. Ord. XXXVI. r. 50.

[2] Penrice *v.* Williams, 1883 (Chitty, J.). But see Appendix K. to R. S. C., Form 26, which is an order for examination of witnesses and production of documents before arbitrator.

[3] See Appendix K. to R. S. C., Form 24.

[4] By Ord. XXXI. r. 12.

[5] R. S. C. Ord. XXXI. rr. 25, 26.

[6] By Ord. XXXI. r. 20.

[7] See Whyte *v.* Ahrens, 1884, where the Court of Appeal was divided, as to whether merchants,—who had charged their agents with fraud in

reason it is desirable that any issue or question in dispute in the cause or matter 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."[1]

§ 1809. Where documents are ordered to be produced for purposes of inspection, the order is generally confined to the applicant himself or his legal adviser. Still, the law does not require such limitation to be strictly enforced in all cases; and the court will occasionally authorise an inspection by other fitting and necessary persons. Thus, for instance, inspection may in a fit case be ordered to be had by the plaintiff's land agent, even though he be himself a witness in the suit;[2] if letters be written in a foreign language, the aid of an interpreter may be called in; if the papers to be produced be engineering plans, a surveyor or other expert will be allowed to attend the inspection,[3] and where documents are suspected to be forged, the court will sometimes, on an affidavit impeaching their genuineness,[4] order them to be submitted to experts, and such order may be made either before or after decree.[5]

§ 1810. The rules in force in the High Court as to discovery apply to the Probate and Admiralty Divisions[6] equally with the other Divisions of the High Court. The Probate Court, however, possesses in addition important powers of enforcing the *production* of *testamentary instruments*. The powers are contained alike in the English Act[7] and in the Irish Act.[8] Details as to the procedure and practice under the above enactments will be properly ascertained from one of the works which treat exclusively of the Practice in Probate.

general terms, and been met by a defence denying the charges, and pleading a settled account,—were or were not bound to give particulars of fraud under Ord. XIX. r. 6, before obtaining an order for discovery of documents.

[1] See Wood *v.* The Anglo-Italian Bk., 1876; Parker *v.* Wells, 1881, C. A.; In re Leigh's Estate, Rowcliffe *v.* Leigh, 1877, C. A.

[2] Att.-Gen. *v.* Whitwood Local Board, 1870.

[3] Swansea Vale Rail. Co. *v.* Budd, 1866.

[4] Boyd *v.* Petrie, 1868.

[5] Id.

[6] For the former law as to the Court of Probate, see 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), § 36; Id. c. 79, § 42, Ir.; Hunt *v.* Anderson, 1868; and as to the Admiralty Court, see 24 & 25 V. c. 10, § 17, now repealed by 44 & 45 V. c. 59; The Mary or Alexandra, 1868; The Don Francisco, 1862; The Macgregor Laird, 1867. See, also, a similar clause in "The Court of Admiralty (Ireland) Act, 1867" (30 & 31 V. c. 114), § 41, Ir.

[7] 20 & 21 V. c. 77, § 26.

[8] Id. c. 79, § 31, Ir.

§ 1810A. Under Rule 72 of the Bankruptcy Rules, 1886—90, any party to any proceeding in any Bankruptcy Court "may, with the leave of the court, administer interrogatories to, or obtain discovery of documents from, any other party to such proceeding. Proceedings under this rule shall be regulated as nearly as may be by the Rules of the Supreme Court for the time being in force in relation to discovery and inspection. An application for leave under this rule may be made ex parte."

§§ 1811—13. The Judicature Act, 1873,[1] makes the Rules of Equity as to discovery, which have already been referred to,[2] also applicable in the County Court. And the rules now in force in the County Courts as to discovery are substantially the same as those of the High Court.[3]

§§ 1814—15. It may be useful to add, while briefly pointing out the powers of enforcing discovery now possessed by various courts, that under the Friendly Societies Act, 1875, powers are conferred on the County Courts, and courts of summary jurisdiction, and also on the chief registrar and assistant registrars of Friendly Societies, to determine certain disputes, and all these functionaries have vested in them the authority of granting to either party such discovery as to documents, and otherwise, or such inspection of documents, as might be granted by any court of law or equity.[4]

§ 1816. With respect to the *production* of documents at the trial little need be said here; for since parol evidence of the contents of writings cannot be given as primary proof, the party who relies upon a document must either produce it, or give such satisfactory reason for its non-production as will justify him in having recourse to secondary evidence.[5] If, therefore, he will require to give evidence of the contents of a paper which has been either lost or destroyed, or the production of which will be physically impossible or highly inconvenient, the particular fact relied on must be proved;[6] if it be in the custody of a stranger, he must be served with a writ of subpœna duces tecum;[7] and if it be in the hands

[1] 36 & 37 V. c. 66, § 89.
[2] Supra, § 1793.
[3] See, generally, Ord. XVI.
[4] 38 & 39 V. c. 60, § 22, subs. (e), amended by 48 & 49 V. c. 27.
[5] Ante, § 428. As to the effect of producing a document to a witness under cross-examination, see ante, §§ 1413, 1446, 1452.
[6] Ante, §§ 428, 429, 438.
[7] Ante, § 457.

or power of the adverse party, the practice in general is to give him or his solicitor a regular notice to produce it at the trial.[1] The adversary is, of course, not obliged by such notice to furnish evidence against himself; but the notice is given,—as has been before explained,[2]—to lay a foundation for the introduction of secondary evidence of the contents of the document, by showing that the party has done all in his power to insure its production.

§ 1817.[3] Where notice has been given to the opponent to produce papers in his possession or power, the *regular time for calling for their production* is not until his case has been entered upon by the party who requires them; till which time the other party may, in strictness, refuse to produce them, and no cross-examination as to their contents is then allowable.[4] Still, it is considered rigorous to insist upon this rule, and as a close adherence to it would be productive of inconvenience, the judges are very unwilling to enforce it.[5] The production of papers upon notice does not make them evidence in the cause, unless the party calling for them inspects them, so as to become acquainted with their contents; in which case he is obliged to use them as his evidence,[6] at least if they be in any way material to the issue.[7] The reason for this rule is, that it would give an unconscionable advantage to a party, to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties.

§ 1818. If a party, after notice, declines to produce a document, when formally called upon to do so, he will not afterwards be allowed to change his mind; and therefore, if he once refuses, he cannot, when his opponent has proved a copy, and is about to have it read, produce the original, and object to its admissibility without the evidence of an attesting witness.[8] Neither, after such refusal, will he be permitted to put the document into the hands of his opponent's witnesses for the purpose of cross-examination,[9] or to

[1] Ante, § 440 et seq.
[2] Ante, § 440.
[3] Gr. Ev. § 563, in part.
[4] Graham *v.* Dyster, 1816.
[5] Sideways *v.* Dyson, 1817; Calvert *v.* Flower, 1836 (Ld. Denman).
[6] Calvert *v.* Flower, 1836; Wharam *v.* Routledge, 1805 (Ld. Ellenborough).
[7] Wilson *v.* Bowie, 1823 (Park, J.). See Sayer *v.* Kitchen, 1795.
[8] Edmonds *v.* Challis, 1849; Jackson *v* Allen, 1822.
[9] Doe *v.* Cockell, 1834 (Alderson, B.).

produce and prove it as part of his own case.[1] The same rule prevails where a party determines upon keeping back a chattel, when called upon under notice to produce it.[2]

§ 1819.[3] When the instrument, on its production, appears to have been *altered*, it is a general rule that *the party offering it* in evidence *must explain* this appearance, *if he be called upon to do so by the issue raised*,[4] and *if the instrument be not admitted by his opponent under notice*;[5] because, as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion.[6] If the alteration be noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the credit of the instrument is restored.[7] It was formerly a presumption of law, that an interlineation, if nothing appeared to the contrary, had been made contemporaneously with the execution of the instrument;[8] and this presumption still prevails in the case of a deed, because a deed cannot be altered after its execution without fraud or wrong, and fraud or wrong is never assumed without some proof.[9] Indeed, it may be laid down as a general rule, that wherever it is an offence to alter a document after it has been completed, the law presumes, primâ facie, that any alteration apparent on it was made at such a time and under such circum-

[1] Doe *v.* Hodgson, 1840; Collins *v.* Gashon, 1860 (Byles, J.).

[2] Lewis *v.* Hartley, 1835 (Ld. Abinger). There notice was given to produce a dog for the purpose of identification.

[3] Gr. Ev. § 564, in part.

[4] Parry *v.* Nicholson, 1845 (Parke, B.).

[5] Freeman *v.* Steggall, 1849; ante, § 724n.

[6] Henman *v.* Dickinson, 1828; Clifford *v.* Parker, 1841; Lond. & Bright. Rail. Co. *v.* Fairclough, 1841 (Tindal, C.J.); Ld. Falmouth *v.* Roberts, 1842.

[7] "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), expressly enacts, in § 122, that "Every erasure, interlineation, or alteration in any agreement with the crew (except additions made for the purpose of shipping substitutes or persons engaged after the first departure of the ship) shall be wholly inoperative, unless proved to have been made with the consent of all the persons interested in the erasure, interlineation, or alteration, by the written attestation (if in her Majesty's dominions) of some superintendent, justice, officer of customs, or other public functionary, or elsewhere of a British consular officer, or, where there is no such officer, of two respectable British merchants." This attestation is not required in the case of fishing boats, where all parties consent to the alteration, &c. See Id. § 407.

[8] Trowell *v.* Castle, 1661. This appears to be still the law in America. See Franklin *v.* Baker, 1893 (Am.). As to alteration in wills, see ante, § 164.

[9] Doe *v.* Catomore, 1851; Simmons *v.* Rudall, 1851 (Ld. Cranworth).

stances as not to constitute an offence.[1] With respect, however, to a bill of exchange, or a promissory note, the law presumes nothing,[2] but leaves the jury to decide, first, by inspecting the instrument itself, whether any alteration has been made; and then, on considering the extrinsic evidence offered, at what time, and under what circumstances, such alteration, if any, was made.[3] These last questions cannot be solved by the jury on the mere inspection of the writing, for juries must decide, not on conjecture, but on proof.[4]

§ 1820. The general rule of law is, that any *material alteration* in a written instrument, whether made by a party or a stranger, if made after its execution, and without the privity of the party to be affected by it, is fatal to its validity. Perhaps it is further necessary that the alteration be made while the instrument was in the possession, or at least under the control, of the party seeking to enforce it.[5] The rule was originally propounded with respect to deeds,[6] probably because, in former days, most written engagements were drawn in that form.[7] It has since been extended to negotiable securities,[8] bought and sold notes,[9] guarantees,[10] and policies of assurance;[11] and may now be said to apply equally to all written instruments, which constitute the evidence of contracts.[12]

§ 1821.[13] Its grounds are twofold. First, public policy dictates that no man should be permitted to take the chance of committing a fraud, without running any risk of losing by the event in case of detection;[14] secondly, the rule ensures the identity of the instru-

[1] R. *v.* Gordon, 1855. There an affidavit was produced with an interlineation on it.

[2] Johnson *v.* D. of Marlborough, 1818 (Abbott, J.).

[3] Bishop *v.* Chambre, 1827; Taylor *v.* Mosely, 1833; Cariss *v.* Tattersall, 1841. All these questions are, of course, determined in the first instance by the court, when they are raised upon a preliminary objection to the admissibility of the instrument; but they are again open to the jury: Ross *v.* Gould, 1828 (Am.).

[4] Knight *v.* Clements, 1838; Clifford *v.* Parker, 1841; Byrom *v.* Thompson, 1839.

[5] Davidson *v.* Cooper, 1844. See post, §§ 1827—1829.

[6] Pigot's case, 1614.

[7] Master *v.* Miller, 1791 (Ld. Kenyon).

[8] Id.; S.C. 1793, in error.

[9] Powell *v.* Divett, 1812; Mollett *v.* Wackerbarth, 1847.

[10] Davidson *v.* Cooper, 1843.

[11] Forshaw *v.* Chabert, 1821; Fairlie *v.* Christie, 1817; Campbell *v.* Christie, 1817 (Ld. Ellenborough).

[12] Davidson *v.* Cooper, 1843.

[13] Gr. Ev. § 565, as to first six lines.

[14] Master *v.* Miller, 1791 (Ld. Kenyon).

ment, and prevents the substitution of another, without the privity of the party concerned.[1] These grounds are common to all altered written instruments. And, as regards bills of exchange and promissory notes, a third reason for the rule is the necessity of protecting the revenue arising from the stamp laws,[2] with respect to which it is immaterial whether the alteration were made with or without the consent of the parties to the instrument.[3]

§ 1822. A short reference to some leading cases will explain what constitutes materiality. Thus, any alteration in negotiable securities, as to the date,[4] amount, or time of payment;[5] the addition of a claim for a specific rate of interest;[6] the insertion of words to limit or vary the consideration as originally expressed;[7] the introduction of a place for payment, though the acceptance still remains a general acceptance;[8] the substitution of one place for another;[9] the converting a joint, into a joint and several, responsibility;[10] the affixing an additional maker's name to a joint and several note after it has issued;[11] or, it seems, the cutting off the signature of one of several co-promisers in a joint and several note;[12]—will, at common law, as against any party *not consenting* thereto, invalidate the instrument, even in the hands of an innocent holder; and will for the most part prove equally fatal, by virtue of the stamp laws, though made by consent of all parties.[13] So, even the alteration of a Bank of England note, by merely erasing the number upon it and substituting another, will avoid the

[1] Sanderson *v.* Symonds, 1819 (Dallas, C.J.).

[2] Mason *v.* Bradley, 1843 (Parke, B.); Davidson *v.* Cooper, 1843.

[3] Bowman *v.* Nichol, 1794.

[4] Outhwaite *v.* Luntley, 1815 (Ld. Ellenborough); Walton *v.* Hastings, 1815; Cardwell *v.* Martin, 1808; Master *v.* Miller, 1791; Vance *v.* Lowther, 1876.

[5] Bowman *v.* Nichol, 1794; Alderson *v.* Langdale, 1832.

[6] Warrington *v.* Early, 1853.

[7] Knill *v.* Williams, 1809.

[8] Macintosh *v.* Haydon, 1826 (Abbott, C.J.); Burchfield *v.* Moore, 1854; Desbrowe *v.* Wetherby, 1834 (Tindal, C.J.); Taylor *v.* Moseley, 1833 (Ld. Lyndhurst, C.B.); Crotty *v.* Hodges, 1842; Cowie *v.* Halsall, 1821. See 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), § 19.

[9] Tidmarsh *v.* Grover, 1813; R. *v.* Treble, 1810.

[10] Perring *v.* Hone, 1826.

[11] Gardner *v.* Walsh, 1855; overruling Catton *v.* Simpson, 1838. See Gould *v.* Coombs, 1845; Ex parte Yates, In re Smith, 1858.

[12] Mason *v.* Bradley, 1843. See Nicholson *v.* Revill, 1836. The removing, however, of the seal of one of several obligers, does not, in the case of a *several* bond, render it void as to the others. Collins *v.* Prosser, 1823. See, also, Caldwell *v.* Parker, 1869; though this case has been much doubted, if not overruled, by Suffell *v.* Bk. of Eng., 1882, C. A.

[13] Chit. on Bills, 181—185; 1 Sm. L. C. 825, 867 et seq.

instrument, and preclude even a bonâ fide holder for value from maintaining an action upon it.[1] Alteration by, without the knowledge of the purchaser, inserting in a sold note an additional term of contract,[2] or by apparently converting an agreement into a deed, by affixing seals to the signatures of the parties,[3] vitiates the instrument. In short, any alteration which causes an agreement or other writing to speak a language different, in legal effect, from what it originally spoke, is material.

§ 1823. On the other hand, the insertion of such words as the law would supply, or such as are altogether inoperative, or such as are necessary to correct an obvious error,[4] will not constitute a material alteration, even though made without consent. Thus, where, subsequently to the execution of a policy, the insured inserted some words which gave him no power to do any one thing which he could not have done under the policy as it originally stood, the instrument was not vacated;[5] and where the words "on demand" are added to a promissory note, which originally expressed no time for payment, this alteration, as it does not change the legal effect of the instrument, does not vitiate it, though the words were added by the payee without the assent of the maker.[6] Moreover, an alteration made in an instrument by the consent, in order to carry out the original intention, of the parties, will not make it bad, or be any infringement of the stamp laws. Thus, the insertion in it of a place for payment will not vitiate a bill of exchange, though made after its acceptance, at least, as against the acceptor, if the words be added or altered by the acceptor, or with his consent;[7] filling in the date of a warrant of attorney after execution will not avoid the instrument, since the parties must clearly have intended that the date should be inserted;[8] where, in a bond conditioned for the payment of 100*l.*, the word "hundred" had been accidentally omitted in the second

[1] Suffell *v.* Bk. of Eng., 1882, C. A. See Leeds and County Bk. *v.* Walker, 1883.
[2] Powell *v.* Divett, 1812; Mollett *v.* Wackerbarth, 1847.
[3] Davidson *v.* Cooper, 1844.
[4] See Bluck *v.* Gompertz, 1852.
[5] Sanderson *v.* Symonds, 1819; Clapham *v.* Cologan, 1813.
[6] Aldous *v.* Cornwell, 1868.
[7] Walter *v.* Cubley, 1833; Stevens *v.* Lloyd, 1829 (Ld. Tenterden); Jacob *v.* Hart, 1817.
[8] Keane *v.* Smallbone, 1855.

place in which the sum was mentioned, its insertion by a stranger was held to be immaterial;[1] and similarly where, in a note intended to be negotiable, the words "or order," had been left out by mistake, their insertion by the holder, with the consent of the maker, was held neither to vitiate the instrument nor to render a new stamp necessary.[2]

§ 1824. It is not, however, on every occasion of a party tendering an instrument in evidence, that he is bound to explain any material alteration that appears upon its face; but only on those occasions, when he is *seeking to enforce it, or claiming an interest under such instrument.*[3] Accordingly, where an action for not cultivating the farm according to agreement was brought against one who had become tenant of such farm from year to year, and subsequently signed an agreement respecting the mode of tillage, and the instrument, when produced by the landlord, contained an erasure in the habendum, by which the term of years was altered from seven to fourteen, it was held that the landlord was not bound to explain this alteration, because the tenant held the farm under a parol agreement, which incorporated only so much of the written instrument as was applicable to a yearly holding, and it consequently was quite immaterial whether seven or fourteen years were mentioned in that instrument. The simple contract which the parties had entered into was, that the tenant should farm the land according to certain written stipulations. Said Parke, B., "The rule of law applies where the obligation is by reason of the instrument; here the obligation is by reason of the parol contract

[1] Waugh *v.* Bussell, 1814.

[2] Byrom *v.* Thompson, 1839; Kershaw *v.* Cox, 1800; Hamelin *v.* Bruck, 1847; Jacob *v.* Hart, 1817; Brutt *v.* Picard, 1824; Robinson *v.* Touray, 1813; Farquhar *v.* Southey, 1826; Eagleton *v.* Gutteridge, 1843. For American cases connected with this subject, see Hunt *v.* Adams, 1810; Smith *v.* Crooker, 1809; Hale *v.* Russ, 1821; Knapp *v.* Maltby, 1835; Brown *v.* Pinkham, 1836.

[3] Harris *v.* Tenpany, 1883, as reported, seems to be an utter misapprehension of the law. That was [illegible] order, in which the plaintiff [illegible] certain furniture which had been seized by an execution creditor. He relied on an agreement of hiring by which he had let to the execution debtor "several articles *mentioned in the schedule hereto.*" At the time of executing this contract, no schedule was attached to it, but one was afterwards added by the plaintiff. On these facts, Lopes, J., is actually reported to have held, that the agreement was not vitiated by the alteration, but that the goods seized might be identified with those named in the schedule. Sed qu., and compare post, § 1836, and cases there cited.

of the parties, quite independent of the subscription of that paper, and arising from the occupation of the land upon all the terms of that instrument which are applicable to a tenancy from year to year, as to which an alteration in the term of years is wholly immaterial." [1]

§ 1825. On the same principle again, where in another case,[2] in an action for an excessive distress, the plaintiff, in order to prove the amount of rent really due, put in an agreement purporting to be one for the lease of a house, No. 35, which was in fact the house occupied by him, but it appeared that the number of the house as originally inserted in the instrument was 38, but the jury found that this had been altered to 35 after the execution of the agreement, and without the defendant's knowledge, it was held that, as the demise was admitted on the record, the altered agreement might be given in evidence to show the terms of the holding. Said Lord Abinger, "I do not think when the case is rightly understood, that the question arises, whether an alteration even by the plaintiff ought to avoid the agreement. If it does, the only consequence would be, that it would be impossible for him to maintain an action upon it as on a demise; but it is quite a different question, whether it can be given in evidence. *It may be void for the purpose of taking an interest under it, but nevertheless admissible to prove a collateral fact.*[3] * * * No case has gone the length of saying that, when a deed is altered, and thereby vitiated, it ceases to be evidence: it may be so with reference to the stamp laws. * * * Here, however, it is sufficient to decide, that this agreement was evidence to prove the terms of the holding; and there was no evidence of any other holding than that of the house No. 35." [4]

§ 1826. It follows, from the principle exemplified by the cases just cited, that a deed is not rendered inadmissible by alteration, if it be produced "merely as proof of some right or title created by, or resulting from, its *having been executed*." [5] In other words, after the deed *has done its work* it may be produced to show the state of

[1] Ld. Fulmouth *v.* Roberts, 1842. See, also, Pattinson *v.* Luckley, 1875.
[2] Hutchins *v.* Scott, 1837.
[3] See, also, Agricult. Cattle Ins. Co. *v.* Fitzgerald, 1851.
[4] In Hutchins *v.* Scott, 1837, as reported 2 M. & W. 815—817.
[5] See Agricult. Cattle Ins. Co. *v.* Fitzgerald, 1851; Ld. Ward *v.* Lumley, 1860.

things which has been thereby called into existence, and this even though it has been subsequently altered. Thus in the case of an ejectment to recover lands which have been conveyed by lease and release, what the plaintiff seeks to enforce is not, in strictness, a right under the lease and release, but a right to the possession of the land, *resulting from the fact of the lease and release having been executed.* The moment after their execution the deeds in one sense become valueless, since the estate has already passed. Their only subsequent use is not to pass any estate but only to afford evidence of the fact. Plainly, if the effect of the execution of such deeds was to create a title to the land in question, that title cannot be affected by the subsequent alteration of the deeds. But if the party is not proceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title, or other covenants contained in the release, then the alteration of the deed in any material point after its execution, whether made by the party or by a stranger, would certainly defeat the right of the party suing to recover."[1] If, however, the estate lies *in grant*, as a watercourse, and cannot exist without deed, it is said that any alteration by the party claiming the estate will avoid the deed as to him, and that therefore the estate itself, as well as all remedy upon the deed, will be utterly gone.[2]

§ 1827. In one of the cases[3] which has been cited as an authority for the proposition that an alteration in an instrument under which a right is claimed makes such instrument void, the doctrine, that every material alteration of an instrument, *even by a stranger*, and *without the privity of either party*, avoids that instrument, was recognised and adopted, and held to apply in all cases, *where the altered instrument is relied on as the foundation of a right sought to be enforced.*[4]

§§ 1828—9. But although the doctrine above stated has thus been recognised in England as recently as 1843, there is much to be said against it, and it is at least doubtful whether it would be now upheld, even there, in a Court of Appeal. The doctrine

[1] Davidson *v.* Cooper, 1843 (Ld. Abinger). See, also, Dr. Leyfield's case, 1610; Bolton *v.* Bp. of Carlisle, 1793; Doe *v.* Hirst, 1821.

[2] More *v.* Salter, 1615 (Coke, C.J.); Lewis *v.* Payn, 1827.

[3] Viz., Davidson *v.* Cooper, 1843, cited ante, § 1820.

[4] Davidson *v.* Cooper, 1843; Crookewit *v.* Fletcher, 1857; Bk. of Hindos., China, and Japan *v.* Smith, 1867.

has been expressly rejected in America[1] by the New York Civil Code, after having been previously rejected in various American cases.[2] In one of these, Story, J. strongly condemned it as repugnant to common sense and justice,—as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful act of third persons, or by the providence of Heaven —and as a rule which ought to have the support of unbroken authority, before a court of law should feel bound to surrender its judgment to what deserves no better name than a technical quibble. In these observations the American judge, moreover, was subsequently supported by Alderson, B., who remarked,[3] "It is difficult to understand why an alteration by a stranger should in any case avoid the deed—why the tortious act of a third person should affect the rights of the two parties to it, unless the alteration goes the length of making it doubtful what the deed originally was, or what the parties meant." Even in places in America where the New York Code does not prevail, the doctrine is not recognised to the extent now established in England; but, unless some fraudulent intent be brought home to the party claiming under the instrument, the unwarranted alteration of a writing by a stranger is treated as a merely accidental spoliation, which in that country does not vitiate the instrument.[4] In Ireland, again, it is held that an instrument is not rendered void by any alteration in it, which an unauthorised stranger may make.[5] The doctrine is, moreover, also inconsistent with several old English cases, decided in conformity with the custom of merchants, in which it was held, that the cancellation by mistake of a cheque

[1] In New York, the law is as follows:—"The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made *by another without his concurrence*, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise": Code Civ. § 1794.

[2] United States *v.* Spalding, 1822 (Am.). And see, further, cases cited infra, in next note but one.

[3] In Hutchins *v.* Scott, 1837.

[4] Cutts *v.* U. S., 1812 (Am.); U. S. *v.* Spalding, 1822 (Am.); Rees *v.* Overbaugh, 1827 (Am.); Lewis *v.* Payn, 1827 (Am.); Jackson *v.* Malin, 1818 (Am.) (Platt, J.); Nichols *v.* Johnson, 1834 (Am.); Marshall *v.* Gougler, 1823 (Am.).

[5] Swiney *v.* Barry, 1835 (L. Ex. Ch.).

or bill does not invalidate the instrument;[1] and also with the express provisions now contained in the Bills of Exchange Act, 1882.[2] It is likewise inconsistent with a case[3] where a deed to lead the uses of a recovery was held good, though the seals had been torn off by a little boy; and with another case,[4] where an award was sustained, though the umpire, after it had been made, altered the amount, leaving the original sum awarded still legible. It must, however, be conceded, that these last two decisions are of less authority on this particular point, as they possibly turned on the distinction between an instrument constituting the foundation of a right, and that which simply furnishes evidence of some right resulting from its execution.[5] The argument in support of the doctrine is that it creates no real hardship, since the party whose right of action is defeated by the alteration has his remedy by an action against the spoliator;[6] but this argument is entitled to little weight, since the spoliator may either be a child, or other irresponsible agent, or be utterly incompetent to pay any damages. If it be further urged, as was done by the judges of the Exchequer Chamber in the case which was decided in 1843,[7] that the party who has the instrument in his possession is bound to take proper care of it, this at least assumes that the alteration is made while the instrument is in his custody, and consequently cannot support the broad proposition stated above.

[1] Raper *v.* Birkbeck, 1812; Fernandey *v.* Glynn, 1807; Wilkinson *v.* Johnson, 1824; Novelli *v.* Rossi, 1831; Warwick *v.* Rogers, 1843.

[2] 45 & 46 V. c. 61, § 63, subs. 3.

[3] Lady Argoll *v.* Cheney, 1624. But in a comparatively modern case (Master *v.* Miller 1791), Buller, J. (as reported 4 T. R. 339), remarked, "In any case where the seal is torn off by accident after plea pleaded (see 1 Roll. R. 40, also cited in Pigot's case, 1614, and Michael *v.* Scockwith, 1587, in both which cases the court on this ground held that the mutilated instrument was the deed of the party on non est factum); and in those days, I think, even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration, which would obviate every doubt on that point by stating the truth of the case."

[4] Henfrey *v.* Bromley, 1808.

[5] See ante, § 1826.

[6] Markham *v.* Gonaston, 1698.

[7] Viz., Davidson v. Cooper. "After *much doubt*, we think the judgment (of the Ct. of Ex.) right. The strictness of the rule on this subject, as laid down in Pigot's case, can only be explained on the principle, that a party, *who has the custody of an instrument* made for his benefit, *is bound to preserve* it in its original state. It is highly important, for preserving the purity of legal instruments, that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part": Ld. Denman, in pronouncing judgment of Ex. Ch., as reported 13 M. & W. 352.

On the whole it at any rate may be gravely questioned, whether the sound rule of law can now be carried further than this, that any party, seeking to enforce a right under a written instrument, is so far responsible for any material alteration apparent on its face, as to be bound to show that it was made, either before its execution, or at a time when the instrument was not in his possession, or not under his control; and that, unless he can establish one or other of these facts, the instrument will be vitiated. The case[1] decided in 1843, which was first referred to, has, however, at present, clearly established that in England no party can rely on a document which has been *altered while in his custody*, though he be in a position to prove most positively, that the alteration was the effect of pure accident or mistake, or was made without his privity or consent by some person over whom he could exercise no control.

§ 1830. While the English law must for the present be taken to be that every *material* alteration in an instrument after it has been executed, by whoever it is made, will render such instrument invalid, modern cases have now established that[2] a mere *immaterial* alteration, though made by the *obligee himself*, will not avoid an instrument, provided it be done innocently, and to no injurious purpose.[3] But if the alteration be *fraudulently made* by the party claiming under the instrument, it does not seem important, whether it be in a material or an immaterial part. In either case, he has brought himself under the operation of the rule established for the prevention of mal-practices; and having fraudulently destroyed the identity of the instrument, he must incur the peril of all the consequences.[4]

[1] Viz., Davidson *v.* Cooper, 1843, cited supra, § 1827.

[2] Gr. Ev. § 568, in part.

[3] Aldous *v.* Cornwell, 1868; Sanderson *v.* Symonds, 1819; Hatch *v.* Hatch, 1812 (Sewell, J.); Smith *v.* Dunham, 1829. In Farquhar *v.* Southey, 1826, the acceptance of a bill was signed "Southey & Crowder"; the bill was originally addressed to "Messrs. Southey, Crowder & Co."; but the address was altered to correspond with the acceptance. Held, that this was an immaterial alteration, and that the acceptors were not discharged (Littledale, J.).

[4] Pigot's case, 1614; cited arguendo in Master *v.* Miller, 1791, as reported 4 T. R. 322; and Davidson *v.* Cooper, 1843, as reported 11 M. & W. 789; Shep. Touch. 68; Sanderson *v.* Symonds, 1819 (Dallas, C.J.). If an obligee procure a person who was not present at the execution of the bond, to sign his name as an attesting witness, this is primâ facie evidence of fraud, and avoids the bond: Adams *v.* Frye, 1841.

§ 1831. It has been said that, in order to render an alteration fatal, it must have been made *after the execution or other completion of the instrument*. These words are, in general, sufficiently explicit; but as to two classes of cases, viz., (1) policies of insurance, composition deeds, and settlements, and (2) negotiable instruments, embarrassing questions respecting their interpretation have arisen.

§ 1831A. The first class of these instruments comprehends *policies of assurance*, *composition deeds*, and other *settlement deeds*, in which several parties with independent interests, joining to effect some general purpose, execute one common deed at different times. By considering such deeds as instruments of a peculiar nature, embracing separate contracts with different individuals, the strict rule of law has been, to a certain degree, eluded;[1] and it has been held that any alterations made during the progress of such transactions still leave the deeds valid as to the parties previously executing them, provided such alterations have not affected the situation in which these parties stood.[2]

§ 1832. *Negotiable securities* constitute the second class of instruments with regard to which a little difficulty arises in applying the rule, that a material alteration made, without the consent of all parties, in an instrument after its execution renders such instrument void. In this case, the time of the "execution" of an instrument is, apart from the stamp laws, considered to be the date of its making, accepting, drawing, or indorsing by the party against whom it is produced. The question often arises, however, as to the precise period at which a bill or note will be considered complete, for the purposes of the stamp laws, so that any subsequent alteration, whether made with or without consent of the parties, will invalidate the instrument by reason of such *stamp laws?* In answer to this question, it may be broadly stated, that a negotiable security is complete, as soon as, but not until, it becomes an *available* instrument, or, in other words, when it is in the hands of a party who can make a valid claim upon it. Thus, on the one hand, an accommodation bill may be altered after it has been drawn, accepted, and indorsed, provided it has not been passed to

[1] Davidson *v.* Cooper, 1843 (Ld. Abinger). See West *v.* Steward, 1845, cited post, § 1835.

[2] Doe *v.* Bingham, 1821 (Bayley, J.), recognised in Hibblewhite *v.* M'Morine, 1840.

a bonâ fide holder for value;[1] a bill for value, if unindorsed, is not deemed complete till its acceptance;[2] and not even then, unless it be absolutely returned to the payee.[3] On the other hand, every material alteration, whether made before or after acceptance, or with or without consent, will invalidate a bill, whether it be drawn for accommodation or for value, if it be once issued to a person who, as holder for valuable consideration, is entitled to sue any prior party thereon.[4]

§ 1833. The principles of the stamp laws with respect to negotiable securities, are equally applicable to other instruments. Consequently, no new stamp was necessary, where a bond, after execution, but before it had passed to the obligee, was altered, by inserting, with the consent of the parties, the name of an additional obligor;[5] or where,[6] after a marriage settlement had been executed by the conveying party, but, before it was executed by the other parties, or had passed into the hands of the persons who were to take under it, a clause was objected to and struck out, and the deed then re-executed. The question in all such cases as the above is, whether, taking into consideration all the circumstances, the matter was or was not in fieri; and that, to use Mr. Preston's language, "depends on the inquiry, whether the intended grantor has given sanction to the instrument, so as to make it conclusively his deed."[7]

§ 1834. Both for the purposes of a person's being taken to have given his assent to an alteration in the instrument effecting it, and for the purposes of the stamp laws, it will, generally speaking, be deemed that a transaction is incomplete, and, consequently, that an alteration in the instrument by which it is carried out may be made, so long as such instrument remains in the grantor's possession, or is in the hands of a third party as an agent for him, provided there be nothing to show that the instrument was intended to operate immediately, or that it was accepted as an effectual deed by the

[1] Downes *v.* Richardson, 1822; Tarleton *v.* Shingler, 1849. See Cardwell *v.* Martin, 1808.

[2] Kennerly *v.* Nash, 1816 (Ld. Ellenborough).

[3] Sherrington *v.* Jermyn, 1828 (Ld. Tenterden).

[4] Outhwaite *v.* Luntley, 1815; Walton *v.* Hastings, 1815. See, further, Chit. Bills, 186–189.

[5] Matson *v.* Booth, 1816. See Zouch *v.* Clay, 1671.

[6] Jones *v.* Waters, 1835. See, also, Spicer *v.* Burgess, 1834; Murray *v.* Ld. Stair, 1823; Johnson *v.* Baker, 1821.

[7] 3 Prest. on Abstr. 64.

party in whose favour it was made.[1] Thus, if an instrument be delivered as an *escrow*, which is not to take effect as a deed until a certain event has happened, it may be altered with impunity.[2] On the other hand, if a *grantor has once parted with all control over the instrument*, it can no longer be altered, though it has not been actually delivered to the grantee.[3] Accordingly, where A. executed a deed transferring certain railway shares, with the name B. inserted as that of the purchaser, and, having received the purchase-money from B.'s brokers, delivered to them the instrument, the transaction was held to be perfected at common law, though B. had not executed the deed, and though the Railway Act directed that, on every sale of shares, the deed should be executed by both parties; and, therefore, the name of C. being afterwards substituted for B., and the deed re-executed by the seller, the court held that it could not operate as a conveyance to C., whose name had been inserted subsequently as being the purchaser, without having a fresh stamp.[4]

§ 1835. Often, however, deeds of transfer and other documents are executed in blank. Questions of nicety sometimes arise respecting the validity of instruments which have been thus *executed in blank*, and subsequently filled up. In dealing with such questions, distinctions are recognised, first, between deeds and other instruments; and secondly, as to deeds, between the insertion of matter essential to their operation, and that which is not so essential. Thus, writs and subpœnas may, it seems, be sealed in blank, and then filled up;[5] an acceptance, written on a blank

[1] See cases cited in last note but one.

[2] Hudson *v.* Revett, 1829; explained (Alderson, B.) in West *v.* Steward, 1845. See, also, Jones *v.* Walters, and other cases cited ante, in notes to § 1833. Whether a deed was executed as an escrow,—unless the point depends on documentary evidence alone,—is for the jury, who should look to all the facts attending the execution, and who are not now bound, as formerly, to find in the negative, if no express words have been used declaratory of such an intention: Bowker *v.* Burdekin, 1843; Furness *v.* Meek, 1858; Kidner *v.* Keith, 1863. See, also, Gudgen *v.* Besset, 1856; Watkins *v.* Nash, 1875; and ante, §§ 41, 43, and 1135.

[3] Doe *v.* Knight, 1826. See Richards *v.* Lewis, 1852; and Xenos *v.* Wickham, 1866.

[4] L. B. & S. C. Rail. Co. *v.* Fairclough, 1841. Perhaps, if the railway company, who produced and relied upon the altered deed, had shown that B.'s name had originally been inserted by *mistake*, no new stamp would have been requisite. See ante, § 1823.

[5] See Hibblewhite *v.* M'Morine, 1840, as reported 6 M. & W. 207, arguendo.

piece of stamped paper, may be afterwards converted into a bill of exchange, to the extent of such sum as the stamp will cover;[1] and blanks may be filled up in a deed after its execution, if the omission did not render it a nullity, and the matter inserted carries out the original intention of the grantor, or is introduced with his consent,[2] so that, for instance, a christian name may be filled in,[3] or a schedule of creditors may be added to a deed which expressly speaks of them as mentioned in "the Schedule hereunto annexed."[4]

§ 1836. If, however, an instrument, at the time of its execution, was, by reason of some material deficiency, incapable of operating as a deed, it cannot afterwards become a deed by being completed and delivered by a stranger, in the absence of the party who executed it, unless such stranger be authorised by instrument under seal; for, if this were permitted, the principle would be violated which requires that an attorney to execute and deliver a deed for another must himself be appointed by deed.[5] Accordingly, where a proprietor of railway shares has executed a conveyance of three shares with the name of the purchaser in blank, nothing having originally passed by this deed, an agent appointed by parol cannot afterwards, in the absence of his principal, introduce the name of a vendee;[6] and, for the same reason, if a deed contain a covenant to deliver to the covenantee certain articles "as per schedule annexed," and the schedule is not annexed at the time of execution, the subsequent annexation of a schedule, in the absence

[1] 45 & 46 V. c. 61, § 20, subs. 1; Garrard *v.* Lewis, 1882; Schultz *v.* Astley, 1836 (Tindal, C.J.); Collis *v.* Emett, 1790; Russell *v.* Langstaffe, 1780. See Hatch *v.* Searles, 1854; Hogarth *v.* Latham, 1878, C. A.; and L. & S. W. Bk. *v.* Wentworth, 1880. As between the drawer and the acceptor, a blank acceptance must, indeed, be filled up within a reasonable time (45 & 46 V. c. 61, § 20, subs. 2; Temple *v.* Pullen, 1853. See Carter *v.* White, 1882; Riley *v.* Gerrish, 1851 (Am.)). But this doctrine does not apply to a bonâ fide indorsee for value without notice, for the law presumes, with reference to him, that the drawer was invested with a general authority from the acceptor to fill up the bill at any time (45 & 46 V. c. 61, § 20, subs. 3. Montague *v.* Perkins, 1853). See Hatch *v.* Searles, 1854.

[2] Markham *v.* Gonaston, 1599; Zouch *v.* Clay, 1671.

[3] Eagleton *v.* Gutteridge, 1843.

[4] West *v.* Steward, 1845. With this case and that cited in the last note, compare Weeks *v.* Maillardet, 1811, and the other cases cited infra, in note at end of this section.

[5] Hibblewhite *v.* M'Morine, 1840 (Parke, B.). See ante, § 985.

[6] Hibblewhite *v.* M'Morine, 1840, overruling Texira *v.* Evans, undated, cited 1 Anstr. 228. See Swan *v.* N. Brit. Austral. Co., 1863; Taylor *v.* Gt. Ind. Pen. Rail. Co., 1859.

of one of the parties, does not give it operation as part of the deed, and the instrument is insensible and void.[1]

§ 1837. These cases, in which the deed originally passes no interest, and is wholly inoperative, must be carefully distinguished from those[2] where a blank is filled up in an instrument which was evidently intended to be filled in, and the filling in of which consequently merely carries out the intention and objects of the original instrument.[3]

§ 1838. The rule of law which requires the party, tendering in evidence an altered instrument, to explain its appearance, does not apply to *letters and ancient documents* coming from the right custody, merely because they are in a mutilated or imperfect state. With regard to such documents, this fact alone is not sufficient to throw upon the party producing them the burthen of proving when, by whom, or for what purpose, they were mutilated; but they will be received, though the mutilation be evidently not accidental, provided that a sufficient portion of the instrument remains to explain its general nature and effect, and it can be shown that it is produced in the same state in which it was actually found. The weight due to such a document may be a just matter of comment, and in many cases a jury would regard it as utterly valueless. Still, no legal objection can be taken to its being presented to their notice, such as it is; and the right enjoyed by the opponent, of

[1] Weeks *v.* Maillardet, 1811, noticed (Parke, B.) in 6 M. & W. 215 (1840); and in West *v.* Steward, 1845. See Dyer *v.* Green, 1847; and Daines *v.* Heath, 1847. Compare, however, Harris *v.* Tenpany, supra, note to § 1824.

[2] Such as those mentioned supra, in § 1835; in addition to which, see Tupper *v.* Foulkes, 1861.

[3] In accordance with the principle here suggested, effect was given to clear and unequivocal acts of assent in pais by a feme mortgagor, after the death of her husband, as amounting to a re-delivery of a deed of mortgage, executed by her while a feme covert: Goodright *v.* Straphan, 1774, Shep. Touch. 58. "The general rule," said Johnson, J., in delivering the judgment of the court in Duncan *v.* Hodges, 1827 (Am.), "is, that if a blank be signed, sealed, and delivered, and afterwards written, it is no deed; and the obvious reason is, that as there was nothing of substance contained in it, nothing could pass by it. But the rule was never intended to prescribe to the grantor the order of time in which the several parts of a deed should be written. A thing to be granted, a person to whom, and the sealing and delivery, are some of those which are necessary, and the whole is consummated by the delivery; and if the grantor should think proper to reverse this order in the manner of execution, but in the end makes it perfect before the delivery, it is a good deed." See ante, § 149.

insisting that the whole instrument shall be read, is not infringed by its admission, since that rule merely provides that no part of the deed, in the state in which it actually is, shall be withheld from the jury without the consent of the adverse party.[1]

§§ 1839—41. Formerly, if an instrument, on being produced, appeared to be signed by *subscribing witnesses*, it was required that one of them at least *should be called* to prove its execution.[2] But the C. L. P. Act of 1854 (now repealed[3]) first altered this. And by the Law of Evidence and Practice in Criminal Cases Act, 1865[4] (which extends to "all Courts of Judicature as well criminal as all others, and to all persons having, by law, or by consent of parties, authority to hear, receive and examine evidence, whether in England or Ireland"), 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 as if there had been no attesting witness thereto." The first consideration, therefore, when an attested document is tendered in evidence, is whether or not it be of such a nature as to *require attestation*. In a former chapter[5] many statutes have been referred to, which render attestation necessary, in order to give validity to particular instruments. There are, however, many other documents to the validity of which attestation is necessary.[6]

[1] Ld. Trimlestown *v.* Kemmis, 1843; Evans *v.* Rees, 1839.

[2] Doe *v.* Durnford, 1813; Higgs *v.* Dixon, 1817; Currie *v.* Brown, 1812.

[3] By 55 & 56 V. c. 19 ("Statute Law Revision Act, 1892").

[4] 28 & 29 V. c. 18, § 7.

[5] Part IV., Ch. III.

[6] Among such documents are the following:—*Assignees of Copyrights* (ante, § 1110); *Bail Bonds* assignments (ante, § 1110); *Bills of sale* (id.); *Charity*, conveyances to charitable uses under "The Mortmain Act" (id.); *Cognovits* (ante, § 1111); *Guardians*, deeds of fathers appointing guardians of their children (ante, § 1110); *Leases*, under "The Leasing Powers Act for Religious Worship in Ireland, 1855" (18 & 19 V. c. 39), § 10 (cited ante, § 1110); *Marriage registers* (ante, § 1110); *Middlesex registry*, certificates of searches and memorials, and some copies of enrolments, granted by the registrar of deeds and wills in Middlesex (ante, § 1652B); *Powers*, all instruments executed under powers, where the persons creating such powers have required the execution to be attested (see 2nd Rep. of Com. Law Commiss. p. 23); *Powers of attorney* to transfer or receive dividends on colonial stock (40 & 41 V. c. 59 ("The Colonial Stock Act, 1877"), § 4, subs. 1, and § 6); *Protests* of bills of exchange by persons not notaries (ante, § 1110); *Shipping documents*, including all bills of sale of British ships (ante, § 998A); and agreements, alterations of agreements, releases, and indentures of apprenticeship, executed in conformity with the provisions of "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60) (ante, § 1098); but in the case of shipping documents, the

§ 1842. Notwithstanding the clear language of the Legislature, cited above,[1] that "it shall *not* be necessary to prove by the attesting witness any instrument," &c., in petitions in lunacy and in Chancery it is still the practice to require proof of documents by the attesting witness, though if he be abroad proof of his handwriting will be enough.[2]

§ 1843. The general rule requiring the production of an attesting witness, when the validity of an instrument depends upon its formal attestation, is so inexorable, that it applies even to a cancelled[3] or a burnt[4] deed. Moreover, when the deed is one which falls within the provisions above[1] set out the attesting witness to it must be called, even although the deed be one the execution of which is admitted by the party to it;[5] and that, too, though such admission be deliberately made, either in open court,[6] or in a subsequent agreement,[7] or even in a sworn answer to interrogatories delivered to the party in the cause.[8] Nay, a party in a cause who is called as a witness by his opponent, cannot be required, or even permitted, to prove the execution by himself of any instrument, to the validity of which attestation is requisite, so long as the attesting witness is capable of being called.[9]

subscribing witnesses need not be called to prove the due execution of the instruments, for the Act provides, in § 694, that, "where any document is required by this Act to be executed in the presence of, or to be attested by, any witness or witnesses, that document may be proved by the evidence of any person who is able to bear witness to the requisite facts without calling the attesting witness, or the attesting witnesses, or any of them"; *Stage carriages*, agreements between the owners and drivers of metropolitan stage carriages (ante, § 1039); *Trustees'* appointments where they are trustees of property conveyed to religious or educational purposes (ante, § 1110); *Warrants of attorney* (ante, § 1111); and *Wills* (ante, § 1050).

[1] Supra, §§ 1839—41.

[2] Re Rice, 1886, C. A.; Re Reay's Estate, 1855; see, also, Leigh *v.* Lloyd, 1865; Re Mair's Estate, 1873.

[3] Breton *v.* Cope, 1791.

[4] Gillies *v.* Smither, 1819.

[5] Abbot *v.* Plumbe, 1779, referred to (Lawrence, J.) in 7 T. R. 267 (1797); and again in 2 East, 187 (1802); and confirmed by Ld. Ellenborough as an inexorable rule, in R. *v.* Harringworth, 1815. See, also, Mounsey *v.* Burnham, 1841. In India § 70 of the Ind. Evid. Act of 1872 enacts that "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."

[6] Johnson *v.* Mason, 1794 (Ld. Kenyon, citing Ld. Mansfield to same effect).

[7] Doe *v.* Penfold, 1838 (Patteson, J.). But see Bringloe *v.* Goodson, 1839 (Tindal, C.J.); and post, § 1849.

[8] See Call *v.* Dunning, 1803. But see Bowles *v.* Langworthy, 1793. Also, post, §§ 1847A, 1849.

[9] Whyman *v.* Garth, 1853; a decision which some may think displays

§ 1843A. The attesting witness must, moreover, be called, though, subsequently to the execution of the deed, he has become blind;[1] and the court will not dispense with his presence on account of illness, however severe.[2] If the indisposition of the witness be of long standing, the party requiring his evidence should have applied for power to examine him before a commissioner or examiner,[3] and if he be taken suddenly ill, a motion must be made to postpone the trial.[4]

§ 1844. The rule that where an attesting witness *is* necessary to the validity of an instrument, a person who was such witness must be called, applies, whatever be the purpose for which the instrument is produced.[5] But, though the witness must be called, in the first instance, he is rather the witness of the court than of the party, and great latitude will, therefore, be allowed in the mode of examining him, and, if it be necessary, the judge will even permit questions in the nature of a cross-examination to be put.[6] Moreover, the party calling him is not precluded from giving further evidence, in case he denies, or does not recollect, having seen the instrument executed.[7]

§ 1845.[8] Some ten important exceptions have, however, been engrafted upon the general rule, which requires the production of the subscribing witnesses to the instrument of which proof is required. These are as follows: (1) Where the instrument to be proved is thirty years old or more; (2) where such instrument is attested merely in pursuance of a rule of court, and the court which has laid down such rule has subsequently acted upon the instrument; (3) when such instrument is in the possession of the adverse

a somewhat too stubborn resolution stare super antiquas vias.

[1] Cronk *v.* Frith, 1839 (Ld. Abinger); Rees *v.* Williams, 1847. See, contrà, Wood *v.* Drury, 1699; and Pedler *v.* Paige, 1833 (Parke, B., reluctantly yielding to the authority of Ld. Holt). See ante, § 477.

[2] Harrison *v.* Blades, 1813 (Ld. Ellenborough); see, contrà, Jones *v.* Brewer, 1811 (where Sir J. Mansfield observes, that "perhaps in some cases of sickness," the handwriting of the attesting witness may be proved). See ante, § 477.

[3] R. S. C. 1883, Ord. XXXVII. rr. 1, 5.

[4] Harrison v. Blades, 1813.

[5] Manners *v.* Postan, 1803 (where the deed was used in evidence collaterally); R. *v.* Jones, 1777 (where the indenture was put in upon an indictment against an apprentice for a fraudulent enlistment).

[6] Bowman *v.* Bowman, 1843 (Creswell, J.); ante, § 1404, ad fin.

[7] Ley *v.* Ballard, 1790; Fitzgerald *v.* Elsee, 1811; Lemon *v.* Dean, 1810; Talbot *v.* Hodson, 1816; overruling Phipps *v.* Parker, 1808.

[8] Gr. Ev. § 570, in part.

party who, after a notice to do so, refuses to produce it; (4) when all the parties to such instrument are represented before the court, and the instrument is not one which, by the statute already cited,[1] requires attestation for its validity; (5) where the party producing such instrument, pursuant to notice so to do, claims a subsisting interest under it in the cause; (6) where the very object of the deed is to create a formal and solemn admission of that which is the foundation of the cause; (7) where the party producing the instrument is a public officer, whose duty it was to procure its execution; (8) where the production of an attesting witness is legally or physically impossible; (9) where such instrument is one under the seal of a corporation; and (10) where the instrument is a deed rendered valid by its having been enrolled. Such being the various exceptions, each of such exceptions will in turn be now considered.

§ 1845A. The first of these exceptions is that when an *instrument*, proof of which is required, *is thirty years old* or more, the subscribing witnesses need not be called, as they are presumed to be dead.[2] This doctrine applies to a memorial of a deed.[3]

§ 1846. The *second exception* to the general rule is, when the attesting witness has attested such *instrument merely in pursuance of a Rule of some court*, and such court has subsequently recognised the validity of the instrument by *acting upon it*, as, e.g., the Court of Bankruptcy.[4] But where no proof is given that the court requiring the attestation has ever *acted* upon the instrument, unless the attesting witness is called, it will not be received.[5]

§ 1847. A *third exception* to such general rule is when the instrument is proved to be in *possession of the adverse party, who*, after proper notice so to do, *refuses to produce it*. In this case, the party who is driven to give secondary evidence of its contents need not call an attesting witness, though the plea be non est factum, and though the name of the witness were mentioned in the notice, and he be actually in court.[6]

§ 1847A. A *fourth exception* is said to exist where all the parties to a deed are represented before the court, and the deed itself does

[1] Supra, § 1839—41.
[2] Ante, § 87.
[3] Miller *v.* Wheatley, 1890 (Ir.).
[4] Bailey *v.* Bidwell, 1844.
[5] Streeter *v.* Bartlett, 1848.
[6] Cooke *v.* Tanswell, 1818; Poole *v.* Warren, 1838. Ante, § 1818.

not fall within the Law of Evidence and Practice in Criminal Cases Act, 1865.[1]

§ 1848.[2] A *fifth exception* to such general rule is again admitted when such instrument is produced by the *adverse party* pursuant to notice to him so to do, and he *claims a subsisting interest in the cause under such instrument.* In such case, the party producing the instrument is not permitted to call on the other for proof of the execution; for, by claiming an interest under it, he admits its validity.[3] But this exception to the general rule only applies when the party producing the deed claims under it *some interest in the subject-matter of the cause.*[4] Accordingly, where, in an action for commission due to the plaintiff as agent in procuring an apprentice for the defendant, the deed of apprenticeship was produced under notice by the defendant, the plaintiff was held bound to call the attesting witness;[5] and where a defendant, to prove himself a partner with the plaintiff, called upon him to produce a contract which they, as partners, had made with a builder for work to be done on the plaintiff's premises, and, on plaintiff accordingly producing it, contended that such plaintiff claimed an interest under this instrument, inasmuch as it would enable him, if necessary, to control the builder's proceedings, or to enforce a specific performance against him, proof of the execution was required probably (though no reasons were assigned by the court) because the interest taken by the plaintiff was certainly not a permanent one, and was not proved to be an existing one.[6] In any event, it is clear that, to render a document admissible without proof as against the party producing it, his interest under it must be *still subsisting* at the time of the trial.[7] The exception to the general rule that where an instrument is one requiring attestation, one of the attesting witnesses must usually be called, will however prevail where the interest claimed by the party producing the deed *is the same* as that

[1] 28 & 29 V c. 18, § 7. See Worthington *v.* Moore, 1891.

[2] Gr. Ev. § 571, in part, as to first five lines.

[3] Pearce *v.* Hooper, 1810; Rearden *v.* Minter, 1843; Carr *v.* Burdiss, 1835; Orr *v.* Morice, 1821; Bradshaw *v.* Bennett, 1831 (Ld. Tenterden); Doe *v.* Wainwright, 1836; Bell *v.* Chaytor, 1843; Doe *v.* Hemming, 1826. See Nagle *v.* Shea, 1875 (Ir.).

[4] Doe *v.* M. of Cleveland, 1829; Curtis *v.* M'Sweeny, 1841 (Ir.).

[5] Rearden *v.* Minter, 1843 (Ir.). See Gordon *v.* Secretan, 1807.

[6] Collins *v.* Bayntun, 1841.

[7] Fuller *v.* Pattrick, 1849.

claimed under it by the party who calls for its production.[1] The fact that the party producing the instrument claims an interest under it, will, moreover, sufficiently appear by a statement to that effect, made by his solicitor shortly before the trial.[2] The above exception does not apply, however, where a party, claiming an interest under a deed, has given it up to the adverse side some months,[3] or perhaps any time,[4] before the action, for in such a case the party wishing to make it evidence has had the instrument in his own custody, and can therefore well be prepared to prove its execution.

§ 1849. The *sixth exception* to the general rule that where a document is required to be proved to have been duly attested, such attestation must usually be proved by calling an attesting witness, is, that this is not required where the deed is one the very object of which was to create a formal and solemn acknowledgment of a matter which is the very foundation of the cause before the court, for although in general, where an instrument requires attestation, the acknowledgment of its validity by a party to it does not,—as before stated,[5]—waive the necessity of calling one of the attesting witnesses, it, under the circumstances in question, has this effect. Accordingly, where a party agreed to admit a warrant of attorney "so as to enable his opponent to enter up judgment thereon," the court held that judgment might be entered up without an affidavit of the subscribing witness;[6] if in an action on covenant the defendant pay money into court on one of the breaches, this is such an admission of the validity of the deed, as to dispense with the production of the attesting witness, though the execution be denied in the statement of defence;[7] if a party or his solicitor, in order to avoid expense, agree to admit the execution of an instrument which he is called upon by notice to admit, he cannot afterwards require that the attesting witness should be examined;[8] if a party solemnly recites a deed or will in an instrument under his *seal*,

[1] Knight *v.* Martin, 1818 (Dallas, C.J.).
[2] Roe *v.* Wilkins, 1835.
[3] Vacher *v.* Cocks, 1830.
[4] Carr *v.* Burdiss, 1835 (Parke, B.).
[5] Ante, § 414, and § 1843.
[6] Laing *v.* Kaine, 1800 (Ld. Eldon and Heath, J.; Rooke, J., dubitante).
[7] Randall *v.* Lynch, 1810 (Ld. Ellenborough).
[8] Freeman *v.* Steggall, 1849 (Coleridge, J.). See ante, § 724A, and § 724B.

and has, moreover, *acquired* some *benefit* on the faith of the document recited being valid, he cannot compel his opponent, who relies on the recited document, to prove its validity by calling the attesting witness;[1] and if the effect of a memorandum indorsed upon an original agreement be to incorporate both and to make the whole one new agreement, it will suffice to prove the due execution of the memorandum, and the witness who has attested the original agreement need not be sworn.[2]

§ 1850. A *seventh exception* prevails, where a document is tendered in evidence as against a public officer, whose legal duty it was to procure its due execution, and who has dealt with it as a document duly executed. For instance, in an action under the old law.[3] against a sheriff for taking insufficient sureties on a replevin bond, the execution of that instrument need not have been proved by calling the attesting witness, if the plaintiff could show that the sheriff had assigned the bond.[4]

§ 1851.[5] An *eighth exception* is recognised, where the production of any attesting witness is legally or physically impossible.[6] Thus, if all[7] the witnesses be proved to be dead;[8] or insane;[9] or out of the jurisdiction of the court;[10] or if the only available attesting

[1] Bringloe *v.* Goodson, 1839; Nagle *v.* Shea, 1875 (Ir.); Nash *v.* Turner, 1795 (Ld. Kenyon). See Fishmongers' Co. *v.* Robertson, 1845.

[2] Fishmongers' Co. *v.* Dimsdale, 1852.

[3] Replevin bonds are now granted by the registrars of County Courts, and the jurisdiction of the sheriffs with respect to them has ceased. See "The County Courts Act, 1888" (51 & 52 V. c. 43), §§ 133—137. They are *in Ireland* (the exemption was formerly general, but is now thus restricted) exempt from stamp duty: 54 & 55 V. c. 39 ("The Stamp Act, 1891"), Sched. (I.) tit. "General Exemptions."

[4] Plumer *v.* Brisco, 1847; recognising Scott *v.* Waithman, 1822. See Barnes *v.* Lucas, 1825.

[5] Gr. Ev. § 572, in some part.

[6] See ante, §§ 472, 1843.

[7] As a general rule such proof is required as to *all* the attesting witnesses. See post, § 1856.

[8] Adam *v.* Kerr, 1798.

[9] Currie *v.* Child, 1812 (Ld. Ellenborough); Bernett *v.* Taylor, 1804. See, also, (1790), 3 T. R. 712 (Buller, J.).

[10] Barnes *v.* Trompowsky, 1797; even though the witness be not proved to be domiciled abroad: Prince *v.* Blackburn, 1802; notwithstanding the power to examine on interrogatories under Ord. XXXVII. rr. 1 and 5, of R. S. C. 1883: Glubb *v.* Edwards, 1840 (Maule, J.); Wilson *v.* Collum, 1881 (Ir.); and though the witness be out of the jurisdiction: Doe *v.* Caperton, 1839; and Hodnett *v.* Forman, 1815. See 26 G. 3, c. 57 ("The East India Company's Act, 1786"), § 38, as to bonds executed in the East Indies. If the witness has set out to leave the kingdom, but the ship has been beaten back, he is still considered absent: Ward *v.* Wells, 1809. See, also, Emery *v.* Twombly, 1840 (Am.).

witness cannot be found after diligent inquiry;[1] or if he have absented himself from the trial by collusion with the opposite party;[1a] it will be sufficient, but perhaps not necessary in all cases,[2] to prove his handwriting. If the instrument be lost, and the name of the subscribing witness be unknown,[3] the execution must be proved by other evidence.

§ 1852. A *ninth exception* is said to exist where the instrument to be proved bears the seal of a corporation, and it has been alleged that such a document will be sufficiently proved by merely showing that the seal affixed is the seal of the corporation, without calling the attesting witness.[4] But this proposition rests it will be observed on a judgment of Lawrence, J., given in 1799,[4] and was, in 1836, described by the Court of Queen's Bench as open to question.[5]

§ 1853. A *tenth exception* has, in several old cases[6] (but in no modern case), been recognised in respect of *deeds* which have derived validity from their having been *inrolled*.[7] In practice it is, consequently, usual to admit such deeds on proof of inrolment. The principle of thus admitting them, except as against the party on whose acknowledgment they have been inrolled, has, however, been questioned by Buller, J.;[8] and in a subsequent case of great importance,[9] which was tried twice, and turned upon the validity of a deed inrolled under the Mortmain Act, the precaution was taken of proving the execution of the indenture on both trials.

[1] Cunliffe *v.* Sefton, 1802; Crosby *v.* Percy, 1808; Lord Falmouth *v.* Roberts, 1842; Parker *v.* Hoskins, 1810; In re Hux, 1877; Burt *v.* Walker, 1821; Spooner *v.* Payne, 1847. As to such inquiry see post, § 1855.

[1a] Egan *v.* Larkin, 1842 (Ir.) (Brady, C.B.); Ld. Clanmorris *v.* Mullen, 1837 (Ir.); Spooner *v.* Payne, 1847.

[2] R. *v.* St. Giles, 1853; In re Hux, 1877. See, further, post, § 1861.

[3] Keeling *v.* Ball, 1796.

[4] Moises *v.* Thornton, 1799 (Lawrence, J.).

[5] Doe *v.* Chambers, 1836.

[6] Bro. Abr., Faits enroll. pl. 11, citing P. 7, E. 4, fol. 5, pl. 13, in which that point is distinctly laid down. See, also, Lady Holcroft *v.* Smith, 1702; Thurlo *v.* Madison, 1655; Smartle *v.* Williams, 1695.

[7] See ante, § 1119 et seq. See, further, as to enrolments, ante, §§ 1646 et seq.

[8] B. N. P. 255. "If divers persons seal a deed, and one of them acknowledges it, it may be inrolled, and may ever after be given in evidence as a deed inrolled; but it would be of very mischievous consequence to say, therefore, that a deed, inrolled upon the acknowledgment of a bare trustee, might be given in evidence against the real owner of the land without proving it executed by him. However, that has been the general opinion, and it seems fortified in some degree by 10 A. c. 18." See ante, § 419.

[9] Doe *v.* Lloyd, first tried (Coleridge, J.) Spring Assizes, 1839; and second trial (Gurney, B.) Summer Assizes, 1839.

§ 1853A. An *eleventh exception* to the general rule, requiring that, where attestation is necessary, the execution of a document shall be proved by one of the attesting witnesses, arises, as will be recollected,[1] under the Merchant Shipping Act.[1]

§ 1854. Where an instrument requiring attestation is subscribed by several witnesses, it is, in general, only necessary to call *one* of them.[2] In the case of *wills* relating to real estate, it was for many years the practice of courts of equity, and is now the practice of all the courts,[3] to require that all the witnesses who are in England, and capable of being called, should be examined.[4] The reasons for this appear to substantially be, that frauds are frequently practised upon dying men, whose hands have survived their heads,—that therefore the sanity of the testator is the great fact to which the witnesses must speak when they come to prove the attestation,—and that the heir-at-law has a right to demand proof of this fact from every one of the witnesses whom the statute has placed about his ancestor.[5]

§ 1855.[6] The *degree of diligence* required in seeking for the attesting witnesses to a document, the attestation of which is required to be proved by an attesting witness, is the same as in the search for a lost paper.[7] The principle is in both cases identical. The inquiry must be strict, diligent, and honest, and in all respects satisfactory to the court under all the circumstances. It should be made at the residence of the witness, if known, and at all other places where he may be expected to be found; as also, in general, of his relatives and others, who may be supposed capable of affording information respecting him. Evidence that the required witness cannot be found is given, if it be shown that the sole attesting witness, having been charged with a serious

[1] Ante, §§ 1839—41, n., title "Shipping Documents."

[2] Holdfast *v.* Dowsing, 1746; B. N. P. 264; Hindson *v.* Kersey, 1765 (Ld. Camden); Gresl. Ev. 120; Forster *v.* Forster, 1864; Belbin *v.* Skeats, 1858. See ante, § 393.

[3] "Jud. Act, 1873" (36 & 37 V. c. 66), § 25, subs. 11, and decisions on it cited ante, § 5, n.

[4] M'Gregor *v.* Topham, 1850, H. L. (Ld. Brougham); Bootle *v.* Blundell, 1815; Grayson *v.* Atkinson, 1752; Townsend *v.* Ives, 1748; Ogle *v.* Cook, 1748; Andrew *v.* Motley, 1862 (Byles, J.).

[5] Ld. Camden, in Hindson *v.* Kersey, 1765, rep. in 4 Burn, Ec. L. 116, 119, 120, and cited Gresl. Ev. 123; Bowman *v.* Bowman, 1843; Andrew *v.* Motley, 1862 (Byles, J.).

[6] Gr. Ev. § 574, in part, as to first nine lines.

[7] Ante, § 429.

offence, has absconded, and cannot be found, though inquiries have been made for him at his house, and at the inns which he was in the habit of frequenting, although no application was shown to have been made to any member of his family;[1] that inquiry has been made at the residences of the parties to the instrument respecting the witness, and that no account could be obtained as to who he was, or where he lived,—though it was urged that, in such a case, a public advertisement for him should have been inserted in the newspapers;[2] or that the attesting witness, on being subpœnaed for the plaintiff, said that he would not attend, that the trial has been already put off on account of his absence, and that in the interval search has been made for him at the house of his employer, and in its neighbourhood, as well as in the place to which such employer stated that he had gone.[3] In all cases of this nature, the answers to the inquiries may be given in evidence, they being not hearsay, but parts of the res gestæ.[4]

§ 1856.[5] If an instrument be necessarily attested by *more than one witness*, the *absence of them all* must be duly accounted for, in order to let in secondary evidence of the execution;[6] but when such evidence is rendered admissible, proof of the handwriting of any *one* of the *witnesses* will, in general, be deemed sufficient, provided it be accompanied by some *evidence* of the *identity* of the party sued, with the person who appears to have executed the instrument.[7] Proof of the signature of the obligor is an obvious, though by no means the only, mode of establishing his identity.

§ 1857. The attesting witness must absolutely prove the *identity* of the party to the instrument with that of the party to the dispute. For this reason the plaintiff was non-suited in an action[8] by the indorsee against the maker of a note, in which the attesting witness only stated that he saw a party called Hugh Jones, who

[1] Earl of Falmouth *v.* Roberts, 1842.

[2] Cunliffe *v.* Sefton, 1802.

[3] Burt *v.* Walker, 1821. For other instances, see Wardell *v.* Fermor, 1809; Willman *v.* Worrall, 1838; Wyatt *v.* Bateman, 1836; Doe *v.* Powell, 1836; Kay *v.* Brookman, 1828; Morgan *v.* Morgan, 1832; Spooner *v.* Payne, 1847; Austin *v.* Rumsey, 1849; and also Cunliffe *v.* Sefton, and other cases cited ante, § 1851, n.

[4] As to which see ante, § 472—8, n.

[5] Gr. Ev. §§ 574, 575, in part, as to first seven lines.

[6] Cunliffe *v.* Sefton, 1802; Wright *v.* Doe d. Tatham, 1834; Whitelock *v.* Musgrove, 1833.

[7] Adam *v.* Kerr, 1798; Nelson *v.* Whittall, 1817; Doe *v.* Paul, 1829.

[8] Jones *v.* Jones, 1841.

kept the Glasgow Tavern at Llangefni, in Anglesea, sign the note, but admitted, on cross-examination, that he had not seen this person since, and that the name was a common one in Anglesea, and this notwithstanding that the defendant had in one of his pleas admitted the making of the note, Parke, B., observing that the defendant's solicitor should have been called, to say whether the person who employed him in the case was the Hugh Jones who lived at the Glasgow Tavern. In the same year, however, in a somewhat similar action against the acceptor of a bill, which was directed to "Charles Banner Crawford, East India House," and accepted "C. B. Crawford," a witness having proved that this acceptance was the signature of Charles Banner Crawford, who was formerly a clerk in the East India House, but said that he did not know whether that Mr. Crawford was the defendant, his evidence was held to furnish sufficient prima facie proof of identity, at least in the absence of an affidavit to show that the defendant was not that person.[1]

§ 1858. In an action by an apothecary for medicines and attendance, a licence from the Apothecaries' Company, granted to a person bearing his name, was held to render unnecessary further evidence to show that he was the party named in the licence;[2] where the question was whether the defendant was proved to be the same person as had been the defender in a Scotch suit, the judges decided that there was ample evidence of identity, on the ground that the peculiar names (of William Gray Smythe), professions, places of abode, and ages of the parties appeared to be the same;[3] in an action[4] for negligence in navigation, on its being objected that the evidence did not show that the defendant was the pilot in charge of the vessel, plaintiff's counsel called out "Mr. Henderson," and a man in court answered "Here; I am the pilot," and it having been then proved that this man, at the time of the accident, was acting as pilot, a nonsuit was set aside. In this last case, Parke, B., during the argument, observed, "*similarity of name and residence, or similarity of name and trade, will do;*" and he added

[1] Greenshields *v.* Crawford, 1842. The distinction between these two cases appears to be that, in the former, the name of Hugh Jones was said to be common, whereas that of Charles Banner Crawford was certainly unusual.

[2] Simpson *v.* Dismore, 1841.

[3] Russell *v.* Smythe, 1842.

[4] Smith *v.* Henderson, 1842.

in the judgment, "The defendant is sued on the face of the *declaration* as William Henderson, a pilot. A man in court answers to the name of Henderson, is a pilot, and was proved to be the pilot acting on board the vessel. He therefore fulfils the description in the *declaration*, in two respects at least, since his name and calling resemble those of the alleged defendant."[1]

§ 1859. It is submitted, however, that the above decision was right, not for the reason given by Parke, B., but because the accident was proved to have been caused by a pilot named Henderson, and a person answering the name and description was *present in court*, and might therefore be fairly presumed to be the same Mr. Henderson who had pleaded to the action. It is obvious that the identity which is required to be shown is not that of some one with the description which the plaintiff has chosen to give, but that of the person who was served with the writ in the court, and who has pleaded to the action with the defendant.

§ 1859A. Other cases on the subject of proof of the identity of a defendant, are, that where a witness, called to prove the defendant's handwriting, said that he had corresponded with a person bearing defendant's name, who dated his letters from Plymouth Dock, where defendant resided, and where it appeared that no other person of the same name lived, the evidence of identity was held to be sufficient;[2] and that where[3] the only proof of the defendant's signature to a bill was given by a banker's clerk, who stated that two years before the trial he saw a person—whom he did not know, but who called himself by that name—sign it: that he had since seen cheques similarly signed pass through the banking house, and that he thought the handwriting was the same as that on the bill,—the evidence, weak as it confessedly was, was allowed to be submitted for the consideration of the jury.

§ 1860. It is, however, now well established that in ordinary cases, where no particular circumstance tends to raise a question as to the party being the same, *mere identity of name is something from which an inference of identity may be drawn.*[4] If the party to

[1] In the judgment in Smith *v.* Henderson, as reported 9 M. & W. 801.

[2] Harrington *v.* Fry, 1824 (Best, C.J.).

[3] Warren *v.* Sir J. C. Anderson, Bart., 1839.

[4] See Sewell *v.* Evans, 1843; Roden *v.* Ryde, 1843; recognised in another court: Hanber *v.* Roberts,

be fixed with liability be a marksman,[1] or if his name be proved to be very common in the country,[2] or if a length of time has elapsed since the name was signed, or if, in short, any other special facts be involved in the case, a stricter proof might be required. Lord Denman,[3] in dealing with an objection that there had been no sufficient proof of identity,—after stating that the onus of proving a negative might, in the generality of cases, be safely thrown upon the defendant, partly, because the proof was easy, and partly, because the supposition that a wrong man had been sued was unreasonable, inasmuch as the fraud would occur to few, and the risk of punishment in practising the fraud would be great, —emphatically added,[3] "The transactions of the world could not go on if such an objection were to prevail. It is unfortunate that the doubt should have been raised; and it is best that we should sweep it away as soon as we can."

§ 1861. In America, where the absence of the subscribing witnesses has been duly accounted for, an instrument may be read upon proof of the handwriting of the obligor, or party by whom it was executed; but it seems to be still undecided in that country, whether such proof will be admissible, without first showing an inability to prove the signatures of the witnesses.[4]

§ 1862. When writings are produced, and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call the *writer* himself, or some person who *actually saw the paper* or signature *written*. When evidence such as this cannot be procured, as must often be the case, recourse may be had, either to the testimony of witnesses, who are *acquainted with the handwriting*, or to a comparison of the document in dispute with any writing proved to the satisfaction of the judge to be genuine.[5] These last modes of proof, indeed, may in all cases be given in the first instance, since the law recognises no distinction between them and the ocular proof just mentioned; but as they are

1849. See, also, Murieta *v.* Wolfhagen, 1849 (Alderson, B.); and Reynolds *v.* Staines, 1849.

[1] As in Whitelocke *v.* Musgrove, 1833.

[2] As in Jones *v.* Jones, 1841, ante, § 1857. See, also, Barker *v.* Stead, 1847.

[3] In Sewell *v.* Evans, 1843, as reported 4 Q. B. 633.

[4] Jackson *v.* Waldron, 1834 (Am.); Valentine *v.* Piper, 1839 (Am.). See R. *v.* St. Giles, 1853, as to English law.

[5] See post, § 1869.

obviously of a less satisfactory character than direct testimony, any unnecessary reliance on them is calculated to raise suspicion that the party is actuated by some improper motive in withholding evidence of a more conclusive nature.

§ 1863. The *knowledge of a person's handwriting* may have been acquired in both or either of two ways.[1] The *first is from having seen him write;* and though the weight of the evidence, which depends upon knowledge so obtained, must of course vary in degree according to the number of times that the party has been seen to write, the interval that has elapsed since the last time, the circumstances, whether of hurry or deliberation, under which he wrote, and the opportunities and motives which the witness had for observing the handwriting with attention;[2]—yet the evidence will be admissible, though the witness has not seen the party write for twenty years,[3] or has seen him write but once, and then only his surname.[4] Indeed, on one occasion, a witness was permitted to speak to the genuineness of a person's *mark*, from having frequently seen it affixed by him on other documents.[5] The proof in such cases may be very slight, but the jury will be allowed to weigh it. The witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands.[6] Still, the party calling the witness may interrogate him, if he thinks proper, as to the circumstances on which his belief is founded. If it should appear that a witness's belief as to handwriting rests on the probabilities of the case, or on the character or conduct of the supposed writer, and not on the actual knowledge of it, the testimony will be rejected.[7] Where a witness, called to establish a forgery, had

[1] See 3 Benth. Ev. 598, 599.

[2] Doe *v.* Suckermore, 1836 (Patteson, J.).

[3] R. *v.* Horne Tooke, 1795; Eagleton *v.* Kingston, 1803 (Ld. Eldon).

[4] Patteson, J., in Doe *v.* Suckermore, 1836; Garrells *v.* Alexander, 1801 (Ld. Kenyon); Willman *v.* Worrall, 1838; Burr *v.* Harper, 1816; Lewis *v.* Sapio, 1827. In this last case, Ld. Tenterden refused to recognise the authority of Powell *v.* Ford, 1817, where Ld. Ellenborough rejected the testimony of a witness who had seen the defendant write his surname only once, the acceptance of the bill in question having been signed at full length. See, also, Warren *v.* Anderson, 1839.

[5] George *v.* Surrey, 1830 (Tindal, C.J., after some hesitation.)

[6] Moody *v.* Rowell, 1835; overruling Slaymaker *v.* Wilson, 1829.

[7] R. *v.* Murphy, 1837 (Coleridge,

become acquainted with the signature of the party, from having seen him, after the commencement of the suit, sign his name for the purpose of showing the witness his true manner of writing it, the evidence was held inadmissible, Lord Kenyon observing, that the party might, through design, have written differently from his common mode of signature.[1]

§ 1864. The *second way* in which the knowledge of a person's handwriting may be acquired, is by the *witness having seen, in the ordinary course of business, documents*, which by some evidence, direct or circumstantial, *are proved to have been written by such person*. Thus, if the witness has received letters purporting to be in the handwriting of the party, and has either personally communicated with him respecting them, or written replies to them, producing further correspondence, or acquiescence by the party in some matter to which they relate, or has so adopted them into the ordinary business transactions between himself and the party, as to induce a reasonable presumption in favour of their genuineness, his evidence will be admissible.[2] It is always a fair presumption that, if a letter be sent to a particular person, and an answer be received in due course, the answer was written by the person addressed in the letter; and, consequently, a witness who received such answer, may be examined as to the genuineness of any other paper which it is necessary to show was or was not written by the same person.[3] Again, the clerk who has constantly read the letters, or the broker who has been consulted upon them, is as competent as the merchant to whom they were addressed, to judge whether another signature is that of the writer of the letters; and so is a servant who having habitually carried his master's letters to the post, has thereby had an opportunity of obtaining a knowledge of his writing, though he never saw him write, or received a letter from him.[4]

§ 1865. It is not clear whether a solicitor can speak to the

J.); Da Costa *v.* Pym, 1797 (Ld. Kenyon).

[1] Stunger *v.* Searle, 1793. See also Page *v.* Homans, 1837.

[2] Doe *v.* Suckermore, 1836 (Patteson, J.); Ld. Ferrers *v.* Shirley, 1730; Carey *v.* Pitt, 1797; Tharpe *v.* Gisburne, 1825; Harrington *v.* Fry, 1824; Burr *v.* Harper, 1816; Com. *v.* Carey, 1823; Johnson *v.* Daverne, 1821; Pope *v.* Askew, 1840.

[3] Carey *v.* Pitt, 1797 (Ld. Kenyon).

[4] Doe *v.* Suckermore, 1836 (Ld. Denman).

signature of a person when his knowledge of the handwriting is solely derived from having seen the same signature attached to other documents which have been used in the cause.[1]

§ 1866. In an action on a joint and several promissory note against three persons, the signature of one of them cannot be proved by calling the solicitor for the defendants, whose knowledge of the handwriting in question is founded on the circumstance, that he has received a retainer purporting to be signed by his three clients, and had acted upon it in defending the action, if no proof be given that the party has ever acknowledged the signature to the solicitor—since either of the other two defendants may have signed the retainer for him with his assent;[2] neither can the signature of an M.P. be proved by the evidence of an inspector of franks, whose knowledge of the handwriting has been simply derived from his having frequently seen franks pass through the post-office, bearing the name of such member, but who has never communicated with the member on the subject of the franks—for the superscriptions of the letters seen by the witness might possibly have been forgeries.[3] These last decisions are founded on a presumption, which is not only improbable in the highest degree, but is in direct contradiction to the sound rule, that a crime is not to be presumed, or so much as suspected, without special cause, in any single instance; much less in a number of unconnected instances.[4]

§ 1867. In whichever of the two ways mentioned above the witness has acquired his knowledge of handwriting, it is obvious that evidence identifying the person whose writing is in dispute with the person whose hand is known to the witness, must be adduced, either aliundè, or by the testimony of the witness himself, if he be personally acquainted with the writer.[5] The witness might otherwise be proving the handwriting of one man, while the party calling him might be seeking to establish the signature of another.

[1] That such evidence is admissible, see Smith *v.* Sainsbury, 1832 (Park, J.), cited (Ld. Denman) in Doe *v.* Suckermore, 1836. But see, contrà, Greaves *v.* Hunter, 1826 (Abbott, C.J.).

[2] Drew *v.* Prior, 1843.

[3] Carey *v.* Pitt, 1797 (Ld. Kenyon); Batchelor *v.* Honeywood, 1799 (id.).

[4] 3 Benth. Ev. 604.

[5] See Doe *v.* Suckermore, 1836 (Patteson, J.).

§ 1868. Witnesses called to speak to handwriting must, it is submitted, declare their *belief* that it is genuine.[1] No doubt witnesses are occasionally pressed too much to form a belief;[2] and some allowance should certainly be made for the over-caution of a scrupulous witness. Consequently it may be very proper to receive the testimony of a person, who, while declining to express a decided belief, will yet declare that he is of *opinion*, or that he *thinks*, the paper is genuine. But it is going a step further when the witness will only state that the handwriting is like; for the statement may be perfectly true, but yet, within the knowledge of the witness, the paper may have been written by an utter stranger.

§ 1869. Although all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature comparison;—it being the belief which a witness entertains, upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge[3]—yet the law, until the year 1854, did not allow the witness, or even the jury, except under certain special circumstances, actually to *compare two writings* with each other, in order to ascertain whether both were written by the same person. This technical rule was peculiar[4] to English common law. So far as Nisi Prius trials were concerned it was abrogated in 1854 by the C. L. P. Act of that

[1] Eagleton *v.* Kingston, 1803 (Ld. Eldon). Ld. Kenyon, indeed (in Garrells *v.* Alexander, 1801), admitted the evidence of a witness who could only say that the handwriting was "like" that of the person whose it was said to be. Ld. Wynford is also said (see 2 Ph. Ev. 304, n. 1) to have followed this ruling of Ld. Kenyon's. See, also, on this question, Beauchamp *v.* Cash, 1822, and Cruise *v.* Clancy, 1844 (Ir.).

[2] Ld. Eldon, in Eagleton *v.* Kingston, 1803.

[3] Doe *v.* Suckermore, 1836 (Patteson, J.).

[4] It was directly opposed to the practice permitting a comparison of handwriting existing in our own ecclesiastical courts (1 Will. on Ex. 309; 1 Ought. tit. 225, §§ 1—4; Doe *v.* Suckermore, 1836 (Coleridge, J.); Beaumont *v.* Perkins, 1809; Saph *v.* Atkinson, 1822; Machin *v.* Grindon, 1756); in our courts in India (see now "The Indian Evidence Act, 1872," § 73); in the French courts (Code de Proc. Civ. Part 1, liv. 2, tit. 10, §§ 193—213; 3 Poth. Œuvr. Posth. 46; Doe *v.* Suckermore, 1836 (Coleridge, J.)); and in the courts of many of the most enlightened States in America (see the N. York Civ. Code, §§ 1763—1765). In Massachusetts, Maine, and Connecticut, it seems to have become the settled practice to admit any papers to the jury, whether relevant to the issue or not, for the purpose of comparison of the handwriting: Homer *v.* Wallis, 1814 (Am.); Moody *v.* Rowell, 1835 (Am.); Richardson *v.* Newcomb, 1838 (Am.); Hammond's case, 1822 (Am.); Lyon *v.* Lyman, 1831 (Am.).

year.[1] And in 1865 it was enacted by the Evidence and Practice in Criminal Cases Amendment Act, 1865,[2]—which, by § 1 thereof, extends to "all courts of judicature as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, receive, and examine evidence," whether in England or Ireland[3]—that[4] "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."[5]

§ 1870. Under this Act it seems clear, first, that any writings, the genuineness of which is proved to the satisfaction, not of the jury, but of the judge,[6] may be used for the purposes of comparison, although they may not be admissible in evidence for any other purpose in the cause;[7] and next, that the comparison may be made either by witnesses acquainted with the handwriting, or by witnesses skilled in deciphering handwriting, or, without the intervention of any witnesses at all, by the jury themselves,[8] or, in the event of there being no jury, by the court. Therefore, in an action by the indorsee of a bill of exchange against the acceptor, who by his statement of defence denies the indorsement by the drawer, the jury may, by simply comparing the indorsement with the drawing, which is conclusively admitted to be genuine,[9] find a verdict for the plaintiff, even though no witness be called to disprove the defence.[10]

§ 1871. It further appears, that any person whose handwriting is in dispute, and who is present in court, may be required by the judge to write in his presence, and that such writing may, under the statute, then be compared with the document in question.[11]

[1] 17 & 18 V. c. 125, §§ 27, 103 (now repealed). See, also, 19 & 20 V. c. 102, § 98, Ir.

[2] 28 & 29 V. c. 18.

[3] The Act does not extend to Scotland: § 10.

[4] § 8 of 28 & 29 V. c. 18.

[5] This rule has been adopted by the Committee for Privileges in the House of Lords: Shrewsbury Peer., 1857, H. L.

[6] See Egan *v.* Cowan, 1858 (Ir.).

[7] Birch *v.* Ridgway, 1858; Cresswell *v.* Jackson, 1860.

[8] Cobbett *v.* Kilmister, 1865 (Martin, B.).

[9] Ante, § 851.

[10] See, as to the former law: Allport *v.* Meek, 1830.

[11] See Doe d. Devine *v.* Wilson,

Moreover, in all cases of comparison of handwriting, the witnesses, the jury, and the court may respectively exercise their judgment on the resemblance or difference of the writings produced. In doing so, they will sometimes derive much aid from the evidence of experts with respect to the general character of the handwriting,—the forms of the letters, and the relative number of diversified forms of each letter,—the use of capitals, abbreviations, stops, and paragraphs,—the mode of effecting erasures, or of inserting interlineations or corrections,—the adoption of peculiar expressions,—the orthography of the words,[1]—the grammatical construction of the sentences,—and the style of the composition,—and also on the fact of one or more of the documents being written in a feigned hand.[2] The evidence of experts who merely dogmatically express what they say is their own opinion, but who are not able to point out any *reasons* for it is, however, worthless.

§ 1872. Many men are capable of writing in several different hands; and, consequently, when the object they have in view is to relieve themselves from liability, nothing can be easier than to produce to the jury genuine documents, which have been written for the express purpose of proving that no similitude exists between them and the writing in dispute. The statute under consideration contains no check upon this.[3]

1855, P. C.; Cobbett *v.* Kilminster, 1865 (Martin, B.). "The Indian Evidence Act, 1872," contains a similar provision in § 73.

[1] This is a test which may often be successfully applied. At the Greenwich County Court a plaintiff, on one occasion, denied most positively his handwriting to a receipt worded:—"Received the Hole of the above." On being asked to write a sentence in which the word "whole" was introduced, he took evident pains to disguise his writing, but he adopted the above *phonetic* style of spelling, and also persisted in using the capital H. On being subsequently threatened with an indictment for perjury, he absconded.

[2] "The Handwriting of Junius professionally investigated by Mr. Charles Chabot, Expert," is the most instructive and scientific essay that has ever been published in English respecting the best methods to be adopted in comparing handwritings. It deserves most attentive study, and quite exhausts the subject. See Handw. of Jun. by Twistleton & Chabot, 4to., published by Murray, in 1871.

[3] Ld. Brougham's Bill of 1853 contained the following clause to avoid this evil:—"Where the handwriting of any person is sought to be *disproved* by comparison with other writings of his, not admissible in evidence for any other purpose in the cause, such writings, before they can be compared with the document in question, must, if sought to be used by the party in whose handwriting they are, be proved to have been written prior to any dispute respecting the genuineness of such document." See ante, § 1863, ad fin.

§ 1873. The cases decided, prior to the alteration in the law effected by the Acts passed in 1854, and 1865,[1] are conflicting,[2] as to whether the knowledge of a witness, who is called to prove handwriting, can be *tested* in cross-examination by the opposite party by the latter *first* showing him other documents, which are neither admissible as evidence in the cause, nor proved to be genuine, then asking him whether such documents were written by the same hand as the paper in dispute, and on the witness expressing his belief that all the documents are in the same handwriting, proving that those produced by the cross-examining counsel were *not* genuine, then putting them in evidence in order to enable the jury to appreciate the testimony given by the witness? The statute leaves this question untouched; but it is conceived that the admission of such evidence would best accord with the spirit of the new law.

§ 1874. When *documents* are of such *antiquity* that witnesses who have corresponded with the supposed writer, or who have seen him write, cannot be produced, the law will, from necessity, be satisfied with less strict proof than is required in other cases.[3] Such documents, when thirty years old, generally prove themselves;[4] but occasions may arise when, in order to establish identity, it will become necessary to prove the handwriting. For instance, if in a pedigree cause, or a peerage claim, a declaration, purporting to have been written by a deceased member of the family, be tendered in evidence, the handwriting must be proved in some legal mode, however ancient the paper may be,[5] and then the question will arise how this is to be done. Doubtless, under the Evidence and Practice in Criminal Cases Amendment Act, 1865,[6] the proof may be established by producing from the proper custody other documents admitted to be genuine, or proved to have been respected, treated, and acted upon as such by the parties interested in them, and by then permitting witnesses, whether

[1] See ante, § 1869.

[2] See, and compare, Hughes *v.* Rogers, 1841; Griffits *v.* Ivory, 1840; Young *v.* Honner, 1843.

[3] Doe *v.* Suckermore, 1836 (Coleridge, Williams, and Patteson, JJ.; and Ld. Denman).

[4] Ante, §§ 87, 88.

[5] Tracy Peer., 1839-43, H. L.; Fitzwalter Peer., 1843, H. L.; Morewood *v.* Wood, 1811; Taylor *v.* Cook, 1820.

[6] 28 & 29 V. c. 18, § 8, set out ante, § 1869.

experts or others, and the court and jury, to compare such documents directly with the pap in dispute.[1]

§ 1875. It is also clear from a decision of the House of Lords,[2] that, without the production of any documents for the purpose of instituting a direct comparison, the handwriting under investigation may be proved by any witness who has become acquainted with it in the *ordinary course of his business*. It having become necessary to show that a family pedigree, produced from the proper custody, and purporting to have been made some ninety years before by an ancestor of the claimant, was written by him, the family solicitor of the claimant was called to establish this fact. On his stating that he had acquired a knowledge of the ancestor's writing, from having had occasion at different times to examine, in the course of his business, many deeds and other instruments purporting to have been written or signed by him, the Lords considered this witness competent to prove the handwriting of the pedigree. These principles were also given effect to in another case,[3] which further shows that where the writing is eighty-five years old, it is not necessary that any witness should be called to speak to the death of the writer, or to show when he died, or that any search should have been made for persons who might have seen him write, or have been able to prove his signature in the ordinary way.

§ 1876. The question still remains, whether a witness in such cases as those just put, can be called to state that he has acquired knowledge of the handwriting in question, *not* from *course of business*, like a party's solicitor or steward, but from *studying* the signatures attached to documents, which are either admitted or proved to be genuine, but which are *not produced*, for *purpose* of speaking to the identity of the writer. The House of Lords[4] has,—in apparent opposition to several older authorities,[5]—

[1] This course was allowable to a great extent under the old law. See Davies *v.* Lowndes, 1843; Doe *v.* Tarver, 1829 (Abbott, C.J.); Anon., undated, cited id. (Lawrence, J.); Roe *v.* Rawlings, 1806 (Le Blanc, J.), on two occasions; Morewood *v.* Wood, 1811 (Hotham, B.); Taylor *v.* Cook; 1820 (Richards, C.B.).

[2] Fitzwalter Peer., 1843, H. L. See Crawford and Lindsay Peer., 1848, H. L.

[3] Doe *v.* Davies, 1847.

[4] In the Fitzwalter Peerage case, 1843, H. L.

[5] See Sparrow *v.* Farrant, 1819 (Holroyd, J.); Doe *v.* Lyne, 1822, (id.); Beer *v.* Ward, 1823, cited id.

decided that such testimony is inadmissible, and the modern legislation as to proof of handwriting,[1] does not seem to have interfered with this decision.

§ 1877. Independently of cases in which handwriting is sought to be proved by actual comparison, the testimony of skilled witnesses will occasionally be admissible for the purpose of throwing light upon a document which is in dispute. In the first place, if a writing be *ancient*, an expert may state his belief as to the probable *period* at which it was written, for the character of handwriting varies according to the progress of civilisation, and antiquarian knowledge, consequently, affords much assistance in arriving at a conclusion as to the value of a document.[2] In the second place, if a question arise whether a paper is written in a *feigned* or a natural hand,[3] the opinions of witnesses whose duty it has been to detect forgeries will probably be admissible in this country,[4] and certainly are so in America,[5] as such persons are more capable of pronouncing a safe opinion on this subject than ordinary men.[6] Still, as experts usually come with a bias on their minds to support the cause in which they are embarked, little weight will in general be attached to the evidence which they give,[7] unless it be obviously based on sensible reasoning.

§ 1878. In ordinary cases, when a witness is called to speak to handwriting, the document itself is produced in court. This course may, however, occasionally be highly inconvenient or even impossible. For instance, suppose it necessary to identify a person, who has either written a paper which is lost, or has signed a record or public register, the removal of which from its proper

(Dallas, C.J., and Ld. Tenterden); Anon., 1846 (Ld. Hardwicke); Doe *v.* Suckermore, 1836.

[1] Set out ante, § 1869.

[2] Doe *v.* Suckermore, 1836 (Coleridge, J.); Tracy Peer., 1839-43, H. L.

[3] Those interested in tracing a similarity between feigned and natural handwriting, will find in the 4th vol. of Ld. Chatham's Corresp. (at p. 37 of the fac-similes of autographs), a curious comparison of the upright writing of Junius with the running-hand of Sir Ph. Francis. See, also, ante, § 1871, n.

[4] R. *v.* Coleman, 1852 (Cresswell, J.).

[5] Hammond's case, 1822 (Am.), Moody *v.* Rowell, 1835 (Am.); Com. *v.* Carey, 1823 (Am.); Lyon *v.* Lyman, 1831 (Am.); Lodge *v.* Phipher, 1824 (Am.).

[6] R. *v.* Cater, 1802 (Hotham, B.); Goodtitle *v.* Braham, 1792; Doe *v.* Suckermore, 1836; Fitzwalter Peer., 1843, H. L. (Ld. Brougham).

[7] Tracy Peer., 1839-43, H. L. (Ld. Campbell); Gurney *v.* Langlands, 1822.

place of custody cannot be enforced. In such cases the witness may be allowed to prove such person's handwriting without producing the original document.[1]

§ 1879. To facilitate the reading of documents on trials in the County Courts, a Rule provides as follows:—"Where any documents, which would, if duly proved, be admissible in evidence, are produced to the court from proper custody, they shall be read without further proof, if, in the opinion of the judge, they appear genuine, and if no objection be taken thereto; and if the admission of any *document so produced* be objected to, the judge may adjourn the hearing for the *proof* of the documents, and the party objecting shall pay the costs caused by such objection, in case the documents shall afterwards be proved, unless the judge shall otherwise order."[2]

§ 1880.[3] The *admissibility* and *effect* of private writings, when offered in evidence, have been incidentally considered, under various heads, in the preceding pages, so far as they are established and governed by any rules of law.

[1] Sayer *v.* Glossop, 1848.
[2] C. C. R. Ord. XVIII. r. 8.
[3] Gr. Ev. § 583, in part.

AMERICAN NOTES.

Private Writings. — The *admissibility* and *effect* of written statements apparently are, in general, governed by the same rules that apply to statements which are oral.

In three points, chiefly, do private writings invite to distinct treatment. (1) The Manner of their Production; (2) The Proof of their Execution; (3) The Proof of their Contents.

Production of Private Documents. — The rules regulating such production vary, — according as the documents consist: — (1) Of papers in control of opponent; (2) Of papers in possession of third parties.

(1) *Papers in control of opponent.* — At common law, documents and papers in the possession of an adversary, however important to a party's case, were practically inaccessible to him.

He must content himself with notifying the other side to produce such documents at the trial. But a notification of this nature carried few consequences, in case of refusal. The party asking for production was merely at liberty to introduce secondary evidence.

It was further true that where a party, on notice, had declined to produce a certain document, and the notifying party had thereupon proved its contents, the party refusing production would not be allowed to produce the original. Doon *v.* Donaher, 113 Mass. 151 (1873).

It frequently happened that the above were comparatively valueless privileges, and that actual inspection of the original might be necessary adequately to support a claim or ground a defence.

Equitable Relief. — Relief from such a practical denial of production was first obtainable solely in equity by means of a bill for discovery. 2 Story Eq. Juris. § 689.

On such a bill it is not necessary to aver or prove that the discovery sought is absolutely necessary to the complainant's case. It is sufficient, if it is material. Howell *v.* Ashmore, 9 N. J. Eq. 82 (1852).

Statutory Relief. — Statutory relief for obtaining discovery has, however, in many and, indeed, most of the states been invoked in addition to the equitable methods of discovery. The methods provided in this way have, as a rule, proved in practice to be so much simpler and more direct, as to cause their substitution for the equitable remedies.

Statutory discovery has followed somewhat different lines, which cannot profitably be traced within the compass of a note though a substantial similarity is naturally observable.

The early statutes of New York, for example, conferred a similar power to order production, enforced by striking out the defendant's

answer and ordering judgment for the plaintiff. Gould *v.* McCarty, 11 N. Y. 575 (1854).

"An inspection of books and papers will be granted, if facts and circumstances are shown which warrant a presumption that the book or document sought contains evidence which will prove, or tend to prove, some fact which the party applying has to establish. (Rule XV of the Supreme Court; Davis agt. Dunham, 13 How., 425; Commercial Bank of Albany agt. Dunham, id., 341; Hoyt agt. American Exchange Bank, 1 Duer, 652; Jaekling agt. Edwards, 3 E. D. Smith, 539.) The applicant is not required to prove positively that the documentary evidence exists, as the right given is one of discovery; but he must show sufficient to satisfy the court that there is good reason to suppose that the opposite party has documentary evidence in his possession material to the matter in issue, and the presumption that he has, becomes a very strong one, if, with the means of knowledge in his power, he does not deny the fact." Lefferts *v.* Brampton, 24 How. Prac. 257 (1862). In certain states "a judge is authorized to make an order for an inspection, or copy, or permission to take a copy of any books, papers, and documents containing evidence relating to the merits of the action or the defense therein." Thompson *v.* Erie R. R., 9 Abb. (N. Y.) Prac. N. S. 230 (1870).

Of the practice under such an order the court say: "The rules which apply to applications of this kind are well settled. The party desirous of a discovery must show, to the satisfaction of the court, or officer, that the books or papers which he seeks to have produced contain evidence relating to the merits of the action. He must state the facts and circumstances upon which the discovery is claimed, and the statement of the facts must be sufficient to satisfy the court or officer that there is reason to believe that the books which the party seeks to obtain, do in fact contain material evidence (Davis *v.* Dunham, 13 How. Pr., 425; Hoyt *v.* American Exchange Bank, 1 Duer, 652; 8 How. Pr., 89). It is not enough that the party believes or is advised that the paper contains material evidence. Facts must be shown to support it (Morrison *v.* Sturges, 26 How. Pr., 177; see, also Husson *v.* Fox, 15 Abb. Pr., 464; People *v.* Rector, &c. of Trinity Church, 6 Id., 177). The moving papers should be such as to enable the court, to see that the documents relate to the merits, and that they will be presumptively material in preparing for trial, and if that appears, the oath of the party to that effect is not even necessary. As was said in Hoyt *v.* American Exchange Bank (1 Duer, 655), 'Enough must be stated to justify a presumption that the documents relating to a specified subject matter exist, are in possession or control of the other party, and that they will tend to establish some claim or defense of the party seeking for the discovery.'" Thompson *v.* Erie Railway Co., 9 Abb. Prac. 212, 225 (1870).

Under an early statute of the United States (Act of Sept. 24th, 1789, § 15; 1 Stat. at Large, 82) the courts of the United States were empowered to compel the production of books and papers at law. *Held*, that the court could enforce such an order by a nonsuit or default upon non-production of the paper. "Curtis, J. By the common law, a notice to produce a paper, merely enables the party to give parol evidence of its contents, if it be not produced. Its non-production has no other legal consequence. This act of Congress has attached to the non-production of a paper, ordered to be produced at the trial, the penalty of a nonsuit or default. This is the whole extent of the law. It does not enable parties to compel the production of papers before trial, but only at the trial, by making such a case, and obtaining such an order as the act contemplates. The applicant must show that the paper exists, and is in the control of the other party; that it is pertinent to the issue, and that the case is such that a court of equity would compel its discovery." Iasigi *v.* Brown, 1 Curtis C. Ct. 401 (1853).

But the plaintiff is to be nonsuited only after an order for the production, at least *nisi*, has been granted. Dunham *v.* Riley, 4 Wash. C. Ct. 126 (1821).

Such an order for production is enforced by process of contempt. Erie R. R. *v.* Heath, 8 Blatch. 413 (1871).

Judicial Relief. — At common law, relief of such a nature as has been conferred by statute was denied, — except in cases "where the instrument to be inspected or copied is the immediate foundation of the action; and in a few other cases, depending on peculiar circumstances." Bank of Utica *v.* Hillard, 6 Cowen, 62 (1826).

But a more extended power has been claimed in New Jersey. "At common law and independently of recent statutes, courts of law had the power to order inspection of papers which, by the pleadings or by being used in evidence, came within the control of the court. When any deed is showed in court, the deed, by judgment of law, doth remain in court all the term at which it is showed, for the whole term is as one day, and the party may demand oyer during the time it is so in court. Wymark's Case, 5 Rep. 74; Simpson *v.* Garside, 2 Lutwyche, 705. A new trial having been granted, the court allowed the plaintiff inspection of a deed read in evidence by the defendant at the first trial, but denied it as to another deed, the execution of which was admitted at the former trial, but which was not offered in evidence. Hewitt *v.* Pigott, 7 Bing. 400.

But the court, in exercising this control over papers and documents offered in evidence, will merely grant inspection and examination by the party and his witnesses, either in open court or before an officer of the court, or in the presence of the party producing them, or his attorney, and will not take them from the latter and deliver them into the possession of the other side. 2 Taylor on Ev.,

§ 1593; Thomas *v.* Dunn, 6 M. & G. 274." Hilyard *v.* Township of Harrison, 37 N. J. L. 170 (1874).

(2) *Papers in hands of third party.* — Where the document of which production is sought is in the possession of a person within the jurisdiction of the court, such person can usually be compelled to produce the same by means of a *subpœna duces tecum*. Lane *v.* Cole, 12 Barb. 680 (1852); Bull *v.* Loveland, 10 Pick. 9, 14 (1830).

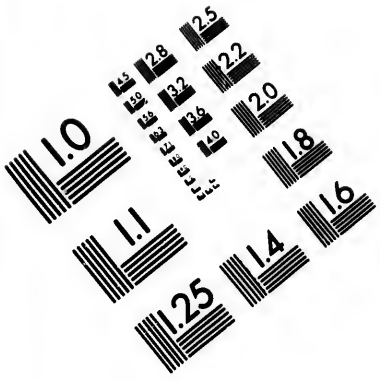
An unjustifiable failure to comply with the summons is a contempt of court. Lane *v.* Cole, 12 Barb. 680 (1852).

And, in addition, renders the perverse witness liable civilly for all damages which his conduct may cause. Lane *v.* Cole, 12 Barb. 680 (1852).

It is no excuse for failure to produce a document under a *subpœna duces tecum* that its production would injuriously affect the pecuniary interest of the witness. Bull *v.* Loveland, 10 Pick. 9 (1830); Hawkins *v.* Sumter, 4 Desaussure's, S. C. 446 (1814). "There seems to be no difference in principle, between compelling a witness to produce a document in his possession, under a *subpœna duces tecum*, in a case where the party calling the witness has a right to the use of such document, and compelling him to give testimony, when the facts lie in his own knowledge. It has been decided, though it was formerly doubted, that a *subpœna duces tecum* is a writ of compulsory obligation, which the court has power to issue, and which the witness is bound to obey, and which will be enforced by proper process to compel the production of the paper, when the witness has no lawful or reasonable excuse for withholding it. Amey *v.* Long, 9 East, 473; Corsen *v.* Dubois, 1 Holt's, N. P. R. 239. But of such lawful or reasonable excuse the court at nisi prius, and not the witness is to judge. And when the witness has the paper ready to produce, in obedience to the summons, but claims to retain it on the ground of legal or equitable interests of his own, it is a question to the discretion of the court, under the circumstances of the case, whether the witness ought to produce, or is entitled to withhold the paper." Bull *v.* Loveland, 10 Pick. 9 (1830).

A different view is adopted by the supreme court of Mississippi.

"By the writ of *subpœna duces tecum*, the witness is compelled to produce all documents in possession, unless he have a reasonable excuse to the contrary, of the validity of which excuse the court, and not the witness, is to judge. 3 Stark. on Ev. 1721. It seems that a witness is not compellable to produce title deeds, where the production would prejudice his civil rights. Ib. 1722. But it is the duty of the witness to obey the subpœna, and bring the document with him; and it is a question of law for the court whether, upon principles of justice and equity, the production of the instrument ought to be enforced." Chaplain *v.* Briscoe, 5 S. & M. 198, 208 (1845).



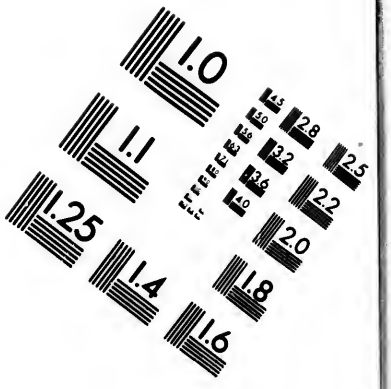
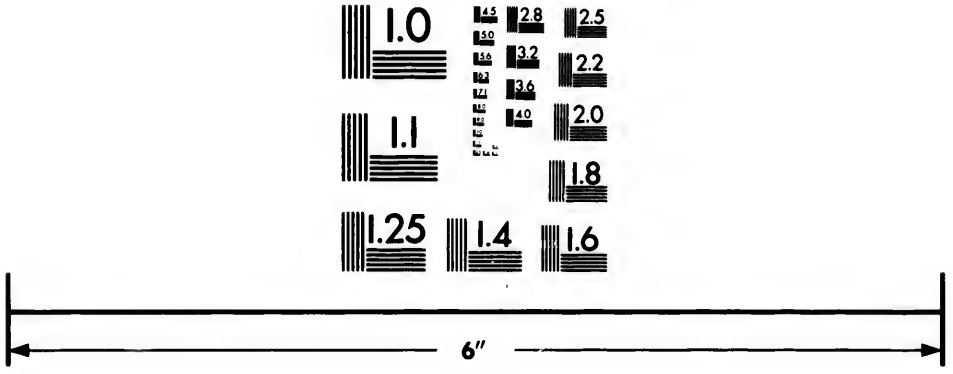
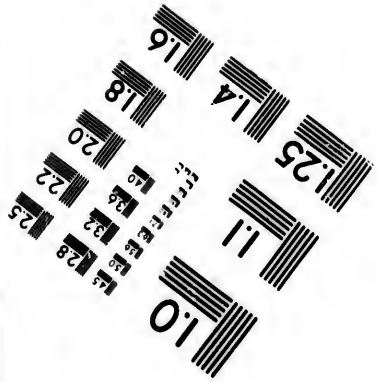
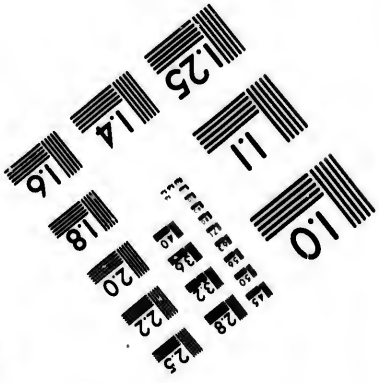


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

A witness is, however, excused from producing books or paper which may tend to convict him of a crime or misdemeanor. Byass *v.* Sullivan, 21 How. (N. Y.) Prac. 50 (1860).

And, in general, it may be said that the rule refusing to compel a witness to produce, under a *subpœna duces tecum*, documents tending to criminate himself is merely part of the general principle, stated *supra*, that writings and oral testimony stand on the same footing as regards admissibility, — and consequently are equally privileged in like cases. So papers intrusted to an attorney by his client are equally privileged with oral communications. Crosby *v.* Berger, 11 Paige's Chan. 377 (1844); Durkee *v.* Leland, 4 Vt. 612 (1832).

And this is true even where the papers do not come directly from the client himself, but are given to the attorney by a third person for the client. Jackson *v.* Burtis, 14 Johns. 391 (1817).

Or that the papers have been left with the attorney by a client in another case. Lynde *v.* Judd, 3 Day, 499 (1807).

So written communications to the state department, revealing the commission of offences against the laws, are equally within the rule allowing the custodian of such confidences to refuse to disclose them. Production of such documents cannot be compelled under a subpœna. Gray *v.* Pentland, 2 S. & R. 23 (1851).

Proof of Execution. — Proof of the execution of private documents presents points requiring especial mention only when the execution of the writing is certified by an attesting witness.

Where there is no attestation, proof is directed merely to establishing the fact that the signature, if any, is genuine. "A written instrument, not attested by a subscribing witness, is sufficiently proved to authorize its introduction, by competent proof that the signature of the person, whose name is undersigned, is genuine. The party producing it is not required to proceed further upon a mere suggestion of a false date, when there are no indications of falsity found upon the paper, and prove, that it was actually made on the day of the date. After proof that the signature is genuine, the law presumes, that the instrument in all its parts is genuine, also, when there are no indications to be found upon it to rebut such a presumption." Pullen *v.* Hutchinson, 25 Me. 249 (1845).

Where the defendant's alleged contract was in writing, and upon being asked to identify his signature he replied, "The signature resembles mine, I wish to have the contract identified before answering further," this reply, coupled with the absence of any later denial, was held to be enough. White *v.* Solomon, 164 Mass. 516 (1895).

If there is no signature, the fact to be established is that the document is in the handwriting of the person who is claimed to have written it.

EXECUTION OF ATTESTED WRITINGS. — The case of documents to which there is an attesting witness presents a striking and almost solitary example of what Bentham has felicitously denominated "pre-appointed evidence." 1 Bentham, Jud. Ev. 256; *Ibid.* 435; 2 Benth. Jud. Ev. 435. Bentham's idea is that when a party about to do a deliberate act calls particular persons to witness, in order that they might be able to bear testimony to it on future occasions, their evidence is *pre-appointed* or pre-constituted. In the intendment of law, originally correct and at all times explainable under the historical development of the rule, the parties, by using an attesting witness, have pre-arranged that he should be the custodian of all attendant facts bearing upon the execution of the instrument, and that when the same is offered in evidence by either as against the other, the legally appointed custodian of the facts attending the execution shall be called upon to state them.

The pre-appointed nature of such evidence was clearly recognized in the earlier practice of empanelling the attesting witnesses as part of the jury itself; — in days when juries decided upon personal knowledge rather than upon evidence — in the modern sense. "In the early periods of the English law, the names of the witnesses were always registered in the body of the deed. They were selected from the best men in the neighbourhood; and if the deed was denied, they formed a necessary part of the jury, who was to try its validity. This rule continued, until the statute 12 Edw. II. c. 2. allowed the inquest to be taken, without any of the witnesses being associated with the jury; but they were still to be summoned as usual. 'It is agreed,' says the statute, 'that when a deed, release, acquittance, or other writing, is denied in the king's court, wherein the witnesses be named, process shall be awarded to cause such witnesses to appear, as before hath been used.' The practice of joining the witnesses to the jury, continued throughout the reign of Edw. III. and Fortescue, (de Laud. Leg. Ang. c. 32.) mentions it as existing in the reign of Hen. VI. It gradually fell into disuse, and ceased about the time of Hen. VIII. and until that period, the process to bring in the witnesses, upon the denial of a deed, continued, of which numerous instances are collected from the Year Books, by Brooke. (Tit. Testmoignes.)

When, therefore, the ancient law required the witnesses to a deed to form part of the jury, and continued down to the time of Hen. VIII. to compel them to come in, by similar process as that awarded for the jury, (see Reg. Brev. Jud. 60. and Thesaurus Brevium, 88.) it cannot be supposed that the notion of proving a deed, by the confession of the party, *in pais*, was ever thought of or admitted." Fox *v.* Reil, 3 Johns. 477 (1808).

Therefore, "the general rule is well settled, that when there is a subscribing witness, that witness must first be called to prove

the execution." Kinney *v.* Flynn, 2 R. I. 319 (1852); Pearl *v.* Allen, 1 Tyler (Vt.), 4 (1800); Fletcher *v.* Perry, (Ga.) 23 S. E. 824 (1895). The rule applies to all attested instruments.

A written contract is equally within the rule as a deed would be, Davis *v.* Alston, 61 Ga. 225 (1878).

So of a promissory note, Quimby *v.* Buzzell, 16 Me. 470 (1840).

But a relaxation of the rule to the extent of admitting confessions of the maker in case of a promissory note, as equivalent to proof by a subscribing witness, has been admitted in the supreme court of New York, Hall *v.* Phelps, 2 Johns. 451 (1807).

But the same court shortly afterward, refused to extend the same relaxation to specialties, *e. g.* a bond, and the stricter rule is the better law. Fox *v.* Reil, 3 Johns. 477 (1808).

As to who is, properly speaking, a subscribing witness, an early New York case holds as follows: "A subscribing witness is one who was present when the instrument was executed, and who at that time subscribed his name to it as a witness of the execution. (Henry *v.* Bishop, 2 Wend. 575.) The witness need not be present at the moment of execution. If he is called in by the parties immediately afterwards, and told that it is their deed or agreement, and requested to subscribe his name as a witness, that will be enough. The execution by the parties, and the subscribing by the witness, are then considered as parts of the same transaction. (Parke *v.* Mears, 3 Esp. R. 171, 2 Bos. & Pull. 217, S. C.; Powell *v.* Blackett, 1 Esp. R. 97; Lesher *v.* Levan, 2 Dall. 96; Grellier *v.* Neale, Peake's Cas. 146; Munns *v.* Dupont, 3 Wash. C. C. Rep. 31, 42; and see *per* Lawrence and Chambre, Js., in Wright *v.* Wakefield, 4 Taunt. 220.) But although the witness was present at the execution, if he did not subscribe the instrument at that time, but did it afterwards without the request of the parties, he is not a good attesting witness. He may prove the instrument if there was no attesting witness, because he saw it executed, and there is no better evidence of the execution. But if there was a subscribing witness at the time, he must be called. (Henry *v.* Bishop, 2 Wend. 575; McCraw *v.* Gentry, 3 Camp. 232.) These distinctions may be enforced by considering the reasons for requiring the subscribing witness, to the exclusion of all other modes of proving the instrument. He must be called, if within the reach of process, because he may be able to state the time of the execution, and other material facts attending the transaction, which may not be within the knowledge of any other witness; and for the further reason, that he is the person selected and agreed on by the parties as the witness of their act in making the instrument, with the attending circumstances." Hollenback *v.* Fleming, 6 Hill, 303 (1844); Homer *v.* Wallis, 11 Mass. 309 (1814).

Where the signatures of individuals, without more, are appended

to a writing in the place where attesting witnesses usually sign, and the names of such witnesses are not mentioned in the body of the instrument as grantors or grantees, or otherwise, "they most fairly may be deemed to be witnesses to the instrument." Chaplain *v.* Briscoe, 11 S. & M. 372 (1848).

The rule under consideration applies equally where the attesting witness signs by a mark. Kinney *v.* Flynn, 2 R. I. 319 (1852). "The plaintiff claims that this is no attestation in law, the witness having merely made her mark without writing her name and claims that such attestation is a mere nullity. It is no objection to the attestation of a will that the witness made her mark. It still appears that she was a witness of the execution — the witness upon whom the parties rely for proof of the fact. The only difficulty in such cases is that where the witness cannot be produced, one usual mode of secondary proof cannot be had, viz.: the hand-writing of the witness. But it in no way affects the testimony of the attesting witness himself. It is still as important to the parties to have his knowledge of what took place at the time. It neither affects his competency or his means of knowledge." Kinney *v.* Flynn, 2 R. I. 319 (1852).

On the contrary, it has been held in Georgia, where a witness had attested an instrument by his mark, and his attendance could not be produced, that the mark could be disregarded and proof directed to authenticating the signature of the party himself. "In the case under consideration, there was no handwriting. The name of the witness is written by another, and he makes a cross mark. In this, there is nothing distinctive to fix its identity. Who can know it? Upon this point then, we think the Court was right in treating such a signature as a nullity, and allowing the handwriting of the party to be proved. His admission that he executed the paper, would have answered the same purpose." Watts *v.* Kilburn, 7 Ga. 356 (1849).

For the operation of the rule requiring the calling of an attesting witness, the attested writing must be one on which the suit is brought, or on which one of the parties relies. "It is undoubtedly a general rule of law, that instruments in writing, introduced by a party, purporting to be witnessed by a subscribing witness, are not allowed to go in evidence, till the execution of them has been proved by such witness, if to be found within the jurisdiction of the Court. But it is believed that this rule does not extend so far as to require every such instrument, which may incidentally and collaterally be introduced, to be so proved. If it be the foundation of a party's claim, or if he be privy to it, or if it purport to be executed by his adversary, there may be good reason for holding him to strict proof of its execution. But if it be wholly *inter alios*, under whom neither party can claim to deduce any right, title, or interest, to

himself, it would be carrying the rule to a more rigorous and inconvenient extent, than the reason and spirit of it would seem to warrant. In this instance, the writing was produced by the witness, at the suggestion of the defendant, as corroborative of his testimony, or to enable the adverse party to determine whether it was in conformity to the evidence contained in the writing. The introduction of it was merely collateral and incidental, and cannot therefore be considered as within the reason of the rule requiring proof of its execution by the subscribing witness." Ayers *v.* Hewett, 19 Me. 281 (1841).

Accordingly, on an indictment for obtaining goods by false pretences, the alleged false pretence was with reference to the transfer of a mortgage alleged to be fraudulent. The mortgage purported to have been executed in the presence of two witnesses; but was admitted when offered by the government, without calling the attesting witnesses. Held, — No error; "this being a criminal case, and the action not being founded upon that instrument." Territory *v.* Ely, 6 Dak. 128 (1889).

So where ownership of personal property is shown by evidence of a promissory note given in part payment for it, the execution of the note need not be proved by the evidence of an attesting witness. "The plaintiff's alleged purchase and acquisition of title from Mrs. Russell rested in parol. The note he executed to her was not a muniment of his title, but was a mere circumstance of the purchase, showing in connection with the other evidence, the consideration of the purchase, and how it was evidenced or paid. The note was incidental merely to the main issue, and it was not necessary to call the subscribing witness to prove its execution." Steiner *v.* Tranum, 98 Ala. 315 (1892).

So on a petition to cancel a deed on the ground of forgery, it is proper for the plaintiff to introduce the deed, though an ancient one, without calling or accounting for the alleged subscribing witnesses. It is regarded not as an effort to prove a deed, but to disprove one. Goza *v.* Browning, 96 Ga. 421 (1895). "It would be hard, indeed, to require him to resort to witnesses, who, he protests, have no existence; who are either men of straw, or if real persons whose names, as witnesses, have been fabricated." Jordan *v.* Faircloth, 14 Ga. 544 (1854).

So where an attempt is made to use a mortgage as evidence of an indebtedness merely, its execution need not be proved by an attesting witness. Burnham *v.* Ayer, 36 N. H. 182 (1858).

The fact to be proved is the attestation.

Therefore all that is needed is that the attesting witness should identify his signature, and, in certain cases, hereinafter mentioned, where the evidence of the attesting witness cannot be procured, the genuineness of his signature must, if possible, be proved, before other

evidence is admissible. Smith *v.* Asbell, 2 Strobh, 141 (1846); Groover *v.* Coffee, 19 Fla. 61 (1882); Walton *v.* Coulson, 1 McLean, 120 (1831).

"If it appear that the testimony of the subscribing witness cannot be had, the next best evidence, is proof of his hand-writing." Cooke *v.* Woodrow, 5 Cranch, 13 (1809). It has been suggested in an early Massachusetts case that if an attesting witness is not needed to the validity of the instrument, *e. g.* a promissory note, the handwriting of the maker, rather than that of the attesting witness, should be proved. Homer *v.* Wallis, 11 Mass. 309 (1814).

The reasonableness of the rule requiring that the signature of the attesting witness, rather than that of the maker, &c., be first proved in case the attesting witness cannot be procured, has not been universally recognized, even by courts who feel obliged to enforce the rule itself. "Proof of the handwriting of a witness is not, in reason, as satisfactory proof of the genuineness of an instrument as proof of the signature of the obligor; but by a long established rule of law the former is the higher and better proof, and must be produced." Walton *v.* Coulson, 1 McLean, 120 (1831).

In Maine and Massachusetts it has been held that where the testimony of no subscribing witness can be obtained, that the handwriting of the obligor, maker, etc. can then be proved instead of proving the signature of the witnesses. Woodman *v.* Segar, 25 Me. 90 (1845); Valentine *v.* Piper, 22 Pick. 85 (1839). The same course was apparently pursued in Sloan *v.* Thompson, 4 Tex. Civ. App. 419 (1893).

An excellent statement of the reasons upon which the ancient rule requiring proof of the signature of the attesting witness, rather than of the obligor, grantor, etc., and the modern reasons urging a change in the order of proof, is given by the supreme court of Georgia, in reversing the old rule.

"The law requires always the highest and best evidence to be produced, of the truth of a fact sought to be established. These subscribing witnesses being those selected by the parties as the repositories of all the incidents connected with the execution of paper, were therefore the ones required to be called upon to bear witness to the actual signing and sealing by the maker. Their testimony was and is the highest and best evidence capable of being procured, to the establishment of that fact. Their minds were presumed to have been addressed particularly to that subject, by those who were most interested in preserving a memorial of what transpired. Therefore it became the established rule to these witnesses. Inasmuch as few of them were themselves able to write, they were not required to sign in person their own names upon the deed, but in earlier times they were indorsed there by the clerk or scrivener who drafted the deed, he himself acting in the capacity of a species of superior subscribing witness; and inasmuch as usually the grantor himself was

incapable of signing his name, in case of the death or inaccessibility of all of these witnesses especially selected to attest the execution of the instrument, the next highest and best evidence would be proof of the handwriting of the subscribing witnesses. These were the conditions at the time we get the first glimpse of the existence of the rule which authorizes the proof of the execution of an instrument by the maker, by evidence of the handwriting of the subscribing witnesses; and they afford a good reason for the adoption of the rule in question. It arose from the necessity of the case. The dense and almost universal ignorance of letters which prevailed in England, made the adoption of any other impracticable. In the classification of secondary evidence, this was the highest attainable of the execution of the instrument, and hence it was demanded in obedience to that rule of evidence which requires the highest and best evidence of the fact always to be produced. As we have seen, the maker himself being unable, except in rare cases, to write, there was a good reason for the adoption of a general rule of evidence authorizing the admission in evidence of a deed by proof, they being inaccessible, of the handwriting of the witnesses. If this be the correct reason for the existence of the rule, and we know of no other or better that has been assigned, there is little reason why in this day and generation it should be continued. In the onward march of civilization and of letters, man has advanced to a point where there are relatively but few who cannot now subscribe their names. The execution of a deed otherwise than by the maker subscribing his name, is the exception; formerly, it was otherwise. Under our system, a deed is a good conveyance, though it be not executed under seal, and there being no subscribing witnesses to attest its execution. The signature of the maker alone is sufficient to give it legal force as a conveyance. Therefore, whenever an issue is made upon the execution of a deed, the primary inquiry is, was it signed by the alleged maker? If it was, it is a good deed, whether its execution be attested by subscribing witnesses or not, and whether the signatures of the alleged subscribing witnesses are genuine or not. The real question then upon the execution of a deed being as to the actual signing, the primary inquiry should be as to the fact." McVicker *v.* Conkle, 96 Ga. 584, 590 (1895).

Sufficiency of Admissions. — Not even an admission by the opposite party of execution of an attested writing is sufficient to dispense with proof by the attesting witness. "So stringent and universal is the rule that even the express admission of the party, or his answer under oath in chancery, cannot be given in evidence, until it is first shown that the witness cannot be had. The reason assigned is that the subscribing witness is the witness agreed upon by the parties, they mutually refer to him for proof of the execution, and the parties each have a right to his testimony as to all the cir-

cumstances attending the transaction, many of which may not be in the recollection of the parties, or not proveable in any other way, and the defendant has the right to cross-examine him. This is alone the primary evidence, all other being by the rules of law secondary in its nature; and for that reason neither the admission of the party nor his answer in chancery can be admitted as primary proof." Kinney *v.* Flynn, 2 R. I. 319 (1852); Gaines *v.* Scott, 7 Ohio C. Ct. 447 (1892).

The admission of the obligor of an attested bond does not dispense with the necessity of calling the subscribing witness. Fox *v.* Reil, 3 Johns. 477 (1808).

"Proof of the confession or acknowledgment of the party that he executed the instrument, will not be received as a substitute for the testimony of the subscribing witness. (Fox *v.* Reil, 3 Johns. 477; Abbot *v.* Plumbe, Doug. 216; Cunliffe *v.* Sefton, 2 East, 183; Laing *v.* Raine, 2 Bos. & Pull. 85; Jones *v.* Brewer, 4 Taunt. 46.) Lord Kenyon refused to receive the acknowledgment of the person who executed the deed, though made in his presence, in court, and on the trial where the deed was to be used. (Johnson *v.* Mason, 1 Esp. R. 89.) The execution of the deed cannot be proved by one of the parties to it. The subscribing witness must be called. (Rex *v.* Inhab. of Harringworth, 4 Maule & Sel. 350; Willoughby *v.* Carleton, 9 Johns. 136.) And he must be produced, although the defendant has admitted the execution of the instrument in his answer to a bill of discovery. (Call *v.* Dunning, 4 East, 53.) I have never supposed that the decision in Jackson *v.* Phillips, (9 Cowen, 94,) so far as relates to the proof of the lease between Yost and Barnes, could be supported upon principle; nor am I able to reconcile it with the subsequent decision in Henry *v.* Bishop, (2 Wend. 575). Hollenback *v.* Fleming, 6 Hill, 303 (1844).

"The rule that the execution of an instrument must be proved by the subscribing witness, if there be one, living, competent to testify, and within the jurisdiction of the court, is inflexible. . . . The oath of the grantor, obligor, or mortgagor, cannot be substituted." Story *v.* Lovett, 1 E. D. Smith, 153 (1851).

It has been intimated that while an ordinary admission *in pais* will not dispense with proof by a subscribing witness, an admission made "solemnly *in judicio*" will have that effect. Coleman *v.* State, 79 Ala. 49 (1885); Pearl *v.* Allen, 1 Tyler (Vt.), 4 (1800); Hargrove *v.* Adcock, 111 N. C. 166 (1892). And in Pennsylvania it has been held competent for the court to make a rule allowing a written instrument on which suit is brought to be admitted in evidence without proof of execution, when the execution has not been denied, or notice given that such proof would be required. Medary *v.* Cathers, 161 Pa. St. 87 (1894).

But on the contrary, it has been held in the supreme court of

Georgia "that an acknowledgment by the obligor himself, that he executed the deed, or even the admission by the defendant in an answer to a bill filed against him for a discovery, will not dispense with the testimony of the subscribing witnesses; and the reason assigned is, that a fact may be known to the subscribing witness, not within the knowledge or recollection of the party himself, and that he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction. And the rule is precisely the same, whether the acknowledgment is offered as evidence against the party himself who made it, or against a third person; or whether it is the foundation of the action, or comes in question collaterally as a part of the evidence in the case. 1 Dougl. 216. 2 East. 187. 4 Ibid, 53. 5 T. R. 366. 7 Ib. 267. 4 Esp. N. P. C. 30." Ellis *v.* Smith, 10 Ga. 253, 261 (1851).

The "rule is old and inflexible, and it is that the attesting witness must be called. It is urged, on the other hand, that the party admitted on the stand, that the paper was the contract, but even if admitted in a sworn answer to a bill in equity, it has been held not to dispense with the call of the attesting witness." Davis *v.* Alston, 61 Ga. 225 (1878), citing Ellis *v.* Smith, 10 Ga. 253 (1851).

So the attorney of a lessor who executed a lease in his name cannot prove its execution where there is an attesting witness. "If the instrument was necessary to the plaintiff's case, before he could read it, or use it for any purpose, he must prove its execution. . . . His (the attorney's) handwriting was secondary evidence only, and could not be proved until the plaintiff had proved that the testimony of the attesting witness could not be obtained. The attorney therefore stood in the same position as any other person, not a subscribing witness, who might have have happened to be present, at the execution of the instrument." Barry *v.* Ryan, 4 Gray, 523 (1855).

The rule requiring proof of the execution of an attested document by calling the attesting witness, is not altered by the enactment of a statute making parties competent as witnesses. "The rule that the execution of an instrument which is offered in evidence by one who is a party to it cannot be proved without calling the attesting witnesses, where they are living, competent and within reach of the process of the court, is a fundamental rule of evidence in this commonwealth, long ago established, and strictly adhered to. Whitaker *v.* Salisbury, 15 Pick. 534. Homer *v.* Wallis, 11 Mass. 309.

In The King *v.* Harringworth, 4 M. & S. 354, Lord Ellenborough said that this rule 'is as fixed, formal and universal as any that can be stated in a court of justice.' In Abbot *v.* Plumbe, 1 Doug. 216, Lord Mansfield said that it is a rule which 'cannot be dispensed with.' In Barnes *v.* Trompowsky, 7 T. R. 265, Lord Kenyon said:

'We ought not to suffer this point to be called in question; it is too clear for discussion.'" Brigham *v.* Palmer, 3 All. 450 (1862).

Number of Witnesses required. — Where there are more than one attesting witness, the evidence of one is usually sufficient. "The testimony of one of the subscribing witnesses to the mortgage of S. H. Melcher, that he subscribed it as a witness, and saw said Melcher sign, and that the other witness was present and also subscribed it, is sufficient proof of the execution, inasmuch as it proves the signing by Melcher, and that it was witnessed by two witnesses." Melcher *v.* Flanders, 40 N. H. 139, 157 (1860).

"Proof of a deed by one witness is sufficient; and proof of the handwriting of one witness, both being dead, is also sufficient. This is settled." Burnett *v.* Thompson, 13 Ired. 379 (1852).

Though more than one attesting witness were present in court during the trial, the court in a Massachusetts case say: "Ordinarily, it is quite sufficient to call one of several subscribing witnesses to a deed, to prove its execution sufficiently to authorize the reading of it to the jury." White *v.* Wood, 8 Cush. 413 (1851).

Where there were two attesting witnesses, of whom one was dead, upon proof of the latter's signature, it was held that comparatively slight evidence of search would suffice to authorize the deed, which was 44 years old, to be read to the jury. Jackson *v.* Burton, 11 Johns. 64 (1814).

Where there are more than one attesting witness, as a rule, proof by one will be considered sufficient. "It purported to be attested by two subscribing witnesses, and its execution should have been proved by at least one of these witnesses, or else the witnesses should all have been shown to be dead, insane, out of the jurisdiction of the court, or that they could not be found after diligent inquiry; or the case should otherwise have been brought within some established exception to the rule, in either of which contingencies the instrument could be proved by other evidence." Coleman *v.* State, 79 Ala. 49 (1885).

Not Conclusive. — The rule requiring production of an attesting witness is satisfied when the attesting witness is produced.

No rule of law requires that he should be believed when produced. "It would be contrary to justice, that the treachery of a witness should exclude a party from establishing the truth by the aid of other testimony." 1 Stark. Evi. 147.

The party producing him may supplement his evidence. "The party who would establish a deed, must lay his groundwork by the production of the subscribing witnesses, if their testimony can be obtained. If they fail to establish the execution of it, the party who thus calls them, by a positive rule of law, is not to be concluded by their testimony; but will be permitted to establish the fact by other evidence." Whitaker *v.* Salisbury, 15 Pick. 534 (1834); Quimby *v.* Buzzell, 16 Me. 470 (1840).

"The witness could not say that the signature was or was not his handwriting. Other evidence was rightfully introduced. . . . The want of recollection of the witness was not sufficient to prevent the legal effect of other testimony going to establish that point." Quimby *v.* Buzzell, 16 Me. 470 (1840).

"If the subscribing witness to an instrument denies or forgets his attestation, circumstances may be resorted to for proof of its execution." Reinhart *v.* Miller, 22 Ga. 402 (1857).

Neither is the opposing party concluded by the statements of the attesting witness tending to prove the execution of the writing.

And where the attesting witness is without the state, and his presence is excused, other evidence of execution being relied on, the opposing party is at liberty to prove by examination of the attesting witness, under a commission, facts tending to deny the execution. Smith *v.* Asbell, 2 Strobh. 141 (1846).

A party may even contradict the evidence of the attesting witness. So where an attesting witness denied his signature, the party calling him was allowed to prove his signature. "The witnesses who were objected to, in this case, and admitted by the court, were called to prove a fact that was important in the cause, and although the first witness had proved that fact contrary to the expectation of the plaintiff, that circumstance could not prevent him from proving how the fact really was, by other witnesses; and if the feelings, or character of the first witness were in any way affected, it was the unavoidable consequence of the exercise of a legal right by the plaintiff." Duckwall *v.* Weaver, 2 Ohio, 13 (1825); Reinhart *v.* Miller, 22 Ga. 402 (1857).

But a party calling an attesting witness cannot, it seems, impeach his general character for truth. Whitaker *v.* Salisbury, 15 Pick. 534 (1834); Duckwall *v.* Weaver, 2 Ohio, 13 (1825).

Except in case of wills, the early learning as to the incapacity of subscribing witnesses to testify on account of interest in the result is largely obsolete.

The early decisions are to the effect that such a witness cannot testify. McKinley *v.* Irvine, 13 Ala. 681, 706 (1848); Packard *v.* Dunsmore, 11 Cush. 282 (1853); Keefer *v.* Zimmerman, 22 Md. 274 (1864).

In such cases the handwriting of the obligor, &c. should be proved. Packard *v.* Dunsmore, 11 Cush. 282 (1853).

Or that of the subscribing witness. Keefer *v.* Zimmerman, 22 Md. 274 (1864).

Exceptions. Unavailable Witness. — When a witness cannot be produced, after reasonable diligence, his testimony is dispensed with. The supreme court of Rhode Island say: "The rule, however, has its exceptions, all founded upon the inability of the party, without any fault of his, to produce the witness upon the

stand, as if the witness be dead or may be so presumed, or after diligent search or inquiry cannot be found, or is beyond sea or otherwise out of the jurisdiction of the Court, or has become incompetent as a witness from insanity, interest or otherwise. In all these cases the party is permitted from his inability to produce the witness, to offer secondary proof." Kinney *v.* Flynn, 2 R. I. 319 (1852). "The general rule on this subject is, that if there be an attesting witness to an instrument, his evidence is the best, and must be adduced, if in the power of the party. But if the witness be dead, or blind, or insane, or infamous, or interested since the execution of the paper, or beyond the process or jurisdiction of the Court, or not to be found, after diligent search and inquiry, the course is, to prove his handwriting. Distinguished Jurists have thought, that proof of the handwriting of the party executing the instrument, is better evidence of the execution, than proof of the handwriting of the attesting witness. 3 Binn. 192; 2 Johns. 451; 11 Mass. 309. Hitherto, however, a technical and artificial rule has prevailed over right reason, in relation to this subject." Watts *v.* Kilburn, 7 Ga. 354 (1849).

The fact that an attesting witness is without the state is sufficient to admit other evidence of execution, *e. g.* proof of the signature of the subscribing witness. Homer *v.* Wallis, 11 Mass. 308 (1814); Dunbar *v.* Marden, 13 N. H. 311 (1842); Emery *v.* Twombly, 17 Me. 65 (1840); Teall *v.* Van Wyck, 10 Barb. 376 (1851); Foote *v.* Cobb, 18 Ala. 585 (1851); Lapowski *v.* Taylor, (Tex. Civ. App.) 35 S. W. 934 (1896).

"It is conceived that the reason which lies at the foundation of the well established rule of evidence, which admits of the introduction of evidence of the handwriting of the subscribing witness, and of the subscriber, in proof of the execution of an instrument, where there is a subscribing witness who is in a foreign country, applies with equal force in the case of the absence of the witness in another of the states of this Union. That reason is, that the process of the court cannot reach the witness effectively, in a foreign government or country, and, consequently, it is not in the power of the party, legally speaking, to produce him. And the process of a court of this state is no more operative upon a witness, being or sojourning in the state of Maine, to compel his attendance as a witness, than if the witness were a resident in Canada, or in China.

And he can no more be produced, or be had at court, within the sense of the rule of law dispensing with his production, and admitting other evidence when the witness cannot be produced, in the one case than in the other. And it is believed to be the well-established general rule of law on this subject, that proof of the handwriting of the witness may be given, in all cases, when from physical or legal causes it is not in the power of the party to produce the witness at the trial." Dunbar *v.* Marden, 13 N. H. 311 (1842).

Where one of two attesting witnesses is dead, and diligent search has been made for the other without avail, a document is admissible upon proof of the signature of the party. Sloan *v.* Thompson, 4 Tex. Civ. App. 419 (1893).

Where it is claimed that an attesting witness cannot be found, before proof of his signature is admissible, proof, satisfactory to the court, must be given that reasonable diligence has been employed to procure his attendance.

As to what search will be considered sufficient to dispense with the evidence of the attesting witness, each case stands practically upon its own merits. Good faith is apparently the test.

In an early Canadian case, where possibly the mind of the court was deflected, unconsciously, by the hardship of the particular case, a rule of considerable strictness was laid down. The attesting witnesses were J. W. Deane and Mary L. Deane.

"The result of this motion depends upon the question, whether such efforts were shewn to have been made for procuring a satisfactory account of the subscribing witnesses, as entitled the plaintiff to have the deed from Duncombe to the plaintiff read, upon proof given of Duncombe's handwriting. The law is not unreasonably rigid in this respect, but we are all of opinion that it clearly requires more to be done than was done in this case. The case cited from the Law Journal is very much in point. It really cannot be said here that the parties made any serious effort to find out even who the witnesses were. Inquiring in London of such persons acquainted with the township of Burford, as they might happen to meet there, is not sufficient. Search should have been made in the neighborhood in which this family of Deane resided, since the plaintiff supposed it to be the one to which these subscribing witnesses belonged. And upon that point whether the subscribing witnesses were of that family or not, which was the first step in the inquiry, no pains seem to have been taken. The plaintiff, or some agent of his, should have gone to the former place of residence of those Deanes, and ascertained whether J. W. Deane and Mary L. Deane, were of that family. It is only necessary to look at the signatures to see that they are persons who might be easily traced, if they had been living in Norwich. The signature of J. W. Deane is a very peculiar one. Then if it could not be learned with certainty whether the witnesses were of that family, or where they had gone to, the obvious step remained of going to the last or present place of residence of one or both of the parties to the deed, and making inquiry there. That was considered necessary in the case of Cunliffe et al. *v.* Sefton, and there is no reason to doubt that if the attorney had done so, he could not have been uncertain who the witnesses were, and what had become of them. All that he has shewn is that some persons of the same surname once lived some-

where in that part of the country, and have now gone out of it. If the plaintiff, or his guardian, had become possessed of a promissory note against J. W. Deane, for a sum of money, he would have made a very different kind of inquiry after him, before he gave up the debt as lost. There may be no doubt whatever, that the deed in question was really executed by Duncombe, in the presence of persons who have attested it by their signatures, and the objection here may seem a mere formal impediment in the administration of justice, but the defendant is entitled to have the subscribing witnesses produced, if they are not shewn to have been inaccessible, for he may desire to inquire of them about the circumstances attending the execution of the deed, and it is important that the rules of evidence should be fixed and adhered to." Tylden *v.* Bullen, 3 Q. B. U. C. 10 (1860).

It is not considered to affect the rule that the residence of the subscribing witness in the foreign state or country is known. Homer *v.* Wallis, 11 Mass. 308 (1814); Dunbar *v.* Marden, 13 N. H. 311 (1842).

Or that the subscribing witness resides in an adjoining state within thirty miles of the place of trial and frequently comes into the state of the forum. Emery *v.* Twombley, 17 Me. 65 (1840).

But where an attesting witness had left the District of Columbia "upwards of a year ago" and gone to Norfolk, Virginia, a refusal of the court below to allow evidence to be given of the handwriting in the absence of evidence of inquiry at Norfolk was sustained. "If such inquiry has been made, and he could not be found, evidence of his handwriting might have been permitted." Cooke *v.* Woodrow, 5 Cranch, 13 (1809).

The fact that an attesting witness, in the opinion of the court, persistently evades process excuses the party from producing him.

Where such a witness, desirous of preventing a recovery by the plaintiff, refused to attend or to depose, and evaded attachments by removing from the county, though not from the state, proof of his handwriting was permitted. "The witness attempts to avail himself of the practice of the court to prevent a recovery; and it would indeed be an odium upon the law if such artifices could be effected. If a witness, when searched for, cannot be found, his handwriting shall be proved; here the witness continues to be as much absent as if he could not be found, and the reason for admitting his testimony in the case now before us is as strong as if he could not be found. Let proof be given of his handwriting." Baker *v.* Blount, 2 Hayw. 404 (1806).

Number of Witnesses required. — Where all attesting witnesses are accounted for, and their production excused, the general rule is that only the signature of one need be proved. But where the absence of only certain of the attesting witnesses is accounted

for, no secondary evidence is admissible. "We assume, therefore, that the case was one properly requiring the admission of secondary evidence. Such being the case, the only further inquiry is, what amount of secondary evidence is required? Is it proof of the handwriting of all the subscribing witnesses, if there be more than one? If the witnesses were within the commonwealth, proof of the execution by one of them would entitle the party to read his deed to the jury, and the like rule applies as to the handwriting where both are shown to be out of the jurisdiction of the court. In ordinary cases, where the mere formal execution is the subject of inquiry, it is quite sufficient to produce one of several subscribing witnesses; and if the secondary evidence is admissible, it is sufficient to prove the handwriting of one of the attesting witnesses, it being always necessary, if there be more than one attesting witness, that the absence of them all should be satisfactorily accounted for, in order to let in the secondary evidence. 1 Greenl. Ev. §§ 574, 575; Cunliffe *v.* Sefton, 2 East, 183; Adam *v.* Kerr, 1 Bos. & Pul. 360; Jackson *v.* Burton, 11 Johns. 64; Dudley *v.* Sumner, 5 Mass. 438.

We perceive no reason, assuming that a proper case for any secondary evidence was shown, why the proof of the handwriting of one witness to the deed was not quite sufficient to authorize reading the deed to the jury." Gelott *v.* Goodspeed, 8 Cush. 411 (1851).

Where no circumstances of suspicion exist, it will not, as a rule, be necessary to prove the signature of more than one attesting witness if all are unavailable. "Where any circumstances of suspicion appear upon the face of an instrument, or arise from the evidence, and they remain unexplained, proof of the handwriting of all the witnesses and also some proof of the signature of the obligor might be necessary. But in ordinary cases proof of the signature of one of the subscribing witnesses, the other being dead or absent, would be deemed sufficient." Walton *v.* Coulson, 1 McLean, 120 (1831).

Where both attesting witnesses are dead, it is sufficient to prove the handwriting of one. Burnett *v.* Thompson, 13 Ired. 379 (1852). So where one is dead and one had removed out of the state. Kelly *v.* Dunlap, 3 Penrose & Watts (Pa.) Reports, 136 (1831).

"Before the testimony of the subscribing witnesses to an instrument can be dispensed with, it must appear, that they are both out of the jurisdiction of the Court; Prince *v.* Blackburn, 2 East, 250; Homer *v.* Wallis, 11 Mass. R. 309; Sluby *v.* Champlin, 4 Johns. R. 461; are incompetent; or that search has been made for them without success. Cantiffe *v.* Septor, 2 East, 183. And the same degree of diligence in the search is required as in the search for a lost paper. 1 Greenl. Ev. § 575." Woodman *v.* Segar, 25 Me. 90 (1845).

But where one of two subscribing witnesses failed to identify the instrument, and the other was neither called nor his absence

explained, it was held that the execution was insufficiently proved. The supreme court of Connecticut say: "There is, however, another subscribing witness, who has not been called, and whose absence is not accounted for. If the plaintiffs cannot prove the execution of the deed, by one of the subscribing witnesses, they are bound to call the other, or show why that other cannot be produced. Had they shown that this witness was dead, or in a situation where her testimony could not be had, then they might well say, we have produced all the evidence in our power. One witness, from want of recollection, is unable to identify the deed; the testimony of the other cannot be obtained; and the deed is lost, so that we cannot prove the hand-writing of the grantor, or of either of the subscribing witnesses. Under these circumstances, it would seem to be reasonable, that they should be permitted to introduce their secondary evidence. But the difficulty here is, that they have not called one of the subscribing witnesses, nor shown why they could not prove the execution, if they had done so." Kelsey *v.* Hanmer, 18 Conn. 311, 317 (1847).

Where neither the attesting witness can be produced nor his signature proved, the handwriting of the obligor can be shown. Jones *v.* Blount, 1 Hayw. 238 (1795); Clark *v.* Sanderson, 3 Binn. 192 (1810); Duncan *v.* Beard, 2 Nott & McC. 400 (1820).

"The law only requires the best evidence the party has in his power. The subscribing witness must be produced when there is one, if he be dead, proof of his hand-writing may be admitted; and if the hand-writing of the witness cannot be proven, then proof of the hand-writing of the obligor may be received; this affording a strong evidence that the obligor meant to make himself chargeable by that signature." Jones *v.* Blount, 1 Haywood, 238 (1795).

Own Claim. — Where the opposite party claims under a deed to which there are attesting witnesses, and produces the deed on notice, the party calling for production need not prove its execution. Chisholm *v.* Sheldon, 2 Grant's Chan. 178 (1851); Rhoades *v.* Selin, 4 Wash. C. Ct. 715 (1827); McGregor *v.* Wait, 10 Gray, 72 (1857); Herring *v.* Rogers, 30 Ga. 615 (1860).

So Mr. Justice Washington, at *nisi prius*, after deciding that the execution of a document produced on notice by the other side must still be proved by the party who desires to introduce it in evidence, no "legal legerdemain" absolving him from this duty, goes on to say: "If indeed, the party producing the instrument, on notice, be a party to it, or claims a beneficial interest under it, these facts may well dispense with the necessity of giving further proof, because of such privity or interest, and not because of the possession of the instrument by the party against whom it is offered in evidence." Rhoades *v.* Selin, 4 Wash. C. Ct. 715 (1827); Jackson *v.* Kingsley, 17 Johns. 158 (1819).

So of a copy deed produced by the other side upon notice "we will not send this case back for a rehearing on account of the admission of the copy deed, for it appears to us, from the history of the trial, that it was produced by Herring himself under notice, and that he claimed under it. This, as against him, was sufficient guaranty of the correctness of the copy and of the execution of the original. No man can complain that other people should be allowed to assume the genuineness and correctness of a paper which he himself treats as being entitled to full credit, when his treatment of it does not depend on the report of witnesses but appears in open Court." Herring *v.* Rogers, 30 Ga. 615 (1860).

It is apparently under a similar line of reasoning that it has been held that an attested replevin bond taken by a sheriff in the performance of his duty, and produced by him, need not be proved by the attesting witnesses.

"It was the bounden duty of the sheriff to take care that such a bond was executed." Scott *v.* Waithman, 3 Stark. N. P. 168 (1822).

"Ancient Documents." — A recognized exception to the rule requiring proof of attested documents by the subscribing witness is found in the case of documents thirty years old, apparently genuine, and produced from a proper custody. The rule applies to wills. Shaller *v.* Brand, 6 Binn. 435 (1814). In case of a will, however, the thirty years is computed, not from the date of the will, but from the death of the testator. Jackson *v.* Blanshan, 3 Johns. 292 (1808). Such documents prove, as it is said, themselves, *i. e.* their own execution, what is meant being that the subscribing witnesses need not be called.

"The deed, being more than thirty years old, required no proof." Henthorn *v.* Doe, 1 Blackf. 157 (1822); Thruston *v.* Masterson, 9 Dana (Ky.), 228, 233 (1839); Walton *v.* Coulson, 1 McLean, 120 (1831); Fairly *v.* Fairly, 38 Miss. 280 (1859); Carter *v.* Doe, 21 Ala. 72 (1852); McReynolds *v.* Longenberger, 57 Pa. St. 13 (1868); Duncan *v.* Beard, 2 Nott & McC. 400 (1820); Burgin *v.* Chenault, 9 B. Monr. 285 (1848); Weitman *v.* Thiot, 64 Ga. 11 (1879); King *v.* Sears, 91 Ga. 577 (1893); National Commercial Bank *v.* Gray, 71 Hun, 295 (1893).

"Attesting witnesses to a document thirty years old need not be called. They are presumed to have passed away with the rest of their generation." Lunn *v.* Scarborough, 6 Tex. Civ. App. 15 (1894).

"What are the reasons on which this rule is founded? 1st. That after a lapse of thirty years it is difficult, and in most cases impossible, to procure the witnesses to the deed. Those who are parties to a deed of thirty years standing, must be upwards of fifty years old, and a great portion of those who are born, die before that period. The second reason is, that a possession or an

exercise of ownership, under the deed, is calculated to give authenticity to it." Duncan *v.* Beard, 2 N. & M'C. 400 (1820).

The rule is the same in Canada. Doe d. Maclem *v.* Turnbull, 5 Q. B. U. C. 129 (1848). "The cases of The King *v.* The Inhabitants of Bathwick, 2 B. & Ad. 639, and of Doe *v.* Benyon, 4 P. & D. 193, shew, that the principle of receiving in evidence documents more than thirty years old, without proof of their authenticity, is not confined to the deeds themselves, on which the party may rely in proof of his title, but extends to any written documents whatever, even to letters."

"But it is not sufficient for this purpose, that the instrument merely *bears date* thirty years before the time of its production. It is necessary to show that it *has been in existence* for that period of time; and that may be done, not only by evidence of its execution, by the maker, or of its possession by the party claiming under it for that period, but by circumstances creating the presumption of such existence." Fairly *v.* Fairly, 38 Miss. 280 (1859).

"The mere existence of any instrument for more than thirty years is not enough, in any case, to authorize it to be read in evidence. Kent, Ch. J. in Johnson *v.* Blanshaw (3 Johns. 292), says, 'It is the accompanying possession alone which establishes the presumption of authenticity in the ancient deed. Where possession fails, the presumption in the favor fails also. The length of the date will not help the deed, for if that was sufficient a knave would have nothing to do but to forge a deed with a very ancient date. (See also Healy *v.* Moule, 5 Serg. & Rawle, 185; McGinnis *v.* Allison, 10 Id. 197.) The theory upon which such evidence is allowed is stated by Starkie with remarkable clearness and felicity of language as follows: 'Presumptions are frequently founded upon, or at least confirmed by ancient deeds and muniments, found in their proper legitimate repositories, although, from lapse of time, no direct evidence can be given of their execution, or of their having been acted upon. It seems, however, that in order to the reception of such evidence, or at least to warrant a court in giving any weight to it, a foundation should be first laid for its admission by proof of acts, possession or enjoyment, of which the document may be considered as explanatory.' (1 Stark. Ev. 66.) So Gilbert says, 'If possession has not gone along with it there should be some account of the deed, because the presumption fails where there is no possession, for it is no more than old parchment, if no account be given of its execution.' (Gilb. Ev. 103. See also Norris' Peake, 163; Jackson *v.* Laraway, 3 John. Cas. 283; Hunt *v.* Luquere, 5 Cowen, 221.)" Ridgeley *v.* Johnson, 11 Barb. 528, 538 (1851).

In order for a certified copy of a conveyance to be admissible in evidence as an ancient instrument, the registration must be ancient. Davis *v.* Pearson, 6 Tex. Civ. App. 593 (1894).

And the document produced from the proper custody. But where no circumstances of suspicion exist regarding an instrument over thirty years old, though it does not prove itself because of the absence of the requirement of proper custody, it will still be admissible as an ancient document upon proof of the handwriting of an attesting witness, it being presumed that all attesting witnesses are dead. Harris *v.* Hoskins, 2 Tex. Civ. App. 486 (1893).

The rule is arbitrary. Twenty-seven years is not sufficient. Jackson *v.* Blanshan, 3 Johns. 292 (1808). "Thirty years has been held to be the lowest period." Homer *v.* Cilley, 14 N. H. 85 (1843).

While it is said, and probably with entire accuracy, that the basis of this rule that in case of attested ancient documents the attesting witnesses need not be summoned to prove the execution of such documents, lies in a presumption that the subscribing witnesses are dead, the rule is arbitrary, and its application is not affected by the circumstance that such a subscribing witness is, in point of fact, alive and available as a witness. McReynolds *v.* Longenberger, 57 Pa. St. 13, 31 (1868); Jackson *v.* Blanshan, 3 Johns. 292 (1808).

To the opposite effect, it has been held in Massachusetts that if the subscribing witness in case of an ancient document is alive, he must be called. Tolman *v.* Emerson, 4 Pick. 160 (1826).

It may be noted that this ruling was based upon a New York case, Jackson *v.* Blanshan, 3 Johns. 292 (1808), which, so far as it decides anything on the point, decides the direct opposite.

"A deed more than thirty years old, having nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead; and when it is found in the proper custody, and is corroborated by enjoyment under it, or by other equivalent explanatory proof, it is allowed to prove itself, or rather, its genuineness is presumed." Carter *v.* Doe, 21 Ala. 72, 91 (1852).

Where circumstances of suspicion exist in case of an ancient document, they may be rebutted by evidence and the document falls at once under the rule applying to ancient documents. Walton *v.* Coulson, 1 McLean, 120 (1831).

The presiding judge, if so disposed, may rule that the circumstances of suspicion are not such as to warrant rejecting the instrument as an ancient document, and may accordingly admit it as *prima facie* evidence, leaving the burden on the opposite party to show that it was not an ancient document. Wisdom *v.* Reeves, (Ala.) 18 So. 13 (1895).

Where, however, the execution of a deed is by one in a fiduciary or representative capacity, the deed, though ancient, will not be competent until the power to execute be shown. Fell *v.* Young, 63 Ill. 106 (1872); Tolman *v.* Emerson, 4 Pick. 160 (1826).

To the contrary effect, it has been held in Texas that where the deed is ancient and executed under a power of attorney, the presumptions in favor of the deed attach also to the power of attorney. Davis *v.* Pearson, 6 Tex. Civ. App. 593 (1894).

And under proper circumstances, where possession has followed a grant by A. as attorney in fact of B., the court will presume a valid delegation of power. Smith *v.* Swan, 2 Tex. Civ. App. 563 (1893).

The rule regulating the admission of ancient documents has been extended, to some extent, to ancient plans, properly authenticated. Whitman *v.* Shaw, (Mass.) 44 N. E. 333 (1896).

CORROBORATION REQUIRED. — It is frequently required, as a preliminary to the admission of ancient deeds, that some corroboration should be given, *e. g.*, by proof of possession under them. Fairly *v.* Fairly, 38 Miss. 280 (1859); Carter *v.* Doe, 21 Ala. 72 (1852); Burgin *v.* Chenault, 9 B. Monr. 285 (1848); Jackson *v.* Blanshan, 3 Johns. 292 (1808).

Payment of taxes according to an ancient partition will apparently be regarded as evidence in corroboration of the deed. Glasscock *v.* Hughes, 55 Tex. 461, 473 (1881).

And a mere entry for purposes of a re-survey has been held sufficient possession. Duncan *v.* Beard, 2 Nott & McC. 400 (1820).

Payment of rent under an ancient lease is sufficient evidence of corroboration. Clark *v.* Owens, 18 N. Y. 434 (1858).

To same effect, see also Thruston *v.* Masterson, 9 Dana (Ky.), 228, 233 (1839).

"The purpose of requiring proof as to a deed seemingly ancient, that it is produced from the proper custody, and that possession has been had under it, is to give assurance that it is truly ancient, and not antedated." Brown *v.* Wood, 6 Rich. (S. C.) Eq. 155, 171 (1853).

"It is the accompanying possession alone which establishes the presumption of authenticity in an ancient deed." Jackson *v.* Blanshan, 3 Johns. 292 (1808); Carroll *v.* Norwood, 1 H. & J. (Md.) 167, 174 (1801); Shaller *v.* Brand, 6 Binn. 435 (1814); Homer *v.* Cilley, 14 N. H. 85 (1843); Ridgeley *v.* Johnson, 11 Barb. 528 (1851).

"Independent however of authority, it appears to me, the reason and propriety of the rule is apparent, and the more so from the only reason which I have seen in opposition to it. It is, because old things are hard to be proved. Now, if this be a good reason, it operates with a two-fold force on the opposite side of the question; for it is certainly more difficult, to say the least of it, to disprove an old thing than to prove it, especially when in most cases the party would be called on to do so without notice of its antiquity or the necessity of doing it. Policy requires, that the possession

of individuals to their landed estates should be shielded by every legitimate means; for it is, in truth, the sheet anchor of the rights of a great proportion of the citizens of this country, to such property. And hence it is, that after a lapse of thirty years, when it may be reasonably presumed, that the witnesses to the deed are dead, or, in the transitory state of the community, they are removed without the knowledge of the party, the law will presume the legal execution of the deed in favor of a possession, according to its provisions. But certainly no such indulgence is due to him, who (as in the present case) neglects, for almost a century, to assert his claim by one single act of ownership. The doctrine contended for, on the part of the motion, might, in its consequences, be productive of incalculable mischiefs; for although it is not now usual to enter upon a course of villainy, the fruits of which are not to be reaped for thirty years to come, yet establish the rule contended for, and it opens the door, and many will no doubt find an easy entry. On the other hand, it is conceived, that no such mischiefs can ensue. Apprize the owner of the danger to which he is exposed, he has the power, and will avert its consequences." Middleton *v.* Mass, 2 N. & M'C. 55 (1819).

The excuses for non-production of the attesting witness above mentioned are practically the only ones admissible.

The fact that the only subscribing witness is the justice who is trying the case in which the document is offered is no ground for admitting other evidence of execution. The court expressly decline to decide whether the case would have been any different if the witness was the only person before whom the suit could have been brought, but in the case before them, they say that the disability of the justice "to be sworn as a witness in the cause was the act of the plaintiffs themselves in bringing the case before him." Jones *v.* Phelps, 5 Mich. 218 (1858).

(3) Proof of Contents. — This is the "modern best evidence rule." See *supra*, pp. 358[7]–358[24].

Even where secondary evidence is admissible of the contents of a written document, the due execution of the instrument must first be proved. Porter *v.* Wilson, 13 Pa. St. 641 (1850); Elmondorff *v.* Carmichael, 3 Litt. 473 (1823); Kimball *v.* Morrell, 4 Greenl. 368 (1826). So where there is an attesting witness, he must be called. Kelsey *v.* Hammer, 18 Conn. 311 (1847); "Exactly as if the paper was produced." Shrowders *v.* Harper, 1 Harr. (Del.) 444 (1832).

On the contrary, in Michigan, where an instrument was lost, it was held unnecessary to prove its execution by the subscribing witness. "Such witnesses are required and expected to establish the genuineness of their own, and of the party's signature, to an original paper. But they are not required or supposed to know the contents of the documents they attest, and are no more likely to be

able to give secondary evidence of their purport, than any other persons. They are expected to know their own handwriting, and to say whether the paper appearing to bear it, was in fact so verified, but not whether they ever attested a paper which they have no means of identifying. It is not usual for such witnesses to charge their memories with the contents of all the papers they have seen executed." Eslow *v.* Mitchell, 26 Mich. 500 (1873).

Proof of Handwriting. — In proving the genuineness of a document, alleged to have been written by A., as in other cases, three classes of persons are entitled to testify: (1) Those who have seen A. write; (2) Those who are familiar with his handwriting from correspondence, &c; (3) Those sufficiently skilled to decide by comparing the document in question with other documents in A.'s handwriting.

Evidence of the nature stated in the first and second of the above divisions is predicated upon the existence in the mind of the witness, of a previously formed idea of the handwriting in question. Evidence of the third division is practically predicated upon the skill in handwriting necessary to form a standard of comparison upon inspection of specimens of the writing in question.

The supreme court of Louisiana treats this subject as follows: — "The commentators upon the principles of evidence state that the proof of handwriting presents many difficulties and has in every age been found a source of embarrassment to legislators, jurists and practitioners. The difficulty does not arise when the handwriting of a certain document is proven by eye witnesses or by admissions of parties, but in cases where a judgment or opinion is that a given document is or is not in the handwriting of a given person. Best on Ev., p. 240.

There are three modes of proof laid down in logical order by Bentham, Vol. 3, Jud. Ev., p. 598:

1. Praesumptio ex visu scriptionis.
2. Praesumptio ex scriptis olim visis.
3. Praesumptio ex comparatione scriptorum or ex scripto non viso.

We are only concerned at this time with the first mode of proof — namely, that any person who has seen the writer write and has acquired a standard in his own mind of the general character of his handwriting is competent to testify as to his belief that the handwriting is genuine or not. Such testimony when credible and sufficient is not objectionable. The word 'believe' does not weaken the force of the testimony. Bradford *v.* Cooper, 1 An. 326; Jewell *vs.* Jewell, 1 R. 316. It must necessarily be a matter of judgment or opinion.

Actual knowledge extends a comparatively little way: men are compelled to resort to judgment — a species of circumstantial evi-

dence not secondary to direct. The evidence of the witnesses who testified from their knowledge acquired by having seen letters and other documents was admitted without objection.

This evidence is within the second of the above rules. It was competent, and supplemented the evidence classed under the first mode of proof as witness, and as to the other witness from having communicated personally with the party upon the contents of the document." Succession of Morvant, 45 La. Ann. 207 (1893).

The relative advantages of proof of handwriting by comparison with a standard shown to be genuine and with a standard previously acquired by the witness in the two ways before mentioned, is thus stated by Court of Queen's Bench sitting for Lower Canada.

"Abstractedly reasoning upon this kind of proof, it seems plain that a more correct judgment as to the identity of handwriting would be formed by a witness by a critical and minute comparison with a fair and genuine specimen of the party's handwriting, than by a comparison of seen signatures with the faint impressions produced by having seen the party write, and even then perhaps under circumstances which did not awaken his attention; hence the greater necessity for such a standard, as without it no possible legal conclusion could be reached." Reid *v.* Warner, 17 Low. Can. 485, 491 (1867).

(1) Witnesses of Writing. — Those who have seen the alleged writer write at any time are competent to testify as to whether the document, or part thereof, in question is in his handwriting. West *v.* State, 22 N. J. Law, 21 (1849); Edelen *v.* Gough, 8 Gill, 87 (1849); Hopkins *v.* Megquire, 35 Me. 78 (1852); Woodford *v.* McClenahan, 9 Ill. 85 (1847); Hammond *v.* Varian, 54 N. Y. 398 (1873); Pepper *v.* Barnett, 22 Gratt. 405 (1872); Burnham *v.* Ayer, 36 N. H. 182 (1858); Gleeson *v.* Wallace, 5 Q. B. U. C. 245 (1848); Williams *v.* Deen, 5 Tex. Civ. App. 575 (1893); Riggs *v.* Powell, 142 Ill. 453 (1892); Karr *v.* State, 106 Ala. 1 (1894); State *v.* Harvey, 131 Mo. 339 (1895); Salazar *v.* Taylor, 18 Colo. 538 (1893). Succession of Morvant, 45 La. Ann. 207 (1893); Berg *v.* Peterson, 49 Minn. 420 (1892); Wilson *v.* Van Leer, 127 Pa. St. 371 (1889).

The rule is the same in criminal cases. State *v.* Harvey, 131 Mo. 339 (1895).

Any ordinary observer answers the requirements of this rule. It is not necessary that the witness should be in any sense an expert. Williams *v.* Deen, 5 Tex. Civ. App. 575 (1893); Kendall *v.* Collier, (Ky.) 30 S. W. 1002 (1895).

Or that the writing should be signed. Rumph *v.* State, 91 Ga. 20 (1892).

It is sufficient if the witness has seen the party in question write *once*. "The evidence was properly received by the court. The witness who had seen the defendant write, although but once,

was competent to speak with respect to the genuineness of the disputed signature, as the opinion which he formed and communicated to the jury was formed, as he states in his testimony, upon knowledge of the general character of her handwriting thus acquired." Edelen *v.* Gough, 8 Gill, 87 (1849); Com. *v.* Nefus, 135 Mass. 533 (1883). And the rule is the same even if the only time the witness saw the party write was when he wrote the document in question. Woodford *v.* McClenahan, 9 Ill. 85 (1847). And it is sufficient that the witness has seen the party write nothing but his name and then only once. Hammond *v.* Varian, 54 N. Y. 398 (1873); Pepper *v.* Barnett, 22 Gratt. 405 (1872); Rogers *v.* Ritter, 12 Wall. 317 (1870); Burnham *v.* Ayer, 36 N. H. 182 (1858); *In re* Diggins' Estate, 68 Vt. 198 (1895).

"Whether he has seen him write once or many times, goes rather to the degree and extent of his knowledge than the extent from which it is derived, and does not affect the question of his competeney, but only the weight to be given to his evidence, which is a question for the jury." Pepper *v* Barnett, 22 Gratt 405 (1872); Karr *v.* State, 106 Ala. 1 (1894).

"The testimony of the witness Glidewell shows that on two or three occasions, considerable lapse of time intervening, he had seen the defendant write the names of persons and places casually, and that there was in his handwriting a peculiarity attracting his attention, and the last of these occasions was several years before the trial. The testimony is not the highest and most satisfactory kind, but it was competent, and authorized the introduction of the writing in evidence, so far as its admissibility depended on proof of handwriting." Karr *v.* State, 106 Ala. 1 (1894).

"If a witness has any knowledge of the handwriting of the person in question, which has been derived from seeing him write, though it be but once, he may give his opinion as to the genuineness of the signature or writing in dispute. And if his knowledge has been derived from having seen general signatures, or writings of the person, either in transacting business with him, so that the papers have been acted upon and recognized by him as genuine, or by an intimate acquaintance with signatures which have been adopted into the ordinary business transactions of life, he may give his opinion of the handwriting. Bowman *v.* Sanborn, 5 Foster (25 N. H.), 87; Hoit *v.* Moulton, 1 Foster (21 N. H.), 586; Wiggin *v.* Plumer, 11 Foster (31 N. H.) 251; State *v.* Carr, 5 N. H. 367.

It is the belief or opinion of the witness, founded upon knowledge, that is admissible. The handwriting is to be proved or disproved by this opinion, and unless the witness is able to give an opinion, his testimony is incompetent." Burnham *v.* Ayer, 36 N. H. 182 (1858).

That the witness has only seen the party write since the date of the disputed document merely affects the weight of his evidence. So in case of a promissory note, the supreme judicial court of Massachusetts say "the objection is, that the defendant, in his business with the witness, and in writing in his presence, may have had this note in mind, and have written differently from his usual manner, for the purpose of making evidence for himself in this case, or that the character of his writing may have changed since the date of the note. All this, however, was for the consideration of the jury." Keith *v.* Lothrop, 10 Cush. 453 (1852).

One who has seen a person make his mark is equally competent to testify to it. "If the witness was acquainted with the character of the party's mark, from having often seen him make it, why not as well speak of it, as of a name? The mark of one, who is unable to write his name, is often as easily recognised as many signatures." Strong *v.* Brewer, 17 Ala. 706 (1850).

Or to testify to cipher letters having been written by A. whom the witness has seen write once. Com. *v.* Nefus, 135 Mass. 533 (1883).

So witnesses may testify to peculiarities of handwriting of which they have acquired knowledge; with a view to showing a connection between a genuine and a disputed specimen of handwriting. "Nothing is clearer than that this is not a mere comparison of hands." Smith *v.* Fenner, 1 Gall. 170 (1812).

It is no objection to the introduction of evidence tending to show that a signature is that of A. that A. himself denies it to be his. Burgess *v.* Burgess, 44 Neb. 16 (1895).

But A. cannot testify as an expert, unless properly qualified, that a certain signature is not his. Pillard *v.* Dunn, (Mich.) 66 N. W. 45 (1896).

A witness testifying from his recollection of the handwriting is allowed to refresh his memory by comparing the disputed writing with the one which he saw written. "It has been well settled in numerous cases, and is laid down as settled law in all the standard works upon evidence, that a witness who has seen the party, whose signature is controverted, write but once, and that only his signature, is competent to testify, although he may have to compare the signature which he knows to be genuine with the one in controversy, in order to refresh and strengthen his recollection.

"The case (cited by the counsel for the appellee) Burr *v.* Harper, 3 Eng. C. L. R. 168, is one exactly in point, and is strikingly like the one under consideration. In that case the witness, whose competency was questioned, stated, when called to prove the signature of Harper, that he once saw him sign his name to a paper, which he then had in his possession; that the fact made so slight an impression upon his mind that, judging from that single occurrence, he was

not able to say whether the handwriting to the agreement was the defendant's or not; that he would not venture, upon the mere inspection of the paper, to form a belief on the subject; but that, by comparing the signature of the agreement, to which he was required to speak, with that which was subscribed to the paper then in his possession, he was able to swear that he believed it to be the defendant's writing. It was held in that case, and its authority has never been questioned, that the witness was competent to prove the handwriting. The court in that case says: 'The mere fact of having seen a man once write his name may have made a very faint impression upon the witness' mind; but some impression, however slight in degree, it will make, and surely as the standard exists, and the witness possesses the genuine paper, he may recur to it to revive his memory upon the subject. Here a basis is laid in the fact of his having seen the defendant sign his name once. But his memory is defective. He then recurs to a paper which he knows to be an authentic writing. He uses it to retouch and strengthen his recollection, and not merely for the purpose of comparison. The evidence, therefore, is admissible." Pepper *v.* Barnett, 22 Gratt. 405 (1872).

In Georgia, however, a witness who had seen the defendant write was not allowed to use that document as a standard of comparison with the disputed signature "unless he also testifies by that means or some other, he knows or would recognize the handwriting of the person who executed it." Wimbish *v.* State, 89 Ga. 294 (1892).

The essential result, however, is that, from seeing the party write, the witness should have acquired such an impression of his handwriting as to enable him to form an opinion as to the genuineness of the writing in dispute. This is a preliminary inquiry. "A witness need not be familiar with another's handwriting, to render him competent; on the other hand, not every person who has seen another write is competent to testify, or give an opinion upon the genuineness of the signature. In the course of a busy life, one may see many persons write, in many instances merely casually, the recollection of which is entirely effaced from the memory, as much so as if he had never seen the writing. In such cases, the witness is not competent to give an opinion, merely because he may remember, or it may be shown, that he has seen the person write. Not being an expert, in order to make a witness competent to give an opinion as to the genuineness of a writing, he must be able to say that he has some knowledge or acquaintance with the handwriting of the person, or believes he has such knowledge or acquaintanceship, acquired by seeing him write many times, or once, or in some other legal way. The extent of his knowledge or familiarity with the handwriting in question enters into the weight of his testimony, but does not affect its competency." Nelms *v.* State, 91 Ala. 97 (1890); Wimbish *v.* State, 89 Ga. 294 (1892).

An interesting instance of the application of this rule is found in a New York criminal case where the indictment was for murder. The government offered a letter from the defendant to one of the government witnesses which practically admitted the defendant's guilt. The majority of the court, against a strong dissenting opinion, held that two illiterate witnesses, one of whom could write with difficulty, and the other not at all, were not competent, by reason of having seen the defendant write or print his name, on one occasion, in a Testament, to identify his handwriting.

"Before a witness should be permitted to testify to the handwriting of another, he should be acquainted and somewhat familiar with the handwriting of the person whose writing is sought to be proved. He should have an intelligent acquaintance with the handwriting of the party so that he can determine with a reasonable degree of certainty whether the writing offered is his genuine handwriting. It seems very clear that neither of these witnesses had any such knowledge of the writing of the defendant, or any such acquaintance with it as qualified them to give an opinion upon the question whether this letter and these envelopes were written by him. An examination of the evidence of these witnesses shows that they possessed little natural intelligence, were ignorant, illiterate, had little knowledge of the art of writing or of reading it, and little appreciation of the responsibility which rested upon them as witnesses when giving evidence as to the handwriting of the defendant." People *v.* Corey, 148 N. Y. 476 (1896).

The witness, in order to testify, must have seen the party write under such circumstances as to leave his own mind unbiased.

Where the only time when the witness saw the party sign was during a recess of the court when the party wrote in the witness's presence to enable him to testify, it was held that the evidence should be rejected. Dakota *v.* O'Hare, 1 N. Dak. 36, 44 (1890); Reese *v.* Reese, 90 Pa. St. 89 (1879).

The means of accurate observation which the witness may be found, on examination, to possess is a consideration going merely to the weight of the evidence. In a North Carolina case where it was important to show who had written a letter signed "Lassiter," the ruling of the trial court admitting the evidence was sustained. "Preliminary to putting the letter in evidence, the witness was asked if he had often seen Gay write, and if he was therefore acquainted with his handwriting. To this, the witness answered, that he had often seen the defendant Gay writing at the counter in Gay's store — Gay standing on one side of the counter, and witness on the other — and that he thought from his having seen him writing on such occasions, that he knew his handwriting; that he could see the writing plainly, although he had not given the writing on such occasions a very close examination. The evidence was objected to

by the defendant Gay, but the objection was overruled, and the evidence was admitted. The witness then testified that he knew no such person as the Lassiter named, and that the handwriting of the letter, and the signature, were in his opinion, the defendant Gay's and the letter was allowed to be read, and the defendant Gay excepted." State *v.* Gay, 94 N. C. 814 (1886).

The question is purely one of competency. "The law is that a witness who has any personal knowledge of a signature in controversy, however slight, has the right to give his opinion, and the weight of that opinion is a question for the jury, and not for the court. A witness who has seen a person write but once, and then only his abbreviated signature, may testify regarding the same; or if he has seen a signature admitted by the owner to be genuine. Rogers *v.* Ritter, 12 Wall. 322; Pepper *v.* Barnett, 22 Gratt. 405; Cody *v.* Conly, 27 Gratt. 313; 1 Greenl. Ev. § 577. But he must have some knowledge, and the mere fact that he has received letters purporting to be from the person whose signature is in controversy is not sufficient, unless there was some admission or acquiescence equivalent to an acknowledgement on the part of the supposed writer, other than the letters themselves, that said letters are genuine, and in the handwriting of the person from whom they purport to come. A person who has had business correspondence with another, acted upon by both parties, is competent to testify as to the handwriting of his correspondent, although he may never have seen him write. But where the letters have no relation to business transactions, but are letters of mere friendly or polite intercourse, some acknowledgement of handwriting, in some way other than the letters themselves, on the part of the supposed writer, must be shown. The knowledge of the witness must be founded on some other means than the receipt and contents of the letters." Flowers *v.* Fletcher, (W. Va.) 20 S. E. 870 (1894); Salazar *v.* Taylor, 18 Colo. 538 (1893).

Degree of Certainty required. — In determining what degree of certainty is to be required at the hands of a witness testifying under such circumstances, it must be borne in mind that the fact to which the witness is really testifying is *resemblance*. "The plaintiff claims to recover as the indorser of a note, signed by the defendant, payable to Pierce & Pool or order, and by them indorsed. To prove the indorsement of the note, he called a witness, who on his direct examination, testified that he had seen Pool write five or six times and that it was his strong impression that the indorsement was in his handwriting; that it looked like it; and, being cross-examined, he said, that the writing on the back of the note resembled Pool's, but that he could not swear to the indorsement nor to his writing. It is insisted, by the counsel for the defendant, that this evidence is not sufficient to prove an indorsement. All

that a witness, called in such cases, can be expected to testify is, that the handwriting in question resembles that of the person, whose it purports to be; in other words, that it looks like it. From the resemblance between the signature before him, as compared with those of the same person previously observed, the witness has drawn the inference that they were made by one and the same individual. The strength of his belief will depend on the greater or less degree of similarity. He can only testify to his own state of mind on this question. The language used as indicative of the strength of his belief, was properly before the jury for their consideration, and it was for them to determine its sufficiency to establish the fact, which it was offered to prove. When the witness stated that he could not swear to the handwriting nor to the indorsement, he was probably understood by the jury as referring to his own knowledge, and not as intending thereby to limit or restrain the testimony previously given, and it is not for us to say that they misunderstood him." Hopkins *v.* Megquire, 35 Me. 78 (1852).

Where a witness "thought it was his handwriting" but "would not swear it was his handwriting," it was held that this was sufficiently positive to let his evidence go to the jury. People *v.* Bidleman, 104 Cal. 608 (1894).

The rule is the same in Missouri. "It was shown by McNeil, a witness for the state, that he had seen defendant write his name, was acquainted with his handwriting, had received letters from him, and that the letter in question was in his handwriting. Under the rule announced by this court in the case of State *v.* Minton, 116 Mo. 605, and authorities cited, the witness showed himself clearly competent to testify to the handwriting of defendant. It was not necessary that he should have stated positively that the letter was in the handwriting of defendant; but it was sufficient to entitle it to go to the jury, that he gave it as his opinion that it was, after having stated that he was acquainted with his handwriting. Watson *v.* Brewster, 1 Pa. St. 381; Clark *v.* Freeman, 25 Pa. St. 133; Fash *v.* Blake, 38 Ill. 363; Garrells *v.* Alexander, 4 Esp. 37." State *v.* Harvey, 131 Mo. 339 (1895).

The appellate court of Indiana have refused to disturb the admission of an otherwise properly qualified witness who testified as to the signature of the deceased, as follows: "I could say nothing to a certainty. I have a general memory of her signature several years ago. It looks like probably it might be her signature; it is something after my memory that it is," and who, in answer to other questions, said, "Well, I cannot say it is her signature. I will say it is probably her signature; it has a general appearance as I remember it. I do not know that I have information enough to say, or that I would form an opinion that I would abide by.

I can only judge from the general appearance, and from that form an impression, but I do not know. It is my impression that it would be her hand-writing, just from the looks of it." Talbott *v.* Hedge, 5 Ind. App. 555 (1892).

It is proper to inquire of witnesses who have testified to their belief in the genuineness of certain signatures on a note, "whether they would act upon the signatures of the defendants attached to the note sued on if they came to them in an ordinary business transaction." The supreme court of the United States say: "Such a question standing alone might be objectionable, but the record discloses that each of these witnesses had testified to his acquaintance with the handwriting of one or more of the defendants, and to his belief of the genuineness of the signatures of the parties with whose handwriting he was acquainted; and, as a means of showing the strength and value of witnesses' opinions, the question put was allowable." Holmes *v.* Goldsmith, 147 U. S. 150 (1892).

"It has been well observed that the impressions of a witness may be nothing more than the hasty conclusions drawn by his own mind from certain facts falling under his observation, and that facts are required to prove or disprove the genuineness of a handwriting; still, although whatever the relative values of the several modes of proof of handwriting may be as compared with each other, it is certain that all such proof is, even in its best forms, precarious and often extremely dangerous; nevertheless jurisprudence has affixed to these impressions the character of proof, and made them admissible as evidence of presumed or contested facts in relation to the genuineness of the handwriting of documents, and the rule therefore in that respect is perfectly authoritative. A recent writer on the principles of legal evidence, speaking of the practice of admitting such proof, *ex visu scriptionis* says, 'the rule is clear and settled that every person who has seen the supposed writer of a document write, so as to have thereby acquired a standard in his own mind of the general character of the handwriting of the party, is a competent witness to say whether he believes the handwriting of the disputed document to be genuine or not; the having seen the party write but once, no matter how long ago, or having merely seen him sign his signature, is sufficient to render the evidence admissible.' So also as to the presumption *ex scriptis olim visis*, which is clearly stated by Patterson, J., in Doe *v.* Suckermore, 5 A. & E. 703, 730, who says that 'knowledge of handwriting may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence, or by

the witness transacting with the party some business to which they relate, or, by any other mode of communication between the party and the witness, which, in the ordinary course of transactions of life, induces a reasonable presumption that the letters or documents are the handwriting of the party." Reid *v.* Warner, 17 Low. Can. 485 (1867).

A witness can be asked not only his opinion but the reasons of it, on direct examination. "The witness Smith, who was called as an expert, was rightly allowed to give the reasons for the opinion that he expressed. This point was adjudged in Commonwealth *v.* Webster, 5 Cush. 301. And in Collier *v.* Simpson, 5 Car. & P. 73, Tindal, C. J. ruled that counsel might ask a witness, who was called to testify as an expert, 'his judgment and the grounds of it.' The value of an opinion may be much increased or diminished, in the estimate of the jury, by the reasons given for it.

We are of opinion that the testimony of Albro was competent, and that its weight and effect were properly left to be judged of by the jury. He had done business with the defendant, and had seen him write, and could form an opinion of his handwriting. There could be no doubt, on the authorities, of the admissibility of this testimony, if the knowledge, which the witness had of the defendant's handwriting, had not been acquired after the date of the note in question." Keith *v.* Lothrop, 10 Cush. 453 (1852). It is error to refuse to permit such evidence. Kendall *v.* Collier, (Ky.) 30 S. W. 1002 (1895).

(2) Acquaintance through Correspondence, &c. — A witness who has engaged in correspondence with A., and done business with him in which writings of A. were used, can testify as to A.'s handwriting. Keith *v.* Lothrop, 10 Cush. 453 (1852); Campbell *v.* Woodstock Iron Co., 83 Ala. 351 (1887); Atlantic Insurance Co. *v.* Manning, 3 Colo. 224 (1877); Riggs *v.* Powell, 142 Ill. 453 (1892); Succession of Morvant, 45 La. Ann. 207 (1893).

Where the witness has written letters to A., and received replies on which both parties acted, "this rendered the persons to whom these letters were addressed competent witnesses to testify concerning his handwriting." Chaffee *v.* Taylor, 3 All. 598 (1862).

So where an express agent was in the habit of receiving letters from the superintendent of the company, and acting upon them, he is competent to testify as to the signature of the superintendent. "The testimony on which the letter was admitted in evidence was, in substance, that Small was the superintendent of the Southern Express Company at the date of the letter, and that the witness was agent of the company at Brandon, and as such had received many letters from him about the business of the company, and had written in reply to those letters, and that he believed the letter produced was in same signature as those received by witness from him.

It appears that the witness's knowledge of the party's handwriting was acquired through correspondence carried on between them in relation to the business of the company, in which they were both engaged. This brings it fully within the rule, admitting such proof of handwriting, which is thus stated by Phillips: 'If a witness has received letters on subjects of business, which can be proved to have been written by a particular person, or letters of such a nature as make it probable that they were written by the hand from which they profess to come, he may be permitted to speak of that person's handwriting.'" Southern Express Co. *v.* Thornton, 41 Miss. 216 (1866).

"It is on this ground that clerks, cashiers, or other officers of banks at which a party has been accustomed to do business may be competent to prove his handwriting, although they may never have seen him write." Berg *v.* Peterson, 49 Minn. 420 (1892); Dubois *v.* Baker, 30 N. Y. 355 (1864); Hanriot *v.* Sherwood, 82 Va. 1 (1884).

A witness who has held a note of the party, conceded to be genuine, is a competent witness. Hammond *v.* Varian, 54 N. Y. 398 (1873).

Where A. did work for the witness, and drew written orders on the witness for portions of his pay, which orders were recognized between A. and the witness upon the settlement of their accounts, it was held that the witness, though he had never seen A. write, was competent to satisfy from his "recollection of his handwriting" that a certain paper was written by A. Cody *v.* Conly, 27 Gratt. 313, 323 (1876).

So where a witness testified that he knew A.'s signature, because he had seen letters that came from his office, he is competent. Empire Mfg. Co. *v.* Stuart, 46 Mich. 482 (1881).

But in a later case in the same state the reasonable qualification is apparently attached to the more sweeping rule just stated, that subsequent ratification or other authentication of letters beyond their mere receipt and appearance of coming from the party whose handwriting is in question, is needed to entitle a witness to testify on the subject. "Where one or more letters, purporting to come from a certain person, are recognized by him in subsequent transactions, that may, in some cases, be admissible on questions of handwriting. But the mere receipt of letters purporting to be from a person never seen, and with whom no subsequent relations existed which were based on them as genuine, has no value as means of knowledge. Where there is no direct knowledge of handwriting, there must be something which assures the recipient of letters, in a reasonable way, of their genuineness, before he can swear to their writer, or use them as comparisons of handwriting." Pinkham *v.* Cockell, 77 Mich. 265 (1889); Talbott *v.* Hedge, 5 Ind. App. 555 (1892); Berg *v.* Peterson, 49 Minn. 420 (1892).

Equally so of a witness who cannot swear to the handwriting of either party of the firm in whose name the bill was drawn, but who testifies, that, in his opinion, the handwriting is the same as that of many of their notes which the firm have paid upon presentation by him. Gordon *v.* Price, 10 Ired. 385 (1849).

A witness who had never seen A. write, but "had seen a long account acknowledged by him to be his handwriting," is competent. State *v.* Spence, 2 Harr. (Del.) 348 (1835). It does not appear that the account was against the witness or otherwise authenticated by its use in course of business. *Ibid.*

A witness is competent who "testified that he never saw the deceased write, but narrated occasions when he received receipts and other papers from him under circumstances which left no doubt that they were written by the deceased." Sprague *v.* Sprague, 80 Hun, 285 (1894).

"The defendant was allowed to testify that in his opinion the signature of Mrs. McCurday to the assignment of the contract was not genuine. The admission of this evidence is assigned as error. The proof shows that defendant had never seen Mrs. McCurday write, but he had sent her a letter which, he says he thinks, was addressed to Scotia, Ohio, and had received a letter in answer thereto which is in evidence. This letter is dated and postmarked 'Otsego, Ohio, October 25.' It contains a proposition by Mrs. McCurday to sign a relinquishment in consideration of the prompt payment of the $950 note. On November 20 the defendant addressed both the McCurdays, this time to Scioto, Ohio, enclosing for execution a quitclaim deed for the property which, on November 24, was returned with an endorsement apparently written by McCurday stating that the deed was enclosed, and there was enclosed therein a deed of quitclaim signed and acknowledged by both Mr. and Mrs. McCurday. The plaintiff in his deposition testifies that subsequently Mrs. McCurday stated to him that she had conducted such a correspondence with the defendant. It will be observed that while the letter from Mrs. McCurday did not come from the post-office to which the defendant's letter was sent, nevertheless it was followed by other correspondence and was acted upon by her. This was sufficient proof of genuineness to support the defendant's testimony." Violet *v.* Rose, 39 Neb. 660, 672 (1894).

A clerk in the business office of a firm to which A. has written on business, and who has seen A.'s letters and knows that A. has acted upon and recognized the letters, may testify as to A.'s handwriting. Reyburn *v.* Belotti, 10 Mo. 597 (1847). "There are different modes of acquiring a knowledge of the handwriting of another, to enable a witness to testify to its genuineness. One means of information, is from having seen letters or writings, purporting to be the handwriting of the party, and having afterwards

personally communicated with him respecting them, or acted upon them as his, the party having known and acquiesced in such acts, founded upon their supposed genuineness; or by such adoption of them into the ordinary business transactions of life, as induces a reasonable presumption of their being his own writings. 1 Green. Ev., § 577. It is not indispensable to call the individual to whom the letters were addressed, for the purpose of proving the handwriting, as any one through whose hands the letters have passed, is equally competent, such as clerks, &c." Reyburn *v.* Belotti, 10 Mo. 597 (1847).

The standard of comparison may, with entire propriety, have been formed in the mind of the witness by documents shown to be genuine through intrinsic evidence and the absence of any motive for deception. Thus the testimony of a witness to the handwriting of his uncle, one Thomas Rainey, was deemed competent upon the witness testifying, "That he knew the handwriting of his uncle though he had never seen him write; that he lived in New York, and witness had seen many letters from him to the father of witness, about family matters and family business, concerning which no one else was familiar; that almost every day came newspapers to his father directed in the same hand, and for years a photograph of his uncle was hanging on the wall of the sitting-room with an under-written message of presentation, concluding with the words: 'From your affectionate brother, Thomas Rainey.'" Tuttle *v.* Rainey, 98 N. C. 513 (1887).

It has been held sufficient, in the absence of objection, for a witness to testify that he is familiar with the signature in question, leaving the opposing interest to find out, if so disposed, upon cross-examination, the sources of his knowledge. Hinchman *v.* Keener, 5 Colo. App. 300 (1894).

(3) Comparison of Hands. — The general advisability and value of attempting to prove A.'s handwriting by the evidence of persons who have never seen A. write and have had no business dealings with him, but who undertake, after comparing the disputed document with other documents in A.'s writing, shown by admission or otherwise to be genuine, to say whether the writing is his or not, is much in dispute.

"Probably there is hardly any rule as to the introduction of evidence on which courts express a greater diversity of opinion than that relating to the proof of handwriting by comparison." Gaunt *v.* Harkness, 53 Kans. 405 (1894).

It is perhaps worthy of notice that the objectionable feature in the "comparison of hands" is not the comparison itself. That is the very essence of all possible proof of handwriting. The objection is that the comparison is not made with a standard previously created in the witness's mind through familiarity with the hand-

writing itself, acquired in ways which the law regards as sufficient, but is made by a witness whose sole standard of comparison is gained by juxtaposition, in court or for the purpose of testifying, of a disputed handwriting with specimens claimed to be in the same handwriting. This distinction is well brought out in a case in the supreme court of California admitting the evidence of a witness whose familiarity with the handwriting in dispute has been acquired through having seen his signature upon several hundred documents in the Spanish archives in the Surveyor General's office, of which archives the witness had been for fifteen years official custodian. "The question presented by the foregoing is not what writings may properly be employed by an expert, on the witness stand, as the basis of his opinion that a particular writing is or is not genuine. In all such cases, the opinion of the witness is based upon a comparison — within the narrower meaning of the word — of the contested signature with others proven or admitted to be genuine, and introduced in evidence. But if a witness have a proper knowledge of the handwriting of the person whose writing is in dispute, he may declare his belief in regard to the genuineness of the particular signature in question. In a broad sense, all evidence of handwriting, except where the witness saw the document written, is comparison. But a distinction is recognized between an opinion based upon the juxtaposition, in the presence of the jury, of the disputed and other signatures, and a belief engendered of the witness's previous knowledge of the party's handwriting; the conscious comparison of the writing in dispute with an exemplar in his own mind — the product of such previous knowledge. In the former case, the expert is required promptly to exercise his skill, derived from experience and study; in the latter, the ordinary witness recalls the prototype, and without being able perhaps to analyze critically the grounds of his own faith, feels that he knows the handwriting.

There are two modes of acquiring this knowledge, each of which is universally admitted to be sufficient to enable a witness to testify on the subject. The first is from having seen the party write. The second mode is from having seen letters, bills, or other documents purporting to be in the handwriting of the party; evidence of the genuineness of such writings and of the identity of the party being, of course, added aliunde. (1 Greenl. Ev., Sec. 577.)

'In both these cases,' adds Mr. Greenleaf, 'the witness acquires his knowledge by his own observation of facts, occurring under his own eye, and, which is especially to be remarked, without having regard to any particular person, case or document.'

If it can be assumed that the Mexican archives in the Surveyor-General's office are genuine, the man who has read these archives and familiarized himself with the official signatures, several hun-

dred in number, of the person whose signature is the subject of inquiry, has certainly as much knowledge of that person's handwriting as one who has received 'letters or bills' purporting to be in the handwriting of a party whom he has never seen. (See in this connection, Turnipseed *v.* Hawkins, 1 McCord, 279.) The archives referred to are public documents and records guarded by the former Government in California, as evidence of the facts to which they relate, and which the Secretary of State was directed to preserve in his department. (Acts of 1851, p. 443.) They were afterwards transferred to the care of the Surveyor-General of the United States. (Concurrent resolution, Laws of 1858, p. 270.) These documents and records have remained continuously in official custody, and although it is not impossible that in some instances forged papers have been surreptitiously or corruptly placed among them, the presumption that officers have done their duty in preventing such frauds, applies equally to the public functionaries of Mexico, and to those of our own Government. It was necessary to prove the validity of such documents in the archives where the object was to show title derived by grant from the former Government before such grants were confirmed; but there can be little danger in assuming the genuineness of the signatures from which the witness acquired his knowledge for a collateral purpose like that under consideration. It may happen that these archives are the only source of information." Sill *v.* Reese, 47 Cal. 294, 343 (1874); Griffin *v.* State, 90 Ala. 596 (1891); Hammond's Case, 2 Greenl. (Me.) 33 (1822).

The same state of facts as existed in Sill *v.* Reese was passed upon by the United States supreme court in Rogers *v.* Ritter, 12 Wall. 317 (1870), and the same decision reached. "It is insisted, in the second place, that comparison of handwriting is in no case legal evidence, and as it was admitted to prove the genuineness of the disputed paper, the judgment should, on that account, be reversed. It is certainly true that the ancient rule of the common law did not allow of testimony derived from a mere comparison of hands, and equally true that there has been a great diversity of opinion, in the different courts of this country, in relation to this species of evidence. But in England this rule of the common law, as it respects civil proceedings, has been abrogated by the legislature, so that in the courts there, at the present day, in civil suits, the witness can compare two writings with each other, in order to ascertain whether they were both written by the same person. It is, however, not necessary for the purposes of this case to discuss the subject in all its bearings, nor to depart from the rule laid down by this court in Strother *v.* Lucas, that evidence by comparison of hands is not admissible when the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison

of hands. The witnesses who testified in this case had previous knowledge of Sanchez's handwriting. It is true this knowledge was not gained from seeing him write, nor from correspondence with him, but in a way equally effectual to make them acquainted with it. Sanchez was for many years, under Mexican rule in California, in official position, acting as justice of the peace, transacting the duties of alcalde, corresponding with the governor, and exercising for a time the power conferred upon him to grant small parcels of land to deserving persons. Necessarily, in the course of the administration of the duties of his office, he had occasion frequently to attach his signature to papers of importance. These papers, after the United States took possession of the country, were deposited in the recorder's office of San Francisco, and the Surveyor-General's office, where the Mexican archives are kept. Sanchez also, as did most of the native Californians and Mexicans who had been in public life, appeared before the United States land commission, which sat in San Francisco to determine the validity of Spanish grants, and gave his depositions. These depositions, with the other papers of the commission, at the expiration of it, were taken to the office of the Land Commissioner at Washington. As no question was raised on the trial of the genuineness of these various writings — Sanchez was present and interposed no objection — they must be considered, if not as having been acknowledged by him, at least as having been proved to the satisfaction of the court.

In this condition of things, Sears, Hopkins, and Fisher were called upon to testify upon the subject of the disputed signatures; and the inquiry is, did the court err in its ruling on this point? Obviously, the evidence is not obnoxious to the objection that it is a mere comparison of hands; that is, a comparison by a juxtaposition of two writings, in order to enable a witness, without previous knowledge of the handwriting of the party, to determine by such comparison whether both were written by the same person.

The witnesses in this case were conversant with the signature of Sanchez, and swore to their belief, not by comparing a disputed with an acknowledged signature, but from the knowledge they had previously acquired on the subject. The text-writers all agree, that a witness is qualified to testify to the genuineness of a controverted signature if he has the proper knowledge of the party's handwriting. The difficulty has been in determining what is proper knowledge, and how it shall be acquired. It is settled everywhere, that if a person has seen another write his name but once he can testify, and that he is equally competent, if he has personally communicated with him by letter, although he has never seen him write at all. But is the witness incompetent unless he has obtained his knowledge in one or the other of these modes? Clearly not, for in the varied affairs of life there are many modes in which one person

can become acquainted with the handwriting of another, besides having seen him write or corresponded with him. There is no good reason for excluding any of these modes of getting information, and if the court, on the preliminary examination of the witness, can see that he has that degree of knowledge of the party's handwriting which will enable him to judge of its genuineness, he should be permitted to give to the jury his opinion on the subject. This was done in this case, and it is manifest that the three witnesses told enough to satisfy any reasonable mind that they were better able to judge of the signature of Sanchez, than if they had only received one or two letters from him, or saw him write his name once." Rogers *v.* Ritter, 12 Wall. 317 (1870).

But to enable a witness to testify from a standard of comparison previously formed in the witness's mind from an examination of signatures, at a time when the witness did not expect to testify, the signatures or other writings from which the standard has been formed must themselves be authenticated. Jarvis *v.* Vanderford, 116 N. C. 147 (1895). In Alabama, a witness testified "In the year 1889 I saw considerable writing of J. L. M. Estes, and I think I am acquainted with his handwriting." He was thereupon permitted to testify as to Estes' handwriting. Held: Error. "Our interpretation of the language of this witness is that he had seen writings which purported to be those of Estes. . . . No sufficient predicate was laid for calling out the belief of this witness." Gibson *v.* Trowbridge Furniture Co., 96 Ala. 357 (1892).

Comparison of Hands allowed. — While the doctrine of Sill *v.* Reese and Rogers *v.* Ritter is generally accepted, on the subject of "comparison of hands," a violent disagreement exists among the American authorities. Many of the states which have followed the early English rule excluding such evidence, have also followed the lead of Parliament in enacting legislation admitting such evidence when the standards of comparison are either admitted or proven to the satisfaction of the court to be genuine, whether in evidence for other purposes or not. 17 & 18 Vict. Chap. 125, § 27 (1854); Reid *v.* Warner, 17 Lower Can. 485 (1867); Powers *v.* McKenzie, 90 Tenn. 167 (1891); Singer Mfg. Co. *v.* McFarland, 53 Ia. 540 (1880); Green *v.* Terwilliger, (Oreg.) 56 Fed. Rep. 384 (1892); Holmes *v.* Goldsmith, 147 U. S. 150 (1892); Glenn *v.* Roosevelt, (N. Y.) 62 Fed. Rep. 550 (1894); Goza *v.* Browning, 96 Ga. 421 (1895); Sankey *v.* Cook, 82 Ia. 125 (1891).

An expert may be believed, testifying from a comparison of hands, even against the alleged writer. Luce *v.* Coyne, 36 Q. B. U. C. 305 (1875).

For the law of Canada prior to 1854, see Gleeson *v.* Wallace, 4 Q. B. U. C. 245 (1848).

The unusual rule has been also announced that comparison of

hands is not to be resorted to until other methods of proving handwriting have failed. Fournel *v.* Duvert, 2 Rev. de Légis. 279 (K. B.)(1801).

A large number of the states originally, and without legislation, adopted the more liberal rule.

So in Alabama, although apparently the jury are not permitted to make the comparison for themselves. "Only experts, persons accustomed to, and skilled in the matter of handwriting, may institute comparison, between writings of unquestioned genuineness and the writing in dispute, and give an opinion." Griffin *v.* State, 90 Ala. 596 (1891); Nelms *v.* State, 91 Ala. 97 (1890).

Comparison of hands is admitted in Washington. Moore *v.* Palmer, (Wash.) 44 Pac. 142 (1896).

In Indiana, comparison of hands is admitted where the standard is admitted to be genuine. Walker *v.* Steele, 121 Ind. 436 (1889).

The reasons for this rule were stated in an earlier Indiana case. "If it were necessary to offer reasons in support of an established rule, they would readily occur. The handwriting of a person may change during the course of his life. It may be affected by his health, mood of mind at the time he writes, his haste or leisure in writing, the character of the pen, ink or paper, or other fortuitous circumstances. The testimony of a witness, therefore, founded solely upon comparison, must necessarily be uncertain; to say nothing of the facilities to commit fraud, which a rule to allow proof by comparison would open, if the basis of the comparison was not conceded." Jones *v.* State, 60 Ind. 241 (1877). But see Merritt *v.* Straw, 6 Ind. App. 360 (1892).

"The rule is firmly settled in this State that on a question involving handwriting, the only papers that may be used in examinations, of even an expert witness, are those which may have been brought into the case for another purpose. Other papers not pertinent to the case cannot be shown to the witness and used upon examination, unless the genuineness of the same is admitted by the party against whom the evidence is sought to be elicited. This rule is supported by the following authorities: Chance *v.* Indianapolis, etc., Gravel Road Co., 32 Ind. 472; Burdick *v.* Hunt, 43 Ind. 381; Huston *v.* Schindler, 46 Ind. 38; Jones *v.* State, 60 Ind. 241; Forgey *v.* First Nat'l Bank, 66 Ind. 123; Hazzard *v.* Vickery, 78 Ind. 64; Shorb *v.* Kinzie, 80 Ind. 500; Shorb *v.* Kinzie, 100 Ind. 429; Walker, Admr., *v.* Steele, 121 Ind. 436; White Sewing Machine Co. *v.* Gordon, 124 Ind. 495; Doe Ex. Dem. Perry *v.* Newton, 5 Ad. & El. 514 (31 Eng. Com. L. 712); Van Wick *v.* McIntosh, 14 N. Y. 439; Bank, etc., *v.* Mudgett, 44 N. Y. 514; Miles *v.* Loomis, 75 N. Y. 288; Hynes *v.* McDermott, 82 N. Y. 41; Pierce *v.* Northey, 14 Wis. 10.

The rule seems to be a reasonable one, and the ground or reason

upon which it is founded is that its requirements are necessary in order to avoid the evil of having collateral issues injected into the case, and the minds of the jurors thereby distracted. If the papers or documents are not in evidence, or connected with the cause for some other purpose, and their genuineness is not admitted by the adverse party, then independent proof would be necessary upon the side of the party seeking to use them as a standard of comparison, to establish their authenticity. This evidence, the opposite party would be entitled to rebut, and thereby the parties would become involved in a collateral issue. This, the rule seeks to avoid." McDonald *v.* McDonald, 142 Ind. 55, 69 (1895); Bowen *v.* Jones, 13 Ind. App. 193 (1895).

Comparison of hands has been permitted in Vermont. State *v.* Ward, 39 Vt. 225 (1867); Rowell *v.* Fuller, 59 Vt. 688 (1887).

Also in Virginia the evidence was admitted, after a very elaborate review of the authorities, in Hanriot *v.* Sherwood, 82 Va. 1 (1884).

And in Massachusetts. Com. *v.* Eastman, 1 Cush. 189, 217 (1848); Costello *v.* Crowell, 133 Mass. 352 (1882); S. C. 139 Mass. 588 (1885).

In a later case, the supreme judicial court say, in admitting evidence of an expert on handwriting as to the authorship of a letter in cipher, "The competency of an expert to testify in respect to the identity of handwriting with an established standard depends very much upon the discretion of the presiding judge, and an exception to his decision will rarely be sustained." Com. *v.* Nefus, 135 Mass. 533 (1883); Com. *v.* Coe, 115 Mass. 481, 504 (1874).

The rule is the same in Maine. State *v.* Thompson, 80 Me. 194 (1888). A party has even been permitted, at the request of the other side, to make a signature at the trial, and have it go to the jury for comparison. Chandler *v.* Le Barron, 45 Me. 534 (1858).

And in New Hampshire. The jury have been permitted to institute a comparison between the disputed and genuine writings. Carter *v.* Jackson, 58 N. H. 156 (1877).

In Georgia, such evidence is admitted. State *v.* Gay, 94 Ga. 814 (1886).

See also Code of Georgia, § 3840.

So in North Carolina. Tunstall *v.* Cobb, 109 N. C. 316 (1891); Fuller *v.* Fox, 101 N. C. 119 (1888); Yates *v.* Yates, 76 N. C. 142 (1877). But the comparison must be either with other papers in the case or "with such papers as the party whose handwriting gives rise to the controversy is estopped to deny the genuineness of or concedes to be genuine, but no comparison by the jury is permitted." Tunstall *v.* Cobb, 109 N. C. 316 (1891); see also Otey *v.* Hoyt, 3 Jones (N. C.) L. 407 (1856).

In Vermont, comparison of hands by the jury has been permitted. Adams *v.* Field, 21 Vt. 256, 266 (1849).

In Iowa, by statute. Code, Iowa, § 3655; Sankey *v.* Cook, 82 Ia. 125 (1891).

In Oregon, also by statute. 1 Hill's Ann. Laws of Oreg. § 765; Holmes *v.* Goldsmith, 147 U. S. 150 (1892).

So also in Ohio. Bell *v.* Brewster, 44 Oh. St. 690 (1887).

But where the conclusion of an expert is admitted, the facts upon which the opinion is based are also competent. Koons *v.* State, 36 Oh. St. 195 (1880).

So in South Carolina, "in a case of conflicting evidence." Robertson *v.* Miller, 1 M'Mullan (S. C.), 120 (1841). "Comparison, as an original means of ascertaining handwriting will not be permitted, but when introduced in aid of doubtful proof already offered, it may be allowed." Benedict *v.* Flanigan, 18 S. C. 507 (1882); Graham *v.* Nesmith, 24 S. C. 285 (1885); Rose *v.* Wimsboro Bank, 41 S. C. 191 (1893).

And also in Kansas. "We have heretofore had occasion to examine the question relating to the comparison of handwritings, and we uphold the doctrine that comparisons of handwritings may be made both by experts and by the jury. (Macomber *v.* Scott, 10 Kas. 335; Joseph *v.* National Bank, 17 Kas. 256.) This case goes a little further, and holds that an expert may compare a signature which he has previously seen, but which is now lost, with one which is admitted to be genuine, and which is among the papers of the case." Abbott *v.* Coleman, 22 Kans. 250 (1879); Gaunt *v.* Harkness, 53 Kans. 405 (1894).

Standard, how Established. — A great objection to this class of evidence has been a fear that collateral issues would be multiplied. The effort is to have the standard so authenticated as to remove this objection. In Massachusetts, before any writing can be used as a standard of comparison, it must be shown, by clear and undoubted testimony, "that the specimen offered as a standard is the genuine handwriting of the party sought to be charged." Com. *v.* Coe, 115 Mass. 481, 503 (1874).

So a letter purporting to come from a testator, purporting to be signed by him and in reply to a letter from the witness who produces it, is not a sufficient standard until further authenticated. McKeone *v.* Barnes, 108 Mass. 344 (1871).

So Vermont requires that the standard should either be admitted or "established by clear, direct and positive testimony." Adams *v.* Field, 21 Vt. 256 (1849).

Pennsylvania requires that the writings used as standards should be "admitted to be genuine or proved to be genuine beyond a doubt." Haycock *v.* Greup, 57 Pa. St. 438 (1868).

So in Oregon it is requisite, "in the first instance, to have a genuine signature admitted or proven beyond all doubt or cavil." "Wherever proof of handwriting by comparison is permitted, it

will be found that great care is taken that the standard of comparison shall be genuine. The reason of this rule is obvious. Under the English statute, comparison of disputed writing is allowable only with the writing proved to the satisfaction of the court to be genuine; and the American tribunals which have refused to follow the common-law rule on the subject of proving handwriting by comparison have been no less careful than the English legislators to see that the standards of comparison shall be beyond suspicion, for it is plain that, if there be any controversy as to the genuineness of the specimens with which the comparison is to be made, all the evils pointed out by the opponents of this species of proof become apparent, and a number of collateral issues are in each case at once raised." Green *v.* Terwilliger, 56 Fed. 384 (1892).

Under the code provision of Iowa, requiring the standard of comparison to be "proved to be genuine," the evidence of the plaintiff that the signature offered as a standard was that of the defendant's intestate, was not sufficient, — in the absence of evidence that plaintiff saw the standard written. "Before the comparison can be made by the expert or jury, the genuineness of the standard writing must be proved, established, and no longer a question of fact in the case. It should be so that the court can say to the jury that the standard, as a matter of law, is genuine, and leave to the jury the inquiry whether the disputed signature was written by the same hand. Such a conclusive condition, as to genuineness does not arise from opinions based on knowledge of handwriting. This court has said that evidence of experts, from comparison of handwriting, is of the lowest order of evidence, and unsatisfactory. Whitaker *v.* Parker, 42 Iowa, 585. This court has also said: 'It appears to us that the genuineness of the writing made the basis of comparison, called sometimes the "standard writing," should be proved by direct and positive evidence.' Winch *v.* Norman, 65 Iowa, 186. And in Hyde *v.* Woolfolk, 1 Iowa, 159, it is said: 'Two obvious methods of proving the standard are: First, by the testimony of a witness who saw the person write it; and, second, by the party's admission when offered by himself.' It is said that these may not be the only ways of making such proof, but they indicate what is understood as 'positive evidence.'" Sankey *v.* Cook, 82 Ia. 125 (1891).

In Iowa it is also required that the standard should be established by "direct evidence," and not itself be proved by comparison. Winch *v.* Norman, 65 Ia. 186 (1884); Sankey *v.* Cook, 82 Ia. 125 (1891).

In Missouri, the standards of comparison must be so proved that "no collateral issue can be raised concerning them, which is only where the papers are either conceded to be genuine or are such as

the other party is estopped to deny." Singer Mfg. Co. *v.* Clay, 53 Mo. App. 412 (1893).

So in Texas, the standard of comparison, whether establishing a previous or present standard from which to form an opinion, must be admittedly or undoubtedly genuine. Eborn *v.* Zimpelman, 47 Tex. 503 (1877); Jester *v.* Steiner, 86 Tex. 415 (1894).

So in Virginia. Hanriot *v.* Sherwood, 82 Va. 1 (1884).

Probably the rule in Ohio is substantially the same. It requires "that the standard of comparison, when not a paper already in the case or admitted to be genuine, must be clearly proved by persons who testify directly to its having been written by the party." Bragg *v.* Colwell, 19 Oh. St. 407 (1869); Pavey *v.* Pavey, 30 Oh. St. 600 (1876).

The Code of Georgia admits as standard of comparison by the jury "other writings, proved or acknowledged to be genuine." Code, § 3840. McVicker *v.* Conkle, 96 Ga. 584 (1895). Under this provision, circumstantial evidence of genuineness is equally admissible with direct. Thus on an action against the estate of a deceased person on a note signed by a mark which was claimed to be a forgery, notes paid by him, found among his effects, signed in the same way are standards for comparison. Little *v.* Rogers, (Ga.) 24 S. E. 856 (1896).

In Indiana, "the law is well settled that only such writings as are conceded to be genuine can be used in such cases for the purpose of comparison with the writing in dispute." Merritt *v.* Straw, 6 Ind. App. 360 (1892).

In Kansas, the same strictness of proof required for the standard of comparison applies to alleged specimens of the handwriting offered for the purpose of testing the expert on cross-examination. Gaunt *v.* Harkness, 53 Kans. 406 (1894).

Apparently, the point decided in Gaunt *v.* Harkness is somewhat in dispute. For authorities in accord, see Rose *v.* First National Bank, 91 Mo. 399 (1886); Pierce *v.* Northey, 14 Wisc. 9 (1861); Massey *v.* Bank, 104 Ill. 327 (1882); Tyler *v.* Todd, 36 Conn. 218.

To the contrary effect, see Browning *v.* Gosnell, 91 Ia. 448 (1894); Thomas *v.* State, 103 Ind. 419 (1885).

The standard cannot be proved genuine by the mere opinion of a witness based on the witness's general knowledge of the disputed handwriting. Steiner *v.* Jester, (Tex. Civ. App.) 23 S. W. 718 (1893); Com. *v.* Eastman, 1 Cush. 189 (1848).

Function of the Court. — The provision of the English statute admitting, as standards of comparison, documents proved to the satisfaction of the judge to be genuine, is a frequently accepted rule.

The documents in the disputed handwriting used as standards for

comparison must be proved genuine to the satisfaction of the court. "The genuineness of the document, however, which goes to the jury for the purpose of comparing the contested document with it, must either be admitted, or else established by clear, direct and positive testimony. Unless this is in the first instance done, the testimony should, for obvious reasons, be excluded." Adams *v.* Field, 21 Vt. 256 (1849); State *v.* Ward, 39 Vt. 225 (1867).

If the court is satisfied, it then becomes the duty of the jury to examine the evidence as to the genuine character of the standards, and reject them if not satisfied. "The court having adjudged the papers genuine, and having permitted them to go to the jury, it then became the duty of the jury, before making comparison of a disputed writing with them, to examine the testimony respecting their genuineness, and decide whether their genuineness was established beyond a reasonable doubt; and in such cases the court should instruct the jury that if they did not find, by such measure of proof, that the papers offered as standards are genuine, they should not be used as evidence against the prisoner. In criminal prosecutions, where the guilt of the accused is sought to be established by proof afforded by comparison of handwriting, although the court have decided that the writing offered as a standard is genuine, still it is the right and duty of the jury to judge for themselves in respect to the sufficiency of the proof of the genuineness of the writing. They should weigh the testimony by the same rule, and require the same measure of proof they would require in respect to any other essential point in the case. In England it was long held that a comparison of handwriting was not admissible; but that rule was modified by more modern decision, under which their courts admitted in evidence comparison of hands, but confined it to documents which were proved to be genuine, and which were in evidence on the trial of the cause for other purposes. The doctrine of those cases (except where the writing in dispute was an ancient document,) was law in England for a long period of time; finally, a different, and, we think, more reasonable rule was introduced by parliament." State *v.* Ward, 39 Vt. 225 (1867); Rowell *v.* Fuller, 59 Vt. 688 (1887).

That the person whose handwriting is involved cannot himself at the trial write for the purpose of furnishing a standard for comparison, see Gulzoni *v.* Tyler, 64 Cal. 334 (1883); Williams *v.* State, 61 Ala. 33, 40 (1878); King *v.* Donahue, 110 Mass. 155, 156 (1872); Hickory *v.* United States, 151 U. S. 303 (1894).

"It would open too wide a door for fraud, if a witness was allowed to corroborate his own testimony, by a preparation of specimens of his writing for the purposes of comparison." Williams *v.* State, 61 Ala. 33, 40 (1878).

So essential is it regarded that the standard of comparison should

be genuine that it has also been ruled that it must be *original*, and, consequently, that impressions of writings, taken by means of a press and duplicates made by a copying machine, not being originals, cannot be used as standards. "The copies of letters, in the letter book of the defendants, were not admissible as competent standards of comparison, by which to prove the genuineness of signatures to papers produced on the part of the prosecution. Impressions of writings produced by means of a press, or duplicate copies made by a machine, are not admissible for this purpose. Nothing but original signatures can be used as standards of comparison, by which to prove other signatures to be genuine. Nor can a paper, proposed to be used as a standard, be proved to be an original, and a genuine signature, merely by the opinion of a witness that it is so; such opinion being derived solely from his general knowledge of the handwriting of the person whose signature it purported to be. The evidence, resulting from a comparison of a disputed signature with other proved signatures, is not regarded as evidence of the most satisfactory character, and by some most respectable judicial tribunals is entirely rejected. In this commonwealth it is competent evidence; but the handwriting used as a standard must first be established by clear and undoubted proof, that is, either by direct evidence of the signature, or by some equivalent evidence. Moody *v.* Rowell, 17 Pick. 490; Richardson *v.* Newcomb, 21 Pick. 315, 317." Com. *v.* Eastman, 1 Cush. 189, 217 (1848).

How far a finding of genuineness is conclusive, is a matter in dispute. Certain courts are inclined to regard a finding by the court that a standard of comparison is a genuine specimen of the handwriting in question as practically conclusive on the point.

Such is the express language of the English statute — "any Writing proved to the Satisfaction of the Judge to be genuine shall be permitted to be made by Witnesses." 17 & 18 Vict. Chap. 125, § 27 (1854).

"His decision must be final and conclusive 'unless it is made clearly to appear that it was based upon some erroneous view of legal principles, or that the ruling was not justified by the state of the evidence as presented to the judge at the time.' Nunes *v.* Perry, 113 Mass. 276; Jones *v.* Roberts, 65 Me. 276; Com. *v.* Coe, 115 Mass. 505." State *v.* Thompson, 80 Me. 194 (1888).

"When any writing is offered as a standard of comparison, it is for the presiding judge to determine whether it is shown by clear testimony that it is the genuine handwriting of the party sought to be charged. Unless his finding is founded upon error of law, or upon evidence which is, as matter of law, insufficient to justify the finding, this court will not revise it upon exceptions." Costelo *v.* Crowell, 139 Mass. 588 (1885).

Other courts hold that the determination of the court on the question is merely preliminary to get the entire matter before the jury; — practically as a *res integra*.

So the supreme court of New Hampshire in State *v.* Hastings, 53 N. H. 452, 461 (1873) say: — "It is to be received, and then the jury are to be instructed that they are first to find, upon all the evidence bearing upon that point, the fact whether the writing introduced for the purpose of comparison, or sought to be used for that purpose, is genuine. If they find it is not so, then they are to lay this writing and all the evidence based upon it entirely out of the case; but if they find it genuine, they are to receive the writing and all the evidence founded upon it, and may then institute comparisons themselves between the paper thus used and the one in dispute, and settle the final and main question whether the signature in dispute is or is not genuine."

Experts Essential. — The court and jury, in their appropriate spheres, determine the effect of the comparison. But they may be aided by persons skilled in such matters.

A test by comparison of hands, indeed, cannot be instituted by an ordinary observer, after a dispute has arisen, although the comparison is with documents confessedly genuine. Board of Trustees *v.* Misenheimer, 78 Ill. 22 (1875). "Andrews does not profess to have had any acquaintance with Leyerle's handwriting until since he was informed he denied the signature to the bond, when, as he says, to satisfy himself, he went to the county clerk's office and examined his signature to his reports as guardian, and, from a comparison of those, he formed an opinion that the signature to the bond is that of Leyerle. This is clearly insufficient to entitle him to give his opinion in evidence. His knowledge was acquired under circumstances tending to bias his mind, imperceptibly though it may have been to himself. It is scarcely probable that he did not have some impression as to the genuineness of the signature before he examined the guardian's reports. That he felt an interest in the question, is shown by the fact that he put himself to the trouble to make the examination. When, therefore, he investigated, however honest he may have believed himself to be, the natural tendency of his mind would most likely find something to confirm his preconceived opinion. In this way, important differences may have been overlooked, and slight resemblances greatly magnified. Knowledge thus acquired is vastly different from that acquired by repeatedly seeing a handwriting, and scrutinizing it, when no unfavorable circumstances exist to arouse suspicion and excite the imagination." Board of Trustees *v.* Misenheimer, 78 Ill. 22 (1875); Weaver *v.* Whilden, 33 S. C. 190 (1890); Griffin *v.* State, 90 Ala. 596 (1891); Goodyear *v.* Vosburgh, 63 Barb. 154 (1872); State *v.* Tompkins, 71 Mo. 613 (1880); Wimbish *v.* State, 89 Ga. 294 (1892).

This is true although the witness himself saw the proposed standard of comparison written. Wimbish *v.* State, 89 Ga. 294 (1892).

The expert on handwriting can, and, for the best result from his testimony, should, state the grounds upon which his judgment is based. A most interesting statement by Chancellor McGill of New Jersey illustrates this. Speaking of an attack upon the genuineness of certain signatures to a will alleged to be forged, the Chancellor says: — "This comparison was made in two ways — first, by witnesses who had acquired personal knowledge of the handwriting of those several persons, by having seen them write, or by having received writings from them, and who had thus formed in their minds an exemplar of the genuine handwriting, with which they compared the several disputed signatures, and thus reached their opinions; and, second, by witnesses who had no previous knowledge of the genuine handwriting, and made their comparison by placing that which was established as genuine in juxtaposition with that which was disputed, and thus formed opinion whether the writings were made by the same person. The latter witnesses were admitted when it was shown that they had special skill and experience in making such comparison.

The theory upon which these expert witnesses are permitted to testify is that handwriting is always in some degree the reflex of the nervous organization of the writer, which, independently of his will and unconsciously, causes him to stamp his individuality in his writing.

I am convinced that this theory is sound. But, at the same time, I realize that in many cases it is unreliable when put to practical test. It must contend not only with disguise, but also with the influence of possible abnormal, mental and physical conditions existing when the writing was made, such, for instance as the position of the body, whether reclining, sitting or standing; the height and stability of that upon which the writing rests, and the character of its surface; the character of the paper written upon, the ink, the pen and holder of the pen, the health of the writer's body and member with which the writing is made, not only generally, but also with reference to the accidents and influences of the moment.

It follows that unreliability is greater when the disputed writing is short or the standards for comparison are meagre or are all written at one time, and also that uncertainty lessens when the disputed writing is long and the standards are numerous and the products of different dates.

Handwriting is an art concerning which correctness of opinion, is susceptible of demonstration, and I am fully convinced that the value of the opinion of every handwriting expert as evidence

must depend upon the clearness with which the expert demonstrates its correctness. That demonstration will naturally consist in the indication of similar characteristics, or lack of similar characteristics, between the disputed writing and the standards, and the value of the expert's conclusion will largely depend upon the number of these characteristics which appear or are wanting.

The appearance or lack of one characteristic may be accounted to coincidence or accident, but, as the number increases, the probability of coincidence or accident will disappear, until conviction will become irresistible. Thus comparison is rated after the fashion of circumstantial evidence, depending for strength upon the number and prominence of the links in the chain.

Without such demonstration the opinion of an expert in handwriting is a low order of testimony, for, as the correctness of his opinion is susceptible of ocular demonstration, and it is a matter of common observation, that an expert's conclusion is apt to be influenced by his employer's interest, the absence of demonstration must be attributed either to deficiency in the expert or lack of merit in his conclusion. It follows that the expert who can most clearly point out will be most highly regarded and most successful." Gordon's Case, 50 New Jersey Eq. 397, 421 (1892).

Courts rejecting Comparison. — Prominent among the courts which follow the English common law rule, rejecting comparison of hands, is the supreme court of the United States. "It is a general rule, that evidence by comparison of hands is not admissible, where the witness had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands." Strother *v.* Lucas, 6 Peters, 763 (1832); Moore *v.* United States, 91 U. S. 270 (1875).

Territorial courts of the United States are governed by the rule prevailing in the federal courts, excluding "comparison of hands," except with genuine documents already in the case. Dakota *v.* O'Hare, 1 No. Dak. 30, 43 (1890). "The territorial district courts were inferior courts, and bound by precedents made by the United States supreme court, which court holds that, to be admissible for purposes of comparison, a paper must not only be admitted or proved to be in the handwriting of a party whose writing is in dispute, but it must also be a paper 'in evidence for some other purpose in the cause.' The letters were not in evidence for any purpose, and hence under this rule, which is a strict rule of the common law, the letters were properly excluded. Moore *v.* U. S., 91 U. S. 270; Strother *v.* Lucas, 6 Pet. 763; Vinton *v.* Peck, 14 Mich. 287." Dakota *v.* O'Hare, 1 No. Dak. 30, 43 (1890); Davis *v.* Fredericks, 3 Mont. 262 (1878).

Where territorial courts adopt the rulings of the supreme court of the United States upon this subject, they feel at liberty to

change their rulings when admitted to the more independent position of states.

"Should the question come before this court in an action arising since the state was admitted into the Union, we should then feel at liberty to adopt a rule for this state, untrammeled by our decision in the present case." Dakota *v.* O'Hare, 1 No. Dak. 30, 43 (1890).

Neither is comparison of hands allowed in Kentucky. "The civil and ecclesiastical law permitted the testimony of experts as to handwriting by comparison. The rule in this country varies in the different States. In some of them the comparison is allowable between the writing in question and any other writing shown to be genuine, whether it be already in the case or not, or relevant or not; while in others it is only permitted as between the disputed paper and one already in the case and relevant to it. Under the rule as adopted in this State, however, the last exception *supra*, and which allows comparison by the jury with or without the aid of experts, is not recognized, the reason doubtless being that there is no necessity for it when witnesses are at hand who know the handwriting. (Hawkins *v.* Grimes, 13 B. M., 257.)

In view of the necessarily uncertain character of such expert testimony, and the fact that as the media of evidence are multiplied the chances of mistake are increased, we regard this as the correct rule; but we must not be understood as holding that an expert may not testify as to differences in the letters or words, or speak of other facts as they appear to him upon the face of a writing." Fee *v.* Taylor, 83 Ky. 259 (1885).

Even comparison by the jury is not permitted. Hawkins *v.* Grimes, 13 B. Monr. 256 (1852).

So, this evidence is not received in Missouri, except as to papers already in the case. Rose *v.* First National Bank of Springfield, 91 Mo. 399 (1886).

But where a party is estopped to deny his signature, *e.g.*, where it is an endorsement upon certain notes, experts can compare such signature with the disputed writing. State *v.* Tompkins, 71 Mo. 613 (1880).

And the rule has been extended further, so as to read "such papers can only be offered in evidence to the jury when no collateral issue can be raised concerning them, which is, only when the papers are either conceded to be genuine or are such as the other party is estopped to deny, or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation of his testimony. State *v.* Clinton, 67 Mo. 380 (1878); Rose *v.* Bank, 91 Mo. 399 (1886); Singer Mfg. Co. *v.* Clay, 53 Mo. App. 412 (1893); Doud *v.* Reid, 53 Mo. App. 553 (1893). "The object of the rule, in the

respect here considered, is to avoid the trial of collateral issues in the midst of the main trial. If the genuineness of the signature is not conceded by the party against whom it is proposed to use it, there immediately springs up a collateral issue which would tend to confuse and hamper the main issue. The rule then should receive such interpretation as will avoid this." McCombs *v.* Foster, 62 Mo. App. 303 (1895); State *v.* Thompson, (Mo.) 34 S. W. 31 (1896).

So also in Michigan, though with some doubt as to whether careful comparison by a competent expert is not really better than experience gained by casually, or even accidentally, watching a person write. Vinton *v.* Peck, 14 Mich. 287 (1866); People *v.* Parker, 67 Mich. 222 (1887).

In Virginia. Rowt *v.* Kile, 1 Leigh, 216 (1829).

And also in West Virginia. State *v.* Koontz, 31 W. Va. 127 (1888).

In Texas, comparison of hands, except as stated below, is neither admitted to establish similarity in handwriting or to identify the alleged writer by peculiarities in the way of incorrect spelling, &c. Matlock *v.* Glover, 63 Tex. 231 (1885); Cook *v.* First Nat. Bank, (Tex. Civ. App.) 33 S. W. 998 (1896).

In Texas, however, comparison of hands is permitted if the standards of comparison are admitted or proven to be genuine. "It is the rule in this state that irrelevant papers are not admissible in evidence for the sole purpose of furnishing a standard of comparison of handwriting, unless they are admitted to be genuine, or are such as the party is estopped to deny, or are established by the most satisfactory proof; but papers already in evidence for other purposes may be used. 9 Am. &c. Eng. Enc. Law, P. 285, note 1, where the Texas authorities are collected; also, Jester *v.* Steiner, 86 Tex. 420, 25 S. W. 411. Greenleaf announces the rule as to the admission of such papers deduced by him from the conflict of authority in America as follows: — 'If it were possible to extract from the conflicting judgments a rule which would find support from a majority of them, perhaps it would be found not to extend beyond this: that such papers can be offered in evidence to the jury only when no collateral issue can be raised concerning them, which is only where the papers are either conceded to be genuine, or are such as the other party is estopped to deny, or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony.' 1 Greenl. Ev. 581. According, then, to the rule established by Greenleaf, such papers are admissible only when no collateral issue can be raised concerning them, or when exhibited in confirmation and explanation of testimony under the restrictions stated. Our

supreme court while never having had the precise question before it, has perhaps gone a little further in the direction of the admission of such papers in holding them admissible when established by the most satisfactory evidence. In Eborn *v.* Zimpelman, 47 Tex. 518, the above citation from Greenleaf is made: and as the extension of the rule as laid down by Greenleaf is reasonable, and yet within the strict lines as drawn by our supreme court, we believe it should be fully adopted, and that the evidence excluded was admissible." Mardes *v.* Meyers, (Tex. Civ. App.) 28 S. W. 693 (1894).

So in the state of New York, at common law. Miles *v.* Loomis, 75 N. Y. 288 (1878).

And comparison cannot be made by the jury with genuine papers not already in the case. Randolph *v.* Loughlin, 48 N. Y. 456 (1872); — which requires that the examination should be by witnesses.

The rule has since been changed by Statute Laws, 1880, c. 36; Laws, 1888, c. 555; Glenn *v.* Roosevelt, 62 Fed. Rep. 550 (1894); People *v.* Corey, 148 N. Y. 476 (1896).

It has been held that the New York statute merely allows an expert to testify that the disputed and the genuine documents were written by the same person. Unless otherwise qualified, he is not allowed to testify who wrote both documents. "It may be observed that this statute only permits a comparison to be made by a witness of a disputed writing with any writing proved to be genuine, and the submission of such writings, and the evidence of such witnesses to the court and jury, as evidence of the genuineness or otherwise, of the writing in dispute. Although this statute permits a comparison of a genuine handwriting of a person with that of a disputed instrument, we find in it no authority which would justify a court in permitting a witness to testify to the handwriting of a person when he had no knowledge of its genuineness, except from having seen a signature that was proved to be genuine. In this case, the witness had never seen the defendant write, nor was there any claim that he had ever received documents purporting to be written by defendant in answer to documents written by the witness or under his authority, or that, in the ordinary course of business, documents purporting to be written by the defendant had been habitually submitted to the witness.

As this witness was not qualified to give evidence as to the handwriting of the defendant, except as he compared the writings in dispute with the one proved to be genuine, he should not, we think, have been permitted to testify positively, that these different entries and papers were in defendant's handwriting. His evidence should have been confined to a comparison of the handwriting of the genuine paper with the handwriting of those in

dispute, and to his opinion that they were or were not written by the same person. Upon such an examination, the jury would have readily understood that his evidence was confined to a comparison of the writings, and his opinion was based thereon, which would naturally have given it less weight than his positive testimony, when the fact that he had no knowledge of the defendant's writing, except by such comparison, might have been easily forgotten by the jury. Such proof was all that was justified by the statute, nd all that should have been allowed. He was also permitted to testify that a paper was in the defendant's handwriting which was not presented to the court or jury, and which he had not seen since the standard offered in evidence was proved to be genuine, and upon this proof he was then permitted to give secondary evidence of the contents of such paper. We think the admission of this evidence, in the form in which it was given, was error." People *v.* Severance, 67 Hun, 182 (1893).

Neither do the New York statutes of 1880 (chap. 36) and 1888 (chap. 555) authorize submission to the jury for comparison of hands, except in connection with the evidence of witnesses. "We think, fatal error was committed in submitting the check purporting to be drawn by Thomas, and the one purporting to be drawn by Pinckney, to the jury for the purpose of comparison of handwriting. It is apparent, upon an inspection of the statute, chapter 36 of the Laws of 1880, as amended by chapter 555 of the Laws of 1888, that the jury, independent of testimony in regard to handwriting, are not permitted to become witnesses simply upon an inspection and comparison of handwriting. Section 1 of the act of 1880, provides that comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, 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. By the Laws of 1888 this rule was enlarged by the addition of a section providing that comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person claimed on the trial to have made or executed the disputed instrument or writing, shall be permitted and submitted to the court and jury in like manner; the words 'in like manner' referring to the manner provided in the first section. Therefore, it is apparent that the submission of a writing to a jury must be in connection with the testimony of witnesses in regard to the validity or authorship of the various handwritings; and that, independent of the examination of witnesses, such handwritings cannot be submitted to the jury for the purpose of arbitrary comparison by them. In other words, the handwriting can only be inspected by the

jury in aid of the testimony of witnesses in reference to the authorship of the handwritings in question.

In the case at bar, without any testimony tending to show that these checks were signed by the same individual, they were submitted to the jury. The jurors thus became original witnesses, to determine the question according to their own sweet will or fancy." People *v.* Pinckney, 67 Hun, 428 (1893).

In New York, even before the passage of these enabling statutes, where the defendant, at the plaintiff's request, wrote his signature in presence of the jury, the plaintiff can offer the signature so acquired in evidence for the purpose of having it compared with the signature in controversy. Bronner *v.* Loomis, 14 Hun, 341 (1878). "The defendant's counsel undertakes to sustain his objection and exception by a reference to the general rule of law as settled in this State, that when the question is upon the genuineness of a signature, you cannot give in evidence other instruments which are genuine to enable the jury to compare the signatures thereto with the one which is disputed. It is true, this is the general rule as adopted in this State. This rule seems to be founded on two reasons: 1. Because, in the absence of such a rule, there would be a great temptation to make an unfair selection of signatures. 2. Because the introduction of a large number of signatures would create a number of collateral issues, and thus tend to burthen the case with irrelevant questions and to embarrass the jury. (Van Wyck *v.* McIntosh, 14 N. Y., 439; Greenleaf's Ev., § 580.)

But, where the signature is made by the person whose signature is in controversy, in the presence of the court and jury at the request of the adverse party, or where such a signature is obtained on the cross-examination of the witness, the reasons for the application of the rule do not exist. The party asserting the forgery cannot, upon the trial, make his own signature, and then offer the signature so made in evidence for the purpose of comparison with the controverted signature for obvious reasons (King *v.* Donahoe, 110 Mass., 155); but, if the opposite party chooses to take the risk, we think a signature thus made may be offered in evidence by the latter, for the purpose of comparing it with the signature in question. (Greenleaf's Ev. [13th ed.], § 581, note. Taylor on Ev., § 1669, and note; 1 Wharton on Ev., § 706; Chandler *v.* Le Barron, 45 Maine, 534; Roe *v.* Roe, 40 Superior Court Rep. [Jones & Spencer], 1; Hayes *v.* Adams, 2 Sup. Court [T. & C.], 593; Doe *v.* Wilson, 10 Moore's Priv. Council Cases, 202.)" Bronner *v.* Loomis, 14 Hun, 341 (1878).

In Wisconsin, the comparison has been rejected. Hazleton *v.* Union Bank of Columbus, 32 Wisc. 34 (1873).

In Illinois. Jumpertz *v.* People, 21 Ill. 375 (1859). "Whatever we might be inclined to hold were the question before us for

the first time, it must be considered the law of this state." Kernin *v.* Hill, 37 Ill. 209 (1865). So held of proof by experts. Pierce *v.* De Long, 45 Ill. App. 462 (1892); Riggs *v.* Powell, 142 Ill. 453 (1892); Himrod *v.* Gilman, 147 Ill. 293 (1893).

In Michigan. Van Sickle *v.* People, 29 Mich. 61 (1874).

And in Tennessee. Wright *v.* Hersey, 59 Tenn. (3 Baxter) 42 (1873).

The rule is the same in Louisiana, deferring to the practice in England. State *v.* Fritz, 23 La. Ann. 55 (1871).

And in Arkansas. "It is said by Mr. Greenleaf, that proof of handwriting may be made by a comparison of the writing to be proven, with other writings, admitted to be genuine, already in the case. 'The reason assigned for this is,' he says, 'that as the jury are entitled to look at such writings for one purpose, it is better to permit them, under the advice and direction of the court, to examine them for all purposes, than to embarrass them with impractical distinctions to the peril of the cause. 1 Green. Ev., sec. 578.

But a comparison with writings not already in the case, but which are proven for the purpose of such comparison, is not admissible. Van Wyck *v.* McIntosh, 4 Kernan, 439; Jackson *v.* Phillips, 9 Cow., 94; Doe *v.* Newton, 5 Adol. & El., 514; Bromage *v.* Rice, 7 Carr. & P., 548; Waddington *v.* Cousins, Ib., 595." Miller *v.* Jones, 32 Ark. 337, 344 (1877).

And Alabama. "In this State handwriting cannot be proved by comparison." Gibson *v.* Trowbridge Furniture Co., 96 Ala. 357 (1892).

So also in Maryland. Tome *v.* Parkersburg Branch R. R., 39 Md. 36, 90 (1873). In Herrick *v.* Swomley, 56 Md. 439, 459 (1881), the court feel themselves bound by Tome *v.* Parkersburg Branch R. R. (*supra*). Evidence is equally incompetent of an expert in handwriting and photography who has enlarged certain genuine signatures and offers to point out the differences between such signatures and the one in dispute. *Ibid.*, p. 90.

In Pennsylvania, an unusual rule prevails. While comparison of hands, as such, by experts, is excluded, the jury are at liberty to compare the disputed writing with well-authenticated specimens of the person's handwriting. Foster *v.* Collner, 107 Pa. St. 305 (1884); Haycock *v.* Greup, 57 Pa. St. 438 (1868). A further qualification is as follows: "The comparison can be made only by the jury, and it is not allowed as independent proof. It can be used only as corroborative. After evidence has been adduced in support of a writing, it can be strengthened by comparing the writing in question with other genuine writings, indubitably such. Beyond this our cases do not go." Haycock *v.* Greup, 57 Pa. St. 438 (1868).

"In Travis *v.* Brown, 43 Pa. 17, a summary was stated, based upon the consideration of the leading cases in Pennsylvania, and the result of that summary was, first, that evidence touching the genuineness of a paper may be corroborated by a comparison to be made by a jury between that paper and other well authenticated writings of the party; second, but mere experts are not admissible to make the comparison, and to testify to their conclusions from it." Rockey's Estate, 155 Pa. St. 453 (1893).

Ancient Documents. — However much the proof of handwriting by comparison of hands has been discountenanced, it has been allowed without serious question in case of ancient documents: — *i.e.*, documents over thirty years old. Strother *v.* Lucas, 6 Peters, 763 (1832). "The question presented by the record, in connection with the facts, as there disclosed, is, whether upon an indictment for forgery of an ancient deed, in regard to which, from lapse of time, all personal knowledge may be presumed to be lost, it is competent to establish the forgery by the testimony of an expert, who has no previous knowledge of the handwriting, but who speaks entirely from comparison of the handwriting in the instrument alleged to be forged with that in other ancient deeds or writings admitted or proved to be genuine.

The general rule of the common law, that handwriting is not to be proved by comparison, has been fully recognised in this state, and is not now questioned. The proof must be by a witness having proper knowledge of the party's handwriting, acquired either by seeing him write, or by correspondence or other business transactions with him, from which a personal knowledge of the character of the handwriting is acquired.

Where, however, the writings are of such antiquity that living witnesses cannot be had, the rule is, and from the very necessity of the case must be, relaxed. In such cases the course is to rely upon the testimony of experts, who testify concerning the genuineness of the instrument in question by comparison with other documents admitted to be genuine, or proved to have been treated and acted upon as such. Or the expert may speak from a knowledge of the handwriting, acquired by a previous inspection of such ancient writings. 7 East, 282, note a; 14 East, 327; 1 Phil. Ev. 491; Greenl. Ev. § 578; Jackson *v.* Brooks, 8 Wend. 426, S. C.; 15 Wend. 111; Strother *v.* Lucas, 7 Peters, 767; Rout's administrator *v.* Riley's administrator, 1 Leigh, 222." West *v.* State, 22 N. J. L. 212, 241 (1849); Bell *v.* Brewster, 44 Oh. St. 690 (1887); Hazleton *v.* Union Bank of Columbus, 32 Wisc. 34 (1873); Sweigart *v.* Richards, 8 Pa. St. 436 (1848); Cantey *v.* Platt, 2 McCord (S. C.), 260 (1822).

Conversely, an ancient document, the authenticity of which is established to the satisfaction of the court, may be used as a

standard for the comparison of hands by a duly qualified expert, under Code, § 3840. Goza *v.* Browning, 96 Ga. 421 (1895).

Documents in Evidence. — In certain courts which continue to reject "comparison of hands," not only are ancient documents regarded as constituting an exception, but an additional exception has been established in the case of genuine documents, in the handwriting of the party whose writing is in dispute, which are already in evidence for other purposes. The basis of this concession apparently is that the jury are bound to do this in any event, and that the result is apt to be better if the fact is frankly recognized and the jury are given all the aid that experts can give them. Moore *v.* United States, 91 U. S. 270 (1875). "When papers are already in the case, it is held almost if not quite universally, that the jury may make the comparison for themselves. 1 Greenl. Ev. § 578. Mr. Greenleaf gives it as his opinion that this comparison may be made with or without the aid of experts. In Doe *v.* Newton, 5 A. & E. 514 (1836), it is said that the court should enter into this inquiry with the jury, but it is doubtful whether it was meant to intimate that witnesses should be examined for that purpose. The general English rule would seem to be that the jury must form their own opinions from the comparison, and the English authorities agree in saying that the objection that a jury may be illiterate cannot now have any weight. But it cannot be denied that, even among intelligent men, there is much difference in regard to the capacity of forming an accurate judgment by comparison, while all persons who can read and write can form some sort of an opinion. Experts can certainly aid a jury very much in these inquiries, and, if any are admitted, the degree of their skill cannot be nicely measured. But, as we have already remarked, we think the presumption cannot safely be raised that all jurors here can be qualified to form opinions for themselves upon questions of handwriting; and while, if capable, they may properly make comparison, it is safer and better, we think, to make sure that they receive such light as is accessible.

Where, as in the present case, the papers used as means of comparison are a part of the records in the cause, and undisputed, it is held by the authorities cited that the jury can compare them, and that a witness may also use them, to form an opinion concerning handwriting; — and no objection can arise on the ground that they can have been specially selected as a standard. We should feel disposed to say — had not the doctrine become almost venerable from much repetition — that there is nothing in ordinary experience which could lead any one to suppose that a person cannot form a better judgment of resemblances in writing from having the specimens before him, than from any mere effort of memory. And we feel constrained to hold that a comparison of hands by witnesses,

where there is an undisputed standard in the cause, or where documents are fairly before the jury upon the issues, is allowable." Vinton *v.* Peck, 14 Mich. 287, 294 (1866); Mallory *v.* Ohio Farmers Ins. Co. 90 Mich. 112 (1892).

"The right to establish handwriting by comparison in other cases has been denied on two grounds; first, because the specimens for comparison may be unfairly selected, and second, because proof of the genuineness of the specimens would raise collateral issues which would cumber the case, and which the party could not be supposed to be ready to meet. Accordingly the rule has been inflexibly and we think justly settled, that disputed papers which do not belong in the cause, and are not involved in the issue, cannot have their genuineness made a question of inquiry in the cause, and cannot therefore be made a basis of comparison for either witnesses or jury. — Doe *v.* Newton, 5 Ad. and El. 514; Griffits *v.* Ivery, 11 Id. 322; Hughes *v.* Rogers, 8 M. and W. 123; Bromage *v.* Rice, 7 C. and P. 548. There is one English case in which the Court of Queen's Bench was equally divided upon the question whether, after an attesting witness had in his testimony stated several specimens of his signature (including his attestation) to be genuine, an expert might be allowed to compare them all (relevant as well as irrelevant) to ascertain whether the attestation was genuine. The course of the discussion on the bench elicited the most complete investigation of the various methods of proving handwriting which is to be found in the books, and while it seems dangerous to allow comparison by disputed documents and signatures, the reasons for allowing it among those not disputed are very forcibly set forth, — Doe *v.* Suckermore, 5 A. and E. 733." Vinton *v.* Peck, 14 Mich. 287, 293 (1866).

So in Missouri. "Where there are other writings in the case, conceded to be genuine, they may be used as standards of comparison, and the comparison may be made by the jury, with or without the aid of experts. 1 Greenl. on Evid., sec. 578; State *v.* Scott, 45 Mo. 302; State *v.* Tompkins, 71 Mo. 614. But with us, such papers can only be used when no collateral issue can be raised concerning them. 1 Greenl. on Evid., sec. 581; State *v.* Clinton, 67 Mo. 380." Rose *v.* First Nat. B'k of Springfield, 91 Mo. 399 (1886); State *v.* David, 131 Mo. 380, 391 (1895); Elsenrath *v.* Kallmeyer, 61 Mo. App. 430 (1895).

Texas. Kennedy *v.* Upshaw, 64 Tex. 411 (1885); Williams *v.* State, 27 Tex. App. 466 (1889).

North Carolina. Tunstall *v.* Cobb, 109 N. C. 316 (1891); Jarvis *v.* Vanderford, 116 N. C. 147 (1895); State *v.* De Graff, 113 N. C. 688 (1893).

And the examination may be made by experts when qualified to the satisfaction of the court. State *v.* De Graff, 113 N. C. 688 (1893); Kornegay *v.* Kornegay, 117 N. C. 242 (1895).

So in Colorado. Wilber *v.* Eicholtz, 5 Colo. 240 (1880).
In Georgia. Henderson *v.* Hackney, 16 Ga. 521 (1854).
In Arkansas. Miller *v.* Jones, 32 Ark. 337 (1877).
In Kansas. Abbott *v.* Coleman, 22 Kans. 250 (1879).
In Utah. Dunnell *v.* Sowden, 5 Utah, 216 (1887).

And in Illinois. "Again, the bill of exceptions states that the court below refused to compare the signature to this receipt with the signatures to the receipts appellee admitted to be genuine. This decision was, no doubt, based on the case of Jumpertz *v.* The People, 21 Ill. 407, as the court stated that he acted in conformity to the decision of this court. There is, as we conceive, a broad distinction between that and this case. Here, all the receipts had been and were legally admitted in evidence, and were before the court for consideration. Notwithstanding the denial of its execution, it was sufficiently proved to be properly admitted, by the evidence and the witness Giles. The court would have erred had he rejected this receipt as evidence on the proof.

In Jumpertz' case, the error consisted in admitting in evidence papers not pertinent to the case, but simply to permit the jury to compare them with the signature of defendant to show it was genuine. But in this case the receipt, if genuine, constituted a defense to the amount for which it was given. Had a letter, or some other paper collateral to the defense, been offered to be compared with the signature to this receipt, then it would have been like Jumpertz' case. But here the receipts and orders were all properly before the court, and in considering the evidence to enable the court to find the issues, there cannot be the least doubt that the court might compare the signatures to determine whether the receipt should be rejected. The court was performing the functions of a jury, and all courts recognize their power to weigh, consider and compare any and all evidence before them, to be the better able to find the truth. The court below should, therefore, have compared the signatures as a means of determining whether the receipt was genuine.

When it is claimed that an instrument has been altered, and it is in evidence, all know that a jury may examine and compare the handwriting of the portion claimed to have been altered with the writing of the body of the instrument as well as the color of the ink, and all particulars connected with it. But other instruments having no connection with the case cannot be introduced to be compared with the instrument claimed to be altered. This is the well and clearly recognized distinction." Brobston *v.* Cahill, 64 Ill. 356 (1872); Himrod *v.* Bolton, 44 Ill. App. 516 (1892); Rogers *v.* Tyley, 144 Ill. 652 (1892); Himrod *v.* Gilman, 147 Ill. 293 (1893).

So also in Indiana. Tucker *v.* Hyatt, (Ind.) 41 N. E. 1047 (1895).

The same concession has been made in the United States supreme court. Williams *v.* Conger, 125 U. S. 397 (1887). "It is well settled that a witness who only knows a person's handwriting from seeing it in papers produced on the trial, and proved or admitted to be his, will not be allowed, from such knowledge, to testify to that person's handwriting, unless the witness be an expert, and the writing in question is of such antiquity that witnesses acquainted with the person's handwriting cannot be had. (Greenl. on Ev. § 578.) It is also the result of the weight of authority that papers cannot be introduced in a cause for the mere purpose of enabling the jury to institute a comparison of handwriting, said papers not being competent for any other purpose. (Greenl. on Ev. §§ 579, 581.) But where other writings, admitted or proved to be genuine, are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury with that of the instrument or signature in question, and its genuineness inferred from such comparison. Griffith *v.* Williams, 1 Compton & Jervis, 47; Doe dem. Perry *v.* Newton, 5 Ad. & El. 514; Van Wyck *v.* McIntosh, 4 Kernan (14 N. Y.), 439; Miles *v.* Loomis, 75 N. Y. 288; Medway *v.* United States, 6 Ct. Cl. 421; McAllister *v.* McAllister, 7 B. Mon. 269; 1 Phil. on Ev. 4th Am. Ed. 615; Greenl. Ev. § 578. The history of this last rule is well stated in Medway *v.* United States, *qua supra*. In Griffith *v.* Williams it was stated by the court that 'where two documents are in evidence, it is competent for the court or jury to compare them. The rule as to the comparison of handwriting applies to witnesses who can only compare a writing to which they are examined with the character of the handwriting impressed upon their own minds; but that rule does not apply to the court or jury, who may compare the two documents when they are properly in evidence.' In Doe *v.* Newton, Lord Denman said: 'There being two documents in question in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the court to enter with the jury into that inquiry, and to do the best it can under circumstances which cannot be helped.' The other judges expressed substantially the same view. 'The true rule on this subject,' said Justice Johnson, in Van Wyck *v.* McIntosh, (4 Kernan 439, 442,) 'is that laid down in Doe *v.* Newton, that where different instruments are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury, and the genuineness or simulation of the handwriting in question be inferred from such comparison. But other instruments or signatures cannot be introduced for that purpose.'" Williams *v.* Conger, 125 U. S. 397, 413 (1887); Stokes *v.* United States, 157 U. S. 187 (1895); Hickory *v.* U. S., 151 U. S. 303 (1894).

The rule is the same in New York. Randolph *v.* Loughlin, 48 N. Y. 456 (1872).

Wisconsin. Hazleton *v.* Union Bank of Columbus, 32 Wisc. 34 (1873).

And Missouri. State *v.* Tompkins, 71 Mo. 613 (1880).

Comparison by the Court of Documents in Evidence. — The rule obtains, though lacking much of the reasoning on which it has been rested, in the case of judges sitting as triers of fact. Thus in an interesting case in the United States Court of Claims the right of A. to recover as a loyal Unionist for injury to her property during the civil war was defeated by a letter, apparently addressed to the President of the Confederate States, which a majority of the judges — "acting as witnesses, judges or jurors, in whatever special or transitory way they may prefer to be regarded," as Judge Peck, in dissenting, says — held, upon comparing it with the petition or claim filed in the case, to be in the handwriting of the claimant. The state of the English authorities is thus interestingly summed up in the majority opinion; — "The subject seems to have slept or the practice to have been undisputed until 1830. Then and in the succeeding ten years its discussion was revived in a number of cases. The first was Griffith *v.* Williams, (1 Crompton & Jervis, 47.) It is stated in the report of that case that in the course of the argument upon a motion for a new trial it was suggested that 'the jury had been influenced by a comparison of handwriting which the learned judge had desired them to make between the admitted and the disputed letters.' Whereupon —

Per curiam: 'Where two documents are in evidence, it is competent for the court or the jury to compare them. The rule as to the comparison of handwriting applies to witnesses who can only compare a writing to which they are examined with the character of the handwriting impressed upon their own minds; but that rule does not apply to the court or jury, who may compare the two documents when they are properly in evidence.'

The report further shows that the rule *nisi* for a new trial was subsequently discharged, 'the judgment of Bolland, B., proceeding on an elaborate comparison which he had made between the letters in question; he pointing out a number of remarkable coincidences between the documents in the formation of several letters and the mode of writing several words.' So it is evident that comparison of hands was here made by both the jury and the judges of a very learned and careful court.

In the following year, 1831, the same judge stated at the Glamorganshire assizes 'that it was not the intention of the court in that case (Griffith *v.* Williams,) and certainly not his own, to decide anything more than that the jury were at liberty to compare the disputed handwriting with that of documents which were in

evidence in the cause independently of that question.' (Rex *v.* Morgan, 1 Moody and Robinson's R., p. 135.)

In a case before Lord Tenterden, the same year, there was a bill of exchange, which was admitted to have been drawn and endorsed by the defendant, and a letter containing admissions of the defendant, of which the writing was in dispute. The plaintiff in summing up relied strongly on the similitude of the disputed writing with the admitted writing, and Lord Tenterden in charging the jury made similar remarks, 'and desired the jury to take the papers and compare them.' (Solita *v.* Yarrow, id., 133.)

In 1836 there was another case at *nisi prius*, (Bromage *v.* Rice, 7 Carr. & Payne, 548,) where Allesbrook *v.* Roach, Griffith *v.* Williams, and Solita *v.* Yarrow were all cited by the plaintiff's counsel as allowing him to offer to the jury a great number of bills of exchange in the defendant's writing, but having nothing to do with the case. Campbell, then Attorney General, objected 'that the jury could not be allowed to compare the signature in dispute with any acknowledged genuine handwriting of the defendant except such as appeared in documents which were properly in evidence in the cause, as being documents in themselves material to the cause.' Littledale, J., (having conferred with Patteson, J.,) said, 'I shall reject the evidence; the jury are not to compare any other writing with that in dispute except documents which are otherwise evidence in the cause.'

The same year there was a case before the judges of the King's Bench *in banc*, (Perry *v.* Newton, 5 Ad. & El., p. 514,) in which it had been proposed to submit letters not in evidence for any other purpose to the jury in order that they might institute a comparison of handwriting. Lord Denman said that Griffith *v.* Williams had been considered 'to go a long way,' and that the real ground upon which it rested was 'that the comparison was unavoidable.' He questioned Allesbrook *v.* Roach, and thought that the rule in Griffith *v.* Williams should not be extended, as did all the judges who heard the case. The head-note states the decision very accurately as follow. 'On a question as to the genuineness of handwriting, a jury may compare the document with authentic writings of the party to whom it is ascribed, if such writings are in evidence for other purposes of the cause, but not else.'

In 1838 there was another case at *nisi prius*, where Mr. Baron Gurney said, 'If these letters and papers had related to distinct transactions, I think the jury could not have been allowed to look at them; but as they all relate to this transaction, they may see them.' (Eaton *v.* Jervis, 8 Car. & Payne, p. 273.) And in 1840, another case before the King's Bench *in banc*, where the court reiterated the ruling in Doe *v.* Newton, and the judges intimated that they were 'not disposed to advance one iota beyond that which

had been expressly decided on this point.' (Griffits *v.* Ivory, 11 Ad. & El., p. 322.)

Thus the cases of Griffith *v.* Williams and Doe *v.* Newton became decisive and leading; the one establishing the rule that comparison of handwriting may be made by courts and juries; the other restricting the comparison to established documents already in the case for other purposes. There can be little doubt but that this became the settled practice in England, for in a note to Cobbett *v.* Kilminster, (4 Foster & Finlason R., p. 490,) those learned, careful, and critical reporters say of comparison of handwriting, citing Doe *v.* Newton, 'Before the act, any documents in evidence might be shown to the jury for that purpose.'

The 'act' alluded to in the note is the Common-law Proceedings act of 1854, (17 and 18 Vict., cap. 125, § 27.) It provides that comparison '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.' This statute changed the law of England, and explains the decisions that have come since its enactment. (Cresswell *v.* Jackson, 2 Fost. & Fin. R., p. 24; Roupell *v.* Haws, 3 id., pp. 784, 802.)" Medway *v.* United States, 6 Ct. of Claims, 421, 430 (1870); Briggs *v.* United States, 29 Ct. of Claims, 178 (1894); Henderson *v.* Hackney, 16 Ga. 521 (1854); Brobston *v.* Cahill, 64 Ill. 356 (1872).

And the judge is not precluded from making a comparison because experts have testified. Millington *v.* Millington, (Tex. Civ. App.) 25 S. W. 320 (1894).

Apparently in New York comparison with genuine documents already in the case was permitted, even prior to the act of 1880. Miles *v.* Loomis, 75 N. Y. 288 (1878).

And this rule has not been affected by the passage of the acts (1880, Chap. 36; 1888, Chap. 555) authorizing the comparison of hands. Shaw *v.* Bryant, 90 Hun, 374 (1895).

But see, to apparently the contrary effect, Goodyear *v.* Vosburgh, 63 Barb. 154 (1872).

So also in Maryland. Tome *v.* Parkersburg Branch R. R., 39 Md. 36, 90 (1873).

And in Indiana. McDonald *v.* McDonald, 142 Ind. 55 (1895).

Province of Court and Jury. — As in other questions involving the admission of evidence, the preliminary proof as to competency to testify is made to the court. Whether the facts which the court has deemed sufficient to admit the evidence really give it any weight, and, if so, how much; — are questions of fact within the province of the jury. "Had the proof been sufficient to go to the jury, it was their province and not that of the court, to determine

the facts; and the court had no right to pass upon any essential fact upon the merits." Pinkham *v.* Cockell, 77 Mich. 265 (1889).

Letters in Reply. — The rule under consideration has no relation to the case where A. writes a letter to B., and B. sends him a letter in reply. B.'s letter is admissible, if relevant, upon ordinary principles, as being presumptively genuine, and no proof of B.'s handwriting need be offered, or of the agency of any person who signs for him. Hoxsie *v.* Empire Lumber Co., 41 Minn. 548 (1889); Ullman *v.* Babcock, 63 Tex. 68 (1885).

"The letters received by plaintiff in due course of mail, and purporting to come from the defendants in answer to letters written by him, were presumptively genuine, and were properly received in evidence. His letters, duly mailed to them, are presumed to have reached their destination in due course, and those received by him purported to be written by or for them in response thereto." Melby *v.* Osborne & Co., 33 Minn. 492 (1885).

PART VI.

SOME GENERAL RULES AS TO THE ADMISSION OR REJECTION OF EVIDENCE AT THE TRIAL, AND AS TO THE ADMISSIBILITY OF FURTHER EVIDENCE ON APPEAL.

§ 1881. The present work may usefully be concluded by stating the general rules which exist with regard to the admission or rejection of evidence at the trial, and as to the admissibility of further evidence on appeal.

§ 1881A. The general rules which exist as to the admission or rejection of evidence at the trial are, principally, six.

§ 1881B. *First*, where evidence is offered for a *particular purpose*, and an objection is taken to its admissibility for that purpose, if the judge pronounce in favour of its *general admissibility* in the cause, the court will support his decision, provided the evidence be admissible for *any purpose*.[1] The opposing counsel should in such a case call upon the judge to explain to the jury that the evidence, though generally admissible in the cause, furnishes no proof of the particular fact in question; and then, should the judge refuse to make the explanation required, an application might be made to the court above for a new trial on the ground of misdirection.[2]

§ 1881C. *Secondly*, as to cases where inadmissible evidence is received at the trial. Here, if in a *civil* case such evidence be received *without objection*, the opposite party cannot afterwards object to its having been received,[3] or obtain a new trial on the

[1] The Irish Society *v.* Bp. of Derry, 1845-6, H. L.

[2] Id. (Ld. Brougham).

[3] Reed *v.* Lamb, 1860.

ground that the judge did not expressly warn the jury to place no reliance upon it.[1] But if, in a *criminal* case, inadmissible evidence be in fact received, and left to the jury, a conviction is bad, even where there is sufficient other evidence to sustain it.[2]

§ 1881D. *Thirdly*, where evidence is objected to at the trial, the *nature of the objections* must be distinctly stated, whether an exception be entered on the record or not;[3] and on either moving for a new trial on account of its improper admission, or on arguing the exception, the counsel will not be permitted to rely on any other objections than those taken at Nisi Prius.[4]

§ 1882. *Fourthly*, where evidence is rightly rejected at the trial, in consequence of its having been tendered on an untenable ground, a new trial will not be granted merely because it has since been discovered that the evidence was admissible on some ground other than that on which it was then tendered; but the party must go much further, and show, first, that he could not by due diligence have offered the evidence on the proper ground at the trial, and next, that manifest injustice will ensue from its rejection. His position, at the best, is that of a party who has discovered fresh evidence since the trial.[5]

§ 1882A. *Fifthly*, where evidence is rejected at the trial, the party proposing it should *formally tender* it to the judge, and request him to make a note of the fact; and, if this request be refused, he should then require an exception to be entered upon or annexed to the record; or, if there be no record (as in the Probate Division of the High Court) he must apply to the Court of Appeal for an order giving leave for a notice of appeal to be served.[6] If neither of these courses has been pursued, and the judge has no note on the subject, the counsel cannot afterwards complain of the rejection of the evidence.[7] If the witness whose evidence at the trial has been

[1] Goslin *v.* Corry, 1844; Doe *v.* Benjamin, 1839.

[2] R. *v.* Gibson, 1887, C. C. R.; R. *v.* Buttleton, 1884, C. C. R.

[3] A bill of exceptions cannot be tendered on a criminal trial: R. *v.* Esdaile, 1858 (Ld. Campbell). Such bills were abolished in civil causes by R. S. C. 1875, Ord. LVIII. r. 1. But the same object may be gained "by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record": 38 & 39 V. c. 77, § 22.

[4] Williams *v.* Wilcox, 1838; Ferrand *v.* Milligan, 1845; Bain *v.* Whitehaven and Furness Junction Rail. Co., 1880 (Ld. Brougham), H. L.

[5] Doe *v.* Beviss, 1849.

[6] Cheese *v.* Lovejoy, 1877, C. A.

[7] Gibbs *v.* Pike, 1842; Whitehouse

rejected become dangerously ill during the pendency of the appeal, the Court of Appeal has power to order his evidence to be taken de bene esse by a special commissioner.[1]

§ 1882n. *Lastly*, though evidence has been improperly admitted or rejected at Nisi Prius, or the judge has omitted to put to the jury a question which he was not asked to leave to them, the court will not grant a new trial, unless in its opinion "some substantial wrong or miscarriage has been thereby occasioned in the trial; and if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the court may give final judgment as to part thereof, or some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties."[2] And on a motion in the High Court for a new trial in an action in the County or other Inferior Court,[3] it is provided that, "On any motion by way of appeal from an Inferior court, the court to which any such appeal may be brought shall have power to draw all inferences of fact which might have been drawn in the court below, and to give any judgment and make any order which ought to have been made. No such motion shall succeed on the ground merely of misdirection or improper reception or rejection of evidence, unless, in the opinion of the court, substantial wrong or miscarriage has been thereby occasioned in the court below."[4]

§ 1883. The question of the admissibility on appeal of further evidence beyond that given at the trial of an action or the hearing of a matter sometimes requires consideration. Besides the rules,

v. Hemmant, 1858; Penn *v.* Bibby, 1867 (Ld. Chelmsford, C.).

[1] Solr. to the Treasury *v.* White, 1886, C. A.

[2] R. S. C. 1883, Ord. XXXIX. r. 6. The Scotch law on this subject is similar, and is embodied in § 45 of 13 & 14 V. c. 36 ("The Court of Session Act, 1850"), enacting that a bill of exceptions shall not be allowed by the Court of Session, upon the ground of the undue admission of evidence, if in the opinion of the court the exclusion of such evidence could not have led to a different verdict than that actually pronounced; and that it shall not be imperative on the court to sustain a bill of exceptions on the ground of the undue rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have affected the result at which the jury by their verdict have arrived. To the like effect is § 167 of "The Indian Evidence Act, 1872." As to the Irish law, see Hodson *v.* Mid. Gt. W. Rail. Co., 1877 (Ir.).

[3] See and compare Shapcott *v.* Chappell, 1883; and Mathews *v.* Ovey, 1884.

[4] See Ord. LIX. r. 7 (otherwise r. 15 of the Rules of October, 1884, which came into operation on that date).

cited in preceding paragraphs, which apply principally to trials by jury, the Court of Appeal now possesses large powers both of *amending*[1] proceedings, and also of receiving *further evidence*.

§ 1883A. For, by Order LVIII., Rule 4, "the Court of Appeal shall have all the powers and duties as to amendments and otherwise of the High Court, 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 application, 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 matters subsequent as aforesaid) shall be admitted *on special grounds only*, and not without special leave of the court."

§ 1884. In the rule just cited the words "further evidence" mean any evidence not used at the trial or hearing in the court below. Provided it has not been so used, it falls within the rule, whether it be evidence altogether fresh, or evidence which has already been used in the same cause, or in any other cause between the same parties, and which might have been read at the trial had notice been given.[2] The court will not grant permission to admit further evidence as a mere matter of course, but will act cautiously in the matter, and will generally require some strong reason to be given for invoking its interference.[3] It will also, of course, be more ready to admit documentary evidence than oral testimony after the pinch of the case has been ascertained;[4] but still, it will be reluctant at any time to shut out any witness, who will probably be able to throw some genuine light upon the matter:[5] and it will grant the application all the more readily, if there be any ground for assuming that the court below has been deceived or otherwise misled by the testimony given.[6]

[1] As to the general powers of amendment, see ante, §§ 228—240.

[2] In re Chennell, Jones *v.* Chennell, 1877 (Jessel, M.R., in C. A.).

[3] Id.; In re Weston's case, 1879, C. A.

[4] In re Coal Economising Gas Co., Ex parte Gover, 1876, C. A.; Weston's case, 1879, C. A. (Jessel, M.R.).

[5] Id.

[6] Bigsby *v.* Dickinson, 1877, C. A.

§ 1884A. When an appellant wishes to adduce *further evidence* upon the hearing of an appeal, and that evidence consists of an affidavit or other document,[1] he may, without any recourse to the court for leave, give notice to the respondent of his intention to apply at the hearing for permission to take such step;[2] but if the party wishes to examine a fresh witness, he must apply for leave by motion before the hearing.[3]

§ 1884B. When a case has been tried alone by a judge, without a jury, the Court of Appeal—following the practice which we have seen[4] is pursued in the analogous case of appeals from the discretion of a judge as to allowing or disallowing amendments—will not, except in an extreme case, reverse the decision of a judge on a question of fact, when he has arrived at a clear conclusion after hearing the witnesses; but this last rule only applies to cases where the judge's decision depends on the credibility of the witnesses as evinced by their demeanour, and not on inferences drawn by him from the facts deposed.[5]

§ 1885.[6] This general view of the principles and rules of the Law of Evidence must here be brought to a close. The student will, it is hoped, rise from the study of such principles, convinced, with Lord Erskine, that, with some few exceptions,[7] "they are founded in the charities of religion,—in the philosophy of nature,—in the truths of history,—and in the experience of common life."[8]

[1] See Dicks *v.* Brooks, 1880 (Jessel, M.R.), explaining Hastie *v.* Hastie, 1876.

[2] Hastie *v.* Hastie, 1876, C. A.; Justice *v.* Mersey Steel Co., 1875. See, as to the practice in Ireland, Long *v.* Donegan, 1873 (Ir.).

[3] Dicks *v.* Brooks, 1880 (Jessel, M.R.).

[4] Ante, § 241A.

[5] The Glannibanta, 1876, C. A.; Bigsby *v.* Dickinson, 1877, C. A. (James, L.J.).

[6] Gr. Ev. § 584, in great part.

[7] See Index, tit. "*Suggestions for amending the Law of Evidence.*"

[8] 23 How. St. Tr. 966.

APPENDIX.

SCALES OF COSTS.

I.—ALLOWANCES IN CIVIL CAUSES.

(A.) In the High Court.

1. *In the Queen's Bench and Chancery Divisions.*

The Scales of Costs, in civil cases, are referred to in §§ 1246A and 1246B, on p. 817.

No Scale of Allowances to witnesses, in either the Chancery or the Queen's Bench Division, has been issued since that approved by the Judges in 1853 (see Reg. Gen., H. T., 16 V., 1 E. & B. App. lxxv.), which was issued under the powers of the C. L. P. Act, 1852, and is still in force by virtue of Ord. LXV. r. 27, subr. 37, of R. S. C.; see, also, Ord. LXXII. r. 2. In practice, however, Ord. LXV. r. 27, subr. 9, is considered in both Divisions of the High Court to authorise the allowance of a more liberal Scale. See Morgan and Wurtzburg, pp. 44—6; Scott's Guide to Preparation of Bills of Costs, p. 73, and cases there cited; and Annual Practice for 1895, Vol. II., p. 204. The strict Scale is itself as follows:—

"ALLOWANCE TO WITNESSES.

	If resident in the Town in which the Cause is tried.	If resident at a Distance from the place of Trial.
	£ s. d.	£ s. d.
Common witnesses, such as labourers, journeymen, &c., per diem	0 5 0	0 5 0 to 0 7 6
Master tradesmen, yeomen, and farmers, per diem .....from	0 7 6 to 0 10 6	0 10 0 to 0 15 0
Auctioneers and accountants, per diem	0 10 6 to 1 1 0	0 10 6 to 1 1 0
Professional men, per diem	1 1 0	—

ALLOWANCE TO WITNESSES—*continued.*

	If resident in the Town in which the Cause is tried.	If resident at a Distance from the place of Trial.
	£ s. d.	£ s. d.
Professional men, inclusive of all, except travelling expenses, per diem	—	2 2 0 to 3 3 0
Attorneys', or other clerks, per diem	0 10 6	0 15 0 to 1 1 0
Engineers and surveyors, per diem.....	1 1 0	1 1 0 to 3 3 0
Notaries, per diem.....	1 1 0	1 1 0
Gentlemen ..... Esquires ..... Bankers ..... Merchants	1 1 0 with subpœna, but no daily allowance except after the first day, and then a reasonable sum for refreshment and conveyance.	1 1 0 per diem.
Females, according to station in life, per diem .....from	0 5 0 to 0 10 0	0 5 0 to 1 0 0
Police inspector, per diem.....	0 5 0	0 7 6 to 0 10 0
Police constable	0 3 0	0 5 0 to 0 7 6

"If the witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause, they will be entitled to a proportionate part in each cause only. The travelling expenses of witnesses shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed 1*s.* per mile one way."

In bankruptcy cases (which are now conducted in the Queen's Bench Division of the High Court) it is directed by Rule 20 of the "General Regulations," which form Part VII. of the "Appendix of Forms" annexed to the Bankruptcy Rules, 1886—90, that "The allowances to witnesses in bankruptcy proceedings in the High Court shall be in accordance with those for the time being ordinarily made in other proceedings in the said Courts."

It has been pointed out in the text (§ 1247), that special allowances may now be made in the High Court to experts and scientific witnesses.

2. *In the Probate, Admiralty and Divorce Division.*

(a) In Divorce and Matrimonial Causes.

"ALLOWANCE TO WITNESSES, *including their board and lodging.*

	If resident within Five Miles of the General Post Office, per diem.	If beyond that distance, per diem.
	£ s. d.	£ s. d.
Common witnesses, such as labourers, journeymen, &c.	0 5 0	0 5 0 to 0 7 6
Master tradesmen, yeomen, farmers, &c.	0 7 6 to 0 10 0	0 10 0 to 0 15 0
Auctioneers and accountants	0 10 6 to 1 1 0	0 10 6 to 1 1 0
Professional men	1 1 0	2 2 0 to 3 3 0
Clerks to attorneys or others	0 10 6	0 15 0 to 1 1 0
Engineers and surveyors	1 1 0	1 1 0 to 3 3 0
Notaries	1 1 0	1 1 0
Esquires, bankers, merchants, and gentlemen	1 1 0	1 1 0
Females, according to station in life	0 5 0 to 0 10 0	0 5 0 to 1 0 0
Police inspectors	0 5 0	0 7 6 to 0 10 0
Police constables	0 3 0	0 5 0 to 0 7 6

"The travelling expenses of witnesses will be allowed according to the sums reasonably and actually paid; but in no case will there be an allowance for such expenses of more than 1*s.* per mile one way."

(b) In Probate Causes.

The Scale is now substantially the same as in the Queen's Bench and Chancery Divisions.

(c) In Admiralty Causes.

Such fees, &c. are now to be allowed as the Taxing Officer may think reasonable. But by Ord. LXVI. r. 27, par. 37, the old practice of the Court of Admiralty is saved where not inconsistent with the

Judicature Acts and Rules. By that practice the allowances to witnesses are as follow:—

"WITNESSES' EXPENSES.

"*Allowance to Witnesses, per day, including their board and lodging, as between party and party.*

	If required to come a distance not exceeding Five Miles, per diem.	If a greater distance, per diem.
	£ s. d.	£ s. d.
Common witnesses, as labourers, journeymen, sailors, &c.	0 5 0	0 7 6
Master tradesmen, yeomen, farmers, masters and mates of vessels, &c.	0 10 0	0 15 0
Bankers, merchants, professional men, notaries, engineers and surveyors, auctioneers and accountants, &c. ....from	1 1 0 to 3 3 0	1 1 0 to 3 3 0
Clerks to bankers, merchants, professional men and others	0 10 6	1 1 0
Esquires and gentlemen	1 1 0	1 1 0
Females, according to station in life	0 5 0 to 0 10 0	0 7 6 to 1 0 0

"The travelling expenses of witnesses shall be allowed according to the sums reasonably and actually paid; but in no case shall there be an allowance for such expenses of more than 1*s.* per mile one way."

(B.) IN THE COUNTY COURTS.

The Scale here is as follows:—

	s. *d.*	£ *s.* *d.*
"Gentlemen, merchants, bankers, and professional men, per diem....from	15 0	to 1 1 0
Tradesmen, auctioneers, accountants, clerks, and yeomen, per diem....from	7 6	to 0 15 0
Artisans and journeymen, per diem ....from	4 0	to 0 7 6
Labourers, and the like, per diem ....from	3 0	to 0 4 0
Females, according to station in life ....from	2 6	to 0 10 6

"*Expert and Scientific Witnesses.*

	If costs taxed on Column B. of Scale.	If on Column C. of Scale.
	£ s. d.	£ s. d.
For qualifying to give evidence	1 1 0 to 3 3 0	1 1 0 to 5 5 0
Attending court on trial, per diem	1 1 0 to 2 2 0	1 1 0 to 3 3 0"

[N.B.—Orders for these allowances, or for the cost of plans and models, are made under C. C. R., Ord. L.A, rr. 6, 30 or 31.]

In bankruptcy cases in the County Courts it is directed by the General Regulations which form Part VII. of the "Appendix of Forms," appended to the Bankruptcy Rules, 1886—90, r. 20, that "in the County Courts such allowances [*i.e.*, 'allowances to witnesses in bankruptcy proceedings'] shall be in accordance with the scale for the time being in force in the County Courts."

By C. C. R., Ord. L.A, r. 30, seamen necessarily detained on shore for the purpose of an action or matter shall be allowed such remuneration as the judge may order, or in the absence of an order, as the registrar may think reasonable compensation for their loss of time: see also Ord. L.A, r. 6. See, as to what such allowances may be, § 1248.

If witnesses attend in more than one cause, their total allowances must not exceed the sum usually allowed in one allowance in one cause, and must be apportioned between the causes; they will be entitled to a proportionate part in each cause only. See C. C. R. 1889, Ord. L.A, r. 28.

(C.) In Consistory Courts.

By the scale attached to the Rules, issued by the Rule Committee pursuant to § 9 of "The Clergy Discipline Act, 1892" (55 & 56 V. c. 32), which, as well as the general scale of costs allowed under such Rules, will be found printed in Errington's Clergy Discipline Act, 1892 [London: Reeves & Turner, price 2*s.* 6*d.*], at pp. 29 *et seq.*, but, so far as can be discovered, nowhere else, on the taxation of costs between party and party in any proceeding under the Clergy Discipline Act, 1892, or the Rules made under that Act, any sums not exceeding the sums specified in the following Scale may be allowed, if actually paid, for the expenses of witnesses attending the Consistory Court, whether examined or not, but where the witness is the prosecutor no sum shall be allowed:—

"*Scale of Maximum Allowances to Witnesses.*

	£	*s.*	*d.*
Gentlemen, merchants, bankers, and professional men, per diem	1	1	0
Tradesmen, auctioneers, accountants, clerks, and yeomen, per diem..	0	15	0
Artisans and journeymen, per diem	0	7	6
Labourers, and the like, per diem.....	0	4	0

"Travelling expenses, sum reasonably paid, but not more than 6*d.* per mile, one way."

In cases not arising under "The Clergy Discipline Act, 1892," and consequently not falling within the above Rules, the Scale of Costs allowed in each Diocese can be learnt from the registrar of such Diocese on application. The allowances to witnesses and other allowances for costs in such cases are in most other Dioceses the same as are allowed in the Diocese of London.

II.—ALLOWANCES IN CRIMINAL CASES.

The Scale referred to in § 1257, on p. 825, as issued by Sir George Grey, in 1858, and still in force*, is as follows:—

"1. I do make, constitute and appoint the following rules and regulations as to the rates and scales of payment according to which such certificates may be granted, by such *examining magistrate* or magistrates in respect of travelling expenses of prosecutors, and witnesses for the prosecution, of attending before such magistrate or magistrates, and of compensation for their trouble and loss of time therein in the cases aforesaid, namely:—

	£	s.	d.
There may be allowed to prosecutors or witnesses, being *members of the profession of the law or of medicine*, if resident in the city, borough, parish, town, or place where the examination is taken, or within a distance not exceeding two miles from such place, for their loss of time and trouble in attending to give professional evidence on such examination, but not otherwise, a sum, in the discretion of the magistrate or magistrates, for each attendance not to exceed	0	10	6
If such prosecutor or witness shall reside elsewhere, then a sum for the same not to exceed	1	1	0
And for mileage, a sum not to exceed 3*d.* per mile each way.			
To prosecutors and witnesses, being *constables* attending the bench of magistrates where such examination is taken on any police duty, and to constables paid by salary, and attending from a distance not exceeding three miles, there shall be allowed	Nil.		
Unless the magistrate or magistrates shall certify that there were special reasons for making an allowance, and shall specify such reasons upon his or their certificate, and then a sum not to exceed for each day	0	1	0
To prosecutors and witnesses, being constables paid by salary, and not attending the magistrate or bench of magistrates on any police duty, for the trouble in attending such examination, from a distance greater than three miles, and not exceeding seven miles from the place where the examination is taken, a sum not to exceed for each day	0	1	0
To the same, if attending from a distance greater than seven miles from the place where the examination is taken, a sum not to exceed for each day	0	1	6
*To prosecutors and witnesses, being constables paid by salary, if necessarily detained all night for the purposes of the examination, a sum for the night, not to exceed			
At assizes	0	2	6
At sessions	0	2	0
The said allowances to prosecutors and witnesses, being constables paid by salary, are to be conditional upon the same being applicable for their personal benefit.			
To prosecutors and witnesses, being constables necessarily travelling to the place of examination in discharge of any police duty, there shall be allowed for mileage	Nil.		

* By a further direction issued by Sir George Grey, and dated 14th February, 1863, the allowances given by the original Order of 9th February, 1858, were slightly varied, and it was directed that they should in future stand as above given.

	£	s.	d.
Unless the examining magistrate or magistrates shall certify that there were special reasons for making an allowance, and shall specify the same upon their certificates, and then the same as other constables.			
To prosecutors and witnesses, being constables not attending the place of examination in discharge of a police duty, and entitled to be conveyed under 7 & 8 V. c. 85, § 12, and able to travel by railway, there shall be allowed mileage as follows:—			
To superintendents, inspectors, serjeants, and constables, the lowest amount per mile authorised by Act of Parliament for their conveyance, and no larger sum;			
To prosecutors and witnesses, being constables able but not so entitled to travel, and not attending the place of examination on any police duty, there shall be allowed for mileage railway fare the same as to ordinary witnesses;			
To prosecutors and witnesses, being constables not able to travel by railway, and not attending the magistrate or magistrates on any police duty, for every mile beyond four miles each way they shall travel to reach the place of examination, a sum not to exceed each way, 2*d.*;			
To prosecutors and witnesses, being constables able partially to travel by railway, for every mile after the first four miles each way, in reaching such means of conveyance, a sum not to exceed 2*d.*, and railway fare as other constables.			
To *prosecutors and witnesses*, not hereinbefore provided for, resident in the city, borough, parish, town, or place where the examination is taken, or within a distance not exceeding two miles from such place, for their trouble and loss of time in so attending, there shall be allowed a sum for each day not to exceed	0	1	0
If resident elsewhere and beyond the distance of two miles, or if such prosecutors or witnesses shall be necessarily detained from home, for the purpose of the examination, more than four hours, a sum, at the like discretion, not to exceed	0	1	6
If they shall be necessarily detained from home more than six hours, then a sum, at the like discretion, not to exceed	0	2	6
When he or they shall reside at such a distance from the place of examination as to render it necessary that he or they shall sleep from home, then, at the like discretion, a sum for the night not to exceed	0	2	6
There may be allowed for mileage as follows:—			
If the prosecutor or witness reside at a greator distance than two miles from the place of examination, and the whole or any portion of the journey can be performed by railway, second-class fare for such whole or portion of the journey, as the case may be, and for a journey, or part of a journey, performed otherwise than by railway, a sum not to exceed per mile each way	0	0	3

In pursuance of the power in me vested, I do make the following rules and regulations as to the rates and scales of payment of costs, expenses, and compensations to be allowed, or ordered to be paid, under the said Act of 7 G. 4, c. 64, and other the Acts of Parliament aforesaid, to prosecutors and witnesses attending *courts of assize, oyer and terminer, gaol delivery, general session of the peace*, or any other courts having power to allow such costs, expenses, and compensations to prosecutors and

witnesses, and persons attending such courts, in obedience to any recognizance or subpœna in cases of criminal prosecutions, for their trouble, loss of time, and travelling expenses in so attending.

For the purposes aforesaid I do make, constitute and appoint the following rules and regulations; that is to say, there may be allowed:—

	£	s.	d.
To prosecutors and witnesses, being *members of the profession of the law or of medicine*, attending to give professional evidence, but not otherwise, for their trouble, expenses, and loss of time, for each day they shall necessarily attend the court to give professional evidence, a sum not to exceed	1	1	0
For each night, the same as ordinary witnesses, and for mileage a sum not to exceed per mile each way	0	0	3
To prosecutors and witnesses, being *constables* and paid by salary, if resident in the city, borough, town, or place where such court is held, or within a distance not exceeding two miles of such place, a sum in the discretion of the court, not to exceed for each day	0	1	0
If resident elsewhere, and if they shall attend from a greater distance than two miles, a sum, in the discretion of the court, for each day not to exceed	0	1	6
To the same, if they shall be necessarily detained all night for the purposes of the prosecution, a further sum for the night not to exceed....	0	2	0

If such prosecutors and witnesses shall be chief constables or superintendents attending from a distance greater than three miles, and they shall be necessarily detained all night for the purposes of the prosecution, instead of the foregoing allowances there may be allowed to them the same as ordinary witnesses.

The said allowances to prosecutors and witnesses, being constables paid by salary, are to be conditional on the same being applicable to their personal benefit.

To prosecutors and witnesses, being constables who shall be entitled to be conveyed under the 7 & 8 V. c. 85, § 12, and able to travel by railway, there may be allowed for mileage as follows:—

To superintendents, inspectors, serjeants, and police constables, the lowest amount per mile authorised by Act of Parliament for their conveyance, and no larger sum;

To prosecutors and witnesses, being constables not so entitled to travel, there may be allowed railway fare the same as to ordinary witnesses;

To the same, if paid by salary, and where they are not able to travel by railway, for every mile beyond four miles, each way they shall travel to and return from the court where the prosecution takes place, a sum not to exceed 2*d.*;

To the same, if paid by salary, when able partially to travel by railway, for every mile after the first four miles, each way in reaching such means of conveyance, a sum not to exceed 2*d.*, and railway fare as other constables.

To *prosecutors and witnesses*, not hereinbefore provided for, there may be allowed, for their expenses, trouble, and loss of time in attending the court where the prosecution takes place, per day, a sum not to exceed..	0	3	6

	£	s.	d.
To the same, if entitled to mileage, for each night they may be necessarily detained from home for the purposes of the prosecution at any assizes, session of gaol delivery, or session of oyer and terminer, a sum not to exceed	0	2	6
To the same for each night they may necessarily be detained from home for the purposes of the prosecution at the session of the peace	0	2	0
To the same for mileage there may be allowed as follows:—			
If resident more than two miles from the court where the prosecution takes place, if the whole or any portion of the journey can be performed by railway, second-class fare for such whole or portion of the journey, as the case may be, and for a journey, or part of a journey, performed otherwise than by railway, per mile, each way, a sum not to exceed	0	0	3

In computing the amount to be allowed for mileage under any of the regulations herein contained, I do direct that no greater allowance be made than at the rate of 3*d.* per mile each way by the nearest available route.

I also direct that no prosecutor or witness allowed for mileage under any of the regulations herein contained, shall be allowed for loss of time occasioned by his or her omission to avail himself or herself of a public conveyance, if available.

I further direct that no prosecutor or witness be allowed, under any of the regulations aforesaid, for his attendance, loss of time, trouble or expenses, in *more than one case* on the same day.

I further direct that no constable paid by salary be allowed for railway fare not actually paid.

EXCEPTIONS.

	£	s.	d.
*I do authorise payment to a governor of a gaol attending to prove a former conviction in any court not being within the county, riding, town, borough, or other jurisdiction in which the gaol of which he is governor is situate, a sum for each day, not to exceed	0	7	0
And when such governor shall be detained all night for such purpose he shall receive in addition for the night's detention the same allowance as other witnesses.			
*When the attendance of any other officer of the gaol is required for such purpose in any court not being within the county, riding, town, borough, or other jurisdiction in which the gaol of which he is such officer is situate, a sum per day, not to exceed	0	3	6
And if detained all night the same sum in addition as that allowed to other witnesses.			
The officer of a gaol whose duties require his attendance in the court where the prosecution takes place, for giving evidence of a former conviction, a sum not to exceed	0	3	6

I do make the following regulations as to the compensation to be allowed in the cases of prisoners brought by writ of *habeas corpus*, or other lawful process, to give evidence for the prosecution.

---

* By a further direction issued by Sir George Grey, and dated 14th February, 1863, the allowances given by the original Order of 9th February, 1858, were slightly varied, and it was directed that they should in future stand as above given.

SCALES OF ALLOWANCE TO WITNESSES.

To *governors* and *officers of gaols*, in whose custody the prisoner is brought, as follows:—

	£	s.	d.
To a governor, for his loss of time, trouble, and expenses, in bringing up such prisoner, for each day he may attend, the sum of	0	12	0
To other officers, for the same, the sum of	0	6	0
And for mileage, a sum in the discretion of the court, not to exceed per mile each way	0	1	0

Provided always, that the above allowances shall not be made to any gaoler or officer charged with the custody of prisoners for trial, at the place where such prisoner shall be required to give evidence, in respect of the time such gaoler or officer shall, by virtue of his office, be required to be there present.

I authorise the following payments to be made to *attorneys* for the prosecution, *giving evidence*, over and above the allowances so made to them as attorneys:—

	£	s.	d.
Such attorneys may be allowed a sum not exceeding ..... if, in the opinion of the proper officer of the court, such evidence was necessary, and saved the attendance of another witness.	0	6	8

*And whereas it may become necessary, in certain cases, that *persons*, unacquainted with the facts to be given in evidence upon the prosecution, may be required to attend as witnesses, in order to state their opinion on matters as to which such opinion is admissible in evidence, and it is reasonable in such cases that the foregoing rates of allowance should be departed from, I hereby direct that the allowances to be made to such persons shall be subject to the decision of the court before which such persons may be examined, which may direct such allowances as to such court may appear reasonable.

Whenever an *interpreter* shall be employed to interpret, on the part of the prosecution, it shall be competent for the court before whom such interpreter shall be so employed to make him such allowances as to such court shall seem reasonable: provided always, that this regulation is not to interfere with any regulations in force, where such now exist, for the remuneration of interpreters.

In case of the *illness* or inability of any prosecutor or witness to travel without some special means of conveyance, it shall be lawful for the court to depart from the foregoing rates of allowances, and to make such other allowances as the justice of the case shall require.

Under the circumstances herein specified under the head of exceptions, I authorise a departure from the rules and regulations herein contained, as well by the examining magistrate or magistrates as by the courts herein mentioned, except only in the case of an attorney for the prosecution giving evidence: provided always, that whenever any allowances hereinbefore authorised under the head of exceptions, shall have been made, the circumstances under which the general rate of allowances shall be departed from, shall in all cases be fully specified by the proper officer of the court, or magistrate, upon the document by which such allowances shall be authorised. And lastly, I do order that, notwithstanding anything herein contained, all lawful rules and regulations heretofore made and in force, under or by reason whereof allowances to a *less* amount than those hereby authorised are now payable in the cases hereinbefore provided for, shall be and remain in as full force

---

* By a further direction issued by Sir George Grey, and dated 14th February, 1863, the allowances given by the original Order of 9th February, 1858, were slightly varied, and it was directed that they should in future stand as above given.

and effect as if this order had not been made, and shall continue to apply to the persons and the circumstances thereby provided for, although such persons and circumstances may be comprehended within the terms hereof, and that the said rules and regulations shall so far remain unaffected by this order, and that nothing herein contained shall have the effect of increasing the amount of any rates or allowances which may be lawfully made under such rules and regulations; it being the true intent and meaning hereof that such rules and regulations shall be and remain unaltered, further or otherwise than in the reduction of allowances to prosecutors and witnesses where the rates thereof shall be in excess of those herein contained.

Given under my hand at Whitehall, the 9th of February, 1858.

(Signed) G. GREY."

INDEX.

*** *The references in this Index are to the paragraphs (§§) and not to pages.*

PARAGRAPHS (§§)

ABATEMENT, plea in, abolished .....1691, n.
of legacies and annuities rateably, when presumed 144

ABBEY (see *Monasteries*).

ABDUCTION, unmarried girl under eighteen cannot consent to 104
wife competent to prove 1371
on trial for, costs of witness may be allowed, when 1254

ABILITY, meaning of, in sect. 6 of Lord Tenterden's Act..... 1085

ABORIGINES, in some colonies may give evidence without oath ....1378, n.

ABORTION, on charge of procuring, dying declarations of woman inadmissible 715
woman not regarded as an accomplice in indictments for attempts to procure .....968, n.

ABROAD, when witness is, his former depositions admissible .....472-8 & n.
his examination taken under commission admissible 515-16

ABSENCE, presumption of death from 200
of attesting witness, when it lets in proof of his signature 1851

ABSTRACTS of old deeds, when admissible 621

ABUTTALS, description by, in indictment for non-repair of highway .. 282
for night poaching 282

ACCEPTANCE of bill, what it admits (see *Bill of Exchange*)..... 851
must be by signed writing on bill 1094
in blank, effect of 1835
of goods, what sufficient to satisfy Statute of Frauds 1045-49
whether sufficient, question for jury 48
of rent, inference from 807
of contract, when binding under Statute of Frauds 1026

ACCEPTOR (see *Bill of Exchange*).

ACCESS, of husband and wife, when presumed 101
cannot be disproved by husband or wife 950
to papers, raises inference of knowledge of, and acquiescence in, contents, when..... 812

ACCESSORY, confession by principal felon, no evidence against 904
record of conviction of principal, no evidence of his guilt, as against.. 1693
acquittal as principal, bar to indictment as accessory before the fact.. 1707
acquittal as principal in rape, no bar to indictment for aiding others.. 1706

PARAGRAPHS (§§)

ACCIDENT, action for compensation to families of persons killed by, must be brought within twelve months after death 71-2
material alteration of instrument by, effect of.....1827-30
when presumptive evidence of negligence.....162-3

ACCOMPLICE, presumption against testimony of 216
confirmation of, not necessary, but in practice required 967-71
rule applicable to both misdemeanours and felonies that corroboration necessary of evidence of 968
not necessary in actions for penalties..... 968
nature of confirmation 969-70
corroboration must probably affect identity of party accused 970
this rule does not apply to informers..... 971
duty of judge to caution jury respecting testimony of 25, 216, 967
confessions by, inadmissible 904

ACCOUCHEUR, entry of a birth in book of, marked "pd.," evidence of child's age 677

ACCOUNT, action for, must be brought within six years .....73, n.

ACCOUNT-BOOKS, contents of, cannot be primarily proved by parol .. 409
lien on debtor's, cannot be set up in bankruptcy .....468, n.
when balance of, may be proved by witness who has examined them.. 462
entries in, sometimes admissible as between master and servant, tradesman and shopman, banker and customer, and partners..... 812
of merchants and tradesmen admissible for them in America.....709-10
so in France and Scotland 712
so in High Court under Rules of Supreme Court, 1883..... 711
not admissible at common law, but admissible under old obsolete Act 709-10
made admissible under 26 & 27 Vict. c. 125 709-10
entries in, by shopmen, when evidence (see *Course of Office or Business*)..697—713
reading one entry in, does not warrant opponent in reading distinct entries 732
entries in, by agents, &c., when evidence as against interest (see *Interest*) 683

ACCOUNT RENDERED, effect of, as an admission 859
in name of a person, admission by maker of it that goods were supplied to his credit..... 804
effect of not objecting to, as an admission 810
effect of objecting to one item of, as an admission of the rest..... 810
presumption from date of..... 109

ACCOUNT STATED, admission under compulsory examination, whether evidence of 799
admission made to stranger, not evidence of .....799, n.
award not evidence of, between parties to submission 1758
production of I O U evidence of..... 124
striking balance of a debt secured by deed not evidence of 1147

ACCUSED (see *Prisoner*).

ACKNOWLEDGMENT of will by testator, what sufficient 1055
of deeds by married women, certificates of, how proved .....1540-1, n.
of debt, what will bar Statute of Limitations (see *Lord Tenterden's Act*) .....744 *et seq.*, 771, 1073-8
of debt by agent in India .....745, n.
insertion in statement of debts by bankrupt not sufficient 1074A
of debt on specialty, what sufficient 1090
of title, what sufficient (see *Limitations*) 1088
of debt or title, sufficiency of, question for Court 40
by family, good hearsay evidence in pedigree cases.. 649-54
against interest (see *Interest*) 668-96A

ACKNOWLEDGMENT—*continued.* PARAGRAPHS (§§)
of registry of Friendly Societies ..... 1611, n.
of amended rules of such societies ..... 1611, n.
of Industrial and Provident Societies ..... 1611, n.

ACQUIESCENCE in claim for long period, raises presumption of title .. 139-42
in counsel's statement or action at a trial, when evidence as an admission (see *Admissions*) 783-4
when evidence in other cases 809-16
as a confession (see *Confessions*) 907

ACQUITTAL, how proved (see *Autrefois acquit* and *Certificates*) 1612-14
of defendant in criminal trial makes him competent witness for or against co-defendants 1357
of husband, makes wife competent witness against his co-defendants .. 1365
copy of record of, when demandable 1489-90
in Revenue information, is it conclusive as to illegality of seizure? .. 1722
in foreign country, when bar to indictment here 1740A

ACT OF GOD relieves carrier from liability 187
relieves contractor from personal services 1184

ACT OF PARLIAMENT (see *Statutes, Private Acts*).

ACT-BOOK of Probate Division,
is evidence 1589
how proved (sub tit. "*Probate Division*") ..... 1600, n.
admissibility of, to prove title of executor or administrator 425, 1589
to prove revocation of probate ..... 1589, n.

ACTING IN OFFICE, when admission of appointment 801-3
appointment to office, when presumed from 171, 173-5

ACTION, question subjecting witness to, he is bound to answer 1463
document subjecting witness to, he is bound to produce, unless title deeds 1464
effect of being made party to, without knowledge or consent 1686
judgment in a prosecution, no evidence in an 1693
unless upon a plea of guilty 1694
judgment in an, no evidence in a prosecution 1693

ACTION TO PERPETUATE TESTIMONY (see *Perpetuating Testimony*).

ACTOR, no presumption as to yearly hiring 177

ACTS OF AUTHOR, ancient documents may be explained by 1204

ACTS OF OWNERSHIP, presumptive evidence of grant 130-1
in one part of waste, river, or mine, when evidence of title to another .. 323-5
when proof of, not necessary 122

ACTS OF STATE, how proved 5, 1526-28
of foreign or colonial governments, how proved 10, 1528
evidence as to secrets of state, excluded (see *Privileged Communications*) .. 939, 947-8

ACTUAL KNOWLEDGE, how far question for judge or for jury 38

ADDRESS of either House of Parliament (see *Parliament*).
on letter, what sufficient to raise inference of delivery by post 179
of ward in Chancery, when solicitor must furnish 935

ADEMPTION OF LEGACY, distinction between, and revocation of will .. 1146
total or partial, may be proved by parol 1146
presumption that portionment of legatee by parent is an 1227
may be rebutted by parol, or by declarations of intention 1227

PARAGRAPHS (§§)

ADHERENCE cannot revive a conditional will 1072

ADJOINING LANDS OR HOUSES when entitled to mutual support.. 121

ADJUDICATION (see *Public Records and Documents*),
in bankruptcy, judgment in rem .....1675, n.
proof of 1549
admissibility and effect of 1747
admissibility and effect of foreign 1737

ADJUSTMENT OF LOSS, when and how far conclusive as an admission.. 859

ADMINISTRATION, letters of, how proved 425, 1590
effect of foreign 1738
grant of, is a judgment in rem .....1675, n.
how far evidence of death 1677
grant of, to child's effects, how far evidence that it was born alive..1677, n.
to next of kin of woman, not evidence of her dying unmarried 1712
by diocesan, how defeated before 11th Jan. 1858 1714
may be defeated by showing intestate still alive..... 1714
calendars of grants of, where deposited and how inspected 1487

ADMINISTRATOR OF CONVICT'S PROPERTY 1015

ADMINISTRATOR, character of, admitted if not denied 307
title of, how proved 425, 1590
entitled by foreign letters cannot sue in this country..... 1738
part payment by one does not take debt out of Statute of Limitations as to others 745
nor does written acknowledgment by one..... 744
how judgment to be given and costs allowed, in such case 744
promise by, to pay out of own estate, must be by signed writing 1019
the consideration must appear expressly or impliedly in the writing.. 1021
judgment against intestate, binding upon 1689
admissions of intestate, evidence against 787
declarations by executor not admissible against special .....787, n.
admits assets by suffering judgment by default 823
proof of waste of assets by, what sufficient 823
inventory exhibited by, how far evidence of assets..... 860

ADMIRALTY, proclamations, orders, and regulations issued by, how proved .....1527, n.

ADMIRALTY, COURT OF, seal of old, for England and Ireland judicially noticed 6
what records of, in custody of Master of the Rolls.....1485, n.
how such records proved 1533
other records and judicial proceedings of, how proved 1546
admissibility and effect of records of old .....1675, n.
of records of foreign 1725A, 1733

ADMIRALTY COURT ACT, 1861 (see *Table St.*, 24 & 25 Vict. c. 10).

ADMIRALTY COURT OF IRELAND ACT, 1867 (see *Table St.*, 30 & 31 Vict. c. 114).

ADMIRALTY DIVISION, attendance of witnesses before, how enforced.. 1283
allowance to witnesses in .....*App.* iii
can enforce production of documents..... 1810
may enforce discovery, when .....521, n.
may order views 562
in actions in, affidavit evidence may be used 1396A
affidavits, examinations, &c. in, taken abroad, how proved..... 12
seal of, for England and Ireland, judicially noticed 6
presumptions recognized in 206
rule of, in cases of collision .....1700, n.

ADMIRALTY DIVISION—*continued.* PARAGRAPHS (§§)
records of, in custody of Master of the Rolls, how proved 1533
other records and judicial proceedings of, how proved 1546
documents in cause in, taken or sworn abroad, how proved..... 12
to prove sentence of, what preliminaries must be put in 1575A
admissibility and effect of records of.....1675, n.

ADMISSIBILITY of evidence, question for judge 2, 23, 23A

ADMISSIONS receivable as substitutes for ordinary proof.....723 *et seq.*
evidence respecting, liable to error 68
distinction between admissions and confessions (see *Confessions*) 724
rules of Court as to notices to admit *documents* (see *Notice to Admit*) 724A (1)-24E
decisions under former somewhat similar rules 724B-24F
caution required in admitting under notice 724F
in County Courts as to admission of *documents* 724G
High Court as to notice to admit *facts* 724H
County Courts as to notice to admit *facts* 724I
whole must be taken together 725, 738
judge should explain this to jury 738
rule applies to written, as to verbal, admissions 726
equal credit need not be given to every part 725
old rule in Equity as to reading whole of answer 730
one or more answers to interrogatories may be used 731
distinct entries not to be read..... 732
distinct matters stated in conversation not evidence 733
answer of opponent evidence without calling on him to produce one's letter 734
when documents are referred to, in old answers in Chancery 735-6
of hearsay, whether receivable 737
will be evidence, though relating to contents of documents.... 410-14, 739
this rule of questionable policy ..... 410-11, n., 412
decision in Ireland concerning 412
question whether it extends to records 413
or to a confessio juris as well as a confessio facti 413
as to documents do not waive necessity of calling attesting witness, when 414, 1843
unless the execution of the instrument be admitted under notice.. 1849
no reliance placed on verbal, not put in issue 739A
rule does not strictly extend to written..... 739A
as to persons whose admissions are receivable :—
bind parties to record, though made when under age 740
wide distinction between nominal and real parties 741
admission by former does not bind latter 741
by prochein amy, or guardian..... 742
by partner or co-obligor 743
effect of written acknowledgment, or of part-payment by joint debtor on Statute of Limitations (see *Lord Tenterden's Act*)..600-1, 744-6
by party, in fraud of others jointly interested..... 749
by one of several executors, trustees, &c..... 750
by one having mere community of interest 750
by executor of joint contractor 751
by survivor of joint contractors 751
by inhabitants of townships, &c. 752
reality of joint interest must be proved..... 753
statement of defence of co-defendant..... 754
answer to interrogatories of co-defendant 754
by parties before clothed in representative character 755
by persons interested in suit 756
by voters in election petitions 756
by cestui que trust, as against trustees and others.....756-7
by strangers to suit, when receivable 759

ADMISSIONS—*continued.* PARAGRAPHS (§§)

as to persons whose admissions are receivable—continued.

by persons referred to by party 760-3
tacit reference sufficient 763
whether conclusive against party 760A
by agent, how far admissible against principal 602-5
not admissible against infant principal..... 605
by wife, when receivable against herself, trustees, or husband..766-66c
wife's letters, when they were admissible on bills of divorce..768-9
wife's confessions, how far they were evidence in Ecclesiastical Courts 768-9
by wife, when binding on husband..... 770-71
by solicitor, when binding on client 772-4
when not 774
by counsel, when evidence 783-4
by principal, when evidence against surety 785-6
by privies (see *Privies*) 787-92

as to the time and circumstances of admissions :— (See *Assignee.*)

made after declarant has assigned his interest..... 794
offers made without prejudice inadmissible 782, 795
offers of compromise when admissible 796
caution respecting overtures of compromise..... 797
made under illegal constraint, inadmissible..... 798
under legal constraint, admissible 798
e.g., by witness on oath..... 798

nature of admissions :—

direct and incidental, same in effect 800
implied from assumed character..... 801
recognition of official character of others 802
implied from conduct 804-8, 810
from acquiescence 809
not objecting to accounts sent by post 810
not answering a letter 811
when access to letters, &c., raises presumption of acquiescence in contents 812
acquiescence in statements made by strangers..... 813
made by party interested..... 813
not addressed to party 813
made on occasion when reply expected. 814
silence of accused in judicial inquiries 814, 907
silence slight evidence of acquiescence 810
statement in party's presence not evidence, but his consequent demeanour is 816

effect of admissions :—

when and how far conclusive 817
1. by estoppel (see *Estoppel*).
2. by solemn judicial admission.....772, 820, 838, 1694
made by mistake 819, 838
3. by pleading, how far conclusive in a subsequent suit 821
in the same suit 824
by passing over averments without denial 824
when averments deemed to have been denied 829
averment must be material 824
material allegation not traversed cannot be disproved 826
demurrer, effect of, in old equity proceedings..... 828
4. by paying money into Court (see *Payment into Court*) 831-7
by pleading tender..... 831
5. admission acted upon by opponent, how far conclusive 839
illustrations..... 840-50
may be expressed or implied 839
person concealing secret Equity cannot afterwards assert it 841
man treating a mistress as a wife 842

ADMISSIONS—*continued.* PARAGRAPHS (§§)
effect of admissions—5, admission acted upon by opponent—*continued.*
allowing his name to appear as a partner ..... 84[illegible]
infant representing himself as of full age ..... 8[illegible]
effect of giving a wrong name to a bailiff ..... 8[illegible]
bailees or agents cannot dispute title of bailors or principals ..... 8[illegible]
acceptance of bill what it admits 850-3
rights of revenue do not intervene 850
indorsement of note, what it admits 852
admissions not acted upon by others, admissible, but not conclusive 854
6. admissions conclusive on grounds of public policy 856
made under oath 857
in deeds (see *Estoppel*) 858
in receipts, adjustment of loss, accounts rendered, &c. 859
effect of exhibiting inventory by executor or administrator 860
verbal, to be received with great caution 216, 861
deliberate, satisfactory evidence 861
of plaintiff's primâ facie case, shifts right to begin (see *Onus Probandi*) 379-80
effect of improper admission of evidence by judge 1881-82B
when and how objection to admission of evidence should be taken. 1881-82B

ADULTERATION of food, drink, or drugs, effect of certificates of (sub tit. "*Sale of Food and Drugs*") ..... 1611, n.
in prosecution under Act respecting, defendant and wife admissible witnesses (sub tit. "*Sale of Food and Drugs*") ..... 1360, n.

ADULTERY, in petition for damages for, strict proof of marriage required ..... 172, 578, n.
admission by defendant of marriage, not conclusive on him or her 854
bad character of wife admissible in mitigation of damages 356
of plaintiff admissible for same purpose 358
evidence of mutual deportment of husband and wife, admissible .. 582, 1416
letters from husband or wife to each other or to strangers admissible but date of letters must be proved by some independent evidence for fear of collusion 168, 582
in suits by reason of, how far wife's confessions admissible 768-9, 869
parties and wives are competent witnesses 1355A
but are not bound to answer questions respecting adultery 1355A
same law now recognised in Scotland ..... 1247, n.
how far acts of adultery subsequent to petition, are evidence 340
his father allowed to sue as prochein amy where wife of infant has committed 1686
and the minor will be bound by the judgment 1686
though the action was brought without his knowledge 1686
wife living openly in, will not rebut presumption of legitimacy 105

ADVANCEMENT for child, when presumed 1617A

ADVERSE ENJOYMENT, after what time gives title 74, 74A, 75A

ADVERSE WITNESS (see *Hostile Witness*).

ADVERTISEMENT in newspapers, when evidence of notice 1665
inference must be raised aliundè that party has read it 1665
how this may be done 1666
in Gazette, when evidence of notice by statute (see *Gazette*) 1662. 1663A-64, n.

ADVOCATE (see *Barrister*).

ADVOWSON, must be recovered within what time ..... 74A, n.
title to, must be evidenced by deed 973-74

AFFIDAVIT, when facts may be proved by 1394
to obtain mandamus for inspection of public books 1493, 1502

AFFIDAVIT—*continued.* PARAGRAPHS (§§)
to obtain attachment of witness for disobeying subpœna 1266-67
to bring up prisoner, &c., as a witness by habeas corpus.....1275-76
witness must state his own knowledge, when 1396B
may state his belief, when .....1396B & n.
effect of prolixity, or scurrility in 1396C
effect of interlineations or erasures in 1396D
cannot be sworn before solicitor on record 1396F
his clerk or agent 1396F
deponent liable to cross-examination.....1396A
his description and place of abode must be stated 1396D
if blind or illiterate, what jurat must contain 1396D
when party by using, makes contents admissible against himself 763
when party bound by incidental statements in his own .....798—800
when admissible as a confession, in criminal proceedings 898
can it prove sickness of witness whose deposition is tendered in evidence? 517
if used as an admission, whole must be read 727
how proved on indictments for perjury respecting..... 1535
who entitled to take in England.....1396E
sworn abroad, how authenticated, and when admissible.....11, 1564-69
sworn before judge, notary, counsel, &c., how proved.....11, 12
sworn in any colony, how proved 10
rules respecting, in force in Bankruptcy Courts.....1396C
how sworn in bankruptcy, and how proved 1548, 1553
not duly taken, will be rejected 465
of witness dying before cross-examination admitted 1469
of documents (see *Discovery*).

AFFILIATION, in case of, mother must be corroborated 964
can she be cross-examined and contradicted as to immoral conduct? .. 1441
putative father competent witness..... 1358
dismissal of one application by petty sessions, no bar to a second 1757A
but order of quarter sessions respecting, when final 1757A

AFFIRMATION, when allowed instead of oath.....1382-89B
form of, on making affidavit under Oaths Act.....1389, n.
form of, on giving oral evidence under Oaths Act.....1382, n.
form of, for Quakers, &c. .....1380A, n.
when permitted..... 1382

AFFIRMATIVE (see *Onus Probandi*) .....364 *et seq.*

AFFRAY, must be alleged and proved to be in a public place 282

AGE, proof of, in pedigree cases (see *Infant*) 642-5, 1774
in other cases.....677, 701
onus of proving, when shifted by statute .....372, n.
of absent person, may accelerate presumption of his death 201
of Jew, not provable by entry of circumcision in book of dead rabbi (sub tit. "*Jewish Registers*").....701, 1592, n.
proof and effect of certificate of, under Factories Acts ....372, n.[2], 1640-5

AGENT, presumption of continuance of agency 196
when principal criminally responsible for acts of 115-15A, 905-6
civilly responsible for acts of 905-6
when presumed not to act for a foreign principal 186
holding documents of principal, need not be subpœnaed, when 441
when he must be appointed by deed 985
how appointed to execute deeds under Companies Act, 1862 989
how appointed to act for creditor in bankruptcy..... 1101
what documents he cannot sign for principal .....1107, n.
what documents he must be authorised in writing to sign.....1001, 1003, 1107, n.

AGENT—*continued.* PARAGRAPHS (§§)
what documents he may sign, if appointed by parol ....745, 1019, n., 1107
a man may sign as agent and principal by one signature.....1100A
an intention to do so may be proved by parol evidence.....1109A
one party to a contract cannot sign for the other party as his agent..1020, n.
acts and declarations of, when admissible against principal as part of res gestæ 602-04
must be within scope of his authority 605
unauthorized acts of, when ratified by principal..... 1108
when principal cannot ratify by parol 605, 985
admissions by, how far admissible 602-04
not admissible against infant principal..... 605
when not bound to produce principal's title-deeds 920
entries against interest by deceased, admissible 682
how far necessary to prove agency in such cases..... 683
warrants that he is authorized to bind principal..... 1185
liable for breach of warranty if he contracts without authority 1185
when he cannot avoid personal liability by proving his character 1153
when principal may sue or be sued on written contract made by 1153
when estopped from denying title of principal 848
cannot be convicted of embezzlement if he has disclosed offence on oath 1455
judgment against principal for negligence of, no evidence against agent of his misconduct 1667
but evidence of amount of damages awarded against principal .. 1667
when wife regarded as husband's agent 197, 605, 771
presumption against deed of gift from principal to 151

AGGRAVATION, matter of, need not be proved.....269-70A
of damages, plaintiff's good character usually inadmissible in 362

AGREEMENT (see *Contract*).

AGRICULTURAL HOLDINGS ACT, England, 1883 (see *Table of Statutes*, 46 & 47 Vict. c. 61),
notice to quit under 34
notices under, may be sent by post, when .....180, n.

AGRICULTURE, BOARD OF (see *Board of Agriculture*).

ALIBI, acts of prisoner, though indictable, admissible to rebut 336

ALIENATION OFFICE, records of, in custody of Master of the Rolls..1185, n.

ALLEGATIONS, evidence must correspond with (see *Variance*) 217
substance of issue need alone be proved 218
immaterial, need not be proved.....255-64
surplusage, definition and instances of 255-64
distinction between unnecessary, and needlessly particular 255-64
cumulative, immaterial in criminal cases 265-71
several intents—compound intents in indictments 267
how far intent must be proved as alleged.....268-9
cumulative, immaterial in civil cases.....271-7
formal, need not be proved 278-80
e.g. of place 278-82
local offences 281-3
of time.....278, 284
of number and value 278, 285
of quality, as mode of killing.....278, 288
essentially descriptive, must be proved as laid 289
what are (see *Variance*) 289-96
effect of passing over, in pleading without denial (see *Admissions*).... 824

ALLOWANCES TO WITNESSES PARAGRAPHS (§§)
in all Divisions of Supreme Court, *including Probate, Admiralty and Divorce*.....1246 & 46A, *App.* i-iv
on trial of Election Petitions 1246B
in Bankruptcy cases .....1246A, *App.* iv
(A) in the High Court .....*App.* ii
(B) in the County Courts .....*App.* iv
in Consistory Courts .....*App.* v
in County Courts .....1246A, *App.* iv
in Criminal Courts .....1246D, 1256-60, *App.* vi
to experts and scientific witnesses—
(A) in High Court .....*App.* ii.
(B) in County Courts.....*App.* iv
taxing masters have certain discretion as to allowances to witnesses not subpœnaed, but who have been called, detained, &c.....1247-48

ALMANAC, judge will refresh his memory by 21
entry in, made by relative, admissible in matters of pedigree 650

ALTERATION, interlineation, and obliteration in wills, effect of, under Wills Act 164, 1069
in will, presumed made after execution 164, 1136
in deed, presumed made before execution..... 1819
in other instruments, no presumption as to when made 1819
unless noted in attestation clause 1819
jury must determine the question on proof 1819
of instrument, must be explained by party tendering it, if called upon to do so by issues raised 1819
objection on ground of, waived by admission under notice 724B
material alterations in instruments after execution, when fatal 1820
rule extends to all instruments, constituting evidence of contracts.... 1820
reasons for rule 1821
what are material alterations generally 1822
what are not material alterations generally..... 1823
what are material or immaterial with reference to stamp laws 1823
rule only applies where party seeks to enforce instrument or derives an interest under it 1824-27
in such cases alteration fatal, though made by stranger 1827
rule applies to cases of accidental spoliation 1828-9
this rule unjust 1828-9
contrary rule in America 1828-9
effect of immaterial alteration by obligee..... 1830
alteration only fatal, if made after completion of instrument 1831
when policies of assurance, composition deeds, and settlements are complete 1831A
when negotiable securities are complete 1832
when other instruments are complete 1833
instruments delivered as escrows 1834
where grantor has parted with all control over deed 1834
where instruments executed in blank 1835-37
of written agreements by oral ones, effect of (see *Parol Evidence*) ..1132-57

ALTERNATIVE RELIEF, when plaintiff may ask for .....226, n.

AMBASSADOR may administer oaths, and do notarial acts, when 1567-68
affidavits sworn before, how proved 13
when admissible 1567-68
marriage registers kept by, at Paris, inadmissible.....1593, n.
declarations of war, transmitted by, to Secretary of State, effect of .. 1661
of foreign country in England, can he certify as to foreign law? 1784A

AMBIGUITIES, distinction between latent and patent 1212
may be explained by declaration of intention when (see *Parol Evidence*) 1206-26
by parol evidence, when (see *Parol Evidence*).

AMENDMENT, when allowable (see *Variance*) 221-53
powers of, should be liberally exercised .....227 & n.

AMENDMENT—*continued.* PARAGRAPHS (§§)
general summary of *principles* by which should be governed 239
of proceedings, by Court of Appeal.....1883-83A
under 9 Geo. 4, c. 15 220
under 3 & 4 Will. 4, c. 42 220
under Common Law Procedure Acts, 1852, 1853, 1854, 1860 221
under Judicature Acts, 1873 and 1875 221
under Rules of Supreme Court, 1883, regulating amendments 221
where pleadings may be amended 226-41
at what period to be made 242
who may make 242
consequential, may be ordered 242
costs of.....243-4
when costs of, must be borne by party making 243
to what proceedings present rules of High Court as to, applicable.... 245
of proceedings for divorce or other matrimonial causes..... 245
in Court of Bankruptcy as part of Supreme Court..... 245
in County Courts having bankruptcy jurisdiction 245
in County Courts 246
in misdemeanor, variance between record and written evidence amendable.....248-51
extended to all offences whatever.....248-51
in Civil Bill Courts in Ireland..... 247
in summary proceedings in Scotland.....248-51, n.
in courts of Quarter Sessions in Ireland .....248-51, n.
in criminal proceedings,
under Lord Campbell's Act..... 248-51
decisions on the subject 252
former dread of amending indictments..... 253
this dread erroneous 253
powers of Court of Appeal respecting (see *Appeal, Court of*).
Court of Appeal seldom interferes with judge's discretion as to 241A
nor will Divisional Court..... 242

AMENDS, payment of money into Court by way of, in libel, when ....831, n.
in actions against persons acting under Statute .....73A, 315, 831 & n.

AMERICAN LAW (see *United States, Law of*).

ANCESTOR, when declarations of, admissible against heir 787
estoppels by, binding on heir 90
judgment for or against, binding on heir..... 1689

ANCIENT POSSESSION, what hearsay admissible in support of, and why .....658 *et seq.*
ancient documents purporting to be part of transaction, admissible .. 658
must be proved to be genuine..... 659
must come from proper custody 659-66
meaning of proper custody illustrated.....660-63
when custody must be proved by extrinsic evidence 664
need not, in strict law, be shown to have been acted upon.....665-66
without such proof, entitled to little weight 665

ANCIENT WRITINGS, presumptions in favour of.....87-8, 667
thirty years old, require no proof 88, 1874
does this rule apply to deeds of corporations?..... 87
attesting witnesses need not be called 1845
explainable by parol and by experts 1159-60
by acts of author, and by contemporaneous usage 1204
when evidence in support of ancient possession (see *Ancient Possession*)..658-67
copies and extracts of, when admissible 621-6B
handwriting of, how proved in pedigree cases 1875
though mutilated, admissible, if coming from proper custody..... 1838
date of, may be proved by experts 1417, 1877
records, when evidence, without proof of commission, &c., on which founded 1585

PARAGRAPHS (§§)

ANIMAL named in indictment, presumed to be alive 262

ANIMUS (see *Intention*).

ANNEXING INCIDENTS, by usage (see *Parol Evidence*).....1168-69
by law-merchant 1170
with respect to marine insurance 1171
by common law 1172
with respect to carriers' contracts..... 1172
to supply of articles for particular purposes 1173
to sale of estates..... 1174
to demises of real property 1175
to letting ready-furnished houses 1176
to the sale of specific ascertained chattels.....1177-79
to executory contracts of sale of unascertained chattels 1177
doctrine of caveat emptor 1178
to the sale of articles bearing trade marks 1180
to the sale of patents 1181
to relationship of master and servant 1182
to relationship of seaman and shipowner 1182A
to contracts made by agents 1185
to contracts by skilled artisans and artists 1183
to contracts to perform personal services 1184
to deposits of goods as security for a loan 1186

ANNUITIES, presumption as to abatement of 166
as to period of..... 166
as to apportionment of 159
grants of, required to be registered 1125
proof of enrolment of deeds granting 1651
purchaser with notice liable to unregistered 1125

ANSWERS (see *Answer in Chancery, Interrogatories*).
to inquiries when admissible in cases of search for writings 430
for witnesses ....472-8, n., 517, 576
for attesting witnesses..1855
to prove that bankrupt has denied himself 576
of witness, what cannot be enforced (see *Witnesses*) 1453-54
what are excluded on grounds of public policy (see *Privileged Communications*) 908-51
to irrelevant questions conclusive 1435-37
to relevant questions, may be contradicted 1436, 1445
what are, or are not, relevant questions 1438-45

ANSWER IN CHANCERY, as admission, whole had to be read to jury. 727
even in case of second answer having been put in 727
defendant might also have had whole bill read 727
old rule in Equity as to reading whole of..... 727
what preliminaries must be proved before giving evidence of 1576
admissibility and effect of, as evidence against defendant....727, 857, 1753
in criminal proceedings ..899, 1455
in matters of pedigree 651
by a peer upon protestation of honour 1230
by husband and wife, not evidence against wife, after husband's death 755
except when it relates to her separate estate 755
by guardian, not evidence against infant in another suit 755

ANTE LITEM MOTAM (see *Lis Mota*) 628-33

ANTICIPATION, when evidence of usage may be given by..... 1189

ANTIQUARY may give opinion as to date of ancient writing 650, 1417

APARTMENTS (see *Furnished Apartments*).

PARAGRAPHS (§§)

APOTHECARY (see *Medical Man*), certificate granted to, how proved 1638
in penal action against, for practising without certificate, defendant must prove that he has one 376A
warrants, possession of competent skill 1183

APPEAL, notice of, from decision of revising barrister, how signed 1102
to quarter sessions, how signed, and what it must contain 1102A
against removal of pauper, how signed 1103-4
statement of grounds of, against removal of pauper, how signed, when served, and what it must contain 1103-4
pendency of, does not prevent judgment from operating as a bar 1721
on hearing of, in Equity, appellant used to begin ..... 378, n.

APPEAL, COURT OF, when further evidence may be adduced before.. 1883A
meaning of further evidence 1884

APPOINTMENT to office, presumption of, from acting 171-5
need not in general be produced, although in writing 171, 461
of guardian to child by father, must be by attested deed..1110, 1839-41, n.
by will, how to be executed 1050
not revoked by marriage, when 1063
of new trustees, of property conveyed for religious purposes, must be by attested deed (sub tits. "*Charity*" and "*Leases*") ..1110, 1839-41, n.

APPORTIONMENT, presumption respecting 159

APPRENTICESHIP, presumption as to parish indentures of 145
terminated by death or permanent illness 1184
indenture of, to sea-service must be attested by justices 1098
to sea-fishing service, what required ..... 1098, n.
may be proved without calling attesting witness (sub tit. "*Shipping Documents*") ..... 1839-41, n.
contents of lost indenture of, when proved 431
proper custody of expired indenture of 432-4

APPROVEMENT of waste by lord, presumption respecting 122A

APPROVER (see *Accomplice*, *Informer*).

ARBITRATION (see *Award*).
under Councils of Conciliation Act, 1867 ..... 1203—1309, n.

ARBITRATOR not bound to disclose grounds of award 938
may be asked questions to show want of jurisdiction 938
admissions before, receivable in subsequent trial 796
attendance of witnesses before, how enforced 1292
witnesses, &c., attending before, privileged from arrest 1334
may examine witnesses under Councils of Conciliation Act, 1867, on oath ..... 1293—1309, n.

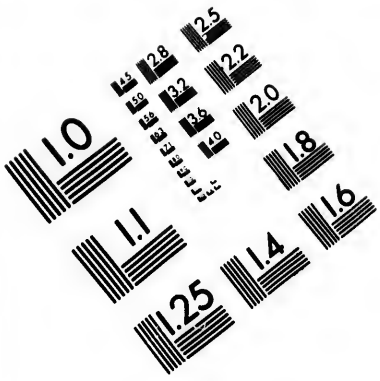
ARCHES, Court of (see *Ecclesiastical Courts*).

ARMORIAL BEARINGS, admissible in cases of pedigree 657
but are of little value unless ancient 657
should be explained by officer of Heralds College 657

ARMY (see *Articles of War*, *Court-Martial*, *Soldier*).

ARMY ACT, 1881 (see *Table of Statutes*, 44 & 45 Vict. c. 58).
affirmations allowed in court-martial under ..... 1382, n.
rules of procedure under, judicially noticed 5
limitation of legal proceedings in respect of acts done under 73A
limitation of time for proceedings by courts-martial under ..... 76-8, n.
articles of war judicially noticed 5, 1530
prisoners on courts-martial under, may be convicted of less offence than that charged ..... 269-70A, n.

Vol. I. ends with § 971.



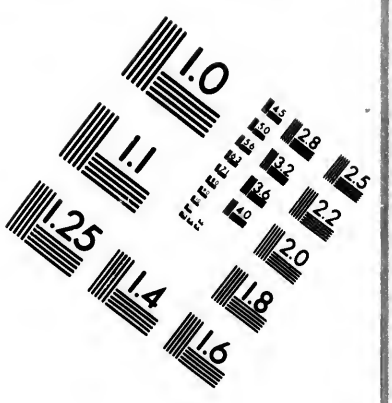
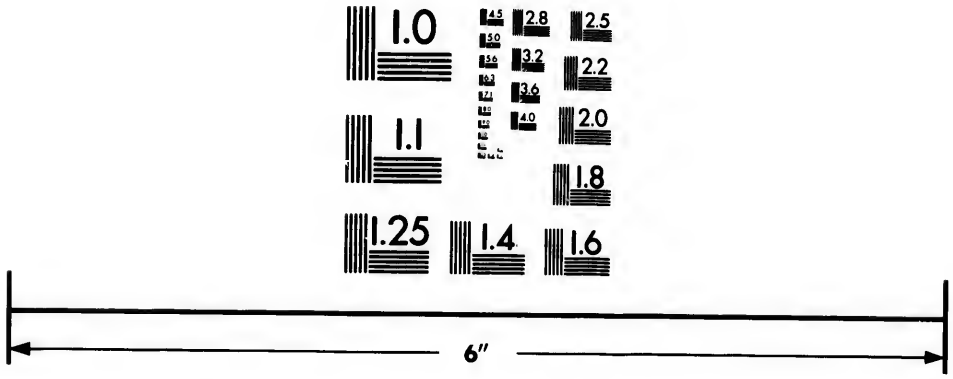
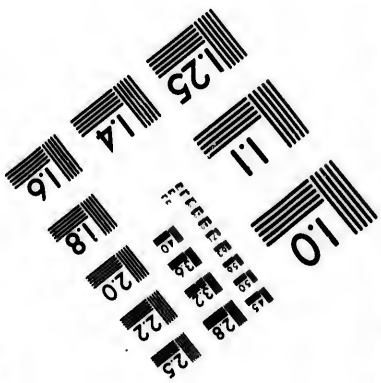


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1.0
2.8
3.2
2.5
2.2
2.0
1.8
1.6
1.1
1.0

ARMY ACT—*continued.* PARAGRAPHS (§§)
as to enforcing attendance of witnesses before courts-martial..1293—1309, n.
persons charged under, with purchasing from soldiers or possessing regimental stores, must prove innocence.....372-4, n.
payment into Court under.....831, n.
proceedings of courts-martial, how proved 1555A
orders made under, by commanding officer, how proved .....1596-7, n.
proof and admission of army list and gazette under 1638A
attendance of witnesses in custody enforced before courts-martial, when .....1276, n.
copy of trial by courts-martial, when demandable.....1490A

ARMY LIST, proof and admissibility of 1638A

ARRANGEMENT, property of debtor under scheme of, vests in trustee.. 1015

ARREST, witnesses, parties, barristers and solicitors, when protected from 1330-41B
eundo, morando, et redeundo 1330A
rule interpreted liberally 1330B
subpœna not necessary to protect witness from 1330B
instances of protection and of non-protection 1331-32
rule does not protect against criminal process 1333
does it protect against County Court warrant of commitment? 1333
or writ of commission of rebellion? 1333
parties and witnesses protected if attending before a lawful tribunal.. 1334
instances 1334
witness protected while attending before magistrate, when..... 1335
common informer not protected, when 1335
barrister, how far protected..... 1335
party discharged from illegal civil process, privileged redeundo 1336
discharge from criminal process affords no protection 1336
to whom persons arrested should apply for discharge 1337-38
within what time motion should be made..... 1339
how far witness may waive protection 1339
privilege that of the Court, not of the person arrested 1339
arrest of witness no ground for action 1340
party arresting witness maliciously, liable to attachment..... 1341
fact and time of, whether provable by certificate of deceased sheriff's officer returned in course of business..... 705
place of, not provable in this manner 705
when member of parliament entitled to freedom from 34B

ARREST OF JUDGMENT, on application for, what presumption will be recognized 85

ARSON, on indictment for, with intent to defraud insurance, policy best evidence of insurance 418
notice to produce policy must be given..... 452
when criminal intent presumed 80
is a local offence, when..... 281

ARTICLES OF CLERKSHIP must be enrolled 1126
proof of such enrolment 1653A

ARTICLES OF MANUFACTURE (see *Designs*).

ARTICLES OF THE PEACE may be exhibited by wife against husband 1371

ARTICLES OF WAR judicially noticed 5, 1530
offences against, must be tried within what time .....76-8, n.

ARTIST warrants possession of competent skill..... 1183
contract by, terminated by death 1184
non-completion of, excused by illness..... 1184

PARAGRAPHS (§§)

ASSAULT, party charged with certain felonies may be convicted of ..269-70A
and any person charged with felony or misdemeanor can be convicted of an attempt to commit it 269-70A
party charged with robbery, may be convicted of, with intent to rob..269-70A
acquittal on charge of robbery, bar to indictment for, with intent to rob 1708
acquittal on charge of rape, no bar to indictment for, with intent to rape 1706
summary conviction for aggravated, on woman or child, bar to future proceedings 1710
conviction for, to be a bar to future proceedings, how proved 1710
summary conviction for, no bar to indictment for manslaughter..... 1710
on trial of aggravated, what costs of witness may be allowed 1254
several, may be included in one indictment 329A
in indictment for, upon wife, wife competent witness against husband 1371
married women may be convicted of 191
proof and admissibility of certificate of dismissal of charge for 1615-20
depositions taken on charge for, admissible on trial for murder 467
within what time action for, must be brought..... 73
indecent, cannot be justified by proof of consent of girl under 13 104

ASSENT of executor to legacy, question for jury 45A

ASSETS, admitted by executor or administrator, who suffers judgment by default 823
how far admitted by exhibiting inventory 860
by probate stamp 860
waste of, how proved when devastavit suggested 823
of wife, when conclusively admitted by husband 830

ASSIGNEE, admissions made by assignor, when evidence against 790
inadmissible if made after assignment of interest. 794
judgment against assignor, when evidence against 1689

ASSIGNMENTS under 8 & 9 Vict. c. 106, must be by deed 992
of incorporeal rights, must be by deed 973-4
of debts and choses in action, must be by signed writing and notice .. 997
under Policies of Marine Assurance Act, 1868, may be indorsed on policy 999
of copyright, must be in writing 998
need not be attested by two witnesses .....1110, n.
of bail bonds, must be attested by two witnesses .....1110, 1839-41, n.
by operation of law in cases of heirs, administrators, executors de son tort, and wives 1015
in cases of bankrupts, debtors, and convicts 1015

ASSIZES, Courts judicially notice length of 19
what is proof of date of 85

ASSUMPTION of character, what admissions implied from 801

ASSURANCE (see *Insurance*, *Registration*).

ATHEIST, competent witness (see *Competency*)..... 1382-83
provided he himself claim to affirm 1384

ATTACHMENT (see *Foreign Attachment*).
witness disobeying subpœna liable to (see *Attendance of Witness*) ...1265-69
of debt, owing from garnishee, effect of 1692
rule for, not absolute in first instance 1269

ATTEMPT, prisoner charged with any crime may be convicted of 269-70A
acquittal on charge of any felony or misdemeanor, bar to indictment for..... 1708
to commit felony, on trial for, costs of witness may be allowed 1254

ATTENDANCE OF WITNESSES, PARAGRAPHS (§§)
how enforced by recognizance 1234A-37-8
is usual mode of enforcing attendance in criminal cases 1234A
not confined to witnesses for Crown 1236
witness may be bound over by committing magistrate or coroner 1234A-35
if he refuses to be bound he may be committed 1235
how in the case of a married woman or infant 1235
not confined to proceedings by indictment 1237
exists under Summary Jurisdiction Act, 1879, wherever appeal to sessions allowed 1237-38
how enforced by subpœna ad testificandum or duces tecum 1239
if production of books, writings, &c., be required 1240
subpœna suffices only for one sitting or term 1241
if writ altered, it must be resealed 1241
time of service of subpœna 1242
whether reasonable, question for judge 1243
rule in United States as to time of service ..... 1243, n.
when witness in court cannot object that he has not been subpœnaed 1242
if not properly served, witness may object to be examined 1242
manner of service of subpœna 1244
writ may include names of three witnesses or more 1241A
subpœna duces tecum can contain only three names 1241A
what writ of subpœna must state 1245
copy served personally, and original writ shown 1244
effect of variance between copy and original 1245
prisoner may compel attendance of witnesses by subpœna 1260
writs of subpœna of no force beyond jurisdiction of court 1261
this rule inconvenient 1263
Central Office subpœnas may issue to any part of England 1264
within what limits subpœnas in force in America ..... 1263, n.
subpœnas to witnesses in Scotland or Ireland in criminal cases..1262 & n.
in civil cases tried in superior courts of law 1262
similar powers should be granted to other courts 1264
tender of expenses required in civil cases 1246
allowance to witness (see *Allowance to Witnesses*).
special allowance to witnesses under certain circumstances 1247-8
tender should be made when subpœna served 1249
if witness married woman, expenses should be tendered to her .. 1249
expenses of witness subpœnaed by both parties 1249
effect of witness waiving demand of expenses 1249
when witness can sue for his costs and charges 1250
when conduct money recoverable back as money had and received 1251
expenses in Crown cases 1252
tender of, not required though indictment removed by certiorari and tried at Nisi Prius 1252
exception in favour of witnesses living in Scotland or Ireland 1252
Court may grant prosecutor and witness their expenses in all felonies 1253
except certain felonies under 11 & 12 Vict. c. 12 1253
and in most serious misdemeanors 1254
in offences against the coin under 24 & 25 V. c. 99, when..1253, n.
when the above rule is inapplicable ..... 1253, n.
what "expenses" mean ..... 1253, n.
scale of costs allowed by Secretary of State ..... 1257, & *App.* vi-xi
court may reward activity in apprehending some felons 1257A
petty sessions may grant expenses of prosecution when they deal with petty larcenies summarily 1258-59
expenses of witness allowed in certain prosecutions before examining justices 1257-59
certified by magistrate, and allowed by Quarter Sessions 1258-9

ATTENDANCE OF WITNESSES—*continued.* PARAGRAPHS (§§)
expenses of prisoner's witnesses appearing on recognizance to be paid, when ... 1260
of accused and his witness if acquitted, when allowed .. 1260
disobedience of subpœna, renders witness liable:—
1. to *attachment*, when ... 1265-69
although jury need not be sworn ... 1265-71
case of contempt must be clear ... 1266
what affidavit must disclose ... 1266
immateriality of testimony, test of wilful misconduct ... 1267
duty of attending court paramount to duty to master ... 1267
attachment only lies on disobeying subpœna from superior court . 1268
disobedience of subpœna granted by Clerk of Assize or Clerk of the Peace, punishable by fine or indictment ... 1268
suggestions to improve law as to subpœnas ... 1263-4
rule for attachment, never absolute at first ... 1269
witness refusing to be sworn, or to give evidence, guilty of contempt ... 1269
2. to *action of debt*, under 5 Eliz. c. 9 ... 1270
3. to *action* for damages ... 1271
what necessary to prove in such action ... 1271
attendance of witness in *custody*, *enforced by habeas corpus*, when ... 1272-77
granting of this writ, where regulated by Statute ... 1272
application made to judge at chambers ... 1273
what affidavit should state ... 1273
whether statutes apply to prisoners for treason or of war ... 1274
common-law power of granting writs of habeas corpus ad test. ... 1275
in cases of lunatics ... 1275
where witness is in military or naval service ... 1275
in other cases ... 1275
attendance of witness in custody enforced by order of judge, when .. 1276
in Ireland, when ... 1276, n.
enforcing attendance of witnesses in particular courts:— ... 1277—1329
1. Houses of Parliament:—
(a) House of Lords ... 1279
House of Lords Committees ... 1279
(b) House of Commons ... 1280
House of Commons Committees ... 1280
Oaths may be administered by House of Commons ... 1281
2. Judicial Committee of Privy Council ... 1282
3. In High Court:—
(a) at assizes ... 1283
(b) in chambers ... 1284
(c) before an examiner ... 1285, 1310
(d) on examination under the Companies Act, 1862 ... 1286
4. Ecclesiastical Courts ... 1287
5. In Courts of Bankruptcy ... 1289
by subpœna, when ... 1289
by summons and warrant, when ... 1289
doubts respecting such summons and warrant ... 1289
summoning debtor or wife ... 1289
6. Coroners' Courts ... 1290
attendance of medical witnesses, how enforced ... 1290
remuneration granted to medical witnesses ... 1290
7. County Courts ... 1291
8. Arbitrators and referees ... 1292
in various Courts (see *Titles of Various Courts*) ... 1293—1309, n.
witnesses when exempted from arrest (see *Arrest*) ... 1330-41B

ATTENDANT TERM, surrender of, when to be presumed ... 136

ATTESTATION, Statutes rendering necessary ... 1110

ATTESTATION CLAUSE, PARAGRAPHS (§§)
when due execution of deed presumed from proper 149
of will presumed from proper..... 1056
of warrants of attorney and cognovits, must contain what (see *Warrant of Attorney*).....1111-17

ATTESTING WITNESS, *number required in certain cases :—*
two necessary to wills since 1st January, 1838 (see *Wills*)..... 1050
to deed of father appointing guardian for child 1110
to appointments of new trustees of property for religious or educational purposes 1110
to assignments of bail bonds 1110
to protests of bills of exchange, when 1110
to conveyances under Mortmain Act 1110
to marriage registers..... 1110
to memorials of deeds registered under Middlesex Registry Act.. 1110
to indentures of apprenticeship to sea service 1098
one to bill of sale 1110
to bill of sale of ship..... 998A
to lease under Leasing Powers for Religious Worship (Ireland) Act, 1855 1110
to agreement between master of ship and merchant seaman..... 1098
to agreement between owner and driver or conductor of London cab or bus 1099A
to warrants of attorney and cognovits, must be attorney named by party (see *Warrant of Attorney*).....1111-17
solicitor, signing client's instrument as, must prove its execution.. 930, 936
to instruments *not* requiring attestation, *need not be called*.....1839-41
to instruments requiring attestation, *must in general be called* 1843
list of such instruments .....1839-41, n.
rule applies to lost or cancelled or burnt deed..... 435, 1843
where execution admitted.....414, 1843
where party to record called to prove execution by himself 1843
for whatever purpose instrument produced 1844
where witness has become blind or ill 1843A
course to be pursued where witness is ill..... 1843A
exceptions to rule:— 1845
1. when instrument is 30 years old.....88, 1845A
2. when witness has attested instrument in pursuance of rule of Court, and Court has acted on instrument 1846
3. when opponent has instrument, and refuses to produce it after notice 1847
4. when opponent producing deed claims an interest under it.... 1848
the interest must be an interest in the cause 1848
and one of a permanent nature 1848
exception inapplicable when instrument given up before trial.. 1848
5. when party has solemnly admitted instrument for purposes of the cause 1849
how if party has recited the instrument in a deed, and has acquired some benefit on faith of its being genuine 1849
6. when document tendered against public officer, who was bound to procure its execution, and has acted on it 1850
7. when witness cannot be produced..... 1851
e. g., dead, insane, out of jurisdiction, not to be found, absenting himself by collusion with opponent 1851
here sufficient, but perhaps not necessary, to prove handwriting of witness 1851
if paper lost and witness unknown 435, 1851
8. whether in cases of deeds executed by corporations?..... 1852
9. whether in cases of deeds enrolled? 1853
10. when document requires attestation under Merchant Shipping Act 1853A

ATTESTING WITNESS—*continued.* PARAGRAPHS (§§)
where several, sufficient to call one 393, 1854
same rule in all Courts 1854
exception in cases of wills relating to real estate 393, 1854
reasons for this exception 1854
deposition of deceased attesting witness may supersede the necessity of calling survivor 393
what search for, sufficient 1855
what answers to inquiries for, evidence 1855
absence of all, must be accounted for 393, 1856
after which, proof of signature of one sufficient 1856
if coupled with some evidence of identity of party to suit with person executing (see *Identity*) 1856
in America, when not necessary to prove signature of 1861
when leading questions may be put to 1844
to will, may be a marksman, under Wills Act or Statute of Frauds .. 1060
declarations of deceased, inadmissible though in disparagement of evidence afforded by his signature 569
character of deceased, if impeached on ground of fraud, may be supported by general evidence 1476
may speak to executor of instrument from recognising his signature .. 1412
must give evidence though solicitor 930, 936

ATTORNEY (see *Solicitor*).

ATTORNEY-GENERAL, when entitled to reply ..... 390 & n.
sanction of, no longer necessary to obtain inspection of public records.. 1480
of colony, though not a barrister, is an expert to prove laws of colony.. 1425

ATTORNEY, POWER OF (see *Power of Attorney*).

ATTORNEY, WARRANTS OF (see *Warrants of Attorney*).

ATTORNMENT, will not operate as an estoppel 103

AUCTIONEER, agent for vendor and purchaser 1109
contract made out from memoranda signed by, binds both parties 1109
and will exclude parol evidence 402
when not bound by description of article in unsigned catalogue 1134
warrants possession of competent skill 1183

AUGMENTATION OFFICE, records of, in custody of Master of Rolls 1485, n.
how proved 1533
proper custody for old chartulary of dissolved abbey 662

AUTHOR, death of, terminates contract by 1184
illness of, excuses non-completion of 1184

AUTHORITY, burthen of proving, in particular cases 372-4
of husband to wife, when presumed 192, 193, 605, 770

AUTREFOIS ACQUIT or CONVICT, party pleading entitled to copy of record 1490
when prisoner not protected by plea of 1706
when prisoner protected by plea of 1707-10

AVERMENT (see *Allegations, Variance*).

AWARD, when solicitor's power to submit to, cannot be disputed 847
how proved, when submission by written agreement 1583
when submission by rule of Court, judge's order, or order of Nisi Prius 1583
when umpire appointed, or time enlarged 1583
when made by public officers 1584
when made under Inclosure Acts 1584
made under Inclosure Acts may be enrolled, but enrolment not necessary 1127

AWARD—*continued.* PARAGRAPHS (§§)
inter alia inadmissible as evidence of reputation 626A
admissibility and effect of 1758
not evidence of account stated between parties to the submission 1758
not evidence in a prosecution to prove the facts adjudicated 1693
presumption in favour of 86

BAD CHARACTER (see *Character*).

BAIL-BOND, assignments of, must be attested by two witnesses 1110
must be proved by calling attesting witness 1839-41, n.

BAILEE, how far estopped from denying title of bailor 848

BAILIFF, entries against interest made by deceased, admissible 673
how far necessary, in such case, to prove that he filled the office 683
must produce writ of execution and judgment to justify seizure, when 729
statements and admissions by, when evidence against sheriff .....756, n.

BAKER, implied warranty by, that bread is wholesome 1178
how far criminally answerable for act of servant 115

BALLOT ACT, 1872 (see *Table of Statutes*, 35 & 36 Vict. c. 33),
documents kept under, may be inspected, when .....1504-21, n.
will be admissible, when 1777

BANK BOOKS, inspection of, by fundholders 1498-99
how proved 1595, 1608A

BANK NOTES, presumption of guilt from possession of paper for making .....372-4, n.
how described in indictment 287
alteration of number upon, will avoid instrument 1822
conclusive evidence furnished by *Gazette* as to amount bankers entitled to issue of 1663A-4

BANK OF RIVER, acts of ownership on one part of, evidence of title to another 323

BANKERS, communications made to, not privileged from disclosure 916
general lien of, on security of their customers, judicially noticed .... 5, n.
holding documents of customer need not be subpœnaed, when 441
when bill presented through, time for giving notice of dishonour 31-2
time allowed for presentment of cheques to..... 31
within what hours instruments must be presented at 32
when estopped from denying title of customers 848
when justified in cashing drafts payable to order 72
bound to answer respecting frauds committed by them, when..... 1455
cannot be convicted of fraud having disclosed their offences on oath .. 1455
entries in books of, how inspected and proved, and how far admissible..1608A
pass-books not conclusive against 859
Statute of Limitations with respect to members of banking co-partnerships..... 74
rules of savings banks, how proved .....1600, n.

BANKERS' BOOKS EVIDENCE ACT, 1879 (see *Table of Statutes*, 42 Vict. c. 11).
its provisions 1608A

BANKING CO-PARTNERSHIPS, members of, how proved..... 1601A

BANKRUPT, privileged from arrest while attending court 1334
assignment of property of, by operation of law 1015
how far protected from self-crimination .....1458A, n.
debtors and their wives may be summoned by Official Receiver and trustee 1289

BANKRUPT—*continued.* PARAGRAPHS (§§)
debtors and their wives may be examined on oath 1390
their depositions when admissible 495
when necessary to prove date of instrument signed by 169
when deed executed by, deemed fraudulent 83
whether he may sue wrong-doer in trover, though undischarged? 123
denial of being at home by, provable by answers to inquiries at house 576
declarations made by, on leaving home, evidence of intention to avoid creditors ..... 586, n.
statements by, on returning home, also admissible 588
when inadmissible, as being mere narratives of a past occurrence 589
admission by, before bankruptcy, evidence to charge estate 794
or in support of petitioning creditor's debt 759
admissions by, after bankruptcy, evidence against himself 759
no evidence against trustee 759, 794
written admissions of, not binding on trustee 817
concealing or removing property worth 10*l.* 286
absconding with property worth 20*l.* 286
trustee of bankrupt may disclaim lease, or other property 1013
character of "trustee" of, suing or sued, must be specially denied .. 307
admission by trustee of, before appointment, whether evidence against him 755
prosecuted under bankrupt law, must prove *no* intent to defraud .. 372-4, n.
release of partnership debt, by partner of, void 748
costs of prosecuting fraudulent, when allowed 1255, 1260
form of indictment in prosecuting fraudulent 292
effect of discharge of 1750

BANKRUPTCY ACT, 1883 (see *Table of Statutes*, 46 & 47 Vict. c. 52).
form of indictment for offences under 292

BANKRUPTCY COURTS, seal of, judicially noticed 5
jurisdiction of, judicially noticed 19
general rules of, judicially noticed 19
general orders and regulations of, made by Board of Trade, when judicially noticed 19
signatures of judges and registrars of, judicially noticed 14
signatures of Commissioners and Registrars of old Court of, judicially noticed 14
witness in, privileged from arrest (see *Arrest*) 1334
how made to attend (see *Attendance of Witnesses*) 1289
allowance to—
(a) In High Court ..... *App.* ii
(b) In County Court ..... *App.* iv
depositions of deceased witness, when admissible 495
depositions of deceased debtor or wife, when admissible 495
may order witness in Scotland or Ireland to be examined there 519
may take evidence by commission abroad 519
may take evidence *viva voce*, or by interrogatory, or by affidavit 519
appointment of proxies in, must be signed and attested 1101
voting letters must be signed and attested 1101
amendment of proceedings in 245
inspection and copies of records of, regulations concerning 1491
proof of petitions, orders, certificates, deeds, instruments, affidavits and documents made or used in proceedings in 1548
special proof of notices gazetted 1549
of official receiver's report 1551
of appointment of trustee 1550
of affidavits in, wherever sworn 1553
of depositions in 495
of resolutions and proceedings of meetings 1552
admission and effect of adjudication in 1747
of foreign adjudication in 1737

BANKRUPTCY COURTS—*continued.* PARAGRAPHS (§§)
admission and effect of depositions in 495
of approval of, to a composition or a scheme of settlement.....72, 1748
of orders in 1748
of order releasing trustee 1749
of order discharging bankrupt 1750
of order and certificate of Board of Trade 1751
of registration under the old law of special or extraordinary resolution 72
adjudication in, is a judgment in rem 1748
witness may refresh memory by his deposition in, when 1410
transfer by debtor, when presumed fraudulent under law of 83
notices under law of, having been duly sent, how proved..... 180
inspection of documents in 1810A

BANKRUPTCY, COURT OF, IN SCOTLAND, proceedings of, admissible in England and Ireland without proof 13
their admissibility and effect..... 1559

BANKRUPTCY AND INSOLVENCY, Court of, in Ireland, now called Bankruptcy Court 6
seal of, judicially noticed 6
signatures of judges, registrars, and chief clerks of, judicially noticed . 14
attendance of witness before, how enforced.....1276, n.
attendance of bankrupt and witness, when in custody, how enforced..1276, n.
bankrupts and their wives are examined on oath in 1390
proof of records, proceedings and depositions in .....495, 1548, n.
form and effect of certificate of conformity granted by.....1750, n.
of certificate in arrangement cases.....1750, n.

BANKRUPTCY (IRELAND) AMENDMENT ACT, 1872 (see *Table of Statutes*, 35 & 36 Vict. c. 58, Ireland).
rules made under, judicially noticed 19

BANKRUPTCY LAW, presumption in prosecutions for offences against 372-4, n.

BANNER, inscription on, provable by oral testimony 417

BANNS, when proof of publication of, unnecessary 143-4

BAPTISM provable by parol, though registered..... 416
parish registers of, what is their proper place of deposit..661, 1504-21, n., 1595
how inspected .....1504-21, n.
how proved 1774
non-parochial registers of, in custody of Registrar-General ....1504-21, n.
how inspected.....1504-21, n.
how proved in civil cases .....1601, n.
in criminal cases ..1596-7, n., 1601, n.
Indian registers of, deposited in Charles Street, St. James's Park ..1486, n.
how proved.....1600, n.
registers of, of British subjects abroad, kept in Consistory Court ..1486, n.
admissibility and effect of registers of (see *Bastardy*) 1594, 1774
registers of, kept at May Fair and the Fleet, inadmissible .....1592, n.
foreign and colonial registers, when admissible 1593

BARGAIN AND SALE (see *Enrolment*) 1120, 1646

BARMOTE COURTS, witness how made to attend before .....1293-1309, n.
documents in custody of steward of, how inspected (sub tit. "*High Peak Mining, &c. Courts*") ..... 1504-21, n.

BAROMETER (see *Scientific Instruments*).

BARON AND FEME (see *Husband and Wife*).

BARRISTER (see *Revising Barrister*). PARAGRAPHS (§§)
competent to testify, though he has addressed the jury 1391
cannot disclose secrets of client (see *Privileged Communications*) 911
perhaps not bound to testify as to matters in which he has been professionally engaged 938
his clerk within rule of privileged communications 920
foreign counsel within same rule 920
admissions by, when evidence against client 783
how far empowered to bind client by compromise .....781, n
protected from arrest, when (see *Arrest*) 1330-31
as witness, may refresh his memory by the notes on his brief 1112

BASTARD, declarations of, are generally not admissible in cases of pedigree 636
family conduct, evidence of person being legitimate or, in cases of pedigree 649
name of, how described in indictment 293

BASTARDY (see *Legitimacy*),
in case of affiliation mother must be corroborated 964
may be cross-examined and contradicted as to immoral conduct..... 1441
putative father admissible witness..... 1358
dismissal of one application by petty sessions no bar to a second 1757A
but order of Quarter Sessions respecting, when final.....1757A
how far parents can give evidence to bastardise their issue 950
admissibility of entries respecting, in baptismal register 1774

BATTERY (see *Assault*).

BAWDY-HOUSE, married woman may be convicted of keeping..... 191

BEGINNING AND REPLY (see *Onus Probandi, Reply*).

BEHAVIOUR (see *Conduct*).

BELGIUM, instance of interrogating prisoners in law of.....887, n.

BELIEF, grounds of 50-69
tendency to, instinctive.....50-69
experienced truth of testimony 51
coincidences in testimony..... 59
accordance of testimony with previous knowledge, or its probability.. 61
danger of relying on this ground of belief 62
connection between collateral facts and facts in issue 63
reasonableness of, how far question for jury 29
religious, what necessary in witness (see *Competency*).....1382-85
witness cannot speak to, in general 1414
when witness may speak to 1415-18, 1470A, 1868
witness speaking to, may be guilty of perjury, but very strong proof required.....962, 1416
when expert may speak to (see *Experts*) 1417-25
witness may speak to, in affidavit, when 1396B

BELT OF TREES, acts of ownership on one part, evidence of title to another ....323, n.

BENEFIT BUILDING SOCIETY (see *Building Society*).

BENEFIT OF A DOUBT, given to accused 112

BENTHAM, JEREMY, his opinions as to competency, how far adopted by Legislature 1344-46

BEQUEST (see *Legacy*).

PARAGRAPHS (§§)

BEST EVIDENCE, always required 217, 391
design and meaning of rule 391
illustrations of rule 391-95
primary and secondary, what 395
contents of documents not provable by parol:— 396
1. where law requires writing 398
2. where parties have put contract in writing 401
but writings collateral to issue need not be produced 405
and parol evidence admissible to identify writings in trover, or detinue, &c. 407
or on indictment for stealing written instrument 408
aliter on indictment for forgery 408
3. where existing or contents of material writing disputed 409
exception to rule, in favour of admissions (see *Admissions*) 410-11
when oral evidence admissible, though writing exists 415
e.g. of payment, though receipt given 415
of inscriptions on flags, and resolutions read at meetings 417
original documents not provable by copies (see *Secondary Evidence*) 418
what constitutes the best documentary evidence of a transaction 420
broker's books, bought and sold notes 420-23
notarial instruments 424
of the title of executor or administrator 425
duplicate originals—counterparts 426-7
secondary evidence inadmissible till primary out of party's power (see *Secondary Evidence*) 428A

BEYOND JURISDICTION (see *Jurisdiction*).

BIAS of witness, what are tests of 52
may be shewn by questions and contradictions 1440-43

BIBLE, entry in, admissible in cases of pedigree 560
if family Bible, without proof of being made by relative 560

BIGAMY, on indictment for, strict proof of first marriage necessary .. 172, 578, n.
of second marriage unnecessary .. 172
how first marriage proved where parties had been married abroad .. 172, 413
what facts presumed on indictment for 143-4
effect of prisoner's admission as to marriage 413
first wife incompetent to prove marriage 1363
after first marriage proved, second wife competent, for or against prisoner 1366
before first marriage proved, it seems, incompetent 1366
death of first husband or wife, when presumed 114, 200-201
that prisoner knew first wife alive, when to be proved 200

BILL IN CHANCERY, provable by certified copies 1599A
statements in, not evidence against plaintiff 859, 1576, 1753
not evidence in matters of pedigree 651
practice as to reading, when answer put in 727
pleadings must generally be proved, to let in decree 1574A
when, to let in depositions 1574A

BILL OF EXCEPTIONS, cannot be tendered on criminal trial ..... 1881D, n.
is now abolished in civil causes ..... 1881D, n.
but right of accepting, remains practically in another form ..... 1881D, n.

BILL OF EXCHANGE, consideration for, presumed 148, 368
if lost, presumed duly stamped 148
if in hands of drawee, presumed duly paid 178
so if promissory note in hands of maker 178
when presumed to be foreign 72
amount of interest payable on foreign, question for jury 45

BILL OF EXCHANGE—*continued.* PARAGRAPHS (§§
date of, primâ facie evidence of day of drawing 169
no proof of time of acceptance 170
usages affecting, judicially noticed 5
may be drawn, indorsed, or accepted by each member of firm, when.. 185
how drawn, indorsed, or accepted by Joint-Stock Registered Companies 978, 989
if alteration appears on, no presumption raised as to when made 1819
effect of alteration of, after completion 1820, 1823
when complete, within this rule as to alteration 1832
acceptance of, must be by writing on bill 1094
acceptance on blank stamp, may be filled up to amount covered by stamp 1835
as between drawer and acceptor, must be filled up within reasonable time 1835
this doctrine inapplicable against indorsee, when 1835
action on lost, formerly not maintainable 437
loss of, cannot now be set up as defence, if indemnity given 437
days of grace allowed on, in different countries .....1168, n.
may be proved by parol 1168
protest of, how proved 424
of foreign, when inferred from conduct of drawer 806
must be attested, when .....1110, 1839-41, n.
indorsement on, by payee of part payment, does not bar Statute of Limitations 691
declarations of prior holder of, when admissible 791
as to burthen of proof in actions on 368-9
presentment of, within what time and hours allowable 32
notice of dishonour of, what time allowed for 30-1
by whom it may be given 31
dishonour of, and notice, proved by entry in course of business by notary's deceased clerk 699
notice to produce notice of dishonour, when unnecessary 450
receipt of notice of dishonour of, when inferred from acts of drawer .. 806
notice to produce bill necessary, if defendant wants it, and has not pleaded so as to enforce its production by plaintiff 452
must be produced at trial, in order to recover interest ..... 452, n.
acceptance of, what it admits as against acceptor 851
indorsement by payee of note, what it admits as against him 853
indorsement of bill, what it admits as against indorser 853
in trover for, notice to produce unnecessary 452
so, in prosecution for stealing 452
party signing in own name, cannot prove he was mere surety or agent.. 1153
may give such evidence to charge or benefit unnamed principal .. 1153
meaning of "duly honoured" may be explained by usage .....1162, n.

BILLS OF EXCHANGE ACT, 1882 (see *Table of Statutes*, 45 & 46 Vict. c. 61).

BILL OF LADING, meaning of terms in, may be explained by usage..1162, n.
cannot be varied by usage 1166
when conclusive evidence of shipment of goods 86
usages affecting, judicially noticed 5

BILL OF SALE, ship must be sold by 998A
of ship may be proved without calling attesting witness ..... 1839-41, n.
of personal chattels must be attested by one or more witnesses 1110
must state the consideration 150A
must be filed in Bills of Sale Department of Central Office 1120A
inspection of 1491B
office copies of.....1540-41
when presumed fraudulent within Statute of Elizabeth..... 150
registration of, must now be renewed every five years ..... 1120A, n.
mode of proof of registration, &c. 1654

PARAGRAPHS (§§)

BILLS OF SALE ACT, 1878 (see *Table of Statutes*, 41 & 42 Vict. c. 31).

BILLS OF SALE, IRELAND, ACT, 1879 (see *Table of Statutes*, 42 & 43 Vict. c. 50, Ireland).

BILLS OF SALE ACT, 1882 (see *Table of Statutes*, 45 & 46 Vict. c. 43).

BIRTH, provable by parol, though registered 416
inspection of registers of, under Registration Acts..... 1504-21, n.
of non-parochial registers of, in custody of Registrar-General ..... 1504-21, n.
what these registers consist of ..... 1504-21, n.
register of, of British subjects abroad, deposited in Consistory Court..1486, n.
registers of, under Registration Act, provable by certified copies (sub tit. "*Births, &c. Registers*") ..... 1601, n.
non-parochial registers of, provable by certified copies in civil cases, under certain regulations as to notice, &c..... 1601, n.
in criminal cases the originals must be produced..1596-97, n., 1601, n.
registers of, in Scotland, since 1854, how proved ..... 1601, n.
admissibility and effect of registers of 1775
fact and time of, usually questions of pedigree, and provable by hearsay..641-2
otherwise, if fact not required to be proved for any genealogical purposes..... 645
place of, whether provable by hearsay 646
when provable by register under Registration Act..... 1775
time and place of, how far provable by register of baptism 1774
entries of, in midwife's books, when evidence..... 677
child not heard to cry at, in Scotland, presumed dead ..... 104, n.

BISHOP, admissions by, evidence against successor..... 788
commission granted by, to inquire into charges against parsons..... 1287
attendance of witnesses, how enforced in these inquiries 1287
Roman Catholic, when competent to speak to matrimonial law of Rome 1425

BISHOP'S REGISTERS, inspection of 1498-99

BLANK, in will, cannot be filled up by parol evidence 1156
presumption as to time of filling up 164
when may be filled up after execution of instrument..... 1835-7
stamp, acceptance on, may be filled up to amount covered by stamp..1835-37

BLIND witness, how his memory refreshed 1411
effect of witness to handwriting becoming.....472-8, n.
man cannot attest a will 1053
may acknowledge his own will 1053
attesting witness becoming, must still be called.....1843A

BLOCKADE, presumption from violating 107
when provable by Gazette 1665

BOARD OF AGRICULTURE,
judicial notice taken of seal of ..... 6, n.
witnesses, how made to attend before (sub tit. "*Inclosures*") .....1329, n.

BOARD OF HEALTH (see *Health, Public Health Act*).

BOARD OF TRADE, proclamations, orders, and regulations, issued by, how proved.....1527, n.
documents of, relating to merchant shipping, how proved (sub tit. "*Merchant Shipping*").....1596-7, n.
to railways how proved (sub tit. "*Railway*") .....1596-7, n.
proof and effect of certificates issued by, under Merchant Shipping Act, 1894 1623-30
for modification of works on railways (sub tit. "*Railway Clauses, &c.*") ..... 1611, n.
rules made by, when judicially noticed..... 19
orders and certificates of, relating to bankruptcy, how proved 1751

PARAGRAPHS (§§)

BOARDING-HOUSE, liability of keeper of, for loss of lodger's goods..187, n.

BOAT under 15 tons burden, does not require registry, when..... 998A
may be transferred, how 998A

BODLEIAN LIBRARY, not proper custody for old books respecting abbeys 661

BONA FIDES, how far a question for judge or for jury 38
collateral facts, when admissible in proof of 338

BONA NOTABILIA, out of diocese, used to defeat probate, when 1714
this law no longer exists 1714

BOND (see *Indorsement*).
consideration for, presumed..... 86
within what time action on, must be brought.....75B, 692
notice to produce notice to pay, when necessary in action on .....451 & n.
indorsement on, of payment of interest or part payment by deceased obligee, admissible for his representatives 690-2
to support replication of acknowledgment to plea of Statute of Limitations 692
whether necessary to prove aliundè date of indorsement 169, 693, 696A
admission by one obligor, evidence against co-obligor 743
in trover for, notice to produce, unnecessary 452
so, in prosecution for stealing 452
execution in wrong name, how far estops party from relying on misnomer 846
assignment of bail-bond, attested by two witnesses 1110

BOOK OF DISTRIBUTIONS, how far evidence 1770A

BOOKS, of science, when may be referred to 1422
when expert may refresh memory by 1422-24
shop, entries in, by shopman, when evidence (see *Course of Office*)..697—703
entries in, by tradesman himself, admissible, in Scotland, America, France, and in old Courts of Chancery of England, and in Ireland 709-13
but were not admissible at common law 709-10
semble, are now by statute law.....709-10
and in High Court by R. S. C. 1883..... 711
what are admissible as official documents .....1596-7 & n.
inspection, proof, and effect of such (see *Public Records and Documents, Copy*).
of public prison, effect of, as evidence .....1596-7, n., 1776
in Ireland, how proved (sub tit. "*General Prisons, Ireland*") .....1663A-4, n.
of account, entries in, when admissible..... 812
of bankers, entries in, how inspected and proved, and how far admissible 1608A
of Corporations (see *Corporation Books*).
of rates, of vestries, of banks, &c., admissibility of .....1595, n., 1776
of third persons, when and why admissible (see *Hearsay*).
knowledge of contents of, when presumed 812

BOOKSELLER, when responsible for libel sold by his shopman 115

BOROUGH, burgess entitled to inspect documents of (sub tit. "*Municipal Corporations*") .....1504-21, n.

BOROUGH ENGLISH, custom of, judicially noticed 5

BOUGHT AND SOLD NOTES constitute the contract made through broker 420
materially varying, whether recourse can be had to broker's book? .. 420
what is a material variance 423
to prove contract, party only bound to produce note in his possession.. 422
if no notes, contract may be proved by signed entry in broker's book.. 420
effect of material alteration in 1820

PARAGRAPHS (§§)

BOUNDARY of counties, parishes, &c., how far judicially noticed 17
in Ireland, how proved.....1663A-4, n., 1771
presumptions as to..... 119
as to ownership of soil of river 119
of land lying on sea-shore 119
of waste land on side of highway 119
of roads set out under Inclosure Acts 119
of hedges and ditches 120
of walls, and banks, and trees 120
when provable by reputation 613
by verdicts or judgments, inter alios..... 1683
by showing boundaries of other places connected with locus in quo 323
by maps 622
by evidence of perambulations 618
by statements of perambulators at these times 618
not provable by hearsay as to particular facts..... 617
of private estates not provable by reputation 614

BOUNTY (see *Gift*, *Voluntary Settlement*).

BOY (see *Children*, *Infant*).

BREACH OF PROMISE of marriage, in action for, plaintiff's character how far admissible 358
parties to record admissible witnesses in action for..... 1355
plaintiff's testimony must be corroborated 964A, 1355

BRIBERY, in penal action for, defendant cannot deny that party bribed had a vote 856
witnesses giving evidence respecting, when indemnified .....1455 & n.
declarations of voters admitting, evidence on trial of election petition.. 756

BRIDGE, prescriptive liability to repair, provable by hearsay 613, 615
on indictment of township for non-repair of, declarations of ratepayers admissible 752

BRITISH LAW ASCERTAINMENT ACT, 1859 (see *Table of Statutes*, 22 & 23 Vict. c. 63).

BROKER (see *Bought and Sold Notes*),
may bind principal by rules of Stock Exchange..... 181
considered to be agent of both buyer and seller 1109
contract made by, provable by bought and sold notes 420
if no notes, provable by signed entry in broker's book 420
if notes vary, is it provable by broker's book? 421
what is material variance in notes..... 423
to prove contract, party only bound to produce note in his possession.. 422
cannot be convicted of embezzlement, if he has disclosed offence on oath .....1455, n.

BROTHEL, married woman may be convicted of keeping 191

BROUGHAM, LORD (see *Lord Brougham's Act*).

BUILDING SOCIETIES ACT, 1874 (see *Table of Statutes*, 37 & 38 Vict. c. 42).

BUILDING SOCIETIES, incorporation and registration of, how proved .....1611, n.
rules of, how proved.....1601, n.
reconveyance of mortgages, how effected by trustees of 1013
certificates of registry of 1611
may reconvey by receipt indorsed on mortgage 1013

BURGESS entitled to inspect documents of borough (sub tit. "*Municipal Corporations*") .....1504-21, n.

BURGLARY AND STEALING, PARAGRAPHS (§§)
prisoner charged with, may be convicted of house-breaking, stealing to value of 5*l.* in dwelling-house, or larceny 269-70A
but proof of burglary with intent to murder, rape, or steal, fatal variance 268
intent laid in indictment for burglary, how far necessary to prove 267-8
proof respecting place must correspond with allegation 280-3
indictment for, and stealing no bar to indictment for, with intent to steal 1705
indictment for, and stealing A.'s goods, no bar to indictment for, and stealing goods of B. 1705
acquittal for burglary and stealing, bar to indictment for larceny 1708
acquittal for larceny, bar to indictment for burglary and stealing 1708

BURIAL provable by parol, though registered 416
inspection of parish registers and burial-ground registers of (sub tit. "*Births, &c. Registers*") ..... 1504-21, n.
of metropolitan registers of ..... 1504-21, n.
of non-parochial registers of, in custody of Registrar General ..... 1504-21, n.
what these registers consist of ..... 1504-21, n.
proof of non-parochial registers of, in civil proceedings (sub tit. "*Births, &c. Registers*") .. 1601, n.
in criminal cases ..... 1596-7, n.
parish and other registers of, how proved (sub tit. "*Births, &c. Registers*") ..... 1600, n.
what proper custody of 661
Indian books of, deposited in Charles Street, St. James's Park .... 1486, n.
provable by examined or certified copies (sub tit. "*Births, &c. Registers*") ..... 1600, n.
admissibility and effect of registers of 1774
registers of, of British subjects abroad, deposited in Consistory Court ..... 1486, n.

BURIALS ACT, 1864 (see *Table of Statutes*, 27 & 28 Vict. c. 97),
register books kept under, when evidence ..... 1775 & n.
how proved ..... 1601, n.

BURNING (see *Arson*),
of will, what sufficient to revoke, under Wills Act 1067

BURTHEN OF PROOF (see *Onus Probandi*).

BUSINESS (see *Course of Office or Business*),
declarations in course of ..... 697—713
presumptions from ordinary course of 176-86

BUTCHER, implied warranty by, that meat is wholesome 1178

BY-LAW, admissible without proof, if authenticated as pointed out by 8 & 9 Vict. c. 113 7-8
proof of particular by-laws:— ..... 1655-8, n.
of companies under Companies Clauses Consolidation Act, 1845 .. 1655
of railway companies 1656
for regulating Port of London, and vending and delivery of coals (sub tit. "*London Corporation*") ..... 1657-8, n.
in force in coal and other mines (sub tit. "*Mines*") ..... 1657-8, n.
made by London County Council (sub tit. "*Metropolis Local Management*") ..... 1657-8, n.
by Municipal Corporation of Dublin ..... 1657-8, n.
under Common Lodging Houses Ireland Acts ..... 1657-8, n.
under Public Health Ireland Act, 1878 ..... 1657-8, n.
under Public Health Act, 1875 ..... 1657-8, n.
under Municipal Corporations Act, 1882 ..... 1657-8, n.
under Slaughter-houses, &c., Metropolitan Act, 1874 .... 1657-8, n.
under Explosives Act, 1875 ..... 1657-8, n.

BY-LAW—*continued.* PARAGRAPHS (§§)
made by Metropolitan Water Companies (sub tit. "*Metropolis Water, &c.*")....1657-8, n.
by Conservators of Thames (sub tit. "*Thames Conservancy*")1657-8, n.
by Conservators under Salmon Fisheries Acts (sub tit. "*Salmon Fisheries*")....1657-8, n.
by trustees of harbours, &c. for regulating landing of emigrants (sub tit. "*Merchant Shipping Act*")....1657-8, n.
by municipal corporations in England....1657-8, n.
as to pleading such by-laws....1657-8, n.
may be presumed from usage, when.... 128
of Corporation may explain its charter.... 1205

"BY STATUTE," not guilty, effect of.... 311

CAB (see *Coach and Licence*).

CABMAN, presumed negligent, if luggage lost or damaged.... 187

CALENDAR MONTH, meaning of.... 16
when implied.... 16

CALENDARS of grants of probate and administration, where deposited.. 1487
how inspected .. 1487

CALLS, how far infant shareholders liable to actions for....104, n.
persons holding themselves out as shareholders are liable for.... 844

CAMPBELL, LORD (see *Lord Campbell's Acts*).

CANCELLATION of will (see *Alterations* and *Will*)....165, 1063-71
of lease does not work a surrender by operation of law.... 1009

CANTERBURY, seal of Prerogative Court of, judicially noticed.... 6

CAPACITY (see *Infant*).

CAPTAIN (see *Ship*).

CAPTION, settlement examinations need not have separate, to each 892
so, depositions and examinations taken by Justices on criminal charges....487, 892

CARE, what is reasonable, question for jury, when.... 37A

CARELESSNESS (see *Negligence*).

CARNAL KNOWLEDGE (see also *Rape*).
girl under thirteen cannot consent to.... 104

CARRIAGE (see *Coach*).

CARRIER, when presumed guilty of negligence.... 187
may dispute title of employer.... 849
of goods, how far an insurer.... 1172
of passengers, not an insurer.... 1172
delivery to, amounts to acceptance by vendee, within Statute of Frauds, when.... 1049
in action against, for non-delivery of writings, notice to produce unnecessary.... 452
in action against, for loss of goods, negligence need not be proved ..256-7
contract under Railway and Canal Traffic Act, when valid.... 1093

CASE laid before counsel, how far privileged....911, 920

CATALOGUE, when auctioneer not bound by description in unsigned .. 1134

CATHOLIC PRIEST, confessions made to, not privileged.....879, 916-17
aliter in Civil Law, and in Scotland.....879, 917

CAUSE OF ACTION, how far admitted by paying money into Court (see *Payment into Court*)....832-7

PARAGRAPHS (§§)

CAUSE, PROBABLE, question for judge 28

CAUTION to prisoner against self-crimination, must be given at common law, when 882
when, if inducement has been held out 878, 882
how to be given 882
to prisoner under examination by justices, when 888-91
absurd legislation on this subject 888A-90
compliance with Statute on this subject, how proved 891-2
requisite, in admitting under notice 724F
in offering to compromise 797
in receiving verbal admissions 861
verbal confessions 862

CAVEAT against marriage, proof and effect of Registrar's declaration of vexatious entry of (sub tit. "*The Marriage Acts*") .....1611, n.

CAVEAT EMPTOR, application of maxim 1178

CELEBRATION of marriage, when presumed regular 143-4

CENTRAL OFFICE OF SUPREME COURT, seals of, and of its several departments, judicially noticed 6
subpœnas from, may issue to any part of England 1264
general practice to procure issue of 1239
fee payable on issue of 1239
index to Crown debtors to be kept in.....1491c
bills of sale of personal chattels to be filed in bills of sale department of 1120A
signed depositions taken before examiners to be filed in.....504, 1577
enumeration of departments in .....1491A, n., 1539
right to inspect records in 1491A
index to Crown debtors in 1491c
what documents must be filed in enrolment department of 1119-26
documents deposited in, may be proved by copy .....1540-41 & n.
without order of judge or master, no affidavit or record to be removed from 1534
no subpœna to issue for production of such documents from 1534

CERTIFICATES, when admissible without proof of seal, signature, or official character of party signing them 7-8, 1610A
alphabetical list of matters which may be proved by .....1611 & n.
of chargeability of paupers (sub tit. "*The Poor Law Acts*") ..1611, n.
of previous conviction of witness, as evidence to discredit him .. 1437
of previous conviction or acquittal under Lord Brougham's Act..1612-14
of previous conviction for indictable offence on second indictment 1612-14
of previous summary conviction 1612-14
proof of identity of person must be given, in addition to proof of conviction or acquittal by.....1612-14
under Army Act, 1881 .....1611, n.
under Corrupt and Illegal Practices Act, 1883 .....1611, n.
of dismissal of charge, in complaints of assault 1615-20
in summary proceedings against juvenile offenders 1615-20
in petty sessions on several indictable offences.....1615-20
of indemnity against certain charges, granted to witness....1455 & n., 1611, n.
under the Reformatory or Industrial Schools Acts, 1886 .....1611, n.
under the Elementary Education Acts, 1870, and 1873.....1611, n.
of marriages solemnized in foreign countries .....1611, n., 1622
of registration of places of religious worship .....1611, n., 1627
of Board of Trade under Merchant Shipping Act, 1894 (sub tit. "*Ships*").....1601, n.
of registry of British ships.....1623-30
of competence or service of masters or mates of British ships.....1623-30
of verification of standard weights and measures .....1611, n.
under Naturalization Act, 1870 .....1611, n.

CERTIFICATES—*continued.* PARAGRAPHS (§§)
under Patents, Designs and Trade Marks Act, 1883 .....16'1, n.
of costs of private bills granted by Clerk of Parliament or Speaker (sub tit. "*Parliamentary Costs*") .....1611, n.
of papers being published by order of Parliament (sub tit. "*Parliamentary Papers*") .....1611, n.
of validity of letters patent having come in question.....1611, n.
of incorporation of Charity Trustees .....1611, n.
of incorporation of Joint Stock Companies 1631-7
of proprietorship of shares in companies 1631-7
of capital being paid up under Consolidation Acts of 1847 .....1637A
of correction of mistakes in plans, maps, &c., under same Acts (sub tit. "*The Companies Clauses Act, 1847*") .....1611, n.
of copies of plans and books of reference under some of same Acts (sub tit. "*The Companies Clauses Act*") .....1611, n.
of completion of works under the Ecclesiastical Dilapidations Act, 1871.....1611, n.
of completion of works under other Acts (sub tits. "*Lands Clauses*," and "*Markets, &c. Clauses Acts*") .....1611, n.
to modify construction of railway works (sub tit. "*Railway Clauses, &c. Act*") .....1611, n.
granted by Board of Trade—
under Railway Companies Powers Act, 1864 .....1611, n.
under Railway Construction Facilities Act, 1864 .....1611, n.
of appointment of trustee in Bankruptcy 1550
of other matters in Bankruptcy 1549
of conformity, granted by Irish Court of Bankruptcy, form and effect of..... 1750, n.
of registration of Friendly Society.....1611, n.
of amendment of rules of Friendly Society .....1611, n.
of registration of Industrial and Provident Societies .....1611, n.
of registration under Trade Union Act, 1871 .....1611, n.
of registration, under Building Societies Act, 1874 .....1611, n.
of registration of medical men..... 1638
of veterinary surgeons 1638
of pharmaceutical chemists and druggists 1638
of dentists..... 1638
of master sweeps (sub tit. "*Chimney Sweepers*") 1611, n.
of qualification of solicitors to practise 1639
of acknowledgment of deeds by married women .....1540-1, n.
of age, granted by surgeons under Factories Acts 1640-5
of cattle being diseased, made by inspector (sub tit. "*Diseases of Animals*") .....1611, n
of analysis to detect adulteration (sub tit. "*Sale of Food and Drugs*") .....1611, n
of Registrar-General that caveat against marriage has been entered vexatiously (sub tit. "*The Marriage Acts*") .....1611, n.
of registry or re-entry of judgments, &c., in Ireland (sub tit. "*Registration of Assurances, &c., in Ireland*") .....1611, n.
under Transfer of Land Act, 1862 (sub tit. "*Title*") .....1611, n.
under Declaration of Title Act, 1862 (sub tit. "*Title*") .....1611, n.
of searches in register of deeds, &c., in Yorkshire or Middlesex ..1652B
of memorials of judgments, &c., registered there 1647
of enrolment indorsed on registered instrument (see *Enrolment*) .. 1647
of expenses granted to prosecutor and witness by magistrates..1258-59
granted by notary, whether recognized 6
of naturalization and of re-admission to British nationality (sub tit. "*Naturalization*") .....1611, n.
foreign, of conviction, how proved under Extradition Act 1560
at common law, of matters of fact inadmissible 1784
though given by persons in official situation 1784
of sovereign, under sign manual, inadmissible 1784
made evidence by statement of certain facts, no evidence of other statement..... 1784

CERTIFICATES—*continued.* PARAGRAPHS (§§)
of judge, when necessary to entitle party to costs 39-9B
to deprive party of costs 39-9n
how proved 1586

CERTIFIED COPY (see *Copy*),
alphabetical list of documents which may be proved by ..... 1601, n.

CESTUI QUE TRUST (see *Trustee*).

CESTUI QUE VIE, death of, when presumed 198, 200
lessee may show lessor's title expired by death of 102

CEYLON, presumption as to marriage in, from habit and repute ..... 172, n.

CHAIRMAN of meeting of creditors to keep minutes 1552
proof and admission of such minutes 1552

CHAMBERLAIN, LORD, records of office of, now in Record Office .. 1485, n.

CHANCERY DIVISION,
rule of,
as to what amount of evidence necessary 965
as to reading whole of answer 730
as to precluding parties from setting up secret equities, when .. 841
as to enforcing representation made in treaty for marriage 841-2
as to admitting parol evidence and declarations of intention to rebut an equity (see *Rebutting an Equity*) 1227-31
as to presuming undue influence with respect to deeds of gift 151-2
as to presuming fraud where reversion dealt with 153
this rule now abolished by Statute 153
as to incumbrances, when paid off by tenant for life 154
as to interpreting charitable grants 155
as to joint tenancy 157
as to presuming mistake with respect to the number of legatees .. 1223
as to requiring proof of deeds by attesting witness on petition, &c. 1842
as to calling all attesting witnesses to wills 1854
orders of, and proceedings in, provable by office copies 1538
old Common Law Seal of, judicially noticed 6
seal of old Enrolment Office in, judicially noticed 6
records in old common law side of, provable by office copies (sub tit. "*Returns to Writs*") ..... 1542 & n.
documents, in, when taken or sworn abroad, how proved 11-12, 1560
proof and effect of documents enrolled in Enrolment Office of .... 1647 & n.
what preliminaries must be proved in giving evidence of decrees in .. 1574A
of depositions in 1576
if ancient 1585
admissibility and effect of decrees in (see *Public Records and Documents*).
how far evidence in nature of reputation 624-7
must for this purpose be final 626
of old answers in, as evidence against defendant 727
in criminal proceedings 899
as evidence in matters of pedigree 651
of old bills in, as evidence of admissions 859, 1576, 1753
as evidence in matters of pedigree 651
of answers to interrogatories for or against co-defendants 754
of demurrers in 1753
of pleas in 1753

CHANCERY (IRELAND) ACT, 1867 (see *Table of Statutes*, 30 & 31 Vict. c. 44).

CHANCERY PROCEDURE AMENDMENT ACT (see *Table of Statutes*, 15 & 16 Vict. c. 86).

CHANNEL ISLANDS (see *Jersey* and *Guernsey*).

CHANNELS OF INFORMATION, by informers to Government, privileged 939-41

PARAGRAPHS (§§)

CHAPEL, when presumed registered to celebrate marriages 143-4
when presumed duly consecrated 143-4

CHAPTER-HOUSE,
registers of, admissible as public books (sub tit. "*Ecclesiastical Documents*") .....1595, n.
where documents, formerly kept in Westminster, now deposited 1484
original Acts of Parliament deposited in tower adjoining Westminster. 1484

CHARACTER of party, when admissible evidence.....349-63
definition of term 350
witness can only give evidence of general repute 350
but may give negative evidence 350
practice of calling witnesses to, when established 354
1. in criminal cases:—
evidence of good, to raise presumption of innocence 349
of bad, to raise counter presumption 352
admissibility for these purposes confined to criminal cases .. 354
not admissible in Revenue informations 354
nor in civil actions, unless general conduct put in issue 355
2. in civil actions, evidence of bad, when admissible to lessen damages.....356-61
of husband or wife in petitions for damages on ground of adultery 358
of daughter in seduction 356-7
of plaintiff in breach of promise of marriage 357
whether of plaintiff in action for defamation? 357
evidence of plaintiff's good, inadmissible to inflame damages.. 362
unless counter proof offered..... 362
3. evidence of bad, admissible to impeach veracity of witness.... 363
extent of this rule 1470
of prosecutrix in indictment for rape..... 363
of party's own witness, cannot be impeached by general evidence 1426
prisoner calling witnesses to, entitles prosecutor to reply.... 387
this privilege to be exercised with discretion 387a
not usual to cross-examine witnesses to 1429
how far witness must answer questions degrading to his ..1459-62
character of impeaching witness may be impeached in turn.. 1473
how far this plan of recrimination can be carried 1473
to support witness attacked, evidence admissible of his good.. 1476
official character of party, when admitted by his acting in ..801-3
of another, when admitted by recognizing it 802-3
of any one, when presumed from acting 771

CHARGEABILITY of pauper, proof and admissibility of certificate of (sub tit. "*The Poor Law Acts*") .....1611, n.
notice of, how signed and served 1103-4

CHARGÉ D'AFFAIRES (see *Ambassador*).

CHARITABLE TRUSTS ACTS of 1853 and 1855 (see *Table of Statutes*, 16 & 17 Vict. c. 137, and 18 & 19 Vict. c. 124).

CHARITY grants explained by evidence of acts of founder 1204
presumptions respecting 155
conveyance to charitable uses under Mortmain Act:—
must be by deed attested by two witnesses 1110
must be proved by attesting witness (sub tit. "*Charity*") 1110, 1839-41, n.
deed must also be enrolled 1119
date and fact of enrolment, how proved 1650
what deeds exempted from this rule as to enrolment..... 1119
accounts of trustees of, how inspected .....1504-21, n.

CHARITY COMMISSIONERS, seal of, judicially noticed 6
and inspectors, may enforce attendance of witnesses, how..... 1329, n.
board of, may enrol documents relating to charities 1127
minutes and orders of board, how proved .....1601, n.

CHARITY COMMISSIONERS—*continued.* PARAGRAPHS (§§)
some papers of, in custody of Master of the Rolls ....1485, n.
others deposited in Petty Bag Office ....1542, n.
certificates of incorporation to trustees of certain charities may be granted by ....1611, n.

CHARTER-PARTY, party signing in own name cannot prove he was mere surety or agent 1153, 1154
but may give such evidence to charge or benefit unnamed principal .. 1153
terms used in, may be explained by usage ....1162 & n., 1163

CHARTERS, how proved 1526
when to be explained by evidence of usage 1205
when presumed from long enjoyment 130
date inserted in, cannot be gainsaid 85

CHARTS OF PEDIGREE, when admissible 652, 654-6

CHARTULARIES in custody of Master of Rolls ....1485, n.
how inspected ....1481 *et seq.*
how proved 1533

CHASTITY, evidence to impeach character for, on indictment for rape .. 363

CHATTELS, interest in, how transferable 975
bills of sale of, must be filed in Central Office, when 1120A
inspection of, when ordered 560
real of wife, vested in husband by marriage, when 1015
what warranty implied in sale of ....1177—80

CHEMISTS AND DRUGGISTS, register of, how proved 1638

CHEQUE, presentment of, within what time and hours allowable 32
payable to order, when banker may cash 72
may now be post-dated 850

CHIEF CLERK in Chancery Division, witness how made to attend before 1284
may administer oaths, when 1386

CHILD-BEARING, women past age of, when presumed 105

CHILD-MURDER, mother indicted for, may be convicted of concealment of birth 269-70A
what facts raised presumption of, under old Statute ....116, n.

CHILDREN, tendency to believe, natural to 50
competency of (see *Competency*) 1377
credibility of 55
conclusive presumptions respecting (see *Infant*) 104
disputable presumptions respecting (see *Infant*) 189
at what age oath may be taken by 1377
whether trial can be postponed to allow instruction of ....1377, n.
dying declaration of, inadmissible, if too young to have been witness.. 717
evidence not on oath may be given by,
under Criminal Law Amendment Act, 1885 ....1389c
under Prevention of Cruelty to Children Act, 1894 ....1389D
statements by, made recenti facto, inadmissible under similar circumstances 568
when leading questions may be put to 1405
in Statute of Distributions mean legitimate children 168
in a will, mean legitimate children 168

CHIMNEY SWEEPER must prove age of climbing-boy, when ....372-4, n.
must be registered ....1611, n.
entry in register, how proved ....1611, n.

CHINESE, how sworn ....1388, n.

CHIROGRAPH, records of office, are in custody of Master of Rolls ...1485, n.
how inspected ....1481 *et seq.*
how proved 1533

Vol. I. ends with § 971.

PARAGRAPHS (§§)

CHOSES IN ACTION assignable by signed writing 997

CHRISTIAN NAME (see *Name*).

CHRONICLES, when admissible 1785

CHURCHWARDEN, presumption of appointment of, from acting..... 171
custom of electing, provable by hearsay 613

CIPHER (see *Cypher*).

CIRCUMCISION, entry of, in book of Rabbi, no proof of age (sub tit. "*Jewish Registers*").....701, 1592, n.

CIRCUMSTANTIAL EVIDENCE, nature of..... 63-9
weight of, compared with direct evidence..... 66-8
"circumstances cannot lie," false maxim 66
dangers peculiar to 67-9

CITIES, how far judicially noticed 17

CITY OF LONDON PAROCHIAL CHARITIES ACT, 1883,
Order in Council under, effect of.....1663A-4, n.

CIVIL BILL COURTS IN IRELAND, powers of amendment granted to 247
service of process, how proved in, if officer absent..... 702
decree of, how proved .....1554, n., 1572
prisoners may be brought before, as witnesses, when .....1276, n.
judgments, decrees and orders of Supreme Court, how provable in .. 1544

CIVIL SUIT, witness must answer questions though it subject him to .. 1463
must produce documents, though their production may subject him to 1464
this rule does not include title deeds..... 1464
evidence of general character inadmissible in 354
exception where general conduct put in issue..... 355
where object to affect damages..... 356

CLAIMS to future titles, &c., kept alive by actions to perpetuate testimony 544

CLERGY DISCIPLINE ACT, 1892 (see *Table of Statutes*, 55 & 56 Vict. c. 32),
witness, how made to attend under 1287
in prosecution under, old ecclesiastical rules of evidence prevail..... 966
defendant is a competent witness 1358
but is subject to cross-examination 1358
within what time offences against, must be tried .....76-8, n.

CLERGYMAN (see *Parson*).

CLERICAL DISABILITIES ACT, 1870 (see *Table of Statutes*, 33 & 34 Vict. c. 91),
enrolment of deed of relinquishment under 1119
proof of such enrolment 1653

CLERK, no presumption as to time of hiring..... 177
not subject to rule as to month's warning 34A
of barrister or solicitor, within rule of privileged communications 920
other clerks not 916

CLERK OF THE CROWN IN CHANCERY, his official department of Central Office (sub tit. "*Ballot Act*") .....1504-21, n.
inspection of documents deposited with, under Ballot Act .....1504-21, n.
proof of such documents (sub tit. "*Parliamentary Elections*") ....1601, n.

CLERK OF THE PEACE, maps and documents deposited with,
how inspected (sub tit. "*Parliamentary Documents Deposit Act*")..1504-21, n.
how proved (sub tit. "*Railways*") .....1601, n.
certificate of corrections of .....1611, n., 1637A, *Errata*
certain convictions to be certified by .....1555c, n.
minute book of, when admissible 1571
copy of order of justices for making highway district, certified by..1571, n.

PARAGRAPHS (§§)

CLERK OF RECORDS AND WRITS now abolished..... .....1599A
was bound to furnish certified copies of bills, answers and depositions in his custody 1599A

CLIENT (see *Privileged Communications* and *Solicitor*).
how far bound by admissions of counsel 783
by compromise made at trial 783
by admissions of solicitor 772-4
presumption against deed of gift by, to solicitor..... 151

CLOCK (see *Scientific Instrument*).

CLOSE, parol evidence to explain meaning of, when admissible 1128

CLOVER, is contract for sale of, within sect. 4 of Statute of Frauds?.... 1042

CLUB, members of, presumed to know the rules of 812
committee of, restrained by court when acting contrary to justice..1730, n.

COACH, owner of, overloading, estopped from denying that accident occurred from that cause (see *Collision*)..... 856
owner of, presumed negligent, if luggage lost or damaged 187
agreement between owner and driver or conductor of metropolitan stage, must be in writing 1099A
and must be signed by driver or conductor in presence of a witness .....1099A, 1839-41, n.
proof of licences to owners, drivers, &c., of (sub tit. "*Public Conveyances*") .....1601, n.
admissibility and effect of licence to owner of (sub tit. "*London Hackney Carriages Act*") .....1778-80, n.

COAL MINES and collieries, rules established in, how proved (sub tit. "*Mines*") .....1657-8, n.

CO-CONSPIRATOR (see *Conspirators*).

CO-CONTRACTOR (see *Joint Contractors*).

CO-DEFENDANT, competency of, in Criminal Courts 1357
in action of tort, admission by, not evidence against other defendants 751
same rule in criminal proceedings 751
apparent exception where inhabitants prosecuted 752
statements of defence of, not evidence for or against other defendant .. 754
unless both have a joint interest..... 754
answer to interrogatories of, not evidence for or against other defendant 754
when wife incompetent witness for husband, in criminal trial..... 1363

CODE NAPOLEON (see *France*).

CODICIL, effect of, in confirming will 1061
in revoking will 1063
in reviving will..... 1072
how signed 1050
when presumed to have been revoked by cancellation of will 165

COERCION of married women, presumption as to 190

CO-EXECUTOR (see *Executor*).

COFFEE-HOUSE, keeper of, presumably included in term "Inn-keeper".. 187

COFFIN-PLATE, inscription on, admissible in matters of pedigree..... 652
provable by copy 438, 653

COGNOVIT, how attested (see *Warrant of Attorney*)..... 1111-17
right to inspect 1491B
in personal action requires registration within seven days after execution in Central Office, Bills of Sale Department 1120
means of proof of registration in such office of 1120

PARAGRAPHS (§§)

COHABITATION (see *Mistress*), presumption of marriage, from 172
presumption of legitimacy, from 106
presumption of impotence from ineffectual, for three years 194
when it precludes the parties from denying their marriage 842
is a kept mistress a competent witness for protector in Criminal Court? 1366

COIN, presumption of guilt from possession of quantity of counterfeit 1270
of coining tools, &c. ....372-4, n.
indictment for uttering base, other utterings, &c., evidence of guilty knowledge on 345
when witnesses to be paid their expenses on .....1253, n.
doctrine of coercion, when wife charged with uttering base 191
how proved to be base 556
judicial notice taken of positive and relative value of current 16

COINCIDENCES in testimony, effect of.....59-60

COLLATERAL *facts*, connection between, and fact in dispute, test of truth 63
evidence of, generally inadmissible, and why 316
illustrations of rule 317-19
exception, where subject directly connected with matter in issue.. 320
custom of one manor inadmissible to prove custom of another..... 320
except after proof of sufficient connection..... 320
acts of ownership on one part of continuous property admissible .. 323 & n.
judge must decide upon the sufficiency of connection 325
usually excluded in criminal cases..... 326
unless crimes so connected as to form one transaction 327
doctrine of election (see *Election*) 329-34
one witness can prove, in treason 955
admissible to establish identity of prisoner 336
to corroborate witness 336
to illustrate opinions of scientific witnesses 335
to prove knowledge, intent, good faith, or malice of party.. 338
judgments as to, not conclusive 1711
issue, as to secretion of witness by prisoner, to let in his deposition in Ireland 496-8
parol agreement not excluded by writing 1147
writings need not be produced, when..... 405

COLLECTOR, entries against interest made by deceased, admissible 673
how far necessary in such cases to prove appointment of 683
admission of being, from acting as such 801

COLLEGE, sentences of deprivation or expulsion by, judgments in rem (sub tit. "*Deprivation, &c.*") .....1675, n.
admissibility of, on trial of indictment 1681
inspection of books of College of Physicians 1498-9

COLLIERIES, rules established in, how proved (sub tit. "*Mines*")..1657-8, n.

COLLISION, in cross actions for, verdict sometimes for both plaintiffs .. 1700
of vessels, presumptions in cases of 206
regulations for preventing, how proved (sub tit. "*Ships*")..1601, n.
in cases of, rule of the Admiralty Division..... 1700, n.

COLLUSION (see *Fraud*).

COLONIAL STOCK ACT, 1877 (see *Table of Statutes*, 40 & 41 Vict. c. 59).
what certificates may be granted under ..... 1611, n.
how proved ..... 1611, n.
registers kept under, admissibility of..... 1777
right of inspecting documents under.....1498-9, n.
what documents under, must be attested (sub tit. "*Powers of Attorney*") .....1839-41, n.

COLONY, judgments of, PARAGRAPHS (§§)
how proved 12
effect of (see *Public Records and Documents*) 1724-46
laws of,
not judicially noticed 5
how proved 9, 1423-25
proclamations, treaties, and acts of state of, how proved..... 9, 1528
seals of, or of colonial courts, when judicially noticed 10
registers of, when admissible 1593
depositions concerning offences committed in 500
suits in, aided by examinations taken in England, Ireland, or Scotland 1313
rules of evidence of, cannot affect proceedings in our courts..... 49
courts in, how far governed by English and Irish rules of evidence .. 1557
presumed to act within their jurisdiction 85
attendance of witnesses before judges of, acting as Commissioners.... 1311

COMITY, spirit of, presumed to exist among nations 213

COMMENCEMENT OF ACTION (see *Limitations*).

COMMISSION (see *Depositions, Evidence on Commission, Examiner.*)
to examine witnesses, under 1 Will. 4, c. 22, or 3 & 4 Vict. c. 105.. 500, n.
civil procedure under 1 Will. 4, c. 22, superseded by R. S. C. 1883.... 504
to examine witnesses under R. S. C. 1883 503-4
how obtained 504
whether Commissioners must be sworn, doubtful 511
Commissioners authorized to examine witnesses resident in foreign countries 511
Commissioners must substantially follow their instructions 513
Commissioners may transmit home either original documents or copies, or extracts, when 513
to examine witness, when granted by Probate and Divorce Division .. 518
by corresponding Courts in Ireland. 518
by Courts of Bankruptcy 519
by County Courts 520
from Crown, how proved 1526
to inquire into charges against parsons..... 1287
into corrupt practices at general elections 1326

COMMISSIONERS (see *Commission*).
of charity (see *Charity Commissioners*).
of customs (see *Custom House*).
of endowed schools (see *Endowed Schools*).
of excise (see *Excise, Inland Revenue*).
of inclosure (see *Inclosure Commissioners*).
of inland revenue (see *Inland Revenue*).
of lunacy (see *Lunacy*).
of her Majesty's Treasury (see *Treasury*).
of patents for inventions (see *Patents*).
of public baths, inspection of accounts of (sub tit. "*Baths and Wash-houses*") .....1504-21, n.
proof of books of orders and proceedings of (sub tit. "*Public Baths*") .....1596-7, n.
of public works in England or Ireland (see *Public Works*).
of railways (see *Railway Commissioners*).
of sewers (see *Sewers Commissioners*).
of stamps and taxes (see *Inland Revenue*).
of lands for England (see *Land Commissioners for England*).
of tithes (see *Tithe Commissioners*).
of prisons (see *Prison Act*, 1877).
of woods and forests (see *Woods and Forests*).

COMMITMENT, jurisdiction must appear on face of 147

COMMITTEE (see *House of Lords, House of Commons, Joint Stock Companies, Judicial Committee, Lunatic*).

PARAGRAPHS (§§)

COMMON, rights of, when barred by Prescription Act.....75A, n.
how taken out of Act .....75A, n., 1092
presumption as to rights of lord over..... 122
encroachments on 122A
right of, when provable by reputation 613
when not..... 614
must be created or assigned by deed 973-74

COMMON LAW (see *Courts of Law*).

COMMON LAW PROCEDURE ACT, 1852 (see *Table of Statutes*, 15 & 16 Vict. c. 76).

COMMON LAW PROCEDURE ACT (IRELAND), 1853 (see *Table of Statutes*, 16 & 17 Vict. c. 113).

COMMON LAW PROCEDURE ACT, 1854 (see *Table of Statutes*, 17 & 18 Vict. c. 125).

COMMON LAW PROCEDURE ACT, 1860 (see *Table of Statutes*, 23 & 24 Vict. c. 126).

COMMON LODGING HOUSES (see also *Lodging Houses*), registers of, how proved.....1601, n
by-laws of, made in Ireland, how proved.....1657-8, n
made in England, how proved (sub tit. "*Public Health Act*") .....1657-8, n.

COMMONS, HOUSE OF (see *House of Commons*, *Parliament*).

COMMUNICATIONS (see *Privileged Communications*).

COMPANIES (see *Joint Stock Companies*).

COMPANIES ACTS, 1862 and 1867 (see *Joint Stock Companies* and *Table of Statutes*, 25 & 26 Vict. c. 89; and 30 & 31 Vict. c. 131).

COMPANIES CLAUSES CONSOLIDATION ACTS (see *Consolidation Acts*).

COMPARISON of handwriting (see *Handwriting*) 1869-76
of property found on prisoner with sample produced by prosecutor .. 555

COMPENSATION (see *Amends*).
judgments in cases of, under Lands Clauses Consolidation Act, 1845, how proved 1555B, 1572
in cases of, with Commissioners of Sewers, witnesses how made to attend (sub tit. "*Sewers Commissioners*") .....1329, n.
to families of persons killed by accident, must be sued for within twelve months 73
for injuries under Employers' Liability Act, also within twelve months 73

COMPETENCY (see also *Oaths Act*, 1888).
of evidence or of witness, question for judge 2, 23A
reasons of common law for considering certain witnesses not to be possessed of.....1342-43
old rule of, discussed and condemned 1342-43
in 1833 earliest Act enlarging.....1344 & n.
Lord Denman's Act, 6 & 7 Vict. c. 85 1347
abolished incompetency from crime or interest 1347
County Courts Act, 1846 1348
rendered parties and wives admissible witnesses..... 1348
Lord Brougham's Evidence Act, 1851 1349
rendered parties competent and compellable witnesses in civil cases 1349
beneficial results of this Act 1350
defective in not rendering married persons where both not a party competent 1351-52
this defect in Evidence Act, 1851, cured by Evidence Amendment Act, 1853 1351-52
provisions of that Act 1351-52

COMPETENCY—*continued.* PARAGRAPHS (§§)
action for breach of promise of marriage excepted from Acts of 1851 and 1853 ..... 1351-2, 1353
this exception now repealed 1355
but plaintiff in such action must be corroborated 1355
parties to suits instituted in consequence of adultery were also excepted from Act of 1851 1353-54
so also were their husbands and wives 1351-2
these persons were rendered only partially competent by Divorce Act 1354
now admissible under Mr. Denman's Act 1355A
but not bound to answer questions respecting adultery 1355A
now four classes of persons incompetent to testify 1356
1st class, defendants in Criminal Courts or charged before justices with minor offences:—
incompetent to testify for or against themselves 1357
also to testify for or against co-defendants 1357
unless nolle prosequi be entered, or witness be acquitted 1357
defendants competent, however, in penal proceedings in Ecclesiastical Courts 1358
in qui tam actions 1358
in affiliation cases 1358
in proceedings under Acts relating to revenue 1359
under Merchant Shipping Act, 1894 ..... 1360, n.
under Mines Regulation Acts, 1872 ..... 1360, n.
under Army Act, 1881 ..... 1360, n.
under Corrupt and Illegal Practices Act, 1883 ..... 1360, n.
under various other recent Acts .. 1360, n.
in courts-martial consequent on loss of ship, when (see *Errata*) . 1360, n.
on trial of indictment for sending unseaworthy ship to sea .... 1360, n.
Lord Brougham's Evidence Act, 1851 not a disqualifying Statute 1361
all defendants in criminal proceedings should be competent witnesses 1342-43
duty of prisoner's counsel as to stating facts 1361A
examples of special statutes rendering defendants in certain criminal proceedings competent ..... 1360, n.
when one of many persons charged with a nuisance ..... 1360, n.
e.g., parish indicted for non-repair of road ..... 1360, n.
2nd class, husbands and wives in criminal proceedings:—
extent and application of rule 1362
wife cannot testify to facts happening before marriage 1363
to fact of marriage 1363
when wife inadmissible for or against co-defendant of husband .. 1363
admissible when husband previously removed from record .. 1357, 1365
rule confined to lawful marriages 1366
on trial for bigamy, first wife cannot prove marriage with defendant 1366
after first marriage proved, second wife competent for or against prisoner 1366
but, it seems, not before first marriage proved 1366
wife, though incompetent, may be produced in court to be identified ..... 1363, n.
is mistress competent witness for protector? 1366
can supposed husband or wife prove invalidity of marriage? 1366
can party who has stated witness to be his wife deny that fact? .. 1366
is wife competent against husband by his consent? 1367
wife competent, though her evidence may *tend* to subject husband to criminal charge 1368

COMPETENCY—*continued.* PARAGRAPHS (§§)
is wife compellable to testify in such case? ... 1369
husband and wife in civil suit may contradict and discredit each other ... 1370
wife of prosecutor may be called to contradict him ... 1370
may give evidence for the Crown or the prisoner 1365
husbands and wives competent witnesses under several recent Acts ... 1360, n.
husbands and wives competent witnesses where one charged with injuring other ... 1371
e.g., on indictment for forcible or fraudulent abduction ... 1371
or for being accessory to rape ... 1371
or for any offence against the liberty or person or property of prosecutor ... 1371-71A
wife may exhibit articles of the peace against husband ... 1371
can she prove facts, which may be proved by other witnesses? ... 1371
is wife admissible against husband in treason? ... 1372
dying declarations of either admissible where other charged with homicide ... 717
3rd class, *witnesses omitted from or misdescribed in list, in treason*:—
what list must contain ... 1373
at what time it must be served on defendant ... 1373
when objection to service of list must be taken ... 1373
rule does not apply to treason in injuring person of Sovereign ... 1373, n.
4th class, persons incapable of comprehending the nature of an oath or of giving rational answers to plain questions:—
e.g., idiots, lunatics, drunkards, little children ... 1375
incapacity only co-extensive with defect ... 1375
e.g., lunatic competent in lucid interval ... 1375
drunkard competent when sober ... 1375
postponement of trial when defect appears to be temporary ... 1375
at what time application for postponement should be made ... 1375
deaf and dumb witnesses formerly presumed incompetent ... 1376
now, if proved to have capacity, competent ... 1376
instance of trial where all witnesses deaf and dumb ... 1376, n.
how examined ... 1376
children, when admissible witnesses ... 1377
no precise rule, respecting age, intelligence, and knowledge requisite ... 1377
at eight or nine years old, in practice admitted ... 1377
judge must decide on degree of intelligence and knowledge ... 23A, 1377
occasional want of discretion in dealing with these cases ... 1377, n.
Little Jo, in Bleak House ... 1377, n.
law places no reliance on unsworn testimony ... 1378
two securities provided for truth ... 1378
1. moral sanction of an oath ... 1378
2. risk of prosecution for perjury ... 1378
testimony must be given under one at least of these securities ... 1378
but certain aborigines in British colonies need not be sworn ... 1378, n.
judges and jurors cannot give testimony until sworn ... 1379
nor peers ... 1380
nor the Sovereign ... 1381
question whether Sovereign admissible witness at all ... 1381
wisdom of rejecting unsworn witness, excepting under special circumstances ... 1382
what those circumstances are:— ... 1383
1. witness must object to oath, or be objected to ... 1383
2. judge must be satisfied that an oath would have no binding effect ... 1383
witness must then make a solemn promise ... 1384
after which liable to an indictment for perjury ... 1382
degree of religious faith capable of binding conscience of witness ... 1384 & n.

COMPETENCY – *continued.* PARAGRAPHS (§§)
defect of religious faith never presumed 1385
mode of proving it 1385
may be shown by interrogating witness himself..... 1385
all courts able to administer oaths..... 1386
under old order of Court of Chancery to be administered reverently 1387
witnesses may be sworn in form they deem binding 1388
how to ascertain such form..... 1388A
examples of different forms..... 1388, n.
if sworn in form not binding, still liable to penalties of perjury.. 1388A
adverse party cannot have new trial for this cause 1388A
is party entitled to new trial if unsworn witness has testified?..... 1388A, n.
if omission known at time of trial, he is not..... 1388A, n.
if not known, he is..... 1388A, n.
solemn affirmation, when allowed in place of oath..... 1382
to persons who are, or have been, Quakers, Moravians, or Separatists 89A
to any other person, if objection sincere 1382
forms of affirmation..... 1382, n., 1389, n.
evidence not on oath allowed under:—
1. Criminal Law Amendment Act, 1885 ..... 1389B
2. Prevention of Cruelty to Children Act, 1894 ..... 1389B
our Saviour submitted to be sworn ..... 1389A, n.
debtors and their wives may be examined upon oath..... 1390
counsel engaged in cause once thought incompetent..... 1391
now held competent 1391
so are solicitors engaged in cause 1391
so are parties though conducting their own cases 1391
private prosecutor has no right to act as advocate and witness 1391
time for objecting to competency of witness on foregoing grounds.... 1392
mode of objecting 1393
either by examining witness on voire dire 1393
or perhaps by proving his incompetency by evidence aliunde 1393
witness found competent on voire dire may afterwards be rejected.... 1392
on voire dire, witness may speak as to contents of instrument..... 1393
of testator, question for jury 45A

COMPILATION from registers, &c., when admissible in pedigree cases..655-6

COMPLAINT made recenti facto, in cases of outrage, admissible..... 581
particulars of, inadmissible either as original or confirmatory evidence.. 581
made by a child, recenti facto, inadmissible, when 568
by parish officers, necessary to justify order of removal 1715

COMPOSITION DEEDS, when completed so as to make subsequent alteration fatal 1831A

COMPOUND INTENTS, need not be proved as laid..... 267-8

COMPROMISE, offers of, made without prejudice, inadmissible 772-4, 795
caution respecting overtures of 797
authority of counsel to bind client by 783-4

COMPULSION, admissions made under illegal, not receivable 798
under legal, receivable 798
whether evidence of account stated 799

COMPULSORY, used to enforce attendance of witness in Ecclesiastical Courts, &c. 1287

CONCEALMENT
of birth of child, mother indicted for murder, may be convicted of..269-70A
old presumption of guilt from ..... 116, n.
on trial for, cost of witness may be allowed 1254
of witness by adversary, lets in his former depositions 472-8

CONCEALMENT—*continued.* PARAGRAPHS (§§)
of attesting witness by adversary, lets in proof of his signature 1851
of witness by prisoner, lets in his deposition in Ireland, when 496-8
of evidence, raises presumption against party..... 116, 555A, 804

CONCESSION (see *Compromise*).

CONCLUSIVE EVIDENCE
1. matters judicially noticed (see *Judicial Notice*) 4-21
2. certain conclusive presumptions of law (see *Presumptions*).....70-108
3. estoppels by deed (see *Estoppel*) 93-100
4. estoppels of record (see *Public Records and Documents*).....1667—1760
5. estoppels in pais (see *Estoppel*) 101-3
6. admissions in judicio.....772, 821 *et seq.*, 1693
7. admissions by pleading (see *Admissions*) 821-31
8. admissions acted upon (see *Admissions*) 839-53
9. judicial confessions 866

CONCURRENCE in testimony, effect of 59-60

CONDEMNATION, judgments of, by Revenue side, Queen's Bench Division, or Commissioners of Inland Revenue, Excise, or Customs, when conclusive ..... 1675, n.
of goods by Justices under customs' laws, how proved .....1555c, n.

CONDITIONAL written promise to pay, will not oust Statute of Limitations, when 1074B, 1075
becomes absolute, if condition fulfilled 1074B
Statute runs from date, not of promise but of fulfilment 1074B

CONDONATION, question for jury 45A

CONDUCT, when evidence as admission (see *Admission*).....804-6
as confession..... 907
when it raises presumption of guilt 107, 116-8
of family, when admissible in cases of pedigree 649
of family towards a relative, inadmissible to prove or disprove insanity..571-3
even in Probate Court now.....575 & n.
of persons in other positions, when admissible as hearsay 571
of strangers towards a man and woman, when evidence of marriage.. 578
of witness, as connected with the cause, when relevant 1436-42
when answers of witness respecting his, open to contradiction.....1436-42

CONDUCT-MONEY (see *Attendance of Witnesses*).

CONFECTIONERY not necessaries for an infant 46

CONFEDERATE (see *Conspirators*).

CONFESSION, distinction between confession of guilt and admission (see *Admissions*) 724
verbal confessions of guilt to be received with great caution 862
instances of false .....863 & n.
deliberate and voluntary, entitled to great weight, why 865
judicial, what are 866
conclusive 866
extra-judicial, what are 867
when only corroborative evidence in treason 867, 955
whether sufficient to justify conviction, without proof of corpus delicti.. 868
effect of, in petition for dissolution of marriage.....768-9, 869
whole must be taken together..... 870
how, if it implicates other persons by name..... 871
must be voluntary 872
whether voluntary, question for judge.....23A, 872
promise or threat by person in authority 873

CONFESSION—*continued.* PARAGRAPHS (§§)
instances of persons in authority 873
inducement sanctioned by such person 873
held out by private person, and confession made to him .. 875
by private person, and confession made to another party.. 877
made after inducement held out..... 878
influence of inducement done away 878
nature of inducement:— 879
must refer to the charge 879
induced by special exhortation 879
by promise of collateral benefit 880
by threat of collateral annoyance 880
modes of obtaining:— 881
by promise of secrecy 881
by intoxicating prisoner 881
by deception 881
by questions 881
by ungrounded hope of being admitted Queen's evidence..... 881
by overhearing prisoner 881
by hearing prisoner talking in sleep .....881, n.
not necessary to warn prisoner 881
how far proper to caution him 882
made under illegal restraint, whether admissible 883
what amounts to promise or threat 884
exhortations to speak truth..... 884
inducement need not be made directly to prisoner 885
manner in which it may be made, 886 *et seq.*
under examination before magistrate 886
old practice of torture 886
when abolished in England and Scotland..... 886
French mode of interrogating prisoner..... 887
statutes respecting examination of prisoner by magistrate ..888 *et seq.*
proper course in taking examinations 888A
proof of examination.....889-93, 1581
examination returned, how far conclusive 892
contents of examination returned cannot be proved by parol..... 399
if informally taken, parol evidence admissible when 400
evidence to contradict, or vary examination, excluded 893
evidence adding to examination, how far admissible for prosecutor.. 893
how far for prisoner..... 894
examination purporting to be taken on oath, effect of 895-7
proof that it was not so taken, inadmissible..... 895
when prisoner has been examined as witness before justice 897
sworn confessions by witnesses, when admissible 898-9A
testimony of witnesses, when inadmissible against them by statute..899A, 1455
examinations taken by coroners 900-1
fact discovered in consequence of, admissible 902
effect of producing property at time of..... 903
of accomplices, inadmissible..... 904
of agents 905-6
conduct and acquiescence may raise implied 907

CONFIDENTIAL COMMUNICATIONS (see *Privileged Communications*).

CONFINEMENT of female witness, recent or expected, whether ground for admitting depositions ..... 481 & n.

CONFIRMATION, of accomplice, when and how far necessary 967-71
of informers 971
of woman in case of bastardy..... 964
of plaintiff in breach of promise of marriage 964A, 1353
of witness in indictment for perjury 959-63
of pauper in settlement cases, when 964B

Vol. I. ends with § 971.

CONFIRMATION—*continued.* PARAGRAPHS (§§)
collateral facts, when admissible to afford witness 335-7
by principal of unauthorized act of agent, effect of 985, 1109
of invalid lease under power, by accepting rent and signing memorandum 808, 994

CONFLICTING presumptions, effect of 114
judgments in rem, effect of 1679

CONFRONTING WITNESSES, practice of..... 1478

CONJUGAL RIGHTS (see *Restitution*).

CONSENT, when implied from silence (see *Admissions*) 809-16
when presumed from long acquiescence 139-42
onus of proving in particular cases.....372-4
of young girl, when no defence to prosecution for rape or assault 104
in case of husband's, can wife be witness against him in Criminal Court?..... 1367

CONSEQUENCES, natural, when presumed..... 80

CONSERVATORS OF THAMES, by-laws of, how proved (sub tit. "*Thames Conservancy*") .....1657-8, n.

CONSIDERATION, what sufficient, to support a written promise.... 1022-23
want of failure of, in written instrument, may be proved by parol.... 1138
must appear in signed writing under §§ 4 and 17 of Statute of Frauds.. 1021
either in express terms, or by reasonable intendment ..1022-23
need not appear on face of guarantee 1030B
must be set forth in bill of sale 150A
for bills of exchange, presumed primâ facie 148, 368
for deed, conclusively presumed in absence of fraud 86, 1138
when parol evidence admissible to show the real 1138
when necessary to prove valuable 150

CONSISTENCY of testimony of different witnesses, effect of.....59-60
of testimony, with probability, effect of 61-2
with circumstances 63

CONSISTORY COURT (see *Ecclesiastical Court*).
how attendance of witnesses compelled in 1287
registers of births, baptisms, marriages, and burials of British subjects abroad, deposited in registry of..... 1486, n.

CONSOLIDATION ACTS of 1847, inspection of documents under..1504-21, n.
proof of by-laws under..... 1601, n., 1655
of certificates under (see *Certificates*) 1631-7A

CONSPIRACY, when indictment for, charges several overt acts, sufficient to prove one 266

CONSPIRATORS, acts and declarations of each in furtherance of common design, evidence against others 591
but fact of conspiracy must be proved by independent evidence 590
how far necessary that this fact should be first established 590
immaterial at what time accused entered into the conspiracy 592
or whether acts or declarations done or made in presence of accused or not 592
narratives or confessions by, of past events, no evidence against the others 593
letter or papers found after apprehension of accused 593-5
unpublished writings upon abstract questions, how far admissible.... 596

PARAGRAPHS (§§)

CONSTABLE, credibility of testimony of 57, 68
presumption of appointment of, from acting 171
confessions made under inducements by, inadmissible 873
duty of, with respect to inducing prisoners to confess .....882 & n.
what costs allowed to, as witness in criminal trial.....*App.* vii, viii

CONSTITUTION, political, judicially noticed 18

CONSTRAINT, admissions made under, when admissible (see *Admissions*).. 798

CONSTRUCTION of documents belong to court, when 40
to jury, when 41-2
distinction between legal presumptions, and rules of..... 1231
rules of, what are best .....1128, 1131, n.
cannot be varied by evidence 1231

CONSTRUCTIVE ACCEPTANCE, what sufficient to satisfy Statute of Frauds 1045-49

CONSULS, invested with what notarial powers.....11-12
documents taken or sworn before, abroad, how proved.....11-12
proof and effect of book notice or document of, as to marriage in foreign countries 1622

CONTEMPORANEOUS acts, declarations and writings, when admissible as part of res gestæ (see *Res gestæ*, *Hearsay*, *Conspirators*)..... 583—605, 1147-8
entries in course of office or business must be, with act..... 704
entries against interest, need not be.....673, 704

CONTEMPT in disobeying a subpœna, how punished 1265-70
in arresting or calumniating a witness, or preventing his attendance..1341a
by remaining in court, after order to withdraw 1401
by refusing to give evidence 1403

CONTENTS of will, testator's knowledge of, when presumed..... 160-1
of books and documents, knowledge of, when presumed 812

CONTEXT should be considered in interpreting writings.....726, 1128

CONTINENTAL LAW allows interrogation of prisoners ..... 887, n.

CONTINUANCE of human affairs, presumption as to..... 196
of partnership, agency, tenancy, &c..... 196
of opinions 197
of life (see *Life*) 198

CONTRA SPOLIATOREM, presumptions 107, 116

CONTRACT, when must be by deed (see *Deed*) .....972 *et seq.*
when, by writing attested (see *Attesting Witness*).
when, by writing signed under Statute of Frauds (see *Statute of Frauds*) .....1000 *et seq.*
under Lord Tenterden's Act (see *Lord Tenterden's Act*)..871, 1073-78
under other Acts (see *Writings*).
made out from letters, to satisfy Statute of Frauds (see *Statute of Frauds*) 1056
how far binding, if made by infant 104
of joint stock companies, how made under the Companies Clauses Consolidation Act, 1845 987-8
under the Companies Acts 989
in writing, excludes parol evidence 401-4
unless such contract be collateral or incomplete 405-6
does not exclude collateral parol agreement 1147
cannot be varied by parol (see *Parol Evidence*) 1132

CONTRACT—*continued.* PARAGRAPHS (§§)
in writing, may be explained by parol (see *Parol Evidence*) 1158
can be totally or partially discharged before breach by subsequent oral agreement 1141
by deed can only be dissolved by deed 1142
in writing by statute may be wholly discharged by oral agreement .. 1143
cannot be partially discharged by oral agreement 1144
difference between executed and executory 982, 1036
when impliedly made in accordance with usage 181
when impliedly to be performed within reasonable time 177A
drawn up in common form, when presumed to have been accepted .. 86A
when misdescribed on record, instances of amendment 235-7
made through broker, how provable by bought and sold notes (see *Bought and Sold Notes*) 420-23
by broker's book 420-21
when incidents annexed to, by usage (see *Parol Evidence*) 1168-73
by law-merchant 1170-72
by common law or statute (see *Annexing Incidents*) 1172-86

CONTRADICTION, when allowable, of own witness (see *Witnesses*) 1426
of opponent's witness 1435-45
of husband's testimony by wife.... 1370
not allowable, of writing by parol..... 1132
by evidence of usage 1165-67

CONTROVERSY (see *Lis Mota*) 628-34

CONVERSATION, evidence of, to be watched with suspicion 68
when admissible as evidence of bodily or mental feelings 580-1
as part of res gestæ (see *Res gestæ*) 583-8
when not evidence as relating to past events 589, 593
relying on part of, as an admission, does not let in whole, when 733
cross-examination as to one part of, does not let in re-examination as to distinct part 1474
of a solicitor, not evidence against his client 774-82

CONVERSION, presumption of, from demand and refusal 176
in trover for converting writings, notice to produce unnecessary ..407, 452

CONVEYANCE, when presumed 134
when effected by operation of law 1005-15
when fraudulent within Act of Elizabeth..... 150
when invalid, unless by deed (see *Deed*).....973-4 *et seq.*
when invalid, unless by attested instrument (see *Attesting Witness*).
to charitable uses (see *Charity*).
under the Landed Estates Court (Ireland) Act, 1858, conclusive evidence of proceedings being regular 86

CONVEYANCERS, general practice of, judicially noticed..... 5, 21
communications to, whether privileged? 912, 916

CONVEYANCING ACT, 1881 (see *Table of Statutes*, 44 & 45 Vict. c. 41).
effect of production by solicitor of deed acknowledging receipt under.. 96
notices and proceedings under, may be served by post .....180, n.
devolution of an estate or interest of inheritance under..... 1015

CONVICT, administrator of property of..... 1015

CONVICTION, incompetency of witness on account of, abolished 1347
witness may be questioned as to his previous 1437
if he denies fact, or refuses to answer, it may be proved by certificate.. 1437
not evidence in civil action, when 1693

CONVICTION—*continued.* PARAGRAPHS (§§)
proof and admission of certificate of previous, under Lord Brougham's Act 1612-14
under Prevention of Crimes Act, 1871.. 1612-14
how proof of previous conviction or acquittal of person may be given 1612-14
under Extradition Act, 1870 1560
under Army Act, 1881 ..... 1611, n.
by court-martial, how proved 1555A
for assault before justice, when a bar to indictment for feloniously wounding 1710
how to be proved 1710
record of, for any offence summarily punishable, how proved 1555
summary, construed with strictness 146
court can intend nothing in favour of, will intend nothing against 146
jurisdiction must appear on face of 147, 1715
bar to other proceedings from same cause 1710
for assault, no bar to indictment for manslaughter 1710
when it appears, facts stated in adjudication cannot be disputed in action against justice 1669-71
must be applied for within what time for offence against Merchant Shipping Act, 1894 ..... 76-8, n.

CO-OBLIGOR (see *Bond*).

COOK warrants competent skill 1183

CO-PARCENERS, privies in blood 787
how described in indictment 293

COPY of public records and documents how obtained (see *Public Records and Documents*) ..... 1479—1522
of private writings, how obtained (see *Private Writings, Discovery*).. 1786—1817
of documents, when admissible (see *Secondary Evidence*) 428-62
of foreign or colonial documents, when admissible 1556
Different kinds of copies, of public documents :—
1. *Exemplifications under Great Seal*, what, and how obtained.. 1536, 1546
proved by mere production 1537A
2. *Exemplifications under Seal of Court*, what, and when admissible 1537, 1546
proved by mere production 1537A
3. *Office Copies*, what 1538
equivalent to original record in Supreme Court 1538
document in central office, proved by 1539
writs, records, affidavits, pleadings, &c., of High Court provable by ..... 1538—1587
orders of old Common Law side of Court of Chancery provable by ..... 1542 & n.
when admissible by statute :— 1539-44
of documents in Petty Bag office 1542
of certificates of acknowledgment of deeds by married women ..... 1540-41, n.
of decisions on appeals from revising barrister .... 1540-41, n.
of registered bills of sale ..... 1540-41, n.
of documents in registry of Court of Probate 1543
these copies need not be collated 1543
in Ireland, how far and when admissible 1544
4. *Certified Copies*, sometimes admissible by statute.. 1533, 1546-7, 1599, 1600-1
the statutable proof cumulative, not substitutionary 1547
seal, signature, and official character of certifier need no proof 7-8, 1601
What records and judicial documents provable by :—
records in custody of the Master of the Rolls 1533
proceedings of Courts of Bankruptcy 1548-53

COPY—*continued.* PARAGRAPHS (§§)
proceedings of Courts of Bankruptcy in Scotland 1559
of County Courts..... 1554
of Courts-Martial 1555A
convictions under Factories Acts .....1555c, n.
under Summary Jurisdiction Act 1555
under other Acts.....1555c, n.
judgments in compensation cases under Lands Clauses Consolidation Act, 1845 .....1555B
records of foreign and colonial courts 10, 1556
depositions under Extradition Treaties..... 1560
under Fugitive Offenders Act, 1881..... 1562
certain foreign depositions, warrants, and certificates 1560-61
how far necessary to prove the seal, signature, and official character of person authenticating these last documents .. 1560
what official documents provable by, under special Acts (alphabetically arranged) .....1601, n.
5. *Examined Copies*, what are 1545
it is not necessary for witness to read both copy and original . 1545
must be accurate and complete 1545
containing abbreviations not found in original, inadmissible . 1545
if original ancient or foreign, party comparing must understand it 1545
original must be in proper custody 1545
proof of this 1545
most usual mode of proving records 1546
and proceedings of inferior courts of justice 1546
admissible in general, though other copies allowable by statute 1547
of records and public documents regarded almost as primary evidence 552
when such copies can be had, parol evidence inadmissible .. 552
rules of savings banks provable by .....1600, n.
when admissible of banker's books 1608A
what *public documents provable by examined or certified copies* under Lord Brougham's Act .....1599A—1601 & n.
when records not provable by copies :— 1535
1. if issue joined on nul tiel record, in certain cases 1535
2. on indictment for perjury in affidavit, &c., or forgery of record 1535
what official registers and documents not provable by copies, without accounting for non-production of originals.....1596-7 & n.
in criminal cases non-parochial register deposited with Registrar-General.....1596-7 & n., 1601, n.
orders of detention in industrial schools .....1601, n.
Different kinds of copies of private writings :—
duplicate originals, what they are 426
each considered primary evidence 426
counterparts, what they are..... 426
each, primary evidence against party executing that part 426
secondary, against party executing the other part.. 426
the part sealed by lessor is usually deemed the original as to stamps 426
as secondary evidence, unstamped counterpart is admissible .....426, n.
whether counterparts signed by lessees ever admissible for lessor in proof of ancient possession? 427
machine copy, not primary evidence 418
presumed correct in India .....418, n.
printed copies, primary evidence of each other's contents 418
copy of document, how far witness may refresh memory by . 1408
inadmissible, unless proved to be accurate 553
of judgment or decree, when evidence of reputation .. 626

COPY—*continued.* PARAGRAPHS (§§)
copy of old deeds, when admissible 621
of document admissible, though illegally procured 922
of copy generally inadmissible 553
of documents, produced to commissioner for taking depositions, admissible 513

COPYHOLD PROPERTY, presumption respecting 211

COPYHOLDER, inspection of court rolls by, how enforced 1494
depositions by, in ancient suit, when evidence of manorial custom.... 612

COPYRIGHT, assignment of, to be in writing..... 995
need not be attested by two witnesses 1110
on sale of, is a warranty of title implied? 1177-8
registers of, kept at Stationers' Hall, how inspected .....1504-21, n.
provable by certified copies .....1504-21, n., 1601, n.
admissibility and effect of .....1778-80, n.

COPYRIGHT OF DESIGNS, seal of registrar's office of, requires no proof .....6, n.
designs kept at Patent Office, how inspected (sub tit. "*Patents, Designs, and Trade Marks*") .....1504-21, n.
registrations and documents kept at Patent Office, how proved (sub tit. "*Patent Office*") .....1601, n.

CORN, growing crop of, not within sect. 4 of Statute of Frauds 1042
meaning of word in bill of lading may be explained by usage ....1162, n.

CORNWALL, DUCHY OF, what deeds must be enrolled in office of.... 1121
date and fact of enrolment, how proved 1646
instruments registered in office of, how proved 1648
records of, where deposited .....1486, n.
seal of, judicially noticed..... 6

CORONER, power of, to bind over witnesses by recognizance 1234A
attendance of witnesses before, how enforced 1290
of medical witnesses before, how enforced 1290
remuneration to medical witnesses called before.....1290, n.
deposition of witnesses, how taken by (see *Depositions*) 493
how proved 493
inadmissible as secondary evidence, if witness can be called..... 468
how inability to call him may arise (see *Secondary Evidence*) ....472-8 & n.
whether admissible if accused not present 494
examination of prisoner by, how taken and proved, and effect of..901, 1581-2
inquest of, how far admissible on question of sanity.....1674, n.

CORPORATION, what contracts by, must be under seal (see *Deed*) 976-84
may be by parol 977-80
appointment of agent by, to act in bankruptcy must be under seal.... 1101
liable in tort for acts of servants 981
may sue or be sued for use and occupation, when 101, 981A
may adopt a private seal, when 149
seal of corporation of London judicially noticed..... 6
whether estopped by suing on contract from objecting in cross-action that it was not under their seal? 821
by-laws of municipal, how proved.....1657-8, n.
proceedings of council of municipal, how proved 1783
must attesting witness to deeds of, be called? 1852
do deeds of, 30 years old, require proof? 87

CORPORATION BOOKS, inspection of, by members 1495
by strangers 1496
of municipal corporations, inspection of.....1504-21, n.
entries in, of a public nature, admissible as official documents..1595, n., 1781
of a private nature, only admissible where members concerned 1781
seldom admissible for corporation against stranger 1781

CORPORATION BOOKS—*continued.* PARAGRAPHS (§§)
entries in, when rendered admissible by Statute 1781
of ecclesiastical aggregate, admissible 688

CORPUS DELICTI, when it need not be proved 1278
whether any proof of, necessary in case of confession 868

CORRESPONDENCE (see *Letters*).

CORROBORATION (see *Accomplices, Number of Witnesses*).
collateral facts, when admissible to corroborate witness 335, 959
of entries made in the course of office or business, how far necessary.. 706
of evidence furnished by ancient documents, how far necessary 665-6
of plaintiff's testimony in action for breach of promise of marriage....964A, 1353
of mother in affiliation case 964
of pauper on what orders of removal 964n
of accomplice 967-71
of claimant making claim on estate of deceased person, generally looked for 965
in ecclesiastical courts 966

CORRUPT AND ILLEGAL PRACTICES PREVENTION ACT, 1883 (see *Table of Statutes*, 46 & 47 Vict. c. 51).
offences against, how affected by Statute of Limitations .....76-8, n.
costs of prosecuting under 1254
defendants and wives may give evidence under .....1360, n.
persons charged with corrupt practice may be convicted of illegal practice .....1707, n.
how witnesses to be summoned under .....1293—1309, n., 1326
notices and documents, how served under .....180, n.

CORRUPT PRACTICES PREVENTION ACTS (see *Table of Statutes*, 15 & 16 Vict. c. 57; 17 & 18 Vict. c. 102; 31 & 32 Vict. c. 125).
costs of prosecuting under .....1254, n.
costs of witnesses for defendant, when allowed under .....1260, n.
how witnesses to be summoned under .....1293—1309, n., 1326

COST-BOOK PRINCIPLE in mining partnerships, not judicially noticed 5

COSTS are now generally in the discretion of the Court 39
of allowing amendments at Nisi Prius 239, 241A-4
of suing in superior courts instead of inferior, when allowed 38
in superior courts not recoverable without certificate, when 38
in actions with jury, to follow event unless judge otherwise orders..39, 39A
interpretation of "event" which is to be followed by 39B
Court will not deprive successful litigant of, except for good cause .. 39A
what would be held good cause .....39A, n.
of witnesses (see *Attendance of Witnesses*).
of procuring evidence, or qualifying witnesses, when allowed 1247
of prosecution, when allowed (see *Attendance of Witnesses*) 1253-60
on what scale, as fixed by Home Secretary .....1257 & *App.* vi—x
of proving documents after notice to admit (see *Notice to Admit*) ..724A (v)
of notice to produce unnecessary documents 456A
of proving facts after notice to admit 724H

CO-TRESPASSERS, declarations of each, if part of res gestæ, admissions against all 597, 751
aliter, admissions or narratives of past events..... 597
or declarations, where no common object or motive 597

COUNCIL, private orders of, not judicially noticed 18

COUNCILS OF CONCILIATION ACT, 1867 (see *Table of Statutes*, 30 & 31 Vict. c. 105).
attendance of witnesses before Council, how enforced .....1293—1309, n.

PARAGRAPHS (§§)

COUNSEL (see *Acquiescence, Arrest, Barrister, Privileged Communications, Revising Barrister*).

COUNTER CLAIM (see *Set-off*).

COUNTERFEIT (see *Coin*).

COUNTERPART, what it is 426
primary evidence against party executing that part .....
secondary evidence against party executing the other part .....
execution of, by lessee, when presumed .....
is part signed by lessee evidence for lessor in proof of ancient possession?
notice to produce, when unnecessary ..... 4[illegible]
part sealed by lessor, deemed original as to stamps 426
as secondary evidence, admissible though unstamped ..... 426, n.
when copy admissible, though counterpart in existence 550

COUNTER PRESUMPTIONS, effect of 114

COUNTIES, how far judicially noticed 17
boundaries of, not judicially noticed 17
provable by reputation 613

COUNTY COURTS, seal of, judicially noticed 6
powers of amendment in 246
orders for examination of witnesses before trial 520
allowance to witnesses in ..... *App.* iv-v
attendance of witnesses before, how enforced 1291
when in custody, how enforced ..... 1276, n.
parties to record, and their wives admissible witnesses in ..... 1348 & n.
proof of records of, and proceedings in 1554
rules as to notices to admit in 724c
inspection of documents, how enforced in 1811-13
as to reading documents in trials in 1879
powers of discovery in 1811-13
plaintiff cannot split cause of action in 1704
judge of, need not be subpœnaed to produce notes, on trial of indictment for perjury committed before him 416
not bound to take notes 416
registrars of, now grant replevin bonds ..... 1850, n.
new trial, when granted on appeal to High Court 1882

COURSE OF OFFICE OR BUSINESS,
presumption from usual 176-83
usual, question for jury 36
declarations in, when and why admissible ..... 697—708
examples 697-99
disinclination to extend the rule 700
legislative recognition of rule 702
death, handwriting and official character of party making entry must be proved 703
must appear that he had no motive to mis-state 703
that entry was made in course of duty 701, 705
that party making it had personal knowledge of facts stated 700
that entry was made contemporaneously with facts stated 704
not evidence of independent matters 705
whether corroborative evidence necessary 706
not necessary to show that better evidence is unattainable 707
rule applies to oral statements 708
entries made by party in his own shop-book admissible in America, when 709-10
in English High Court, when 709-11
so by the Roman, French, and Scotch law 712

Vol. I. ends with § 971.

COURSE OF OFFICE OR BUSINESS—*continued.* PARAGRAPHS (§§)
this rule beneficial 713
is not recognized at common law 709-10
is by Statute, semble 709-10

COURT (see *Judge*).

COURT OF ARCHES (see *Ecclesiastical Courts*).

COURT OF BANKRUPTCY (see *Bankruptcy Courts*).

COURT OF BANKRUPTCY IN IRELAND (see *Bankruptcy and Insolvency, Court of, in Ireland*).

COURT FOR DIVORCE AND MATRIMONIAL CAUSES (see *Divorce*).

COURTS BARON (see also *Court Rolls*), judgments in, how proved..1572, 1575A
rolls of, how proved ..... 1600, n.
regarded as public documents ..... 1595, n.
provable by examined or certified copies ..... 1600, n.

COURTS OF EQUITY (see *Chancery Division*).

COURTS OF LAW (see *Inferior Courts, Judicature Acts, Supreme Court*).
superior, judges of, and proceedings in, judicially noticed 19
seals of, judicially noticed 6
seals of old, judicially noticed..... 6
signature of judges of, when judicially noticed 7-8, 12
jurisdiction of, when presumed 84
writs of, presumed to be duly issued 84-5
rules of, provable by office copies 1534, 1587
witnesses, parties, counsel, and solicitor attending free from arrest (see *Arrest*) ..... 1330A *et seq.*
witnesses, how made to attend (see *Attendance of Witnesses*) ....1232—1329 & n.
records of, twenty years old, in custody of Master of Rolls ..1485 & n.
inspection, proof, admissibility, and effect of records of (see *Public Records and Documents*).
may enforce discovery by interrogatories, when (see *Parties*) 521-2

COURTS-MARTIAL (see *Army Act*).
enforcing attendance of witnesses before ..... 1293—1309, n.
witnesses, &c. attending before, privileged from arrest 1334
copies of trials by, when demandable 1490A
proceedings of, how proved 1555A
what rules of evidence adopted in 49A
when defendant in, may give evidence on oath ..1360, n., and see *Addenda*
certificates of conviction or acquittal, proof and effect of 1612-14
sentences of, are judgments in rem ..... 1675, n.

COURTS OF PROBATE (see *Probate, Court of*).

COURT ROLLS (see also *Courts Baron*), inspection of, who entitled to, and how obtained 1494
admissibility of, as hearsay 623
in other cases 1773

COURT OF VICE-WARDEN OF STANNARIES (see *Stannaries*).

COUSINS, meaning of word 168

COVENANT, breach of, when waived, by suing or distraining for, or accepting rent..... 806
by having misled opponent 847
when not waived by passive acquiescence 809
cannot be discharged by parol 1141

COVENANT—*continued.* PARAGRAPHS (§§)
in action on, payment into Court admits deed, though execution is denied 1849
when covenantee may sue for breach of, though he has not executed deed .....1029, n.

COVENANTER, Scotch, how sworn .....1388, n.

COVERTURE (see *Husband and Wife*).

COVIN (see *Fraud*).

CRASSA NEGLIGENTIA (see *Gross negligence*).

CREDIT, defence of unexpired, was available under plea never indebted.. 303
of another, representations respecting, must be by writing signed.... 1085
this law extended to Scotland by 19 & 20 Vict. c. 60, s. 6 1085

CREDIT OF WITNESSES, their demeanour good test of 52
how impeached by cross-examination (see *Witnesses*).....1435-45
how impeached by other means (see *Witnesses*) 1447-73
how supported 1474-78
how far party may discredit his own witness (see *Witnesses*) 1426

CREDITORS, defeat of, by fraudulent deed, when presumed.....83, 150
resolutions passed at meeting of, how proved 1552
agents of, in bankruptcy, how appointed..... 1101

CREDULITY, implanted in our nature 50
found in excess among partisans 57-8
unbounded, the attribute of weak minds 61

CREW (see *Seaman, Ship*).
competent witness, when, in court-martial for loss of ship .....1360, n.
liability of shipowners for injuries sustained by..... .....1182A

CRIMES, witnesses no longer incompetent from .....1347 & n.
what are local.....281-3
infant under 7, incapable of committing 104
between 7 and 14, primâ facie presumed incapable of 189
this presumption in practice too little regarded.....189, n.
communication by client to solicitor for criminal purposes, how far admissible 912-14, 923, 929
presumption of guilt from possession of instruments for committing.. 372-4, n.
from other causes 115-18
how far rebutted by the presumption of innocence.....113-15

CRIMES PREVENTION ACT, 1871 (see *Table of Statutes*, 34 & 35 Vict. c. 112).

CRIMINAL CONVERSATION (see *Adultery*).

CRIMINAL INTENT must be proved, when act becomes criminal if done with such 118
will be presumed, when act in itself unlawful..... 118

CRIMINAL LAW AMENDMENT ACT, 1885 (see *Table of Statutes*, 48 & 49 Vict. c. 69).
when boys may be convicted under 104
offences created by 1389c
children of tender years may give evidence under 1389c
payment of costs of prosecution may be ordered by persons convicted under .....1254, n.

PARAGRAPHS (§§)

CRIMINAL PROCEEDINGS, what will render defendants incompetent witnesses ... 1357
all defendants in, should be competent witnesses ... 1360, n.
new rules relating to discovery and inspection do not apply to ... 1792
when admissions in, are not evidence ... 751

CRIMINATION, witness not compellable to criminate himself ... 1453-58A
excuses the production of documents ... 458, 1793
protection how far recognized in bankrupt law ... 1458A

CROPS, growing, when within § 4 of Statute of Frauds ... 1042-3
presumption as to title of executor to ... 167
title of lessee to away-going, may be proved by usage ... 1168

CROSS-ACTION, judgment when not conclusive in ... 1700
opposite verdicts are sometimes given in ... 1700

CROSS-EXAMINATION (see *Witnesses*).
when right may be claimed to subject one's own witness to ... 1426
party, against whom depositions, affidavit, or answers offered, must have had right of ... 466, 486, 568
need not have exercised the right ... 466

CROWN, public acts of, how proved (see *Sovereign*) ... 5, 15, 26, 27
prerogatives of, judicially noticed ... 5
grants from, when presumed ... 130
how proved ... 1526
charter presumed correctly dated ... 85
law officers of, when entitled to reply ... 390
land revenues of, can only be dealt with by deeds enrolled ... 1121

CROWN DEBTORS, index to, kept in central office of Supreme Court ... 1491c
right to inspect index to ... 1491c

CROWN-OFFICE, subpœnas from, may issue to any part of England (see also *Central Office Subpœna*) ... 1264
general practice as to issue of subpœnas from ... 1239
fee payable on issue of ... 1239
now forms part of central office of Supreme Court ... 1264
when justices should have recourse to subpœnas from ... 1239, 1322

CROWN-OFFICE ACT, 1877 (see *Table of Statutes*, 40 & 41 Vict. c. 41), rules made under, judicially noticed ... 19, n.

CROWN SUITS ACT, 1865 (see *Table of Statutes*, 28 & 29 Vict. c. 104), documents under, when taken or sworn abroad, how proved (see how *R. S. C., Ord. XXXVIII., r.* 6, set out) ... 12 & n.

CRUELTY of husband, question for jury ... 45A

CUMULATIVE allegations need not be proved (see *Variance*) ... 265-77
this rule recognized in Naval Discipline Act, 1866 ... 269-70A, n.
this rule recognized in courts-martial under Army Act, 1881 ... 269-70A, n.
methods of proof, when afforded by statute ... 1547
legacies, rule respecting ... 1129, 1227

CURATOR BONIS, question whether action in England can be maintained by Scotch Lunatics ... 1736, n.

CUSTODY, of privy or agent is custody of party or principal ... 441
what is proper, of instrument ... 432-34, 660-64
question for judge ... 23A
places of proper, of lost instruments, must be searched ... 429-35
ancient documents must come from proper ... 87, 660-63
of documents, when it must be proved by extrinsic evidence ... 664
what sufficient to justify order for inspection ... 1799—1808

CUSTODY—*continued.* PARAGRAPHS (§§)
mutilated documents, when admissible, if coming from proper 1838
of Master of Rolls, what documents are in, and where kept ....1485 & n., 1486 & n.
attendance of person in, as witness, enforced by habeas corpus 1272
by warrant or order of judge, when 1276
how enforced in Ireland .....1276, n.
how enforced in County Courts .....1276, n.
illegal, confession made during, whether admissible 883

CUSTOMS, when provable by hearsay 609-14
when judicially noticed 5
reasonableness of, question for judge 37A
of one manor inadmissible evidence of customs in another 320
except after proof of sufficient connection 320
when verdicts and judgments inter alios admissible to prove 1683
of country, meaning of, with reference to good husbandry 1188
evidence of, how far admissible to explain lease.....1168-87
when appointment of officers of, presumed from acting 171
condemnation of property by Commissioners of, judgment in rem..1675, n.
two Commissioners must sign all orders of Commissioners of 1106

CUSTOM-HOUSE books, inspection of 1491-99
provable by examined or certified copies (sub tit. "*Public Offices*")..1600, n.
what certificates of, inadmissible as public documents .....1592, n.

CUSTOMS ACT, 1876, limitation of actions and proceedings under....76-8, n.
offenders against, must be indicted or sued within three years ....76-8, n.
are competent witnesses, when defendants 1359
persons accused under, presumption against.....116, 372-4, n.
must justify their conduct .....372-4, n.
condemnation under, how proved .....1555c, n.

CYPHER, writing in, parol evidence admissible to explain ..1159-96, 1210-13

DAMAGES, when character admissible to affect (see *Character*) 356-62
plaintiff seeking substantial unliquidated, must begin 381-2
meaning and extent of this rule..... 383
defendant, allowed to reduce, by showing breach of warranty or contract in suit for goods sold with warranty, or work done by contract 1699
laid in statement of claim, can be increased..... 237
if special damage laid, how far necessary to prove.....271-7

DANGEROUS PERFORMANCE,
person employing child in, must prove age of child.....372-4, n.

DANIEL detected perjury of judges by examining them apart.....1402, n.

DATE, presumption that instruments were executed on day of 169
exceptions to this rule:—..... 169
1. when to prove petitioning creditor's debt, a writing is put in signed by bankrupt, dated before bankruptcy..... 169
2. when in petition for damages on ground of adultery, letters are put in to prove terms on which husband and wife lived ..169, 502
3. when indorsement of part payment by deceased obligee of bond is put in by his representatives to bar Statute of Limitations 169, 690-96
deeds of even, presumed executed in order supporting intent 148
of bill, no proof of acceptance at that time 170
evidence respecting, liable to error 68
averment of, generally immaterial .....280, n., 284 & n.
wrong, can be amended, when 237
of record, conclusively proved, by production of record 1667
alteration of, in instrument, after completion, when fatal 1820
as recited in deed, will, or order, may be contradicted by parol 1150

DAUGHTER (see *Seduction*). PARAGRAPHS (§§)

DAY, allegation of a wrong or impossible, in indictment, immaterial (see *Date*) ..... 280, n.
meaning of, in bill of lading, may be proved by usage ..... 1162, n.

DAYS OF GRACE allowed in different countries on bills of exchange .. 1168, n.
may be proved by parol evidence 1168
abolished in England as to bills payable on demand 1168

DEAF AND DUMB WITNESSES competent, if proved to have capacity 1376
examination how taken 1376
instance of trial where all witnesses were ..... 1376, n.

DEALING, presumptions from ordinary course of 176-82
previous, between parties, when admissible to explain contract 1189

DEATH (see *Life*, *Survivorship*).
when presumed ..... 198—203
in the grant of letters of administration evidence of? 1677
provable by parol, though registered 416
inspection of registers of, under Registration Acts (sub tit. "*Births, &c. Registers*") ..... 1504-21, n.
of non-parochial register of, in custody of Registrar-General (see *Non-Parochial Registers*) ..... 1504-21, n.
proof of registers of, under Registration Acts (sub tit. "*Births, &c. Registers*") ..... 1601, n.
of non-parochial registers of, in civil cases (see *Non-Parochial Registers*) ..... 1601, n.
in criminal cases .. 1597-8, n., 1601, n.
of Indian registers of (sub tit. "*Births, &c. Registers*") .... 1600, n.
of Scotch registers of, since 1854 (sub tit. "*Births, &c. Registers*") ..... 1601, n
of Irish registers of ..... 1601, n.
admissibility and effect of registers of 1775
terminates contract of personal service, when 1184
of attesting witness, lets in proof of his signature 1351
of witness, lets in his depositions (see *Secondary Evidence*) 479A-82, 495, 515-16
of witness under examination, effect of 1469
of declarant, necessary to let in declarations in matters of pedigree .. 641
also in declarations against pecuniary interest 669
in declarations against proprietary interest, how far 684
in declarations in course of office or business 703-8
in dying declarations 718
sense of impending, necessary to let in dying declaration (see *Dying Declarations*) 718
fact and time of, questions of pedigree 642
place of, how far question of pedigree 646
of client, does not release solicitor from rule as to privileged communications 927
of husband, does it release wife from rule as to confidential communications? 910A
of seamen, how proved 1776

DEATH-BED DECLARATIONS (see *Dying Declarations*) 714-22

DEBENTURE STOCK of railway not an interest in lands 1039A-40
not included in the term "debentures," when 168

DEBENTURES, inspection of registers of (sub tit. "*Mortgage Debenture, &c. Act*, 1870") ..... 1504-21, n.
how issued under Mortgage Debenture Acts of 1865 and 1870 ..... 995A
under Local Loans Act, 1875 ..... 995A, n.
how transferred ..... 995A, n.
not negotiable at common law ..... 995A, n.
of railways, are not an interest in land 1039A-40
term used in will does not include debenture stock 168

PARAGRAPHS (§§)

DEBT, witness disobeying subpœna liable to action of....1270-71
witness must answer, though he exposes himself to action of 1463
contract by infant cannot now be ratified at all 1084
judgment against one joint debtor, even without satisfaction, may be pleaded and proved in bar by another 1691
judgment against joint and several debtors, with satisfaction, may be pleaded as estoppel by other 1691
within what time action for, must be brought....73, 75B, 692
taken out of Statutes of Limitation by part-payment or written acknowledgment. 690, 744, 1073-82
payment of, when presumed 178
by garnishee under attachment, effect of 1692
satisfaction of, by legacy, when presumed 1228
assignment of, when allowable 997

DEBTOR, and wife may be examined on oath by Court of Bankruptcy, when 1390
on examination bound to answer all questions, criminative or not 1458A

DEBTORS ACT, 1869, The (see *Table of Statutes*, 32 & 33 Vict. c. 62).
costs of witnesses when allowed in prosecution under.....1255, 1260, n.
form of indictment for offences under 292
presumptions in prosecutions under.....372-4, n.
extended to offences under Bankruptcy Act, 1883 292

DECEPTION (see *Fraud*).

DECLARANT, competent knowledge must be possessed by every..611, 669, 700
his relationship must be proved in matters of pedigree 636

DECLARATION OF WAR by home government, how proved 1527
by foreign government, how proved and admissibility of..... 1661

DECLARATIONS admissible:—
1. in matters of public and general interest (see *Public and General Interest, Lis Mota*) 607-34
2. of pedigree (see *Pedigree, Lis Mota*).....635-57
3. of ancient possession (see *Ancient Possession*).....658-67
4. against interest (see *Interest*) 668-96A
5. in course of office or business (see *Course of Office or Business*) ..697—713
6. dying declarations (see *Dying Declarations*) 714-22
7. as forming part of the res gestæ (see *Hearsay, Res Gestæ*) 583-88
of intention, generally inadmissible to explain writings 1202
except 1. when deed or will impeached on ground of fraud or forgery 1135
2. when description alike applicable to two subjects..... 1206
3. to rebut an equity (see *Rebutting an Equity*) 1227-31
admissible to prove contents of lost will 1203A
to prove constituent parts of existing will 1203A
when admissible, it matters not when and how made 1209
when the word includes oral, as well as written, statements 673
when substituted for oaths 1382, 1389A

DECREE (see *Public Records and Documents, Chancery Division*).
when evidence in nature of reputation 624-27

DEDICATION to public of highway, what constitutes 131
when presumed..... 131

DEED, when must be attested (see *Attesting Witness*).
presumed executed on good consideration 86, 1138
parol evidence, when admissible to show real consideration of 1138
when presumed fraudulent under statute 13 Eliz. c. 5 150
under bankrupt law..... 83
when equity presumes against deeds of gift 151-2
e. g., if fiduciary relation subsists between the parties 151

DEED—*continued.* PARAGRAPHS (§§)
presumed executed on day of date 169
deeds of even date, presumed executed in order to support intent 148
knowledge of contents of, when presumed 150
cannot bind an infant 104
except marriage settlements, when .....104, n.
enrolment of, when necessary 1119-27
when allowable..... 1127
effect of omitting 1125
how proved (see *Enrolment*) 1646-54
contents of, when provable by copy of enrolment (see *Enrolment*).
reasonableness of covenants or powers in, question for judge 37
registration of, in Ireland, proof and effect of..... . 1652
due execution and delivery of, when presumed 149
whether delivered as an escrow, question for jury 45A
what a sufficient sealing of 149
need not be signed under Statute of Frauds..... 1001
thirty years old requires no proof 87, 1845A
whether this rule applies to deeds of corporations 87
estoppels by (see *Estoppels*) 91-100
waiver or release of, can only be effected by deed 1141
admissions in, how far binding 858
receipts indorsed on, effect of 96, 859
description in, party not estopped from disputing 96
recitals in, how far party estopped from disputing 97
when evidence of reputation 621
recitals of formal matters in, when liable to contradiction by parol .. 1150
recited date of, when liable to contradiction by parol 1150
recitals in family deeds and marriage settlements, when evidence in matters of pedigree 651
alterations in, presumed made before execution 164, 1819
material alterations in, after execution, when fatal (see *Alteration*) .. 1820
blanks in, may be filled up after execution, when 1835-37
identity of, may be proved by parol in trover for 407
in indictment for larceny of 408
what transactions must be evidenced by:—..... 972-94
incorporeal rights 973-4
party enjoying right not protected from liability by absence of .. 973-4
transfer of personal property, when and when not..... 975
debentures, when and when not..... 995A
what contracts, by corporations 976
by trading corporations 978
when absence of, will not protect corporation 978-84
distinction between executed and executory contracts 983
contracts under Companies Acts, 1862 and 1867..... 989
Public Health Act, 1875..... 995
when agents must be appointed by 985
transfer of shares under Companies Clauses Consolid. Act, 1845.. 986
sale or mortgage of a ship 998A
apprenticeship to sea-service 1098
conveyances under 7 & 8 Vict. c. 76 991
feoffments, partitions, exchanges, leases, assignments, and surrenders under the Real Property Act, 1845 992
certificate of acknowledgment of, by married woman, how proved.... 1539

DEFAMATION (see *Libel*), suits for, abolished in Ecclesiastical Courts .. 966

DEFAULT, judgment by, admission of right of action 83
suffered by executor or administrator, admits assets 823

DEFECTS in proceedings, in civil causes, may be amended 220-47A
in pleading, when cured by verdict 85
in law of evidence (see *Suggestions for amending the Law of Evidence*).

PARAGRAPHS (§§)

DEFENDANT, competent witness for himself in civil causes 1349
compellable to testify for opponent in civil causes 1349
may be examined by plaintiff prior to trial (see *Interrogatories*).
if charged with indictable offence, incompetent for or against himself.. 1356
so also, if charged with offence punishable on summary conviction.... 1356
in such cases incompetent for or against co-defendant 1357
unless nolle prosequi be entered, or witness be acquitted 1357
how far competent in other trials (see *Competency*)..... 1358-60

DEGRADE, how far witness bound to answer questions calculated to (see *Witness*) 1459-62

DELAY in claiming rights, presumption from.....139-42
statements tending to cause, may be struck out of pleadings 226

DELIVERY of deed, presumption of 149
of goods, within what hours must be made 33
of goods, presumption respecting 178
of goods to vendee's carrier, when acceptance within Statute of Frauds.. 1049
of goods, what amounts to constructive 1045-49
of chattel, when necessary to render gift irrevocable..... 975
of an account, how far binding as an admission that no more is due .. 859
of letter by post (see *Post*).

DEMAND, plaintiff cannot split his 1702-4
stale, presumption against 139-42, 709-10
of rent, within what hours it must be made..... 32A
will it waive a notice to quit?..... 806

DEMAND AND REFUSAL, presumptive evidence of conversion 176
necessary before court will order inspection of documents 1502
verbal demand provable, though written demand also made 415
notice to produce written demand unne essary 450

DEMEANOUR of witness, test of his credibility..... 52

DEMISE of incorporeal rights must be by deed.....973-4
of real property, what incidents annexed to..... 1175
in writing not provable by parol 401

DEMONSTRATION unattainable in judicial investigation 1

DEMURRER, no amendment formerly allowable, if grounds for 240
what it used to admit in chancery..... 838
proceedings substituted by new rules for the old procedure by..... 828

DENIAL at trader's house, of his being at home, original evidence 576

DENMAN (see *Lord Denman*).

DENOTING STAMP, effect of 1763

DENTISTS ACT, 1878 (see *Table of Statutes*, 41 & 42 Vict. c. 33).
notices under, may be sent by post..... 180, n.

DENTIST cannot recover charges unless registered as medical practitioner.....173, n.
registration of, how proved..... 1638
reasonable skill impliedly warranted by 1183
writing necessary to evidence contract for making set of teeth by.. 1614, n.

DEPOSIT, place of (see *Custody*).....431, 660-64

DEPOSITIONS in former suit, when secondary evidence (see *Secondary Evidence*) 464-71, 489
in same suit, when substituted for viva voce evidence (see *Secondary Evidence*) ..... 499—520, 1754-5

DEPOSITIONS—*continued.* PARAGRAPHS (§§)
only evidence when parties making, not producible 472-8, 515-17
when evidence against deponent in criminal trial as a sworn confession ..... 898—901
when evidence though informally taken, as admissions by deponent .. 1754-55
or to contradict or impeach witness 1754-55
when admissible against strangers as reputation 623, 1754-5
foreign and colonial, when admissible in case of prisoner escaping into this country 1560
generally open to what objections 546-49
answers to leading questions will be suppressed 548
so, statements as to contents of documents not produced 548-9
must be taken in relation to our rules of law 513, 548
when parol evidence of statement of witness is excluded by 399, 552
is not excluded by 416
when memory of witness may be refreshed by 1410
when witness may be contradicted by, in civil causes 1446-48
in criminal cases 1449-50A
taken before *Justices* on charge of felony or misdemeanor:— 479-91
enactments as to criminal cases respecting ..... 479A *et seq.*, 490-1
doubts arising on enactment of 11 & 12 Vict. c. 42 480-482
statutable form of ..... 479A & n.
mode of taking 484-5
accused must be charged with indictable offence 484
witness must be sworn in presence of accused 484
examined in like presence 484
opportunity for cross-examination 484
whole reduced to writing, not merely what is material 485
taken down in first person in words of witness 484
read over to witness and signed by him 484
signed by Justice 484, 487
transmitted to Court 484
if witness be a child or of weak intellect, questions and answers should be taken down 485
how if taken in absence of accused and read over in his presence 486
how if witness too ill to have examination completed 486
how they should be entitled 487
one caption sufficient 487, 892
mode of proving 482, 488, 1577
handwriting of Justice need not be proved 488
of disproving 483
admissibility of 479A-483
if witness dead or too ill to travel 482
suffering under temporary indisposition 481
what proof of sickness necessary 488
permanently insane 480
kept out of the way ..... 472-8 & n.
decision of judge as to these facts, generally conclusive .... 504 (R. 8), 516-17
may have been taken on a charge technically different 467-8, 489
prisoners are entitled to inspect, at trial 1488
may demand copies of, on payment of small sum 1488
when this demand must be made ..... 1488, n.
is convict entitled to copy of, in order to assign perjury? ..... 1489, n.
are rules as to cross-examining witness respecting, still in force? 1449
of witnesses under 30 & 31 Vict. c. 35, s. 6 490-91
Coroner's mode of taking 492, 494
so much evidence as is material must be taken down 493
must be certified and subscribed by coroner 492
narrative may be drawn in third person 493
witness not required to sign 493
how proved 493
probably not admissible if prisoner absent 494

DEPOSITIONS—*continued.* PARAGRAPHS (§§)
taken in *Bankruptcy*—proof and admission of 495
as a confession in criminal proceedings..... 898
taken in Ireland on criminal charge, effect of, if witness murdered, maimed, or secreted 496-8
taken in India in cases of misdemeanor committed there.....500 & n.
how proved 1563
in civil actions, the causes of which have arisen there .....500 & n.
taken in the Colonies in cases of misdemeanor against slave trade ..500, n.
how proved 1653
of misdemeanors by officers abroad in public service .....500, n.
taken under 1 Will. 4, c. 22, s. 1, or 3 & 4 Vict. c. 105 .....500, n., 1311, 1580 & n.
taken under Ord. XXXVII. of the rules of the Supreme Court, 1883..504-11
must be taken down in writing.....504 (R. 12)
by the examiner or officer of the Court .....504 (R. 12)
so as to represent the statement of witness.....504 (R. 12)
must be read over to the witness .....504 (R. 12)
must be signed by him in presence of parties.....504 (R. 12)
course to be pursued by examiner when questions objected to.....504 (R. 12 & R. 14)
original depositions to be signed by examiner .....504 (R. 12)
to be transmitted by him to the Central Office .....504 (R. 14)
to be filed in Central Office .....504 (R. 13)
not admissible without consent of party against whom same is offered, unless Court so directs.....504 (R. 18)
or unless deponent is dead .....504 (R. 18)
or beyond the jurisdiction of the Court .....504 (R. 18)
or unable from sickness or infirmity to attend .....504 (R. 18)
how proved.....515-20, 1580
when admissible 515-16
1. if opposite party consents.....515-16
2. if deponent dead 515-16
3. if out of jurisdiction 515-16
4. if unable to attend trial from sickness or infirmity 515-16
how far these rules are absolutely binding now 515-16
evidence on these points addressed to judge 517
can affidavits be substituted for viva voce testimony? 517
commissions to take, may be granted—
by Probate and Divorce Division 518
by corresponding courts in Ireland 518
by Courts of Bankruptcy 519
by County Courts 520
power of courts of law to order examination of parties by interrogatories before trial (see *Interrogatories*) 521-42
may be transmitted home through the Post-office 1579
taken in action to perpetuate testimony 543-5
taken in aid of suits in foreign Courts 1313
in Colonial Courts..... 1314
taken under Merchant Shipping Act abroad, how proved, and when admissible 1564-5
taken under special commissions, how proved..... 1578
taken in Chancery, how proved 1576
if ancient..... 1585
foreign, how proved under Extradition Act 1560

DEPRIVATION, sentence of, conclusive on strangers as a judgment in rem .....1675, n.

DEPUTY COUNTY COURT JUDGE presumed to have been properly appointed, when 171

DERELICTION, presumption against, as between owners and salvors .. 207

DESCENT (see *Pedigree*). PARAGRAPHS (§§)

DESCRIPTION, matter of essential, must be proved as laid (see *Variance*)..289-96
of instrument in indictment for forgery, what sufficient 291
by way of exception or limitation material 1224
is error in, less important than mistake in name? 1215-16
falsa demonstratio non nocet 1218-23
application to two subjects, lets in parol evidence and declaration of intention 1206
in deed, party not estopped from disputing 96

DESIGNS (see *Patents, Designs, and Trade Marks Act*, 1883).
novelty of, question for jury 45A

DESTRUCTION of evidence (see *Spoliation*).
of instrument, what proof of, sufficient to let in secondary evidence..428-36
admission of, by adversary, waiver of notice 455
when plaintiff can recover on destroyed bill or cheque 437
when probate will be granted of destroyed will 436
of will, what sufficient to revoke it 1067-68
of property (see *Malicious Injuries*).

DETENTION OF WITNESSES, when costs allowed for special 1247

DETINUE, within what time action of, must be brought 73
whether founded on tort, for purposes of costs .....38, n.

DEVIATION, warranty against, implied in marine policy..... 1171

DEVISE (see *Will* and *Parol Evidence*) may be proved by probate, when ..1759-61

DEVISEE, when presumed entitled to emblements 167
may be cited to Probate Division, when 1759

DEVOLUTION of property without conveyance, when allowed 1005-15

DIARY of deceased solicitor not generally admissible.....700 & n.

DICTIONARY, judge will refresh his memory by 21

DILAPIDATIONS, ecclesiastical, repairs of, certified by official surveyor.. 1611, n.

DILIGENCE, how far question for judge or for jury..... 37-7A
in search for documents, what will let in secondary evidence (see *Lost Instrument*) 428-37
for witnesses, what sufficient .....472-8, n., 517
for attesting witnesses, what sufficient..... 1855

DIOCESAN, probate granted by, how it used to be defeated..... 1714

DIPLOMATIC AGENTS (see *Ambassador* and *Consul*).

DIPLOMATIC CORRESPONDENCE, admissibility and effect of..... 1661

DIRECT EVIDENCE contrasted with circumstantial 64-8
dangers to be guarded against in 68-9

DIRECTORIES, inadmissible 1785

DIRECTORS (see *Joint Stock Companies*) bound to answer respecting frauds committed by them, when 1455
cannot be convicted of fraud having disclosed their offences on oath.. 1455

DISCHARGE of witness improperly arrested, motion for, to what Court made..... 1337
within what time it should be made 1339
disobedience of order for, renders sheriff liable to trespass 1340
of a contract under seal, how effected 1141
of a statutory written agreement, by parol, how far 1142

DISCHARGE—*continued.* PARAGRAPHS (§§)
of a written agreement at common law, by parol, how far 1141
proof and effect of certificate of, in cases of assault.....1615-20
of jury, effect of..... 1719

DISCLAIMER of gift may be by parol 975
of lease and of unprofitable property by trustee of bankrupt 1013

DISCLOSURES (see *Privileged Communications*).

DISCOVERY not enforced in aid of prosecuting or defending indictment .. 1500
when subjecting party to prosecution, penalty, or forfeit..... 1453
exceptions to last-mentioned rule 1455
powers of enforcing under R. S. C.....521-42
as to existence and contents of documents (see *Private Writings*) 1786-87
how existence to be ascertained.....1799—1808
affidavit .....1799—1808
to what documents order may extend 1809
provisions for, in County Courts.....1811-13
under Friendly Societies Acts 1814-15
as to facts known to opponent (see *Interrogatories*) 521-42

DISCREDIT, how far party may throw, on his own witness (see *Witnesses*).. 1426
how far witness may throw, on himself .....1347, n.
of husband's testimony by wife 1368

DISCREPANCIES in evidence, effect of.....59-60

DISCRETION OF JUDGE in allowing amendment should be liberally exercised .....227 & n., 253
when controllable by Court..... 242
in refusing amendments, decision of judge generally final 242
in deciding on right to begin, how far controllable by court 387
as to recalling or confronting witnesses 1477-8
as to examining young children 1377
in regulating the mode of examining witnesses 1399

DISEASE, declaration of patient as to, admissible 580

DISEASES OF ANIMALS ACT, 1894 (see *Table of Statutes*, 57 & 58 Vict. c. 57).
limitations of actions under.....76-8, n.
accused under, must prove lawful authority or excuse .....372-4, n.
orders and regulations, under, how proved.....1601, n.
effect of .....1779-80, n.
certificate of inspector under, effect of.....1611, n.
payment into Court under .....832-7, n.

DISGRACE, how far witness bound to answer questions tending to his..1459-61

DISHONOUR (see *Bill of Exchange*).

DISMISSAL (see *Discharge*) of summons at chambers, effect of..... 1756
of information under Summary Jurisdiction Act, 1879, effect of....1615-20
of application at quarter sessions, effect of 1720
at petty sessions, effect of 1757-7A
of action without hearing evidence, effect of 1719
of suit in Ecclesiastical Court, effect of..... 1723

DISPARAGEMENT of own title by person in possession, admissible 684-7
as against both privies and strangers .. 684
but must be of his title merely, and not of the estate 684

DISPUTABLE PRESUMPTIONS (see *Presumptions*) 109-10

DISSENTERS, registers of, what in custody of Registrar-General..1504-21, n.
how inspected .....1504-21, n.
when admissible (see *Non-Parochial Registers*) .....1592, n.
inscriptions in burial-ground of, admissible in pedigree cases 652
registration for worship and marriage of meeting-houses of.....1621A
effect of certificate of such registration 1621A

Vol. I. ends with § 971.

PARAGRAPHS (§§)

DISSOLUTION of partnership proved by notice in Gazette or newspaper.. 1666
inference must be raised aliundè that party has read the notice 1666
how this may be done 1666
of Parliament does not justify arrest of member, when 31n
of marriage (see *Divorce*).

DISTANCE measured as the crow flies 16
evidence respecting, liable to error 68

DISTRESS, warrant of, to enforce payment of rate, when action lies against justice for granting 1672
putting in, for rent, when waiver of forfeiture 806
when mortgagor may put in, as bailiff or mortgagee 176
in action for excessive, effect of not guilty by statute 313
lodger's goods how protected from 1096
recent Act for Amending Law of (see *Table of Statutes*, 34 & 35 Vict. c. 79).

DISTRIBUTIONS, books of, how far evidence 1770A

DISTRIBUTIONS, STATUTE OF (see *Table of Statutes*, 22 & 23 Vict. c. 10).
word "children" used in, means legitimate children 168

DISTRICT REGISTRY OFFICE (see *Land Registry Office*).
seal of, judicially noticed 6

DITCH, presumption as to ownership of 120

DIVIDENDS, apportionment of 159

DIVINE (see *Parson*).

DIVISIBILITY of demands by plaintiffs 1702-4
of cause of action in County Court 1704

DIVORCE does not make communication between husband and wife less privileged 910A
presumption of bastardy arising from 106
on bill for, how far wife's letters were admissible ..... 768-9 & n., 169, 502
in suit for, by reason of adultery, how far wife's confession admissible 768-9, 869
in suit for, how far acts of adultery subsequent to petition evidence .. 340
parties to record and their wives are admissible witnesses 1355-55A
but not bound to answer questions respecting adultery 1355A
sentence of, is a judgment in rem ..... 1675, n.
as such, conclusive of fact adjudicated, as against strangers. 1676
effect of, in a criminal prosecution 1680
foreign sentence of, its effect 1726, 1735

DIVORCE COURT, seal of, judicially noticed 6
documents in cause in, taken or sworn abroad, how proved 11-12
powers of, judicially noticed 19
how causes in, are to be tried 21c
notice to admit documents in ..... 724A & n.
are wife's admissions of adultery evidence in? 768-9, 869
commissions to examine witnesses granted in 518
common law rules of evidence observed in 966A
competency of parties to suits in, as witnesses 1355-55A
attendance of witnesses before, how enforced 1283
allowance to witnesses in ..... *App.* iii.
what decisions of, judgments in rem ..... 1675, n.
rules relating to discovery and inspection do not apply to 1792

DOCK-WARRANT, delivery of, vests goods sold, when 1048

DOCTOR (see *Medical Man*).

DOCUMENTARY EVIDENCE ACT, 1845 (see *Table of Statutes*, 8 & 9 Vict. c. 113) 7-8

DOCUMENTARY EVIDENCE ACT, 1868 (see *Table of Statutes*, 31 & 32 Vict. c. 37) 1527, 1662

PARAGRAPHS (§§)

DOCUMENTARY EVIDENCE ACT, 1882 (see *Table of Statutes*, 45 Vict. c. 9) 1527

DOCUMENTARY EVIDENCE ACT, 1895 (see *Table of Statutes*, 58 Vict. c. 9).
provisions of.....1527 & *Addenda*

DOCUMENTS (see *Admissions*, *Writings*, *Notice to Produce*, *Public Records and Documents*, *Private Writings*).
coming from abroad, statutory provisions concerning .....1500 *et seq.*

DOG, presumption as to ownership of 123
worrying sheep, cause of action in England, Scotland, and Ireland, when..... 123
person charged with keeping, without licence, must prove age of dog, when .....372-4, n.

DOMESDAY-BOOK, what it contains 1768
where deposited 1485
how inspected 1481-3
how proved 1533
admissibility and effect of 1768

DOMESTIC (see *Servant*).

DOMICIL, presumptions respecting 209-10
declarations at time of changing, admissible as part of res gestæ 583-4

DONATIO MORTIS CAUSÂ passes no property without delivery..... 975
requires actual contemplation of death 975
liable to probate duty, when 975

DONEE of personal chattels, when title complete..... 975

DORMANT PARTNER (see *Partner*).

DOUBLE PORTIONS, presumption against..... 1227
no presumption against, recognised in Scotland .....1227, n.

DOUBT, benefit of, given to prisoner 112

DOWER may be barred by Statute of Limitations.....74A, n.

DOWN SURVEY, admissibility and effect of 1770

DRAFT (see *Cheque*).

DRAINAGE ACTS in Ireland, notices, &c., under, proved by Gazette, 1663A-4, n.
orders under, how proved .....1601, n.

DRAMATIC PIECE, what constitutes representation of, question for jury 47
onus of proving consent of owner to perform 377

DRAWER (see *Bill of Exchange*).
acceptor estopped from disputing signature of 851
may dispute indorsement by 851

DREAM, whether confessions admissible if made while talking in a ....881, n.

DRUGGISTS, registration of, how proved..... 1638

DRUNKENNESS, confessions obtained by making prisoner drunk, admissible 881
incompetency of witness from..... 1375
of attesting witness renders attestation invalid 1053

DUBLIN GAZETTE (see *Gazette*) 1527

DUCES TECUM (see *Subpœna*, *Attendance of Witnesses*) 1239-40

DUCHY (see *Cornwall*, *Lancaster*).

DUES presumed legal from long enjoyment 130

PARAGRAPHS (§§)

DUE DILIGENCE, how far question for judge or for jury 37-7A

DUEL, persons present at and countenancing may refuse to answer questions on indictment for murder 1454

DUMB witness competent, if proved to have capacity 1376
examination, how taken 1376

DUPLICATE ORIGINALS, what they are 418, 426
each considered primary evidence 418, 426
all must be accounted for, before secondary evidence of one can be given 391
notice to produce, when unnecessary 449, 449B

DURATION OF LIFE, presumption as to ..... 198—203

DURESS, admissions made under illegal, not receivable 798
under legal, receivable 798
confessions made during illegal, whether admissible 883
instrument may be defeated by parol proof of being obtained by 1137
party not estopped by deed obtained by 93

DUTIES (see *Functions of Judge and Jury*).
instances of amendment, where duties misdescribed on record 236

DWELLING-HOUSE, on indictment for stealing in, maliciously firing, riotously demolishing, or house-breaking, place must be proved as laid 281
on indictment for stealing in, prisoner may be convicted of larceny .. 269-70A
acquittal for stealing in, bar to indictment for larceny 1708
is an acquittal for larceny a bar to indictment for stealing in? 1708

DYING DECLARATIONS, why admissible 714
only admissible where death of declarant subject of charge, and circumstances of death subject of declaration 714
admissibility of, question for judge 23A
why limited to cases of homicide 716
inadmissible, where declarant, if living, would have been incompetent from imbecility or tender age 717
of felo-de-se admissible against accomplice 717
of wife admissible against husband charged with murdering her 717
declarant must have been in actual danger of death and aware of his danger, and death must have ensued 718
the existence of these facts must be decided on by judge 23A, 718
Scotch law respecting 719
declaration must relate facts, and not opinions, and be relevant to issue 720
must be complete 721
if taken in writing, must writing be produced? 721
need not be taken in writing 721
may be in answer to leading questions 720
if informal as a deposition, still admissible 721
admissible for accused, as well as for prosecuter 720
value of 722
is diminished by want of cross-examination ..... 718, n., 722

EARNEST, to bind a bargain, when sufficient under Statute of Frauds .. 1020

EASEMENT must be created and assigned by deed 973-4
how affected by Prescription Act 75A
how far sect. 4 of Statute of Frauds applies to 1038
admission of, by tenant, not binding on landlord 687
presumption as to right of support from adjoining land 121
from adjoining house 121
from subjacent soil 121
from lower story 121

EAST INDIA COMPANY (see *India.*) PARAGRAPHS (§§)
deposit and transfer books of, how inspected ....1498-9, n.
how proved ....1600, n.
admissible as public documents....1596-7, n.
correspondence between, and Board of Control, privileged from disclosure 947

ECCLESIASTICAL CENSURE, witness not bound to answer questions subjecting him to 1453

ECCLESIASTICAL COURTS now shorn of much of their jurisdiction.. 966
powers of, judicially noticed 19
single witness insufficient in 966
attendance of witnesses before, how enforced 1287
seal of Prerogative Court of Canterbury, judicially noticed.... 6
proof of judicial proceedings of 1546
in proving judgment of, what preliminaries must be put in.... 1575
when judgment of, provable by putting in minute book 1572
decrees of, when judgments in rem ....1675, n.
and as such, how far binding upon strangers 1676
how far binding in criminal matters 1680
sanity or insanity of testator was provable in, by evidence of treatment by relatives ....575, n.
wife's confessions, how far were evidence in 768-9
comparison of handwriting allowed in ....1869, n.
witnesses protected from self-crimination in.... 1453
exemplification of probate or letters granted by, admissible to prove title of executor or administrator 425

ECCLESIASTICAL DILAPIDATIONS ACT, 1871 (see *Table of Statutes*, 34 & 35 Vict. c. 43), repairs of dilapidations certified by surveyor.. 1611, n.

ECCLESIASTICAL LAW, judicially noticed 5

ECCLESIASTICAL LEASES AND DEEDS, how proved under certain Acts ....1601, n.

ECCLESIASTICAL PERSONS, entries in books of deceased evidence in favour of succeeding.... 688

ECCLESIASTICAL SURVEYS (see *Terriers*).

EDINBURGH GAZETTE (see *Gazette*).... 1527

EDUCATION (see *Elementary Education Act*).

EJECTMENT (see *Recovery of Land*).

ELECTION, when prosecutor will be put to, in cases of felony 329-34
when not 329-34
indictment for embezzlement or larceny may charge three acts, when.. 332
counts for stealing and receiving may be joined.... 333
proper time for putting prosecutor to 334
doctrine of, does not apply to misdemeanors 329A
by trustee of bankruptcy to disclaim lease or other property 1013

ELECTION BRIBERY (see *Bribery*).

ELECTION PETITIONS,
in Courts for trial of, attendance of witness how enforced (sub tit. "*Courts for the Trial of Election Petitions*") ....1293-1309, n.
scale of costs to witness 1246n
witness when indemnified ....1455, n.
declaration of voter against own vote, evidence 756
certificate of indemnity granted to witness, its effect ....1445, n.

PARAGRAPHS (§§)

ELEMENTARY EDUCATION ACT, 1870 (see *Table of Statutes*, 33 & 34 Vict. c. 75).
notices respecting, may be sent by post ..... 180, n.
minutes of meetings under, admissibility of 1781
certificates of Education Department granted under ..... 1611, n.
inspection of books of School Boards under ..... 1504-21, n.
orders and regulations issued by Education Department, how proved 1611, n., 1527, n.

EMBARRASS, when statements tending to, will be struck out of pleadings 226

EMBEZZLEMENT, three acts of, may be charged in one indictment, when 331
on indictment for, when sufficient to allege and prove generally that money was embezzled 287
trial for, bar to indictment for larceny on same facts 1707
trial for larceny, bar to indictment for, on same facts 1707
agents, solicitors, bankers, &c., cannot be convicted of, if they have disclosed their offences on oath ..... 1455, n.

EMBLEMENTS, presumption respecting title to 167
definition of 167
what crops do not fall within law of 1042

EMIGRANTS, rules of trustees of docks concerning landing of, how proved ..... 1658, n.

EMPLOYERS' LIABILITY ACT, 1880 (see *Table of Statutes*, 43 & 44 Vict. c. 42).
limitation of time for bringing actions under 73
provisions of, as to liability of employers for injuries to workmen 1182
notices, how served under the Act ..... 180, n.
Act to expire at end of 1895 ..... 1182, n.

ENCROACHMENT on waste by tenant presumed to be for landlord 122A

ENDOWED SCHOOLS ACT, 1869 (see *Table of Statutes*, 32 & 33 Vict. c. 56).
Charity Commissioners may enforce attendance of witness in cases under ..... 1329, n.
schemes under, presumed duly made 72
notices under, may be sent by post ..... 180, n.

ENFORCING ATTENDANCE OF WITNESSES (see *Attendance of Witnesses*).

ENGINEERS, testimony of, often partisan 58, 68

ENGRAVED FAC-SIMILE of name, when sufficient signature 1029, 1060

ENGRAVINGS on rings admissible in matters of pedigree 652

ENJOYMENT, inference of legal right from 123-6

ENLISTMENT of soldiers, how proved ..... 1601, n.

ENQUIRIES (see *Inquiries*).

ENROLMENT DEPARTMENT in Central Office, what documents must be filed in 1119-25

ENROLMENT of documents, when necessary:— 1119-27, 1647A-54
under Mortmain Act 1119, 1650
deeds of relinquishment by parsons 1119, 1653
bargains and sales, when 1120, 1646
warrants of attorney and cognovits, and judge's orders 1120A, 1654
bills of sale of personal chattels 1120A, 1654

ENROLMENT—*continued.* PARAGRAPHS (§§)
deeds relating to Crown revenues 1121, 1648
assurance under Act for abolishing fines and recoveries 1122, 1650A
life annuities before 1854, and since 1125, 1651
contracts between solicitors and their clerks 1126, 1653A
of documents, when allowable:— 1119
registrations in Yorkshire and Middlesex 1127, 1652n
deeds relating to charities 1127
awards under Inclosure Acts ..... 1127 & n.
of document, does it dispense with calling attesting witnesses? 1853
want of, in case of annuity, cannot be set up by grantee 845
of deeds, &c., proof of:— ..... 1647 *et s. q.*
1. by producing instrument with indorsement of, signed by registrar .. 1647
rule applied to bargains and sales enrolled under 27 Hen. 8, c. 16 1649
to leases within Duchy of Lancaster 1648
to indentures under Mortmain Act 1650
to instruments enrolled in Duchies of Cornwall or Lancaster 1648
in Petty Bag Office ..... 1647, n.
in Enrolment Department of Central Office 1647
to deeds as to Crown lands, enrolled in Land Revenue Office 1648
2. by office or certified copies, when ..... 1654A & *Addenda*
rule applied to documents enrolled in Enrolment Department 1647
in Duchies of Cornwall or Lancaster 1648
in Office of Charity Commissioners. 1127
to instruments registered in Dublin 1652
to judgment mortgage in Ireland 1652
to documents registered in Yorkshire 1652A
to parsons' deeds of relinquishment, how far 1653
3. by examined copies, when 419
copies generally inadmissible as primary evidence to prove contents of deeds 419
generally admissible as secondary evidence, only against party registered and his privies 419
exception to these rules 419
of leases granted by Crown, admissible as primary evidence of their contents 419
so, of leases granted by Duke of Cornwall 419
old Office in Chancery, seal of, judicially noticed 6

ENTRIES, when may be used to refresh memory (see *Memory*) 1406-13
of births, deaths, and marriages in books by relatives, evidence in matters of pedigree 650
against interest, in account books, admissible when party who made them is dead (see *Interest*) 395, 668-83
in books of deceased ecclesiastical persons, when admissible for successors 688
30 years old require no proof 88
made in course of office or business, when admissible (see *Course of Office or Business*) ..... 697—708
made by party himself in his own shop books, admissible in America 709-10
so by civil law, and by laws of France and Scotland 712
so in taking accounts in High Court, when 711
not admissible at common law 709-10
but admissible by statute law, *semble* 709-10
reading of some, does not let in other distinct entries in same book .. 732

ENVOYS (see *Ambassador*).

EQUITABLE MORTGAGE by deposit of deeds, not within Statute of Frauds 1038

PARAGRAPHS (§§)

EQUITY (see *Chancery Division*), rules of, judicially noticed 5
rules of, to be acted on in all courts 5
conflicting with rules of law, must prevail 5
person having a secret, standing by 841
parol evidence admissible to rebut an (see *Rebutting an Equity*) 1227-31

EQUITY OF REDEMPTION, contract to convey, within sect. 4 of Statute of Frauds 1038

EQUITY PROCEDURE ACT, 1852 (see *Table of Statutes*, 15 & 16 Vict. c. 86).
1867, for Ireland (see *Table of Statutes*, 30 & 31 Vict. c. 44, Ireland).

ERASURE (see *Alterations*).
what has been written over, is question for judge 47
when solicitor cannot give evidence as to..... 937A

ERROR, pendency of proceedings in, will not prevent judgment from acting as a bar 1721
in proceedings in civil causes may be amended 221

ESCAPE, sheriff no longer liable to action for .....1665, n.
in action against officer for, he might dispute legality of custody 854
could he be forced to produce writ for inspection?..... 1501
proof of foreign or colonial depositions, where prisoner escapes into England 1560-63

ESCROW, effect of alteration in instrument delivered as an 1834
whether deed delivered as an, question for jury.....45A, 1834, n.
unless question turn on writings 45A
delivery of deed as an, provable by parol 1135

ESTOPPEL, nature and principles of 89
must be certain to every intent 89
binds parties and privies (see *Privies*) 90
as to post-dated bills, cheques, &c., even as against the rights of the revenue, there may exist an 850
exception as to privies 90
three classes: by deed—of record—in pais 91
must be specially pleaded, when 91, 1673
abolished by New York Code .....89, n.
by deed:— 93-9
party not estopped from avoiding his deed by proving illegality .... 9?
trustees for public, when estopped from disputing their deeds 94
party estopped from disputing conveyance which he executed when heir 95
party not estopped from disputing mere description 96
how far party estopped by recitals..... 97-8
must be reciprocal 99, 817-18, 858
deed that can take effect by interest shall not take effect by 100
of records (see *Public Records and Documents*).
in pais (see *Admissions*).....101-3
tenant how far estopped from disputing landlord's title 101-3
if landlord devisee, tenant cannot show devisor insane 101
unless in clear case of fraud 101
tenant should yield up premises and bring action to recover them 101
even where landlord shows a joint or equitable title, tenant cannot avail himself of it 101
if landlord a corporation, tenant cannot rely on occupation without deed 101
rule applicable in trespass as well as in action to recover land..... 101
rule extends to party coming in under tenant..... 101
and to lodgers, servants, and licensees 101
tenant may show that landlord's title has expired 102
or that he had none at a previous time..... 102
or may rely on eviction by title paramount 102

ESTOPPEL—*continued* PARAGRAPHS (§§)
tenant only estopped from denying title of party who gave him possession 103
what constitutes a letting into possession 103

EUNDO, morando, et redeundo (see *Arrest*) 1330-41

EVICTION by title paramount, tenant may show 102

EVIDENCE, definition 1
not susceptible of demonstration 1
competent or admissible, what 2
satisfactory, or sufficient, what is 2
admissibility of, question for judge 2, 23
effect of, question for jury 2
presumptive (see *Presumptions*) 70-216
general rules governing production of .....217 *et seq.*
must correspond with allegations, but sufficient if substance of issue proved (see *Variance, Amendment*) 217
must be confined to points in issue (see *Issue, General Issue*) 298, 316
of collateral facts, how far admissible (see *Collateral Facts*) 316-29, 335-48
of character of party, when admissible (see *Character*).....349-63
of witness, when admissible (see *Character*).....363, 1470-70A
on whom the burden of proof lies (see *Onus Probandi*).....364-90
best, always required (see *Best Evidence*) 391-427
secondary, when admissible (see *Secondary Evidence*) 428-553
addressed to senses, most satisfactory (see *Inspection by Jury*) 554-66
hearsay, generally inadmissible (see *Hearsay*) 567-606
except: 1. in matters of public and general interest (see *Public and General Interest, Lis Mota*) 607-34
2. of pedigree (see *Pedigree, Lis Mota*) 635-57
3. of ancient possession (see *Ancient Possession*).....658-67
4. declarations against interest (see *Interest*).....668-96
5. in course of office (see *Course of Office or Business*) 697-713
6. dying declarations (see *Dying Declarations*) 714-22
admissions, when evidence (see *Admissions*).....723-861
confessions, when evidence (see *Confessions*) 862-907
what excluded on grounds of public policy (see *Privileged Communications*) 908-51
when more than one witness necessary (see *Number of Witnesses*) 952-71
what transactions must be evidenced by deed (see *Deed*).....972-94
by writing signed under Statute of Frauds (see *Statute of Frauds*).....1000-49
by will.....1050-72
by writing signed under Lord Tenterden's Act (see *Lord Tenterden's Act*).....1073-87
by acknowledgment taking case out of Real Property Limitation Acts.....1088-91
or out of Prescription Acts 1092
by writings under other Acts (see *Writings*) 1093-1106
what instruments must be attested by witness (see *Attesting Witnesses, Wills, Warrant of Attorney*) .....1050, 1098, 1110-17, 1839-41, n.
what instruments must be enrolled 1119-27
may be enrolled 1127
parol inadmissible to vary writings (see *Parol Evidence*) 1128-57
admissible to explain writings (see *Parol Evidence*).....1158-1231
enforcing attendance of witnesses (see *Attendance of Witnesses*) ..1232-1329
witnesses protected from arrest (see *Arrest*) 1330-41B
competency of witnesses (see *Competency*).....1342-93
use of affidavits (see *Affidavits*) 1394-97
examination of witnesses (see *Witnesses*) 1398-1478

Vol. I. ends with § 971.

EVIDENCE—*continued.* PARAGRAPHS (§§)
inspection, proof, admissibility, and effect of public records and documents (*Public Records and Documents*) 1479-1785
of private writings (see *Private Writings*) 1786-1880
proof of handwriting (see *Handwriting*) 1862-80
practical rules as to time and mode of objecting to 1881
when evidence offered for particular purpose is inadmissible for that purpose, but admissible generally 1881B
in civil suits pending in foreign courts on 1313
as to criminal proceedings pending in foreign courts 1313
in actions pending in colonial courts 1313
proof of evidence taken by commission 1578-80
when inadmissible evidence is received at trial without objection 1881C
nature of objection to, must be distinctly stated at trial 1881D
when evidence rightly rejected on ground on which tendered, is admissible on another ground 1882
when rejected at trial, there should be a formal tender to judge 1882A
effect of improper admission or rejection of 1882B
Court of Appeal may receive further ... . 1883 *et seq.*
meaning of "further evidence" 1884
practice as to calling, in reply 387*-90
foreign rules of, cannot affect proceedings in this country 49

EVIDENCE ACT, 1851 (see *Lord Brougham's Act, and Table of Statutes*, 14 & 15 Vict. c. 99).

EVIDENCE BY COMMISSION ACTS, 1859 & 1885 (see *Table of Statutes*, 22 Vict. c. 20) 1314-15

EVIDENCE ON COMMISSION, power of High Court to order evidence to be taken on 1310
power of County Court to order evidence to be taken on 1315A
power of Q. B. Div. to issue writs of mandamus, or commissions to judges in India, the colonies, &c., to take 1311
power to order attendance of witnesses to give evidence in suits pending in High Court on 1310A, 1312, 1313

EXAGGERATION, ground for suspecting witness 52
women addicted to 54

EXAMINATION of witness viva voce (see *Witness*) 1398-1478
of witness by justice, coroner, examiner, or by commission (see *Depositions, Examiner, and Commission*).
of prisoner by justices or coroner (see *Confession*) 888-901
when formally taken, excludes parol evidence of prisoner's statement 399
informal, may refresh memory of party who wrote it 894
if used as an admission, whole formerly had to be read 727-32
of parties, prior to trial (see *Commission, Interrogatories*) 518-43
in bankruptcy (see *Bankruptcy Courts*).
under Poor Law Acts, need not have separate caption to each 892
of witnesses in aid of suits in foreign courts 1313
in colonial courts 1314-15

EXAMINED COPY (see *Copy*).

EXAMINER (see *Commission, Depositions; Evidence on Commission*).
who may be 507-10
must take all examinations ordered in Ch. Div. 507-10
may take examination in matters depending in Q. B. Div. 507-10
in P. D. & A. Div. 507-10
mode of distribution of examinations among 507-10
duties of 507-10
form of order for examination of witnesses by 511
witness wilfully failing to attend before, when ordered, guilty of contempt ..... 504 (RR. 8 & 9)
witness how made to attend before 1285

EXAMINER—*continued.* PARAGRAPHS (§§)
witness attending before, entitled to conduct money as at trial ..504 (R. 9)
witness attending before, privileged from arrest (see *Arrest*) 1334
copies of writ and pleadings to be furnished to.....504 (R. 10)
mode of taking examination by.....504 (R. 12), *ibid.* (R. 23), 1576
court may give special directions as to the evidence to be taken before.....504 (R. 23)
proceedings where subpœnaed witness refuses to attend or to be sworn.....504 (R. 13)
proceedings where witness objects to questions asked .....504 (R. 14)
to make special report to court.....504 (R. 17)
court may act on report as it thinks fit .....504 (R. 17)
may administer oaths.....504 (R. 19), 1285, 1386
depositions taken before, to be sent to and filed in Central Office..... 1577
has no power to allow party to discredit own witness 1427
but leave must be granted by the court 1427
how he must act on such occasions 1427

EXCEPTION, burthen of proving, in certain cases 376A

EXCEPTIONS (see *Bill of Exceptions*).

EXCHANGE, BILLS OF (see *Bill of Exchange*).

EXCHANGES under 8 & 9 Vict. c. 106, must be by deed 992
of common lands made by Ecclesiastical Corporation, how proved.. 1601, n

EXCHEQUER BILLS, contracts for sale of, not within sect. 17 of Statute of Frauds.....1039A-40, n.

EXCISE (see *Inland Revenue*), books of, admissible as public documents (sub tit. "*Public Documents*").....1595, n.
condemnation of property by Commissioners of, judgment in rem.. 1675, n.
when appointment of officer of, presumed from acting 171
offenders against laws of, competent witnesses as defendants 1359

EXCUSE, burthen of proving lawful, in certain cases.....372-4, 375

EXECUTED CONTRACTS, difference between, and executory 982, 1036

EXECUTION OF DEEDS, &c., how proved 1412
when presumed 149
when admitted by payment into court 1849
thirty years old requires no proof..... 87, 1845
whether this rule applies to deeds of corporations 87
of Wills (see *Wills*).

EXECUTOR (see *Probate*) character of, must be specially denied 307
title of, how proved 425, 1589
entitled by foreign probate, cannot sue in this country..... 1738
part-payment by one, does not take debt out of Statute of Limitations as to others 745
nor does written acknowledgment by one..... 744
how judgment to be given and costs allowed in such case 744
assent of, to legacy, question for jury 45A
forfeits legacy, if he declines office, when..... 167
presumption against deed of gift by legatee to 151
presumed to be trustee of undisposed-of residuary estate for next of kin 167
may retain undisposed-of residuary estate for his own use, when 167
when presumed entitled to emblements..... 167
judgment against testator binding upon 1089
admission of testator, evidence against..... 787
declarations by, inadmissible against special administrator 787
admissions and promises by one, how far evidence against others 750
admission by, before he became executor, whether evidence against him as executor 755

EXECUTOR—*continued.* PARAGRAPHS (§§)
of solicitor is privileged from producing client's papers 922
exhibition of inventory by, how far evidence of assets 860
probate stamp, how far evidence of assets 860
proof of waste of assets by, what sufficient 823
admits assets by suffering judgment by default 823
promise by, to pay out of own estate, must be by signed writing 1019
consideration must appear expressly or impliedly in the writing 1021
intermeddling with goods of deceased, estops denial of being 856
purchase from legatee by, presumption against 151

EXECUTORY, difference between, and executed contracts.....982, 1036

EXEMPLIFICATION, two kinds of.....1536-7
(1) under Great Seal, what, and how obtained..... 1536
proceedings of what courts may be proved 1536, 1546
proved by mere production, being a record 1537
(2) under seal of particular court, wh t, and how proved..... 1537
when record may be proved by 1537
of higher credit than examined copy.....1537A
granted by Probate Division, when evidence of title of executor, &c. 425

EXEMPTION, burthen of proving, in certain cases.....372-4, 375

EXPECTANCIES, negotiations respecting, how formerly dealt with in equity 153
but now see 31 Vict. c. 4 153

EXPENSES OF WITNESS (see *Attendance of Witnesses*).

EXPERIENCE, evidence rests on faith of testimony, sanctioned by 51
sometimes misleading..... 61-2
statements apparently contrary to, not always false 62

EXPERTS, competent knowledge of, question for judge..... 48
testimony of, how far deserving of credit 58, 68, 650, 1878
as to handwriting 1878
collateral facts, when admissible to illustrate opinions of 335
may refresh memory by referring to professional treatises 1422
e. g., physician may refer to medical books..... 1422
foreign lawyer to prove foreign law may refer to text-books, codes, &c. 1423-25
may speak to belief or opinion 1417
examples..... 1417-19
cannot state their views on matters of moral or legal obligation..... 1419
opinions of, confined to questions of science..... 1420
admissible, though merely founded on case as proved 1421
but cannot be asked the very point which jury are to decide 1421
cannot be called to prove nautical knowledge or skill, when 1421
questions should be put in the abstract..... 1421
necessary, to prove foreign laws..... 1423
who are experts for such purpose 1425
when allowed to compare writings..... 1670
may be called to prove date of ancient writing.....650, 1417, 1877
to prove that writing is in feigned hand 1417, 1877
may aid jury, by identifying articles by comparison 556
e. g., may state opinion whether two coins were struck in the same die 556
e. g., may state opinion of two samples of wine drawn from same bin 556
may aid in inspection of documents under order of inspection 1809

EXPERTS AND SCIENTIFIC WITNESSES,
special allowance may be made to—
(a) in High Court 1247
(b) in County Court ..... *App.* iv.

PARAGRAPHS (§§)

EXPIRED lease, proper custody of 432
indenture of apprenticeship, proper custody of 432

EXPLANATION of doubtful document by parol (see *Parol Evidence*) 1158
in re-examination, of witness's statement in cross-examination 1474

EXPLOSIVES ACT, 1875 (see *Table of Statutes*, 38 & 39 Vict. c. 17).
by-laws under ..... 1657-8, n.
licences and rules under, how proved ..... 1601, n.

EXPOSURE of person (see *Indecent Exposure*).

EXPRESSIONS of bodily or mental feeling, admissible as original evidence 580
e. g., statement by sick man as to nature and effects of his malady 580
complaints of outrages, recenti facto 581
particulars of complaint cannot be disclosed 581

EXPRESSUM FACIT CESSARE TACITUM, application of maxim .. 806, 1187

EXPULSION, sentence of, conclusive on strangers, as a judgment in rem .. 1675, n.

EXTENTS, how proved 1582
when necessary to put in commission 1582
when not 1582, 1585

EXTRADITION ACTS, 1870 & 1873 (see *Table of Statutes*, 33 & 34 Vict. c. 52, and 36 & 37 Vict. c. 60) 1314A, 1560
proof of orders in council under ..... 1663A-4, n.
proof of warrants, depositions, affirmations, and certificates of convictions under 1560

EXTRAS beyond contract, cannot be proved by parol, when 402

EXTRINSIC EVIDENCE, to explain testator's intention, when admissible (see *Parol Evidence*).

FABRICATION OF EVIDENCE, presumption from 117

FACTOR (see *Agent*, *Broker*), lien of, judicially noticed 5

FACTORS ACT, 1889 (see *Table of Statutes*, 52 & 53 Vict. c. 45).
presumption of ownership arising from agent's possession, under 123
person in possession of goods under hiring agreement not enabled to pass property therein on sale by the 123

FACTORY AND WORKSHOPS ACT, 1878 (see *Table of Statutes*, 41 Vict. c. 16), convictions under, how proved ..... 1555c, n.
surgical certificate of fitness for employment under, how proved 1640-45
age of persons employed under, how proved 1640-45
limitation for laying informations under ..... 76-8, n.
notices and documents under, may be served by post ..... 180, n.
burden of proof of age in proceedings under ..... 372-4, n.

FACTS (see *Functions of Judge and Jury*, *Presumptions*).
preliminary, must be decided by judge, when 23A
discovered by inadmissible confession, evidence, when 902
spoken to by witness, must be within his own knowledge 1414
cannot be proved by hearsay in matters of general interest 617
when evidence in matters of pedigree 641-44
notice to admit facts (see *Notice to Admit*).

FAITH IN TESTIMONY, on what it depends (see *Belief*) 50-69

FALSA DEMONSTRATIO NON NOCET, application of maxim 1218-19

FALSEHOOD, best tests for detecting 52

PARAGRAPHS (§§)

FALSE IMPRISONMENT, within what time action for, must be brought 73
in action for, evidence of plaintiff's bad character inadmissible 354
plea of justification, evidence of malice 341
recovery of damages no bar to action for malicious prosecution 1607
confessions made during, whether admissible 883

FALSE PRETENCES, on indictment for obtaining money by, prisoner not to be acquitted, though offence proved be larceny.....1705, 1707
if several alleged in indictment, not necessary to prove them all 266
indictment for obtaining money by, bar to indictment for larceny.... 1707
is an acquittal for larceny a bar to indictment for obtaining goods by ? 1705
on trial for obtaining goods by, witness may be allowed costs..... 1254

FALSE REPRESENTATION, inference of malicious or fraudulent intent from..... 83
as to a man's credit, must be in signed writing, when.....1085 *et seq.*

FAMILY, meaning of, in wills 168
recognition by, in proof of pedigree (see *Pedigree*) 649, 654
conduct of, towards a relative, inadmissible on question of insanity .. 571
aliter, formerly in Ecclesiastical Courts 575
of person killed may sue for compensation within 12 months 73

FAMILY PORTRAITS, admissible in matters of pedigree 652

FARM SERVANTS, not liable to discharge at month's notice.....34A, 177

FASTS, judicially noticed 18

FATHER and SON, presumption respecting survivorship 202
where both of same name 195
deed by father, appointing guardian of child, must be attested (sub tit. "*Guardians*") .....1110, 1839—41, n.
purchase by father, when presumed advancement for child 1017

FEAR, confessions under influence of, what inadmissible (see *Confessions*)..872-85

FEE SIMPLE, title to, presumed from possession 123, 125, 685
in land, carries presumptively right to minerals..... 125

FEELINGS, expressions of bodily or mental, admissible as original evidence.....580-81
of strangers respected, when impertinent evidence tendered 949

FEES, presumed legal from long enjoyment 130
paid for inspecting and copying public records .....1482, n.
when medical men may sue for.....803 & n.

FEIGNED HAND, experts may give opinion respecting 1417, 1877

FELLOW-SERVANTS, master at Common Law not liable for negligence of 1182

FELO-DE-SE, dying declarations of, admissible against accessory 717

FELON, administrator of property of..... 1015

FELONY, infant under seven incapable of committing 104
under fourteen incapable of committing some 104
married woman committing, when presumed coerced..... 190
what felonies are local 281
what are subject to Statutes of Limitations.....76-8 & n.
party charged with, not entitled to copy of indictment .....1488 & n.
may claim to have it read slowly in open court,1438 & n.
copy of record of acquittal or conviction for, when demandable....1489-90

FELONY—*continued.* PARAGRAPHS (§§)
indictment for, when amendable (see *Amendment*).....248-53
on indictment for, tender of expenses to witnesses unnecessary 1252
unless witness lives in Scotland or Ireland..... 1252
court may allow costs to prosecutors and witnesses 1253
when court may reward activity in apprehending prisoners.....1257A
when felonies so connected as to form one transaction, on indictment for one, evidence of all admissible 327-8
doctrine of election, when more than one charged in same indictment..329-34
party charged with, may be convicted of an attempt.....269-70A
judgment on indictment for, when a bar to a second indictment 1706-8
when not 1706
verdict on charge of misdemeanor bar to indictment for, on same facts 1707
proof and effect of certificate of previous conviction for.....353, 1612-14
witness convicted of, no longer incompetent.....1347 & n.

FEMALE WITNESSES, credibility of 54

FEMALES (see *Women*).

FEME COVERT (see *Husband and Wife, Married Woman*).

FENCE, presumptions as to ownership of 120

FEOFFMENT, after 1st October, 1845, must be evidenced by deed 992
presumption as to 127

FERRY, right of, provable by reputation 609, 613
cannot be granted or demised, except by deed 973-4

FESTIVALS, judicially noticed 16, 18

FIERI FACIAS, its effect as evidence 1766

FILING AND RECORD DEPARTMENT, masters and clerks of, may administer oaths and take affidavits 1386

FINAL judgments not conclusive unless actual point in issue determined.. 1719
and unless decision turned on actual merits.....1719A
what are "merits" 1720
award bad unless 1758
decree must be, to be evidence 626
order of Quarter Sessions in bastardy case, when 1757A

FINES, reasonableness of, question for judge..... 37A

FIRM (see *Partners*).

FIRST-FRUITS AND TENTHS, records of, in custody of Master of the Rolls.....1485, n.

FISH, offence of illegally taking or destroying, what local description necessary 282

FISHERIES, seal of Commissioners for Irish, judicially noticed..... 6, n.
Commissioners for Irish, may enforce attendance of witnesses.....1293-1309, n., & *Errata*.

FISHERMEN, agreements with, how executed and proved 1098

FISHERY, right of, presumed to belong to owner of adjacent land, when 119
presumed public, when..... 119

FISHING BOATS (see *Table of Statutes*, 46 & 47 Vict. c. 41).
agreements in sea-fishing service 1098
apprenticeships in sea-fishing service 1098

PARAGRAPHS (§§)

FITNESS, warranty of, when implied in demise 1175-76
in sale of chattels 1178-79A

FIXTURES, contract respecting, not within sect. 4 of Statute of Frauds, 1038, 1044
not within sect. 17 of Statute of Frauds..1044
when growing crops within sect. 4 of Statute of Frauds 1041-43
on indictment for stealing, in a square, &c., property need not be alleged 294

FLAGS, inscriptions on, provable by oral testimony..... 417

FLATS, house let in, presumptive rights of occupiers 121

FLEET REGISTERS of baptisms and marriages, inadmissible (sub tit. "*Baptism, &c. Registers*") .....1592, n.

FLIPPANCY in witness, evidence of falsehood..... 62

FLOTSAM, how distinguished from wreck .....614, n.

FOOD for use of man, when warranted by vendor wholesome..... 1178

FOOTMARKS, testimony respecting, should be watched with care 68

FORCIBLE ENTRY is a local offence 281

FORCIBLE MARRIAGE, wife competent to prove 1371

FOREIGN ATTACHMENT, custom of, when judicially noticed .....5, & n.
judgment and execution against garnishee, when an estoppel..... 1692

FOREIGN BILL OF EXCHANGE (see *Bill of Exchange*).
what purports to be, is so, as far as stamp laws are concerned 72
amount of interest payable on, question for jury 45A
days of grace allowed on .....1168, n.
may be proved by parol evidence 1168
protest of, how proved 424

FOREIGN COUNSEL, communications with, privileged 920

FOREIGN COURTS, seals of, when judicially noticed 10
judgments of (see *Public Records and Documents*).
presumed to act within their jurisdiction 85
suits in, aided by examinations taken in England 1313
also criminal proceedings .....1314A, & *Errata*
except those of a political character 1314A
executors and administrators entitled by, cannot sue in our Courts .. 1738
probates and letters of administrations granted by, effect of 1738

FOREIGN CRIMINALS, proof of warrants and depositions under Extradition Acts 1560

FOREIGN ENLISTMENT ACT, 1870 (see *Table of Statutes*, 33 & 34 Vict. c. 90).
breach of neutrality under, when presumed .....372-4, n.

FOREIGN JUDGMENTS, and other judicial documents, how proved, 10, 1556
admissibility and effect of (see *Public Records and Documents*) 1724-46
in rem, effect of 1733-37
in personam, effect of 1739-40
presumptions in favour of 85

FOREIGN LANGUAGE, writing in, may be explained by parol 1159

FOREIGN LAW ASCERTAINMENT ACT, 1861 (see *Table of Statutes*, 24 & 25 Vict. c. 11).

PARAGRAPHS (§§)

FOREIGN LAWS, not judicially noticed 5
ascertainment of, by obtaining legal opinion from foreign Courts 5
of our own colonies, how proved 10
must be proved by experts.....48, 1423-25
who are experts for this purpose..... 1425
cannot be proved by production of codes or statutes 1423, 1525
can they be proved by certificate of foreign ambassador in England?..1784A
functions of judge and jury respecting..... 48
foreign rules of evidence cannot affect proceedings in our Courts 49

FOREIGN PROBATES and letters of administration, effect of 1738

FOREIGN STATES, existence and titles of, judicially noticed..... 4
laws of (see *Foreign Laws*).
courts of (see *Foreign Courts*).
judgments of (see *Foreign Judgments*, *Public Records and Documents*).
acts of, how proved 10, 1528
seals of, when judicially recognised 10
registers of, when admissible 1593
documents deposited in, when provable by secondary evidence 438, 446
inscriptions on tombstones in, admissible in matters of pedigree 652

FOREIGN TRIBUNALS EVIDENCE ACT, 1856 (see *Table of Statutes*, 19 & 20 Vict. c. 113), provisions of 1313

FOREIGN WITNESS, credibility of 56
expenses of 1248

FOREIGNER (see *Agent*), indictment for crime here, though no offence in his country 80
his ignorance of our law is no defence 80
of rank, how described in indictment 293

FORESTS, reports of Commissioners of, how proved 1531

FORFEITURE, questions exposing witness to, he is not bound to answer 1453
extent of this protection (see *Witnesses*) 1453-66
interrogatories exposing defendant to, not bound to answer 1453
when waived by suing or distraining for or accepting rent 806
by landlord having misled tenant 847
when not waived by passive acquiescence in breach 809
when defeated by presumption of licence 139-42
must be proved by party relying on it, though such proof involve a negative 367

FORGERY, in indictment for, when felonious intent presumed 80, 118
what description of instrument sufficient in indictment 291
when instrument in prisoner's hands, notice to produce necessary..408, 452
proof of other forgeries in general inadmissible..... 319
when admissible to prove guilty knowledge or intent 345
acceptor of bill, how far estopped from setting up..... 851
on indictment for forging a record, the original must be produced.... 1535
for forging a will, is the probate conclusive evidence for defendant? 1677
for forging cheque, party whose name forged need not be called..... 393
of seal, stamp, or signature to any official or public document, felony 8, n.
indictment for, cannot be tried at Quarter Sessions .....1714, n.

FORMAL ALLEGATIONS, need not be proved (see *Variance*).....278-9
recitals in instruments, may be contradicted by parol 1150

FORMÂ PAUPERIS (see *Pauper*).

PARAGRAPHS (§§)

FRANCE, LAW OF, as to presumption of survivorship 202
respecting loss of ship..... 204
as to comparison of handwriting .....1869, n.
as to admitting tradesman's shop-books 712
permits interrogation of prisoners..... 887
does not recognise days of grace on bills of exchange .....1168, n.
implies warranty of title on sale of specific chattel 1177
what law of the road is recognised in ..... 5, n.

FRAUD, greater danger of, where witnesses are few 67
party not estopped by deed from proving it to be founded on 93
confession obtained by, not inadmissible 881
will render void every instrument 1136
may be established by parol evidence 1136
judgment inadmissible on proof of..... 1713
how far party to record can defeat a judgment, by proving 1713
agents, bankers, &c., bound to disclose, when.....1455, n.
cannot be indicted if they disclose .....1455, n.
what trusts result in cases of .....1017, c.
when conclusively presumed in case of forgery 80
in transfers by a bankrupt 83
in case of false representations..... 83
in other cases (see *Presumptions*).
equitable, when presumed 151

FRAUDS, STATUTE OF (see *Statute of Frauds*, and *Table of Statutes*, 29 Car. 2, c. 3).

FRAUDULENT PREFERENCE, when presumed..... 83

FRAUDULENT TRUSTEE, on trial of, for misdemeanor, costs of witness allowable 1254
will not be protected from answering in Civil Courts or in Bankruptcy..1455A
but no such answer admissible against witness on subsequent indictment.....1455A
offence by, cannot be tried at Quarter Sessions .....1714, n.

FREIGHT (see *Ship*), meaning of term may be explained by evidence of usage .....1162, n.

FRENCH CODE (see *France*).

FRIEND, declarations of, inadmissible in matters of pedigree 635
confidential communication to, not privileged..... 916

FRIENDLY SOCIETIES, documents of, how proved.....1611, n.
exempt from stamp duty..1611, n. & *Addenda*
rules of, how proved.....1601, n.
acknowledgments of amended rules .....1611, n.
of registry of.....1611, n.
effect of issue of such .....1611, n.
devolution of property in 1015
discharge of mortgages of, by receipt 1013
notices of, may be served by post.....180, n.
in prosecutions under Act, burthen of proof (see 38 & 39 Vict. c. 60, s. 33 (5)).
registrar of, may administer oaths, and enforce attendance of witnesses 1293—1309, n.
County Courts and justices and registrars may grant discovery 1814-15
may order inspection 1814-15
books of, may be inspected, when.....1504-21, n.
infants may be members of (see 38 & 39 Vict. c. 60, s. 15 (8))..... 104

FRIENDLY SOCIETIES ACT, 1875 (see *Table of Statutes*, 38 & 39 Vict. c. 60).

PARAGRAPHS (§§)

FRUITS, when within sect. 4 of Statute of Frauds 1042
records of first-fruits and tenths, in custody of Master of Rolls ....1485, n.

FUGITIVE OFFENDERS ACT, 1881 (see *Table of Statutes*, 44 & 45 Vict. c. 69).
depositions and other documents under, how proved 1562

FUNCTIONS OF JUDGE AND JURY, important to define 22
judge to decide on competency of witnesses 2, 23A
to regulate mode of examining witnesses 1399
may for sufficient reason decide whether trial be heard on affidavit or by viva voce evidence 1395
to decide on admissibility of evidence 2, 23
and on evidence and facts on which admissibility depends....23-4, 325
e.g., on existence and sufficiency of threat or promise to exclude confession 23, 872
on belief of impending death, to let in dying declarations 23
on disability of witness to attend, to let in deposition 23
on relationship of declarant in matters of pedigree 23
on collusive absence of attesting witness to let in evidence of his signature 23
as to whether instrument be duly executed or stamped 23
or whether it comes from right custody 23
or whether due search has been made for it..... 23
or whether notice to produce it has been given 23
or whether it be properly identified 23
or whether alteration in it be material .....1819, n.
or whether it be a confidential communication..... 23
as to genuineness of writings used for comparison 1870
on objection to witness, on ground of unripeness or imbecility .. 23
on competent knowledge of expert to prove foreign laws 48
on due service of subpœna 1243-4
on validity of excuse by witness for not producing document.... 1240
as to what acts and declarations form part of res gestæ 583
on unity of character to let in evidence of collateral facts 24, 325
on nature of evidence to prove usage in trade 24
these, and the like facts, must first be decided by judge, however complicated the facts on which they depend 23-4
when the evidence is admitted, the jury may decide on its weight.... 24A
rule rejecting secondary evidence, less strict when evidence addressed to judge 430
judge to explain rules, by which facts are to be proved, and evidence weighed 25
e.g., to explain nature of any presumptions 25, 111
to point out what is conclusive evidence by statute 25
to point out when single witness insufficient to prove guilt..... 25
to caution jury where an accomplice is witness 25
how far to state opinion respecting merits of case 25
to decide if there is any evidence to be submitted to jury.....23, 25A
to explain law applicable to issues 26
and to distinguish questions of law from questions of fact 26
jury to decide questions of fact, and to take the law from judge 22
observations of Lord Mansfield and Story, J., on this subject....22, n.
illustrations of distinction between law and fact..... 26
mixed cases, what are 26
probable cause, question for judge..... 28
credibility of witness, question for jury 28
reasonable belief or suspicion, how far for judge, how far for jury .. 29
reasonable time, question for judge, where precise rules laid down .. 30
e.g., for giving notice of dishonour 30A
for presenting cheque or note payable on demand .. 31
for giving notice to quit a tenancy 34
for giving notice to servant to quit 34A
for protecting a member of parliament from arrest .. 34B

FUNCTIONS OF JUDGE AND JURY—*continued.* PARAGRAPHS (§§)
reasonable time for taking party arrested to prison 35A
for countermanding arrest 35A
for executor to remove goods from testator's house .. 35A
for service of subpœna..... 1243
for which party suspected may be committed for re-examination, how far question for judge..... 35
other questions of reasonable time for jury 36
reasonable hours, how far for judge or for jury 32, 32A, 33
e.g., for presenting instrument at banker's 32
at other places 32
for demanding or tendering rent on the demised hereditaments 32A
elsewhere.. 32A
for delivery of goods..... 33
reasonable skill or care, due diligence, and gross negligence, how far for judge, how far for jury 37-7A
bona fides, actual knowledge, express malice, or real intention 38
judge certifies for costs of suing in superior instead of inferior courts.. 38-9
in other cases, costs are now in judge's discretion 38
privileged communications 44
question of materiality on indictment for perjury 45
permissive occupation, executor's assent, unsoundness..... 45A
question of whether place is a "street" 45A
unseaworthiness and materiality of facts not common to underwriters 45A
competency of a testator, cruelty of a husband, condonation 45A
acceptance of goods to satisfy Statute of Frauds 45A
whether a tender be absolute or conditional..... 45A
what interest is payable on a foreign bill..... 45A
necessaries supplied to infants 46
construction of written documents..... 40-5
generally belongs to judge alone, and why 40
judge will construe specification of patent 40
will decide if written acknowledgment of debt or title will oust Statutes of Limitation 40
will decide between a penalty and liquidated damages 40
will interpret letters and contracts, how far..... 41
jury may interpret technical words in contract 40
may decide whether an excavation is a mine 47
whether a deed has been delivered as an escrow..45A, 1835
must decide whether goods sold have been accepted by vendee..... 1045
what is a representation of a dramatic piece 47
whether instrument, not being a deed or will, was altered before or after its completion..... 1819
jury cannot examine a record to give opinion as to an erasure in it ... 47
may interpret writing, in indictment or action for libel 42
how far judge should explain what constitutes a libel 42
jury may interpret writing, on trial for sending threatening letter 43
foreign laws, how far question for judge, or for jury 43
presumptions of fact, how far for judge, or for jury..... 216
jury in Ireland must determine whether witness has been secreted by prisoner, to let in his deposition 496-8

FUNDHOLDERS entitled to inspect bank-books.....1498-99

FUNERAL EXPENSES of deceased husband necessary for infant widow 46

FUNEREAL INSCRIPTIONS (see *Inscriptions*).

FURNISHED APARTMENTS, is notice to quit necessary where hiring weekly ? .....34, n.
in County Courts, week's notice held to be necessary and sufficient ..34, n.
agreement to take, within sect. 4 of Statute of Frauds..... 1038
if not reasonably fit for habitation, may be quitted without notice.... 1176

PARAGRAPHS (§§)

FURNITURE, custom of hotel-keepers holding, on hire, judicially noticed 5
meaning of term in will 168

FUTURE STATE of rewards and punishment, witness need not believe in .....1382, 1384, n., 1388A

GAME (see *Poaching*).
in proceedings under game laws, defendant must prove his licence, &c. 377
privilege of shooting, must be granted and revoked by deed, when .. 974
may be revoked by parol, when 974
lessee's right to kill ground game implied in demise 1175

GAMING, witnesses giving evidence respecting, how far indemnified..1455, n.

GAOL (see *Prison*).

GAOLER, bringing prisoner by habeas corpus to testify in criminal court, entitled to what allowance .....*App.* x

GARDENER included among domestic servants 34A

GARNISHEE, judgment and execution against, in suit of foreign attachment, when an estoppel in his favour 1692
so payment by, or execution on, is a valid discharge as against judgment debtor..... 1692

GAS, register of meter is evidence of quantity of gas consumed .....183, n.
fraudulent abstraction of, proof of .....372-4, n.

GAS AND WATERWORKS FACILITIES ACT, 1873 (see *Table of Statutes*, 36 & 37 Vict c. 89).
rules made under, by Board of Trade judicially noticed..... 19, n.

GAVELKIND, custom of, judicially noticed..... 5

GAZETTE, judicially noticed 15, 1527, 1662
the entire copy must be produced—a cutting not sufficient.....1527, n.
at common law evidence of acts of State 1662
e. g., addresses received by the Crown 1662
not evidence at common law of other acts of public functionaries..... 1662
e. g., appointment of officer to commission in army 1662
Queen's grant of land to subject 1662
primâ facie evidence by statute of proclamation, orders, or regulations issued by the Crown or Government.....1527, 1662
conclusive evidence by statute in certain cases .....1663A-4 & n.
e. g., of what proceedings in bankruptcy 1549, 1747
of appointment of officer to commission in army 1638A, 1662
gazettes and newspapers, when evidence of notice..... 1665
e. g., containing notice of dissolution of partnership..... 1666
of blockade of foreign port 1665
inference must be raised, that party has read advertisement 1665
how this may be done 1665

GENERAL INTEREST (see *Public and General Interest*).

GENERAL ISSUE practically abolished, except in pleadings subsequent to defence 303-4
issue may be joined on defence and any subsequent pleadings 302
but need not be so joined.....302, 304
such joinder of issue denies every material allegation in the preceding pleading 302
effect of, under old forms of pleading 303
any defence might be raised to show that no debt ever existed before action 303c

GENERAL ISSUE—*continued.* PARAGRAPHS (§§)
plea of "not guilty by statute" still remains 311-15
but must not be pleaded with any other pleas without leave ... 311, 313
the words "by statute" must be inserted in margin of plea 311
the Act must be specified on which defendant relies 311
what is acting in pursuance of a statute 312
what defences available under plea of 302-3c
when defence of "not guilty by statute" allowable 311-13

GENERAL REGISTER OFFICE (see *Register Office*).

GENUINE, meaning of term as applied to documents 1870
writings may be used for comparison 1869

GESTATION, time of, how far judicially noticed 16

GIFT of chattels, when irrevocable 975
deed of, presumptions respecting 151, 158

GIRL (see *Children*, *Infant*).

GOD, belief in, formerly requisite in witness, but not now (see *Competency*) 1382, 1384, n., 1388A
presumed primâ facie 1385

GOOD CHARACTER (see *Character*).

GOOD FAITH (see *Bona Fides*).

GOODS, what amounts to constructive delivery of 1045-49
delivery of, within what hours must be made 33
gift of, when complete, and mortgage of, when valid 975
contract for sale of, must be by signed writing, when (see *Statute of Frauds*) 1020
though goods being not actually made, &c. (see *Lord Tenterden's Act*) 1020
several articles bought at one time at distinct prices, within rule 1044
growing crops, when within the rule 1041-43
scrip and shares in companies not within the rule ..... 1039A-40, n.
stock and exchequer bills not within the rule ..... 1039A-40, n.
fixtures not within the rule 1044
part payment or acceptance and receipt of goods, ousts rule (see *Statute of Frauds*) 1021
warranty of title and quality, when implied in sale of 1177-79

GOVERNESS, how far presumed to be hired for a year 177
not liable to discharge at a month's notice 34A

GOVERNMENT, acts of, how proved 18, 1520-27
acts of foreign or colonial, how proved 9, 1528
communications to and from, when inadmissible (see *Privileged Communications*) 947-8A

GOVERNOR OF COLONY, communications from, privileged 948

GRACE, days of, when, and how many allowed in different places .... 1168, n.
may be proved by parol evidence 1168
abolished in England, in what cases 1168

GRAND JURY, transactions before, how far privileged 942-3
perjury before, whether indictable 943

PARAGRAPHS (§§)

GRANT, when presumed 128-35
from Crown, how proved 1526
rights lying in, must be evidenced by deed 973-4
since 1st of October, 1845, corporeal hereditaments lie in, as well as in livery 992
when ancient, acts of author and usage admissible to explain 1204
must come from proper custody to be admissiblo 661
what is proper custody for 662
what is not 661

GRASS, when within sect. 4 of Statute of Frauds..... 1041-42

GRAVESTONES, inscriptions on, provable by secondary evidence 438, 653
admissible in cases of pedigree 652
though placed in dissenters' burial ground 652
or in a foreign country 652

GREAT SEAL, judicially noticed 6
wafer great seal, judicially noticed 6

GROSS NEGLIGENCE, how far question for judge, how far for jury ..37-7A

GROWING CROPS, when within sect. 4 of Statute of Frauds.....1041-43
when not within sect. 4 are within sect. 17 1041-43
presumption respecting title of executor to 167

GUARANTEE, must be by writing signed under Statute of Frauds 1019, 1085-87
the consideration need not appear in the writing 1021, 1030
what constitutes a guarantee 1030-34
how far partners can bind each other by 185
extends to tort as well as contract 1034
may be explained by parol evidence, when 1197
provisions of Statute of Frauds extended by Lord Tenterden's Act .. 1085
effect of material alteration in 1820
amendment of declaration on, when allowed under old law..... 236

GUARDIAN (see *Prochein Amy*), admissions by 742
not a party within rule, which makes judgment evidence for or against parties 1686
affidavit of, to bill against infant, not evidence against infant in another suit 755
but evidence against himself in subsequent suit 755
foreign sentences as to guardianship, effect of 1736
presumption against deed of gift by ward to 151
deed by father appointing, must be attested .....1110, 1839-41, n.

GUARDIANS OF POOR, proof and effect of certificates of chargeability by (sub tit. "*Poor Law, &c. Acts*") .....1611, n.
of orders given by, respecting complaints, &c. (sub tit. "*Poor Law*")..1601, n.
relief given by, to pauper out of parish, effect of 805
of parish, notices of chargeability and grounds of appeal, how signed by 1103-4

GUERNSEY, laws of, not judicially noticed 5
judicial proceedings of Courts of, how proved..... 1556
baptismal register of, when admissible .....1593, n.
forms part of diocese of Winchester .....1593, n.

GUEST, presumption respecting missing goods deposited with innkeeper by .....187 & n.
what constitutes a guest .....187 & n.

GUILT, when presumed (see *Presumption*) PARAGRAPHS (§§)
possession of fruits of crime, when evidence of 63, 127A-27C
of coining tools, &c., when evidence of .....372-4, n.

GUILTY, pleading, conclusive evidence of guilt 866
principal pleading, no evidence against accessory 904
e. g., thief pleading, no evidence of theft as against receiver 904
judgment in criminal case upon plea of, admissible against defendant in civil action 1694
knowledge, collateral facts admissible to prove 345-8

GURNEY (see *Russell Gurney*).

HABEAS CORPUS AD TESTIFICANDUM (see *Attendance of Witness*) 1272-77

HABIT AND REPUTE evidence of marriage.....172, 578

HACKNEY CARRIAGES, agreements between proprietors and drivers must be in writing and attested .....1099A, 1839-41, n.

HALL OF STATIONERS' COMPANY (see *Copyright*).

HAMLET, boundaries of, provable by reputation..... 613

HANDBILLS, are contents of, provable by parol? 417, 438

HANDWRITING (see *Signature*) evidence respecting, liable to error 68
signature of what statutable writings, unnecessary to prove 7-8
signatures of superior judges, judicially noticed..... 7-8
forging or uttering forged signatures of official or judicial documents, felony .....7-8, n.
solicitor competent to prove client's 934
Modes of Proving :— 1863-79
1. by calling writer 1862
not necessary to call him..... 393
2. by witness who saw instrument or signature written 1862
3. by witness who knows writing from having seen party write..
evidence resting on knowledge thus obtained varies much in weight 1863
admissible, though witness has not seen party write for twenty years 1863
or has seen him write but once, and only his surname.. 1863
proof of mark by witness who has seen party affix it to other writings 1863
inadmissible, where witness has merely seen party write after commencement of suit..... 1863
4. by witness who has correspondence with party, or acted on his letters 1864
instances of sufficient knowledge thus obtained 1864-66
studying signatures for purpose of testifying, insufficient 1876
witness must speak to his belief..... 1416
belief must be founded on actual knowledge of writing 1863
5. by comparison of writings 1869-75
this formerly not allowed, but old law abrogated 1869
judge must be satisfied that writing used for comparison is genuine 1870
meaning of term "genuine"..... 1870
comparison may be made by skilled witnesses 1870
by witness acquainted with the handwriting 1870
by the jury 1870
by the Court, if no jury 1870

HANDWRITING—*continued.* PARAGRAPHS (§§)
party may be made to write in Court, and such writing may be compared ... 1871
comparison may relate to character of writing ... 1871
to form of letters ... 1871
to use of capitals, stops, &c. ... 1871
to orthography of words ... 1871
to style of composition ... 1871
to fact of document being in feigned hand. 1871
evidence of experts worthless unless *reasons* as to similarity of, or otherwise of, given ... 1871
can knowledge of witness be tested by showing him inadmissible documents, not proved genuine, and asking if they are in same hand as document in dispute? ... 1873
of ancient documents requires less strict proof than in other cases ... 1874
what will be regared as sufficient proof ... 1874-76
when no proof required ... 88
experts may be called to prove date of ancient writing ... 650, 1417, 1877
or that writing is in feigned hand ... 1417, 1877
when witness may speak to, without producing document ... 1878

HATCHMENTS admissible as evidence in matters of pedigree ... 652

HEALTH (see *Public Health Act*),
Local Boards of, and Sanitary Authorities, seals of, require no proof.. 6, n.
documents purporting to proceed from, how proved ... 1601, n.
certain contracts of, to be under seal ... 995
by-laws made by, how proved ... 1657-8, n.
rate books kept by, how proved ... 16[illegible], n.
by whom inspected ... 1504-21, n.
registers of mortgages kept by, how inspected ... 1504-21, n.
registers of voters for, may be inspectod ... 1504-21, n.
minutes of proceedings at meetings of, how proved ... 1783

HEARSAY, what it is ... 567-70
rule excluding, caricatured by Dickens ... 567, n.
not recognised in Scotland ... 568, n.
inadmissible though no other evidence attainable ... 568
though it be an examination taken on oath ... 568
a declaration of deceased attesting witness ... 569
admissions of, how far receivable ... 737
rule respecting, applies to things done as well as written ... 570
sometimes inconvenient ... 571-75
evidence of treatment and opinion admitted in Ecclesiastical Courts.. 575, n.
distinction between, and original evidence ... 576
what declarations are not: —
1. where fact that declaration was made, and not its truth, in question ... 576, 606
e. g., information, upon which one has acted ... 576
replies given to inquiries for information ... 576
general reputation, notoriety ... 577
2. expressions of bodily or mental feelings ... 580, 606
e. g., complaints of injury, recenti facto ... 581
mutual deportment of husband and wife in adultery petitions ... 582
3. declarations and acts forming part of res gestæ (see *Res Gestæ*).. 583-88, 606
which are evidence of declarant's knowledge, belief, or intention 586
but no proof of facts themselves ... 586
declarations explaining irrelevant acts inadmissible ... 587
declarations need not be contemporaneous with principal fact ... 588
but narratives of past events inadmissible ... 589
acts and declarations of conspirators (see *Conspirators*) ... 590-96
of co-trespassers ... 597

HEARSAY—*continued.* PARAGRAPHS (§§)
acts and declarations of partners 598
except the acknowledgments of debt 600
of joint contractors 601
of agents 602-5
Exceptions to rule rejecting :—
1. in matters of public and general interest (see *Public and General Interest, Lis Mota*) 607-34
2. of pedigree (see *Pedigree, Lis Mota*) 635-57
3. of ancient possession (see *Ancient Possession*) 658-67
4. declarations against interest (see *Interest*) 668-96A
5. in course of office or business (see *Course of Office or Business*) 697—713
6. dying declarations (see *Dying Declarations*) 714-22

HEATHEN may be competent as a witness, and how sworn 1388A

HEDGE, presumptions as to ownership of 120

HEIR, estoppels by ancestor, binding on 90
admissions of ancestor, when evidence against 787
conveying estate, estopped after its descent on him, from denying his title 95
bound by judgment for or against ancestor 1689
reversions of, formerly protected by Equity 153
this rule abolished by 31 Vict. c. 4 153

HERALDS, books of, where deposited ..... 1486, n.
sometimes admissible in cases of pedigree 657, 1769
but in other cases not evidence ..... 1592, n., 1769
officer of college of, may explain armorial bearings in cases of pedigree 657
have exercised no authority since Revolution 657
office of, not proper custody for old MSS. respecting dissolved monasteries 661
communication to officer of college not privileged 916

HERIOT, custom of, provable by reputation 613
custom to take, may be annexed as incident to a lease 1168

HIGH AND LOW WATER, presumption as to land between 119

HIGH COURT (see *Supreme Court*).

HIGH TREASON (see *Treason*).

HIGHWAY (see *Road* and *Robbery*), presumption as to ownership of 119
as to dedication of, to public 131
right of, provable by reputation 609, 613
in indictment for non-repair of, locality must be alleged and proved .. 282
conviction conclusive of liability to do repairs, on second indictment .. 1689, 1722
acquittal will not prove non-liability, on second indictment 1722
Act, 1835, inspection of what books allowed by (see *Turnpike*) .. 1504-21, n.
order of justices for making highway district, how proved .. 1571, n., 1601, n.

HIGHWAY RATE, how proved 147A

HINDOO LAW, as to limitation of actions ..... 74A, n.

HIRING AGREEMENT, property in them cannot be passed by person in possession of goods under an ..... *Addenda*

HIRING AND SERVICE, when presumed to be for a year 177
contract of, explained by custom as to holidays 1168
terms of, provable by parol, though reduced to writing, when 406

PARAGRAPHS (§§)

HISTORY, public, admissible 16, 1785
private, inadmissible 1785

HOLDING OVER by tenant, presumptive effect of 196

HOLIDAYS, custom as to, may explain contract of hiring and service .. 1168

HOMICIDE, malice presumed from unless rebutted (see *Murder*) 118
dying declarations admissible in cases of (see *Dying Declarations*) 714-22
depositions of deceased on charge of assault, admissible on trial for .. 467
married women may be convicted of 190

HONOURS, actions to perpetuate testimony respecting claims to 544-45

HOPE, confessions under influence of, when inadmissible (see *Confessions*).. 872-85

HOPS, not within sect. 4 of Statute of Frauds 1042
sect. 17 of Statute of Frauds does not affect sale of crop of growing .. 1042
contract respecting, may be explained by usage .....1162, n.

HORSE, whether nomen generalissimum in an indictment 290
unsoundness of, question for jury 45A
onus of proving, is on plaintiff 366
declarations of servant on sale of, how far binding on master 603

HOSIERY TRADE, burthen of proof in disputes in .....372-4, n.

HOSTILE WITNESS may be examined in chief by leading questions .. 1401
may be discredited by party calling him, how and when 1426

HOTEL-KEEPER, presumption respecting 187
liability of, for lost goods, how limited ..... 187, n.
custom of holding furniture on hire by, judicially noticed 5

HOURS, reasonable, question for judge where precise rules laid down 30-3
e. g., for presenting instruments at bankers' 32
at other places 32
for demanding or tendering rent on the land 32A
elsewhere 32A
for delivery of goods 33

HOUSE let in flats, presumptive right of occupiers 121
presumptive title to support of adjoining house 121
lodging, registers of, how proved (see *Lodging, Lodging-Houses*) (sub tit. "*Common Lodging Houses*") .....1601, n.

HOUSE OF COMMONS (see *Parliament*).
attendance of witnesses before, how enforced 1280
before select committees 1280
witness attending before, may be sworn 1281
before committee of, may be sworn 1281
witnesses attending before, privileged from arrest (see *Arrest*)..... 1334
statements made in, not to be disclosed..... 946
journals of, may now be proved and how 7-8, 18, 1529
admissibility and effect of 1661
on trial of election petition, declaration of voters against own votes admissible 756

HOUSE OF LORDS (see *Parliament, Peer*).
mode of enforcing attendance of witnesses before 1279
before committees of..... 1279
select committees of, examine witnesses unsworn, when 1279
witnesses attending before, privileged from arrest (see *Arrest*) 1334
judgments of, provable by minutes on journals 1571
journals of, may now be proved and how 7-8, 18, 1529
admissibility and effect of 1661
statements made in, not to be disclosed..... 946
on bills of divorce in, when wife's letters were admissible 768-9

PARAGRAPHS (§§)

HOUSE-BREAKING, proof respecting place must correspond with allegation 281
party indicted for, may be found guilty of larceny 269-70
party indicted for burglary may be found guilty of 269-70
party acquitted of, cannot be indicted for larceny, when 1708
party acquitted of larceny cannot be indicted for, when 1708
presumption of guilt from possession of implements for .....372-4, n.

HUNTSMAN, included in term "domestic servants" 34A

HUSBAND AND WIFE (see *Married Woman*), intercourse between, when presumed 106
coercion of wife by husband, when presumed 190
marriage of, when presumed from cohabitation 172
when strict proof of marriage necessary 172
wife's agency in ordering necessaries, when presumed 192
husband not liable for money lent to wife, under old law 193
liable under present law, when 193
communications between, privileged 909A
meaning and extent of this rule 909A-10A
in civil proceedings, admissible witnesses for or against each other..1351-52
in Divorce Division, how far admissible 1355A
in criminal proceedings inadmissible for or against each other .. 1362, 1369
except where crime committed by one on the other 1371
how far admissible for or against co-defendants of each other..... 1364
wife not admissible against husband, in case under Vagrant Act for desertion 1371
for further illustrations of competency of (see *Competency*).
dying declarations of either admissible where other charged with homicide 717
mutual deportment of, evidence in suit for damages for adultery 582
letters of, to each other or to strangers, admissible in same suit 582
but date of letters must be proved 582
confessions by wife, how far admissible in suits before court for divorce 768-69
wife's letters, how far they were admissible on bills for divorce 768-69
confessions by wife, how far they were admissible in Ecclesiastical Courts 768-69
admissions of wife, how far admissible against herself 766-66A
against her trustees..... 766B
for her husband 767-69
presumption against deed of gift by wife to husband 151
acts, declarations, and admissions by wife, when admissible against husband on ground of agency or as part of res gestæ..... 605, 770-71
declarations of husband and wife in matters of pedigree.....638-39
how far husband and wife can give evidence to bastardise their issue.. 950
joint answer of, to bill in Chancery, no evidence against wife after husband's death..... 755
except when it relates to her separate estate 755
when parties estopped from denying that they are married 842
verdict against wife before marriage, when binding upon husband .. 1689
wife's chattels real assigned to husband by marriage, when..... 1015
husband how far liable for wife's debts before marriage .....830, 1689, n.
cannot sue for wife's wages, when .....770, n

IDENTITY, when articles should be produced, to be identified by jury..554-57
when inferred by jury from comparison 555
presumption respecting, when parent and child bear the same name.. 195
of party sued, with obligor of instrument sued on, how proved 1856-60
similarity of name and residence, or of name and trade, will do .. 1858
inference may be drawn from mere identity of name..... 1860
of client with a party to suit, may be proved by the solicitor 935

IDENTITY—*continued.* PARAGRAPHS (¶¶)
of prisoner, collateral facts when admissible to prove 336
of prisoner, may be proved by photograph .....1612-14, n.
of prisoner, with person whose examination is put in 892
of prisoner with person named in certificate of previous conviction .....1612-14, n.
of party, with person whose handwriting is proved 1867
of subject mentioned in document when ascertained by parol 1194-99
of parties and points in issue, how far necessary :—
to let in former depositions 467-69
to let in former judgments as estoppels (see *Public Records*)..1684-1710
in questions of, witness may speak to his belief or opinion 1416

IDIOT, incompetent witness 1375
dying declaration of, inadmissible 717
if witness objected to, as being an, question for judge 23A

IGNORANTIA JURIS NEMINEM EXCUSAT applies to foreigners.. 80

ILLEGALITY, party not estopped by it from proving deeds 93
will render void every instrument 1136
may be established by parol evidence 1135-37
when presumed 372-5

ILLEGITIMACY (see *Legitimacy, Bastardy*).

ILLNESS (see *Sickness*).

IMBECILE (see *Idiot*).

IMMATERIAL ALLEGATIONS need not be proved 255

IMMORALITY, party not estopped by it from proving that deed was founded on 93
evidence of, in what actions and how far admissible 356-62

IMMUTABILITY, presumptions in favour of 196-7

IMPARTIALITY of witness may be impeached by question and contradiction 1442

IMPERTINENCE of witness, evidence of his falsehood 52

IMPLIED CONTRACTS (see *Contracts and Annexing Incidents*).

IMPLIED WARRANTIES (see *Warranties Implied*).

IMPOTENCE, presumption respecting, from ineffectual cohabitation 194
from infancy 104

IMPRISONMENT (see *False Imprisonment, Duress*).

IMPROPRIATOR, lay, entries in books of, whether admissible 688

INADVERTENCE (see *Mistake*).

INCIDENTS, annexed by usage (see *Annexing Incidents*) 1168-92
by law merchant.....1170-71
by common law or statute.....1171-85

INCLOSURE of waste by tenant presumed to be for landlord 122A

INCLOSURE COMMISSIONERS, Board of Agriculture now discharges duties of ..... 6, n.
award by, not invalid for want of enrolment 1127
may be enrolled 1127
how proved .....1584, 1601, n.

INCOMPETENCY (see *Competency*). PARAGRAPHS (§§)

INCONSISTENT statements, when party can show that his witness has made 1426

INCORPORATED LAW SOCIETY, what documents may be signed by registrar of 1639
rules, notices, &c., of, how authenticated .....1596-7, n.
rolls and books of, may be inspected, when .....1504-21, n.

INCORPORATION of writings in will 1061, 1212
in contracts 1026

INCORPOREAL RIGHTS, what that term includes 973-4
presumption as to 132
Statutes of Limitation affecting .....75A & n.
how taken out of statute.....75A, n., 1092
must be evidenced by deed 973-4

INCUMBENCY, acting as parson, admission of 801

INCUMBENT (see *Parson*).

INCUMBERED ESTATES, seal of former Commissioner for sale of, requires no proof ..... 6, n.

INCUMBRANCE, effect of paying off, by tenant for life 154

INDECENCY of disclosures, no objection to evidence 949

INDECENT ASSAULT, consent of young female inoperative, when.... 104

INDECENT EXPOSURE of person, on trial for, costs of witnesses may be allowed 1254

INDEMNIFY, promise to, what amounts to guarantee within Statute of Frauds 1032-34B
witness when indemnified by giving evidence.....1455, n., 1611, n.

INDEMNITY, when given under order of Court, plaintiff may sue on lost bill .....437, n.
certificates of, granted to witnesses, effect of.....1455, n., 1611, n.

INDENTURE (see *Deed*).

INDIA (see *East India Company*, *Hindoo Law*, *Mahomedan*).
articles of war for the forces in, judicially noticed..... 5
registration of marriage in, since 1st January, 1852, must be attested by two witnesses 1110
records of baptisms, marriages, and burials in, where kept.....1486, n.
admissible as public documents (sub tit. "*Births, &c.*")..1595, n.
how proved (sub tit. "*Birth, &c. Registers*") .....1600, n.
lists of passengers to, admissible as public documents (sub tit. "*East India Company*") .....1595, n.
suits in, aided by examinations taken in England, Scotland, and Ireland.....1314-15
depositions respecting misdemeanors committed in, how taken and proved, and when and where admissible 500, 1563
wills made in, how executed .....1050, n.
judicial proceedings of Courts in, how proved 1556
acknowledgment of debt by agent in .....745, n.

INDIAN EVIDENCE ACT, 1872,
s. 70, admission of execution by party to attested documents.....1843, n.
s. 73, comparison of handwriting .....1869, n.
person may be compelled to write in court for that purpose..1871, n.
s. 118, who may testify .....1375, n.
s. 120, married persons competent witnesses in criminal proceedings.. 1362

INDIAN EVIDENCE ACT, 1872—*continued.* PARAGRAPHS (§§)
s. 159, refreshing memory 1406
experts refreshing memory..... 1422
when witness may use copy of document to refresh memory 1408, n.
s. 167, improper admission or rejection of evidence, when no ground for new trial .....1882B, n.
machine copies presumed correct 418

INDICTMENT, within what time some must be preferred (see *Limitations*).....76-8 & n.
amendment of (see *Amendment*) 248-51
dread of amending, erroneous..... 253
immaterial averments may be omitted from.....278-9
formal defects in, how objected to (see *Variance*) .....280, n.
form of, in prosecution for forgery 291
under Debtors Act, 1869 292
under Bankruptcy Act, 1883 292
venue need only be stated in margin of 280
excepting when local description is required 280
prisoner not entitled to copy of, in felony 1488
may claim to have it read slowly in open court 1488
the rule of withholding the copy highly unjust ..... 1488, n.
does not extend to misdemeanors 1488
nor to treasons, except that of compassing death or injury to sovereign 1488
in other treasons prisoner entitled to copy of, ten days before trial ... 1488
in action for malicious prosecution, is plaintiff entitled to copy of? .. 1489
when several offences charged in same, doctrine of election 329-34
declarations exposing declarant to, not evidence after death, as against interest 670
questions tending to expose witness to, he is not bound to answer.... 1453
extent of this protection, and exceptions to it.....1453-58
documents tending to expose witness to, he is not bound to produce .. 1464
when principal liable to, for act of agent 115
name of bastard, how described in..... 293
what sufficient description of partners, joint tenants, trustees, &c., in.. 293
when evidence of prisoner's character admissible 349-63
no tender of expenses to witnesses, necessary on 1252
unless witness lives in Scotland or Ireland 1252, 1261
when court may grant costs to prosecutor and witnesses (see *Attendance of Witnesses*).....1253-57
scale of costs allowed under order of Home Secretary .... *Appendix* vi-xi
when court may grant rewards for activity in taking offenders ..1257A, n.
when court may make prosecutor pay defendant's costs 1260
alphabetical list of offences not triable at quarter sessions by justices or recorders.....1714, n.
witnesses usually called, if named on back of 1430
the finding of, how proved 1570
is a judgment in rem conclusive in trial of? .....1680 *et seq.*
judgment on, not evidence in a civil action, of facts adjudicated 1693
except upon a plea of guilty 1694
judgment in an action, not evidence on, of facts adjudicated 1693

INDORSEMENT (see *Bill of Exchange, Pleading*).
errors in indorsement on writ may be amended.....221, n.
amendments in, how to be made .....221, n.
by payee of cheque, when presumed genuine 72
by payee of promissory note admits signature of maker 853
by drawer of bill, not admitted by acceptance..... 851
by payee of part-payment on bond or bill, effect of, on Statute of Limitations 690-96A
on negotiable security does not bar Statute 691
on bond does, and may be proved by representatives of deceased obligee 692

INDORSEMENT—*continued.* PARAGRAPHS (§§)
how far necessary to show date of, on a receipt, &c., defeating Statute of Limitations....169, 693-96A
on record of name of interested witness, rendered him competent, when....1344-46
on will to prove probate 1589

INDORSER, declarations of, when evidence against indorsee 791
admissions by, after indorsement, not evidence against indorsee.... 794
estopped from disputing preceding signatures on bill 853

INDUCEMENT, judgment inter alios admissible, where record is matter of 1668
what, will render confession inadmissible (see *Confession*) 872-87

INDUSTRIAL SCHOOLS, certificates of, how proved ....1611, n.
order of detention in, how proved ....1601, n.
rules of, how proved....1601, n.

INDUSTRIAL SCHOOLS ACT, 1866 (see *Table of Statutes*, 29 & 30 Vict. c. 118).

INDUSTRIAL SCHOOLS ACT (IRELAND), 1868 (see *Table of Statutes*, 31 & 32 Vict. c. 25).
certificates under, how proved....1601, n.

INDUSTRIAL AND PROVIDENT SOCIETIES (see *Friendly Societies*).
acknowledgment of registry of ....1611, n.
may reconvey by indorsement of receipt on mortgages 1013

INDUSTRIAL AND PROVIDENT SOCIETIES ACT, 1871 (see *Table of Statutes*, 34 & 35 Vict. c. 80).

INEBRIETY (see *Drunkenness*).

INFAMY, witness no longer incompetent on ground of 1347

INFANCY (see *Infant* and *Children*).
plea of, cannot be proved by hearsay as a matter of pedigree 615

INFANT (see *Children*), conclusive presumptions respecting 104
presumed in Scotland born dead, if not heard to cry....104, n.
under 7 incapable of committing felony or indictable offence 104
under 14, boy cannot commit rape 104
or an assault with intent to commit rape 104
may be principal in second degree....104, n.
patient may be convicted of unnatural crime though agent under 14..104, n.
under 13, girl cannot consent to sexual intercourse 104
between 13 and 16, girl's consent reduces crime from felony to misdemeanor.... 104
under 13 girl cannot consent to indecent assault.... 104
between 7 and 14, primâ facie presumed ignorant of distinction between good and evil 189
this presumption in practice disregarded ....189, n.
before 1838, boys of 14, and girls of 12, might bequeath personalty..104, n.
under 21 cannot in general alien his land.... 104
or execute a deed 104
or, since 1st January, 1838, make a will 104
or, since 7th August, 1874, state an account 104
can be a member of a friendly society ....104 & *Addenda*
cannot in general contract, except for necessaries 104
or be made bankrupt 104
what are necessaries for 46
question how far, for jury 46
shareholder, when liable to action for calls ....104, n.
may be member of friendly society ....104, n.
boys of 20 and girls of 17 may make marriage settlements, when....104, n.

INFANT—*continued.* PARAGRAPHS (§§)
how far he can act as trustee ..... 104, n.
written acknowledgment by, of debt for necessaries, bars Statute of Limitations 1075c
fraudulently representing himself of age, liable to creditor 844
admissions made by, receivable against him when of age 740
admissions by agent of, not evidence against infant 605
admissions by prochein amy or guardian of, not evidence against infant 742
unless they would be evidence if made by solicitor 742
affidavit of guardian of, not evidence against infant in another suit .. 755
bound by judgment in action brought by his guardian 1686
though action commenced and conducted without his knowledge .. 1686
and though infant be at the time of mature age or even married .. 1686
recognizance to prosecute, or give evidence, binding on 1235

INFANTS' RELIEF ACT, 1874 (*Table of Statutes*, 37 & 38 Vict. c. 62).

INFERENCE (see *Presumptions*).

INFERIOR COURTS (see *County Courts*).
judges of, and proceedings in, how far judicially noticed 20
right to inspect records of 1492
how far applicant must be interested 1492
course to be pursued in case of refusal to grant inspection by 1492
proof, admission, and effect of records of (see *Public Records*) 1516
witnesses, how made to attend (see *Attendance of Witnesses*) ....1287—1329
witnesses, parties, counsel, &c., attending when free from arrest 1330A, 1334
judgments in, how proved 1572, 1575
general rules of, how proved 1587

INFIDEL competent as a witness 1382

INFIDELITY in wife does not rebut presumptive legitimacy 106

INFIRMITY (see *Sickness, Insanity*).

INFLUENCE, undue, when presumed in equity 151

INFORMATION (see *Depositions*),
on Revenue side of Queen's Bench Division, witness to character, inadmissible in 354
is witness remaining in court, after order to withdraw, inadmissible? 1401
conviction on, judgment in rem ..... 1675, n.
effect of acquittal on, as proof of illegality of seizure 1722

INFORMER, corroboration of 971
communication by, to government, privileged 939-41
cannot be questioned as to channels of information 940

INFRINGEMENT OF PATENT, question for jury, when 45A
order for inspection, when granted in action for 562

INHABITANTS, when suing or prosecuting, admissions and declarations by one, evidence against all 752
e. g., on indictment against a township for non-repair of a bridge 752
in settlement-cases declarations of rated, admissible against parish 752, 756
meaning of term, may be interpreted by evidence of usage ..... 1162, n.
are competent witnesses on indictment for nuisance, &c. to public highway ..... 1366, n.

INITIALS, signature by, how far sufficient within Statute of Frauds 1029
within Wills Act 1060

INJURY, presumption of malice from 80, 118

PARAGRAPHS (§§)

INLAND REVENUE, office of, includes excise and stamp offices ....1595, n.
books of, admissible as public documents.....1595, n.
provable by examined or certified copies (sub tit. "*Public Books*") .....1600, n., & *Errata*.
duplicates of licences of stage carriages filed at office of, how proved..1601, n.
admissibility and effect of .....1778-80, n.
banking memorials filed at office of, how proved.....1601, n.
admissibility and effect of .....1778-80, n.
condemnation of property by commissioners of, judgment in rem ..1675, n.
offender against laws of, can now testify for or against himself..... 1359
proof of certificates granted to solicitors by commissioners of 1639
effect of denoting stamps affixed to documents by commissioners of .. 1763

INNKEEPER, presumption respecting 187
liability of, for lost goods, how limited .....187 & n.
salaried manager of hotel is not 187
lien of, judicially noticed 5
may sell property of guests, when 1186

INNOCENCE, when presumed 112
evidence of good character, when admissible to raise presumption of..349-52
when presumption of, met by some counter-presumption 114
when onus of proving, is cast on defendant by statute.....372-4 & n.

INQUEST (see *Coroner* and *Inquisition*) finding temporary insanity, is it evidence of insanity on an issue? .....1674, n
fee to medical man for attending .....1290, n.

INQUIRIES,
answers to, how far evidence to prove search for document .....429-34 (esp. 430)
for witness..472-8, n., 517, 576
for attesting witness.... 1855
to prove denial by bankrupt 576

INQUISITION (see *Coroner* and *Inquest*), in proof of, when necessary to prove commission 1582
when not.....1582, 1585
admissibility and effect of 1674, 1767
jurisdiction must appear on face of.....147, 1716

IN REM, judgments, definition of 1674
alphabetical list of .....1675, n.
what are not ..... 1675, n.
what are.....1675, n.
how far binding upon strangers 1674, 1676-79
effect of conflicting 1679
how far conclusive in criminal cases .....1680 *et seq.*

INROLMENT (see *Enrolment*).

INSANITY (see *Lunacy, Lunatic*), proved to exist at particular period, presumed to continue 197
on whom onus of proving, lies 370
cannot be proved by treatment of party by relatives 571-75
aliter in ecclesiastical courts .....575, n.
can friends of party testify as to their belief respecting? 1416
opinion of medical men respecting 1417, 1421
evidence respecting sanity of near relations, when admissible 335
inquisition in lunacy, how far evidence of .....1474, n.
of witness, makes him incompetent, when 1375
lets in his former depositions, when .....472-8, n., 480
ground for postponing trial, when .....472-8, n.
of attesting witness, lets in proof of his signature 1851
of testator, may be proved notwithstanding probate, if executor's title not impeached 1677
can attesting witness to will testify as to his belief respecting? .. 1416

INSCRIPTIONS, PARAGRAPHS (§§)
on mural monuments, &c., provable by secondary evidence.....438, 653
evidence in matters of pedigree 652
on rings, evidence in matters of pedigree 652
on flags and banners, provable by oral testimony 417

INSOLVENT, omission of debt in schedule of, admission that it is not due 804

INSOLVENT DEBTOR'S COURT, seal of late, judicially noticed 6
is adjudication for discharge of prisoner without proof of petition and schedule evidence of insolvency? 1576
effect of decisions of foreign 1737

INSPECTION (see *Inspection by Jury*, *Notice to Admit*).
alphabetical list of documents as to which there exists right of..1504-21, n.
publication of documents over which there exists right of privileged.. 1522
of public records and documents (see *Public Records and Documents*)..1483—1522
of private writings (see *Private Writings*) .....1786—1819
of document, how obtained (see *Discovery*).
of document in hands of witness at trial by adverse counsel, rules as to right of 1413
of property the subject of dispute in an action 560
of such property by the judge..... 560
who may make application for 560
what notice necessary on making application for 560
power of Admiralty Court to grant 562

INSPECTION BY JURY most satisfactory mode of proof 554
to identify two articles found in different places..... 555
e. g., wheat found on prisoner with sample belonging to prosecutor .. 555
or fractured bone of sheep, with mutton found in prisoner's house 555
skilled witnesses should aid jury in inspection, when 556
exciting prejudice by ocular inspection..... 557
when jury allowed to view the locus in quo or chattel in dispute 558-66
to obtain proper inspection by jury, judge may order wall to be removed.....563-65
expedient to extend the power of viewing and 566
inspection of prisoner pleading pregnancy by jury of matrons .....554, n.

INSPECTORS under particular Acts, how to summon witnesses....1326-29, n.
of mines, may grant certified copies of their rules for proof.....1657-8, n.
of cattle, certificate by, that animal diseased, conclusive..1611, n. & *Errata*

INSTITUTIONS TO LIVINGS, registers of, who entitled to inspect ..1498-9

INSTRUCTIONS TO COUNSEL (see *Privileged Communications*).

INSTRUMENT (see *Private Writings* and *Scientific Instruments*).

INSURANCE,
presumption recognized in law of, as to loss of ship 204
as to unseaworthiness of ship 205
materiality of facts not communicated in effecting, question for jury.. 45A
onus of proving such non-communication is on defendant 367
incidents annexed to policy of, by law merchant..... 1171
marine policy of, may be assigned by indorsement..... 999
assignee of, may sue in his own name..... 999
effect of alteration of policy of, after completion 1820
policy of, when completed, so as to render subsequent alteration fatal..1831A
in action on policy of, though total loss alleged, part loss may be proved 271-7
in action on policy of, plaintiff may rely on mere possession..... 123
on indictment for arson, with intent to defraud office, policy best evidence of fact of 418

INSURANCE—*continued.* PARAGRAPHS (§§)
on indictment for arson, notice to produce policy must be given..... 452
adjustment of a loss on policy of, not conclusive admission..... 859
acknowledgment of receipt of premium in policy, when conclusive admission..... 845, n.
parol evidence inadmissible to vary terms of policy of..... 1151
of usage admissible to explain terms in charter party or policy of..... 1162 n.-64
underwriter of policy of, presumed to know usage of trade insured 181, 1164
to know contents of Lloyd's Shipping List .. 181
may prove by parol evidence amount of seaworthiness implied in marine 1171
warranty that lighters shall be seaworthy not implied in marine 1171
warranty that goods are seaworthy not implied in voyage policies.... 1171
warranty that ship is seaworthy not implied on a time policy..... 1171
what warranties are implied in carrier's contract..... 1172

INTENTION (see *Functions of Judge and Jury*).
criminal, when presumed..... 80-82A
will be presumed, if act in itself unlawful..... 116-18
must be proved if act only criminal if done with particular intention..... 118
several intents, when sufficient to prove one..... 267
compound intent, when sufficient to prove simple intent..... 268
how far intent must be proved as laid..... 269-70A
collateral facts, when admissible in proof of..... 335-48
surrender by operation of law does not depend on..... 1005
declarations of, generally inadmissible to explain writings..... 1201
except 1. where description alike applicable to two subjects..... 1206-8
2. to rebut an equity (see *Rebutting an Equity*)..... 1227-31
3. when will impeached on ground of fraud or forgery..... 1136
where admissible, it matters not when and how made..... 1209
no presumption of, can revoke will..... 1063

INTEREST (see *Public and General Interest*).
community of, not sufficient to render admissions receivable..... 750
declaration against, why and when admissible..... 668, 669
declarant must be dead..... 669
not sufficient that he has absconded or is out of power of party..... 669
how far knowledge in declarant necessary..... 669
declaration must be against interest of declarant..... 670
such interest must be of a pecuniary or proprietary nature..... 670
declarations rendering declarant liable to prosecution, inadmissible .. 670
1. *as to declarations against pecuniary:*—..... 669-83
amount of pecuniary, immaterial..... 671
whether rule applies to oral declarations..... 672
it includes all written statements, whether made at time of fact declared or subsequently..... 673
it includes entries in private books kept by declarant..... 673
entry must charge declarant with receipt of money for another or acknowledge payment of money due to himself..... 673
entry in debtor and creditor account..... 674
when entry is sole evidence of charge..... 675-76
entries how far evidence of collateral matters..... 677-79
no proof of independent matters..... 680
not necessary that declarant, if living, should have been competent..... 681
declaration admissible, though living witnesses might be called 681
though account does not show from whom money received 681
though not written by declarant, if authorized by him .. 682
if entry by agent, some proof of agency required..... 683
unless book ancient, and internal evidence of genuineness 683
2. *as to declarations against proprietary:*—..... 684
in disparagement of declarant's title to land..... 684-87

INTEREST—*continued.* PARAGRAPHS (§§)
may be verbal, or in writing, or by deed, &c. 685
must state what declarant knows or believes 685
not what he has heard others say 685
must be made while declarant in possession 685-86
what sufficient evidence of possession 686
must disparage declarant's own title 687
not admissible, if merely tending to abridge or incumber estate 687
3. entries in books of deceased rectors or vicars, when evidence for succession 688-89
4. how indorsement by payee of part payment on bond or bill affects Statute of Limitations 690-96A
such indorsement on negotiable security does not bar Statute .. 691
on specialty does, and may be proved by representatives of deceased payee 692
how far necessary to show date of indorsement 693-96A
deed that can take effect by, shall not take effect by estoppel 100
witness no longer inadmissible on ground of (see *Competency*) 1347
in lands, what is, within Statute of Frauds (see *Statute of Frauds*) ..1038-43
of witness, questions respecting, how far relevant 1440-45
answers of witness respecting his, how far open to contradiction 1440-45
attesting witness to instrument produced by opponent, in which he claims an interest, need not be called, when 1848
party not bound to explain alteration of instrument unless he claims an, under it 1824-26
payment of, ousts Statute of Limitations, when (see *Limitation* and *Lord Tenterden's Act*) 1079-83
payment of, by one co-contractor does not bar Statute of Limitations as to others 600-1, 745-46
amount of, payable on foreign bill of exchange question for jury 45A
on bill of exchange not recoverable without producing bill ..... 452, n.

INTERLINEATIONS (see *Alterations*).
admission of document under notice waives objection to it on grounds of it containing 1819

INTERLOCUTORY orders, not evidence in nature of reputation 626

INTERPLEADER ACTS, bad order under old, when held binding as a quasi award 847

INTERPRETATION, of wills, V.-C. Wigram's rules for ..... 1131, n.
of other writings, rules for (see *Writings*) 1131-32

INTERPRETER, communication through, when privileged 920
entitled to what allowance in criminal court ..... *Appendix* x
may aid in inspection of foreign documents under order of inspection .. 1809
may translate evidence of deaf and dumb witnesses 1376

INTERROGATIONS OF PRISONERS allowed by Continental law 887

INTERROGATORIES (see *Commission*).
under R. S. C. of 1883 521-42
party cannot be compelled to answer, going to criminate, &c. 1453
what questions may be asked in 1457, 1465-66
may not 1453
answers to, are admissible in evidence 523
but need not all be read, unless ordered by judge 734
how far necessary to read, in putting in depositions in Chancery 1578
when ancient depositions may be read without putting in 1585

INTESTATE, judgment against, binding upon administrator 1689
admissions by, evidence against administrator 787

INTIMIDATION of witness, a misdemeanor 1345

INTOXICATING LIQUORS ACT (see *Licensing Act*, 1872).

INTOXICATION (see *Drunkenness*). PARAGRAPHS (§§)

INVENTIONS (see *Patent*).

INVENTORY exhibited by executor or administrator when evidence of assets 860

INVOICE, evidence of credit given to party named in it..... 804

IONIAN ISLANDS, registers of marriage in the, now deposited with Registrar General.....1504-21, n., 1595
registers of marriage in the, is official.....1595, n.
entry in, how proved, 1601, n.

I O U, production of, no evidence of money lent 124
is evidence of account stated 124
need not be addressed to any one by name 124

IRELAND (see *Landed Estates Court*).
records and judicial proceedings of courts of, how proved 1544
admissibility and effect of 1724, 1727, 1731
laws of, how far judicially noticed..... 5
seal of what courts in, judicially noticed 6
seal of Record Office in, judicially noticed ..... 6, n.
public records in, proved by certified copies .....1533, n.
statutes of, prior to Union, how proved 1524
documents admissible in, are also evidence in England and the Colonies 1557
documents admissible in England are also evidence in 1557
Poor Law valuations in (see *Poor Law*).
registers of births, deaths, and marriages in, how proved .....1601, n.
valuation of rateable property in, how proved.....1601, n.
grant or surrender of leases in.....1003, n.
what warranties implied in leases in 1175
judgment mortgages in, how proved..... 1652
registration of judgments in, how proved.....1611, n., 1652
land judges and land commissioners in, may enforce attendance of witnesses in ..... 1293-1309, n.
deeds executed by authority of, how far conclusive evidence 86
information of murdered witness, when admissible 496-98

IRISH BANKRUPT AND INSOLVENT ACT (see *Bankruptcy and Insolvency*).

IRISH FISHERIES, seal of commissioners for, judicially noticed ..... 6, n.
commissioners for, may enforce attendance of witnesses.....1293-1309, n.
inspectors of, licenses granted by, how proved .....1601, n.

IRISH LAND COMMISSION, seal of, judicially noticed ..... 6, n.
how attendance of witnesses compelled before .....1293-1309, n.

IRISH LANDLORD AND TENANT ACT, 1870 (see *Landlord and Tenant (Ireland) Act*).

IRISH WITNESSES, credibility of some 53
if murdered, maimed, or secreted, their depositions admissible.....496-98
attendance of, how enforced on indictments in England 1231
in civil trials in England.....1262 & n.
on commission to take evidence from English or Irish courts 1312
may be ordered to be examined in Ireland by English Court of Bankruptcy 519

IRRELEVANT FACTS, not evidence (see *Issue, Collateral Facts*) 316-19
declarations qualifying or explaining, not evidence 587

PARAGRAPHS (§§)

IRRELEVANT QUESTIONS, when allowed on cross-examination (see *Witness*) 1435-45
answers to, conclusive 1435-37
what are not 1438-45

IRREVOCABLE voluntary settlements, presumption respecting 158
gift of chattels, when 975

ISSUE, substance of, must be proved (see *Variance, Allegations*) 217
proof of, on whom (see *Onus Probandi*) 364-77
evidence must be confined to points in 298
rules of pleading, object of 300
character of trustee in bankruptcy, executors, administrators, or persons suing or sued by statute, not in issue, unless specially denied 307-8
general issue has been practically abolished (see *General Issue*).
except in form of "not guilty by statute" 311-15
evidence of collateral facts excluded in general 316
reasons for rule 316
illustrations of rule 317-19
exception, if connected with matter in issue (see *Collateral Facts*) 320
if offered to establish identity of party 330
or to corroborate witness 330
or to illustrate opinions of scientific witnesses 335
or to prove knowledge, intention, good faith, or malice of party 338-48
evidence of character, when admissible to raise presumption of innocence or guilt 349-55
when admissible to affect damages 356-62
to impeach veracity of witness (see *Character*) 363
admissions not put in, by pleading, rejected in evidence 739a

JACTITATION OF MARRIAGE, decrees in suits for, how far judgments in rem ..... 1675, n.

JERSEY, laws of, not judicially noticed 5
judicial proceedings of courts of, how proved 15, 50

JERVIS' ACTS (see *Table of Statutes*, 11 & 12 Vict. cc. 42, 43).

JEW, how sworn ..... 1388, n.
age of, not provable by entry of circumcision in book of dead Rabbi .. 701, 1592, n.

JEWELLERY, not necessaries for infant 46

JOINDER (see *Misjoinder, Nonjoinder*).

JOINT CONTRACTORS, written acknowledgment by one does not take debt out of Statute of Limitations, as to others 600-1, 744
how judgment to be given and costs allowed in such case 745-46
part payment by one does not take case out of Statute of Limitations as to others 600-1, 745-46
admission by one, when evidence against others 598-99, 743
but the reality of the joint interest must be proved aliunde 753
effect of death of one 751
judgment against one, without satisfaction, bar to action against others 1691

JOINT DEBTOR, judgment against one, without satisfaction, may be pleaded in bar by others 1691
judgment against one joint and several debtor, with satisfaction, may be pleaded as estoppel by others 1691
in action on joint contract or trespass against two, one may plead pendency of another action against him for same cause 1691

PARAGRAPHS (§§)

JOINT-OWNERS, when prosecutors, how names must be described 293

JOINT-STOCK COMPANY, how described in indictment 293
liabilities of provisional committee-men 843
shares in, not within sect. 17 of Statute of Frauds .....1039A-40 n.
when, if at all, within sect. 4 of the same Act 1039
under Companies Clauses Consolidation Act, 1845, contracts of, how made 987-88
transfer of shares in, must be by deed 986
registers of, how inspected .....1504-21 n.
admissibility and effect of 1781
books of proceedings of, how inspected .....1504-21 n.
proof and effect of .....1601 n.
bye-laws of, proof and effect of 1655
orders of general meetings for borrowing money, how proved ..1601 n.
certificates of proprietors of shares, form of 1631-7
proof of 1631-7
of capital paid up, proof and effect of 1637A
notices, &c. of, may be served by post, when .....180 n.
under the Companies Acts, 1862 & 1867, contracts of, how made ..989 & n.
bills of exchange and promissory notes, how made, accepted, and indorsed by 989
memoranda and articles of association need not be under seal.... 989
transfer of shares in, need not be by deed 986
documents and registers of, how inspected .....1504-21 n.
proof and effect of .....1601 n.
books of proceedings of, how signed 1782
how proved .....1596-7 n., 1781
admission and effect of..... 1781
reports of inspectors of, how proved .....1601 n.
certificates of incorporation, proof and effect of 1631-7
need not be produced to prove registration 416
of proprietor of shares, proof and effect of.....1631-7
notices, &c., of, may be served by post, when .....180 n.
how authenticated 1105A
what seals judicially noticed under winding-up clauses of Act ..... 6 n.
what signatures so noticed 14
attendance of witnesses before winding-up court, how enforced..... 1286

JOINT TENANTS, presumptions respecting 157
distinction between, and tenants in common, how shown 1198

JOSEPH, his cup found in Benjamin's sack ..... 63 n.
his coat regarded by Jacob as evidence of his death ..... 66 n.

JOURNALS OF PARLIAMENT, how proved 7-8, 18, 15-29
admissibility and effect of 1661

JUDGE (see *Functions of Judge and Jury, Judicial Notice*).
notes of, whether evidence of testimony of deceased witness 546
presumed to be correct..... 85
whether bound to disclose matters which he knows as judge 938
handwriting of, when judicially noticed.....7-8, 14
orders and certificates of, how proved 1586
effect of, as a bar to fresh summons 1756
refreshing memory of 21
may issue order for attendance of witness in custody 1276
may enforce discovery by interrogatories, when (see *Interrogatories*). 521-42
discretion of, in allowing amendments, should be liberally exercised.. 253
decision of, respecting amendments, when controllable by court 242
respecting right to begin, when controllable by court 387
respecting sufficiency of stamp, final 397
discretionary power of recalling witnesses possessed by 1477
of confronting witnesses possessed by 1478

JUDGE—*continued.* PARAGRAPHS (§§)
discretionary power of regulating mode of examining witnesses possessed by 1399
of allowing leading questions 1404-5
this last discretion not controllable by Court of Appeal 1405
presiding judge must conceal facts within his knowledge, unless sworn 1379
if sole judge, apparently can. . depose as witness .. 1379
if sitting with others, he may be sworn and examined.. 1379
in such case, should take no further part in trial 1379
duty of, in summing up 25
must certify as to costs, when 38
effect of error of, in admitting or rejecting evidence improperly.. 1881B-82A
rules as to time and mode of objecting to ruling of, on these points 1881A-82A
not liable to action, for act done in judicial capacity 1669
unless he wilfully, or under mistake of law, acts without jurisdiction 1669

JUDGE'S ORDER in personal action if defendant consent to judgment and execution, registration required within seven days of 1120
proof of, registration of 1120

JUDGMENT (see *Public Records and Documents*).
in rem, is generally conclusive (see *In rem*) 1674-81
inter partes, will not act conclusively as an estopped, when 1682-1710
when evidence in nature of reputation 624-27
what may be given on admissions in pleading 827
by default, admission of right of action 83
suffered by executor or administrator, admits assets 823
treated as regular, if signed after defendant's death 85
effect of certificate of registrar of, in Ireland .....1611 n.
recovered, plea of (see *Public Records and Documents*).

JUDGMENT MORTGAGE, how proved in Ireland 1652

JUDGMENTS ACT, 1855 (see *Table of Statutes*, 18 & 19 V. c. 15).
requires registration of life annuities and rent-charges..... 1125

JUDICATURE ACTS, 1873, 1875 (see *Table of Statutes*, 36 & 37 V. c. 66, 38 & 39 V. c. 77).

JUDICATURE (IRELAND) ACT, 1877 (see *Table of Statutes*, 40 & 41 V. c. 57, Ir.).

JUDICIAL ACTS, when presumed to have taken place 85
presumption of due execution of 143-7

JUDICIAL COMMITTEE OF PRIVY COUNCIL enforce attendance of witnesses, how 1282

JUDICIAL NOTICE, of what things taken without proof:— 4-21
of existence and titles of foreign states..... 4
of prerogatives of Crown 5
of privileges of Parliament 5
of the royal palaces 5
of what laws 5
of articles of war 5
of what customs and usages..... 5
not taken of foreign, colonial, or Scotch laws, usages and customs.... 5
how far of Irish laws 5
of what seals .....6 & n., 12
of what official and public documents 7-15
of what signatures of superior judges.....7-8, 14
of private and local and personal Acts, when 7-8
of royal proclamations, when 5, 7-8
of the journals of either House of Parliament, when..... 7-8, 18
of what foreign and colonial documents 10
seals or signatures 11-12, 1566

JUDICIAL NOTICE—*continued.* PARAGRAPHS (§§)
of what documents sworn in the Colonies 12
signatures 12-14
whether of Royal sign manual 14
of London, Dublin, and Edinburgh Gazettes, how far 15
of ordinary fasts and festivals 16-18
of commencement and ending of legal sittings 16
of coincidence of years of reign with years of our Lord 16
of what days of month fall on Sundays ..... 16, n.
of course of time 16
of meaning of words 16
of matters of public history 16
of legal weights and measures 16
of the value of the coin of the realm 16
of local divisions of country, how far 17
of jurisdiction of Crown, and matters affecting government of country 17-18
but not private orders made at council table 18
of jurisdiction and course of proceeding of courts of justice 19
of rules under Landlord and Tenant (Ireland) Act ..... 19, n.
of rules of practice of Bankruptcy Courts 19
but not of customs and proceedings of inferior courts 20
how judge will refresh his memory as to matters he is bound to notice 21

JUDICIAL PROCEEDINGS, presumption in favour of 84-5

JUDICIAL SEPARATION (*see Divorce*).

JURISDICTION of Crown, extent of, judicially noticed 17
of Parliament, when presumed 84
of courts of justice, how far judicially noticed 19
when presumed 84
of inferior courts, will not be presumed 147
of a court, provable by hearsay 613
want of, how far an available defence without special plea 310
must appear on face of proceedings when statutory power acted under 147, 1715-18
no distinction between convictions, commitments, examinations, or orders 147-7A
illustrations of this rule 1716-18
facts showing, when implied 1718
when it appears, facts stated in adjudication cannot be disputed in action against magistrate 1669-71
if witness out of, his former depositions admissible 472-78
his examination taken under commission admissible 517
judgments may be defeated, by showing courts had no 1714-18
foreign judgments may be defeated, by showing court had no 1725-28
of foreign courts, plea to, what it must contain 1730-31
of Quarter Sessions, alphabetical list of criminal cases within ..... 1714, n.

JURY (*see Functions of Judge and Jury* and *Trials by Jury*).
inspection by, most satisfactory mode of proof 554
skilled witnesses should aid, in inspection, when 556
allowed to view the locus in quo, or chattel in dispute, when 558-66
of matrons on plea of pregnancy ..... 554, n.
perjury before grand, how to be dealt with 913
proceedings of grand, not to be disclosed 942
grounds for verdict of petty, when evidence of, inadmissible 944
misconduct of, cannot be proved by affidavit of jurors 944
juryman may apply general knowledge to case before him 1379
must not mention privately to his fellows particular material facts 1379
but must be sworn and examined openly 1379
giving evidence, is under no necessity of leaving box, or not interfering with verdict 1379
list of jurors, inspection of ..... 1504-21 n.
list of, must be delivered to party charged with treason (*see Treason*) .. 1373
discharge of, or withdrawal of juror, by consent, effect of 1719

PARAGRAPHS (§§)

JUS TERTII cannot be set up by wrong-doer in trover 123
cannot, in general, be set up by licensee, bailee, or agent 848
can be set up by bailee or agent, when 848
by carrier or pledgee 849

JUSTICES, actions against, must be brought within six months of cause of action 73A
in actions against, they may plead general issue 73A, 315
may tender amends and pay money into court 73A, 315
when parties, witnesses, &c., attending before, privileged from arrest 1335
witnesses, how made to attend before 1315n-19
when by summons and warrant 1316-19
when by Crown office subpœna 1322
power of, to bind witness by recognizance (*see Attendance of Witnesses*) 1232-38
commissions of, presumed from acting 171
confession of prisoner made under inducement by, inadmissible 873
should not dissuade prisoner from confessing 882
examination of prisoners by, how taken and proved, and when admissible (*see Confession*) 888-97
depositions of witnesses, by, on criminal charges, how taken and proved, and when admissible (*see Depositions*) 479-91
adjudications of, when admissible to protect them, if sued 1669-71
warrants of distress, when no protection to 1672
proof and admissibility of certificates granted by:—
when dismissing charges of assault 1615-20
of capital being subscribed by companies 1637A
of corrections of mistakes in special Acts, maps and plans, under Consolidation Acts ..... 1611, n.
of completion of works under Consolidation Acts ..... 1611, n.
convictions by (*see Jurisdiction, Conviction*).
orders of removal by (*see Removal*).
order of, forming a highway district, how proved ..... 1571, n.
are restrained from trying what offences ..... 1714, n.
may dispose of many offences in petty sessions 1258-59
may, in such cases, grant costs of prosecution and witnesses 1258-59

JUSTIFICATION, when plea of, may be referred to as evidence of malice 341-2
when admissible under "not guilty by statute" 313
effect of abandonment of, at trial 341-42

KEPT MISTRESS (*see Cohabitation, Mistress*).

KEY of warehouse, when its delivery amounts to delivery of goods deposited 1048

KILLING (*see Homicide, Manslaughter, Murder*).

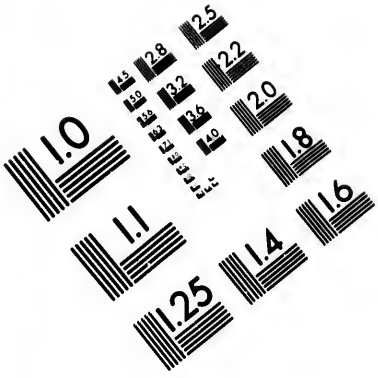
KINDRED (*see Pedigree*).

KING (*see Crown, Sovereign*).

KING'S BENCH (*see Prison, Queen's Bench*).

KIRK, members of, how sworn ..... 1388, n.

KNOWLEDGE, how far question for judge or for jury 38
of party, collateral facts when admissible to establish 338-48
effect of facts being within peculiar, in shifting onus probandi 376A-77
of testator, respecting contents and effect of will, presumed 160
of contents of books, when presumed 812
of contents of deeds, when presumed 150
when allegation of, is surplusage in action for breach of warranty 255
of law presumed, when 80
what is competent 609-11
what is not competent 616
when witness must swear to facts within his own 1414



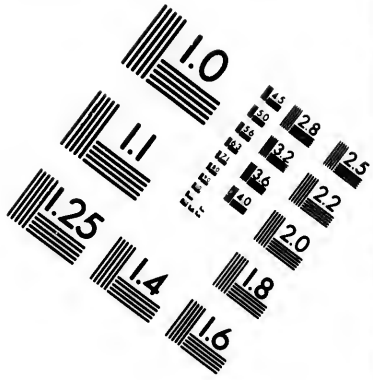
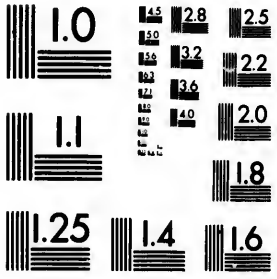
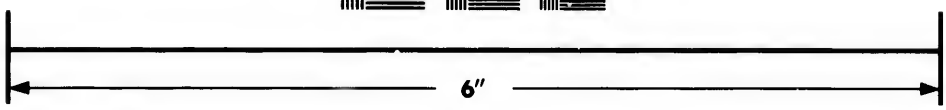
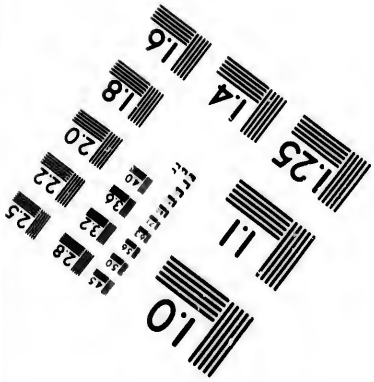
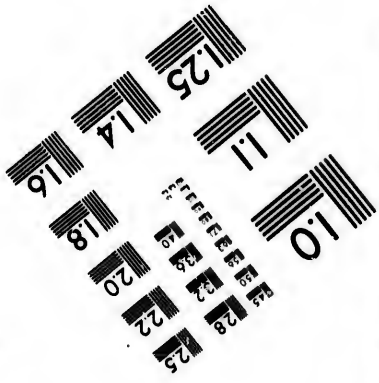


IMAGE EVALUATION TEST TARGET (MT-3)









Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

2.8
3.2
3.6
2.5
2.2
2.0
1.8
1.6
1.1
1.0

PARAGRAPHS (§§)

LABOURER (see *Employers' Liability Act*).

LACHES in claiming rights, presumption from 136-42

LADING (see *Bill of Lading*).

LADY-DAY, in lease, presumed to mean 25th of March..... 1165
evidence of custom, to show Old Style meant, inadmissible, but admissible as to parol demise..... 1165

LAMB, conviction for stealing a, good, on indictment for stealing sheep.. 290

LANCASTER, seal of Duchy of, judicially noticed 6
records of Duchy of, where deposited .....1186, n.
what deeds must be enrolled in Office of Duchy of..... 1121
fact and date of enrolment, how proved.....1646-47
documents enrolled in, how proved 1648
Court of Chancery of County Palatine of, makes witnesses attend, how .....1293—1309, n.

LAND, Statute of Limitations affecting title to..... 74A
what is an interest in, within Statute of Frauds.....1038-43
person in possession of, making statements against proprietary interest 681-87
tenant encroaching on waste, presumed to act for benefit of landlord.. 122A
recovery of (see *Recovery of Land*).

LAND COMMISSION FOR ENGLAND, Board of Agriculture now discharge duties of, judicial notice of seal of ..... 6, n.

LANDED ESTATES COURT, Ireland, seal of, judicially noticed..... 6
record of title office, seal of, judicially noticed 6
attendance of witness before, how enforced.....1293—1309, n.
may enforce attendance of witnesses before commissioners ..1293—1309, n,
deeds executed under authority of, how far conclusive evidence..... 86

LAND LAW (IRELAND) ACT, 1881 (see *Table of Statutes*, 44 & 45 Vict. c. 49).
rules made under, judicially noticed .....19, n.

LANDLORD (see *Lease*, *Tenancy*, *Tenant*).
tenant when estopped from denying title of (see *Estoppel*) 101-3
admission by, how far evidence against tenant 788
by tenant, how far evidence against 789
how far waives forfeiture, by suing or distraining for or accepting rent 807
by misleading tenant..... 847
does not waive forfeiture by passive acquiescence 809
must prove forfeiture, though proof involves a negative 367
can have recourse to oral testimony, when 404-5
may serve notice to quit on tenant's servant .....182, n.
how far waives notice to quit by accepting or demanding rent 807
impliedly warrants lessee's quiet enjoyment 1175
does not impliedly warrant title by parol demise..... 1175
does by lease in Ireland .....1175, n.
does not warrant premises fit for occupation 1175
except in the case of ready furnished house..... 1176
does not impliedly undertake to keep premises in repair 1175
title of, when implied from receipt of rent 123
are counterparts of leases sealed by tenant ever admissible for?..... 426
course to be pursued by, when tenant becomes bankrupt 1013

LANDLORD AND TENANT (IRELAND) ACT, 1870 (see *Table of Statutes*, 33 & 34 Vict. c. 46).
rules under, judicially noticed..... 19

PARAGRAPHS (§§)

LAND REGISTRY OFFICE, seal of, judicially noticed ..... 6, n.
effect of certificates granted by registrar of (sub tit. "*Title*") ....1611, n.

LAND REVENUE RECORDS, where deposited .....1485, n.
what instruments must be enrolled in office of 1121
enrolment of instruments in office of, how proved 1648

LANDS CLAUSES CONSOLIDATION ACT, 1845, presumes ownership from possession 123
judgment under, how proved 1555B, 1572

LAND-TAX ASSESSMENTS, admissible as public documents .....1595, n.
duplicates of, in custody of Master of the Rolls .....1485, n.
how inspected 1482-83
how proved 1533
those not in such custody, how proved .....1600, n.
effect of, as evidence 1777

LAND TRANSFER ACT, 1875 (see *Table of Statutes*, 38 & 39 Vict. c. 87).
rules made under, judicially noticed .....19, n.
how attendance of witnesses procured under .....1293—1309, n.
how production of documents enforced under .....1293—1309, n.
who may inspect documents kept under .....1504-21, n.

LANGDALE'S ACT (i. e., "Wills Act, 1837") (see *Table of Statutes*, 7 W. 4 & 1 Vict. c. 26), its provisions 1050

LANGUAGE of document, when may be explained by parol .....1158, *et seq.*

LARCENY, presumption of, from recent possession of stolen property .. 63
proof of, will bar indictment for obtaining goods by false pretences 1705, 1707
count for, may be joined with count for receiving stolen property 333
indictment for, may charge three acts, done within six months of each other..... 332
on indictment for, when allegations of value material 286
what is matter of essential description 289-90
name or nature of property stolen 289-90
when needless to allege or prove ownership..... 294
on indictment for stealing deeds or writings, notice to produce needless 408, 452
is an acquittal for, a bar to indictment for false pretences?..... 1705
for embezzlement, on same facts 1707
acquittal for obtaining money by false pretences, bar to indictment for 1707
for compound felony, including larceny, bar to indictment for 1708
for embezzlement, bar to indictment for, on same facts 1707
under Larceny Act of 1861, fraudulent bankers, &c., indemnified, how far 1455
stealers of title deeds or wills indemnified, how far..... 1455
on indictment for certain misdemeanors, costs may be allowed..... 1254
justices may dispose summarily of, when 1258-59
may in such cases allow costs of prosecution and witnesses ..1258-59
summary convictions for, how proved, and effect of 1555

LATENT AMBIGUITY, what and how far explainable by parol, or by declarations of intention (see *Parol Evidence*) 1206-26

LATERAL SUPPORT, presumption respecting 121

LAW AND FACT (see *Functions of Judge and Jury*).

LAW LIST, of what it is evidence 1639

LAW MERCHANT, judicially noticed 5, 1170

PARAGRAPHS (§§)

LAW OF AMERICA (see *United States, Law of*).

LAW OF NATIONS, presumptions recognized in 107

LAW OF SCOTLAND (see *Scotland*).

LAW OF THE ROAD, judicially noticed 5

LAWS (see *By-Laws, Foreign Laws*), what judicially noticed..... 5
colonial, how proved..... 9
ignorance of, does not excuse 80

LAWYER (see *Barrister, Solicitor*).

LEADING QUESTION, what is a..... 1404
in general not allowed in examination in chief 1404
unless witness obviously interested or hostile 1404
when right may be claimed to put to own witness..... 1426
case of attesting witness called to satisfy court 1404
allowed where suggestion necessary to refresh memory..... 1405
e.g., where name forgotten 1405
to identify a party 1405
to enable witness to contradict another as to contents of lost letter 1405
where witness is of tender age 1405
also allowed wherever justice plainly requires it..... 1405
discretion of judge as to allowing, not controllable by Court of Appeal 1405
allowed in cross-examination, within what limits 1431
answers to, in depositions, constantly suppressed.....548-49

LEASE (see *Landlord, Tenancy, Tenant*).
when deed required for a 992-94
deed not necessary for, where lease does not exceed three years ..994-1001
computed from the date of the agreement 1002
parol, for more than three years, effect of 993, 1002
law in Ireland, as to the necessity for a deed or signed writing ....1001, n.
how assigned or surrendered under Statute of Frauds 1003
surrender of, by operation of law, what (see *Statute of Frauds*) 1005-12
when presumable.....136-8
cancellation will not work a 1009
terms of, not provable by parol 401
what, must be by deed, under 8 & 9 Vict. c. 106 992
ecclesiastical, under certain Acts, how proved.....1601, n.
evidence of usage, how far admissible to explain 1165, 1168, 1187
recitals in, when evidence of reputation 621
what warranties implied in, on part of lessor 1175
on part of lessee in Ireland .....1175, n.
confirmation of invalid, by accepting rent and signing a memorandum 808, 993
whether counterparts of, sealed by lessee, ever admissible for lessor .. 426
counterparts of, when primary, when secondary, evidence 426
when execution presumed 148
who entitled to custody of expired 432, 663
when trustee of bankrupt lessee may disclaim..... 1013
assignment of, by operation of law 1015

LEDGER (see *Account Books*).

LEGACY, distinction between ademption of, and revocation of will 1146
total or partial ademption of, may be proved by parol 1146
presumptive, legacies not cumulative, where sums and motives correspond 1227
against double portions where child provided for by settlement and will 1227

LEGACY—*continued.* PARAGRAPHS (§§)
that legacy is satisfaction of debt, when 1228
that portionment of legatee by parent is ademption of legacy .. 1227
these presumptions may be rebutted by parol and declarations of intention 1227
may be fortified in like manner if evidence given in reply 1229
presumption as to rateable abatement of 166
as to being given to executor in that character 167
assent of executor to, question for jury..... 45a

LEGAL ADVISER (see *Barrister, Solicitor*).

LEGAL EFFECT, when amendment may be made of erroneous statement of contract according to supposed 234

LEGAL ESTATE, presumption of, from possession 123-6
conveyance of, to beneficial owner, when presumed 134

LEGAL MEMORY, what is the limit of 175a

LEGAL ORIGIN of rights presumed from usage 126-7
from long enjoyment 127, 132

LEGATEES, error in number of, when court will presume 1223
in name of, more important than mistake in description 1215
may be explained by testator's habit of miscalling persons 1210-11

LEGISLATURE (see *Parliament*).

LEGITIMACY (see *Bastardy*).
presumptions respecting 16, 106
family conduct, recognition of, in cases of pedigree 649
whether declarations of bastard, admissible in cases of pedigree..... 636
of children, how far parents may give evidence respecting 950
Act for perpetuating testimony of (see *Table of Statutes*, 21 & 22 Vict. c. 93)..... 544

LESSEE (see *Tenant*).

LESSOR of plaintiff, under old law, real party in ejectment 1688

LETTER-CARRIER, admission of being, from acting as such..... 801

LETTERS, construction of, question for judge.....40-1, 43
30 years old require no proof 88
presumed to be written on day of date 169
except in petition for damages for adultery when put in to prove terms on which husband and wife lived 169, 582
of co-conspirator when evidence against their fellows (see *Conspirators*) 593
of husband or wife to each other or to strangers, when admissible in petition for damages for adultery 582
in bills of divorce under old law..... 768-69
of witnesses cannot be read to discredit him, without previous cross-examination..... 1426, 1445
cross-examination as to contents of, allowable without producing them 1446
mode of proceeding in such case..... 1447
judge may require production of, at trial, when..... 1446-47
written to party, no evidence of his sanity 573
unless he has manifested a knowledge of their contents 574
rule of Ecclesiastical Court on this subject .....575 n.
of relatives, when evidence in matters of pedigree 651
of a solicitor "without prejudice," not evidence..... 774
between client and solicitor privileged, when.....911-13
sending off, provable by entry in deceased clerk's letter book 699
receipt of, by master, presumed, if proved to have been given to servant 182

LETTERS—*continued.* PARAGRAPHS (§§)
presumed to have been posted, when 182
sent by post, presumed to reach destination in due course 179
post-mark, evidence of time of receipt of 179
presumed to be written to party producing them 124
when evidence as admissions, without putting in, or calling for production of, those to which they were answers 734
referred to in legal proceedings, may be read without putting in other parts of proceedings 735-36
how, if annexed to answer in Chancery 736
contract to satisfy Statute of Frauds, may be made out from (see *Statute of Frauds*) 1026
acquiescence in contents of, how far presumable from not answering .. 811
knowledge of contents of, how far presumable from letters being found in party's possession 812
knowledge of handwriting, obtained by receiving 1864
written subsequent to action for libel, when admissible 340
on indictment for sending threatening, duty of jury 43
other threatening letters admissible, when 347

LETTERS OF ADMINISTRATION (see *Administration*).

LETTERS PATENT (see *Patent*).
from the Crown, how proved 1556

LEVEL, meaning of, in mining contract, may be proved by usage ..... 1162 n.

LEX FORI, rules of evidence are governed by 49
except in courts-martial 49A

LIBEL AND SLANDER, on indictment or action for, jury may interpret words used 42
when witness may testify to meaning of words 1414
when malice presumed 83, 118
within what time action for, must be brought 73
witness protected from action for 1330
in action for, when amendments allowed 232-3
who entitled to begin 381-2
payment of money into court allowed as amends, when .. 831-37
jury must decide, whether communication made bonâ fide 44
judge must decide, whether on a justifiable occasion 44
other libels admissible to prove malice or deliberate publication 341-2
evidence of mode of publishing such libels also admissible 343
when plea of justification may be referred to as evidence of malice 341
when plaintiff may give evidence of good conduct 355
what defendant may prove in mitigation of damages 344
whether he may prove plaintiff's bad character 356-60
special damage laid need not be proved if words actionable 271-7
may be contained in telegram transmitted to another ..... 981, n.
and company transmitting may be liable for ..... 981, n.
in indictment for, cumulative averments immaterial 265
several libels may be charged and proved 329A
criminal responsibility of bookseller for libel sold by his shopman 115
of proprietor of newspaper for libel inserted by his agent 115, 906
proof and effect of certificate of publication by order of Parliament (sub tit. "*Parliamentary Papers*") ..... 1611, n.
bill of discovery used to lie to discover defendant's connection with libellous newspaper 1456

LIBERUM TENEMENTUM, judgment in support of old plea of, how far bar to second action of trespass 1698

LICENCE, when presumed, from long enjoyment, to defeat forfeiture .. 139-42
to marry, when proof of, unnecessary 143-4
to export, when presumed 180A
of pleasure, revocable, whether granted by parol or deed 973-74

LICENCE—*continued.* PARAGRAPHS (§§)
to shoot, hunt, and fish, and take game killed, may be, and can only be irrevocably granted by deed 973-74
for formation of oyster beds in Ireland, copy of, when evidence..1778-80, n.
of metropolitan public carriages, and of stage carriages, how proved (sub tit. "*Public Conveyances*") .....1601, n.
admissibility and effect of registers of (sub tit. "*London Hackney Carriages Act*") .....1778-80, n.
of theatre, must be proved by manager, when..... 372-4, n.
parties charged with sporting, selling liquors, &c., without, must show that they have them 377

LICENSING ACT, 1872 (see *Table of Statutes* 35 & 36 Vict. c. 94).
in criminal proceedings under, defendant and wife admissible witnesses.....1360, n.
proof and admission of registers of licences under .....1601, n.

LIEN, witness how far bound to produce document on which he has a.... 458
on debtor's account books cannot be set up in bankruptcy .....458, n.
of innkeepers, judicially noticed..... 5
part acceptance, to bar Statute of Frauds, must preclude vendor's.... 1045
judicial notice taken of factor's 5
of bankers, on securities of their customers.....5 & n.
usually gives only a right of retention 1186

LIFE, presumptions respecting continuance of 198-203
if party has not been heard of for seven years, he is presumed dead .. 200
no presumption raised as to time of his death 200
jury may infer death within seven years, if party aged, ill, or in peril 201
in absence of proof of inquiry, death not presumed within 60 years .. 199
presumption of, when it conflicts with that of innocence 114
presumption as to survivorship, where two men die in the same calamity 202-3

LIGHT, right to, when barred by Prescription Act ..... 75A, n.
how taken out of Act .....75A, n., 1092

LIGHTERS, no warranty in marine insurance that they shall be seaworthy 1171

LIMITATIONS, STATUTES OF, on what principle they rest 79
Lord Plunkett's observations on..... 79
necessary to plead specially in High Court 301
what actions must be brought within six years 73
within four years 73
within two years..... 73
within one year 73
actions against justices must be brought within six months..... 73A
actions under Employers' Liability Act, 1880, within six months 73
against persons acting under Acts of Parliament, &c. within six months 73A
within Public Authorities Protection Act within six months 73A
executions must issue within three years against former members of banking co-partnerships 73A
title to lands or rent, when barred by 74
in case of spiritual or eleemosynary corporations sole .... 74A, n.
in case of redemption of mortgage by mortgagor.....74A, n.
in case of mortgagee bringing action to recover land .....74A, n.
in case of disability.....74A, n.
to dower, when barred by.....74A, n.
to advowsons, when barred by.....74A, n.
to moneys charged on land and legacies, when barred by .....74A, n.
to tithes, when barred by 74A
to incorporeal rights, when barred by 75A
within what time actions of covenant must be brought 75B
of debt on specialities 75B

LIMITATIONS, STATUTES OF—*continued.* PARAGRAPHS (§§)
within what time actions must be brought of scire facias upon recognizance 75n
for penalties 75n
within what time prosecution for treason must be commenced ....76-8, n.
for treason for smuggling offences ..76-8, n.
for night poaching .....76-8, n.
under Marriage Act.....76-8, n.
under Act for registration of births, deaths, and marriages.....76-8, n.
under "Naval Discipline Act, 1866" 76-8, n.
within what time suit against clergyman for transgressing Ecclesiastical Law must be commenced .....76-8, n.
within what time proceedings must be commenced for contravening Corrupt Practices Act, 1883 .....76-8, n.
within what time proceedings must be commenced for contravening Municipal Corporations Act, 1882 .....76-8, n.
within what time proceedings must be commenced for offences under the Army Act, 1881 .....76-8, n.
within what time proceedings must be commenced under Merchant Shipping Act, 1894 .....76-8, n.
within what time proceedings must be commenced under Public Health Acts for England and Ireland .....76-8, n.
within what time proceedings must be commenced under Mines Regulation Acts .....76-8, n.
within what time proceedings must be commenced under Factory and Workshop Act, 1878.....76-8, n.
within what time summary proceedings in Scotland must be commenced.....76-8, n.
usage for 25 years, when conclusive of religious opinions 75o
taking case out of Stat. 21 J. 1, c. 16 (see *Lord Tenterden's Act*).
1. by signed acknowledgment 73, 600-1, 744-46, 1073-78
2. by part-payment 73, 600-1, 690-91, 745-46, 1079-83
taking case out of Real Property Limitation Acts, by signed acknowledgment 747, 1088
acknowledgment signed by one of several mortgagees, effect of..... 747
when, must be signed by party himself 1088, 1107
when by party or his agent 1088, 1107
must be distinct and unconditional 1089
taking debts on specialty out of :—
by written acknowledgment, signed by party or his agent ..692, 1090
what acknowledgment will suffice 1091
by part-payment or payment of interest 690, 1090
effect of indorsement of part-payment on specialty by deceased payee (see *Specialties*) 690-96A
taking incorporeal rights out of Prescription Acts by consent or agreement by deed or writing 1092
sufficiency of acknowledgment to take case out of Statute, question for Judge 40

LIMITS of a town, provable by hearsay 613

LIQUIDATED DAMAGES, rule as to right to begin in case of 383
difference between penalty and, question for Judge 40

LIS MOTA, doctrine of, explained.....629-34
does not apply to privilege communication, so far as solicitor is concerned 912
nor does it now, so far as client is concerned.....924-25
why it rejects declaration in matters of public interest and pedigree 628, 641
means commencement of controversy, not commencement of suit 629
when declarations not rejected by doctrine of..... 630
when rejected 632
if existence of controversy unknown to declarant 634

PARAGRAPHS (§§)

LISTS of witnesses and jurors must be given to alleged traitor, when (see *Treason*) 1373
inspection of lists of jurors (sub tit. "*Jurors Lists*") .....1501-21, n.
of parliamentary voters, &c. .....1504-21, n.
of persons whose real estate is affected by judgments 1491c
of debtors and accountants to the Crown 1491c
of non-parochial registers, where deposited, and contents of 1486, n., 1504-21, n.
of grants of probate and administration, where deposited .....1487 & n.
how inspected.....1487 & n.
of convoy, admissible as public documents (sub tit. "*Admiralty*")..1595, n.
Navy, and Clergy Lists, inadmissible 1785
Army Lists, are admissible.....1638A, 1785, n.
Law Lists, admissible for what purpose 1639

LIVERY, since 1845, corporeal hereditaments lie in grant as well as in, when 992

LIVERYMAN, office of, defined by custom 5

LIVERY OF SEISIN, when presumed formerly 127

LIVERY-STABLE KEEPER, when bound by declaration of servant .. 603

LLOYD'S list, underwriter presumed to know contents of 181
register of shipping at, inadmissible as a public document .....1592, n.

LOAN, not presumed from mere payment of money..... 178
presumption as to authority of wife to contract 193
contract to pay, out of future rent of farm is an interest in land within Statute of Frauds 1038

LOAN SOCIETIES, rules of, how proved .....1601, n.

LOCAL AND PERSONAL ACTS, how proved (see *Statutes*).....7-8, 1523

LOCAL CUSTOMS (see *Customs*).

LOCAL GOVERNMENT BOARD, seal of, judicially noticed..... 6, n.
rules, orders, and regulations of English, how made 1106
of Irish, how made 1106
how proved .....1527, n.
attendance of witnesses before, how enforced.....1329, n.
orders made by, touching settlement, &c., of paupers, effect of 1762

LOCAL LOANS ACT, 1875 (see *Debentures*, and *Table of Statutes*, 38 & 39 Vict. c. 83).

LOCAL OFFENCES, what are.....281-3

LOCAL PAPERS, advertisement of bankruptcy notices in, proof and effect of 1752

LOCALITY, how far hearsay evidence of, in questions of pedigree 646-47

LOCUS IN QUO, view of, by jury 558-66

LODGER, cannot dispute title of landlord 101
can protect his goods from distress, how 1096
meaning of term .....1096, n.

LODGING, contract to take furnished, within sect. 4 of Statute of Frauds 1038
contract for board and, no rooms being named, not so 1038

LODGING HOUSES, registers of, how proved (sub tit. "*Common Lodging Houses*").....1601, n.
by-laws of how proved (sub-tit. "*Public Health Act*") .....1657-8, n.
non-liability of keeper of, for loss of lodger's goods ..... 187, n.

PARAGRAPHS (§§)

LOG-BOOKS of Royal Navy, in custody of Master of the Rolls (sub tit. "*Admiralty*") ..... 1485, n.
how inspected 1481-83
how proved (sub tit. "*Admiralty*") 1533
admissibility and effect of ..... 1595, n., 1776
when may be used to refresh memory 1410
kept under Merchant Shipping Act, how proved (sub tit. "*Log-books*") ..... 1600, n.
admissibility and effect of (sub tit. "*Merchant Shipping Act, 1894*") ..... 1778-80, n.

LONDON, customs of, how ascertained 5
customs of, what judicially noticed 5
what provable by reputation 613
seal of corporation of, judicially noticed 6
by-laws for regulating Port of, and vending of coals in, how proved (sub tit. "*London Corporation*") ..... 1657-8, n.

LONDON COUNTY COUNCIL, notices from, may be served by post . 180, n.
contracts made by ..... 976, n., & *Errata*
minutes of proceedings of, how proved (sub tit. "*Metropolis Local Management*") ..... 1596-7, n.
right of inspection of books of (sub tit. "*Metropolis Local Management*") ..... 1504-21, n.
admissibility and effect of registers of stock of (sub tit. "*Metropolitan Board of Works*") 1777
rules and by-laws of, how proved (sub tit. "*Metropolis Local Management*") ..... 1657-8, n.
notices from, how authenticated ..... 1105 & *Errata*

LONDON GAZETTE (see *Gazette*).

LORD OF MANOR, must allow inspection of court rolls, when 1494
presumed owner of waste lands within manor 122

LORDS, HOUSE OF (see *House of Lords, Parliament*).

LORD BROUGHAM'S DOCUMENTARY EVIDENCE ACT, 1845 (see *Table of Statutes*, 8 & 9 Vict. c. 113), its provisions 7-8
Evidence Act, 1851 (see *Table of Statutes*, 14 & 15 Vict. c. 99), its provisions for making parties witnesses 1349
for proving Foreign and Colonial Acts of State, judgment, &c., by certified copies 10
for facilitating proof of proceedings of Foreign and Colonial Courts 1556
for facilitating proof of Irish documents in England, of English documents in Ireland, and of English and Irish documents in Colonies 1557
for proving public documents by examined or certified copies 1599
for proving previous convictions or acquittals by certificate 1612-14
empowers courts and others to administer oaths to witnesses 1386
Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), its provisions for making wives of parties witnesses 1351-52

LORD CAMPBELL'S ACT, 1846 (see *Table of Statutes*, 9 & 10 Vict. c. 93).
effect of judgment recovered under 1697
of 1851 (see *Table of Statutes*, 14 & 15 Vict. c. 100), amendment under 248-52

LORD CHAMBERLAIN'S OFFICE, records of, now in Record Office (sub tit. "*Lord Chamberlain's Office*") ..... 1485, n.

LORD DENMAN'S EVIDENCE ACT, 1843 (see *Table of Statutes*, 6 & 7 Vict. c. 85), its provisions 1347
removed incapacity of witnesses from crime or interest 1347
from conviction of crime 1347
its exceptions as to competency of parties repealed 1347
as to competency of wives repealed 1347

References are to paragraphs (§§) not pages.

PARAGRAPHS (§§)

LORD TENDERDEN'S ACT (see *Table of Statutes*, 9 Geo. 4, c. 14), how it affects Statute of Limitations 691, 744
sect. 1, no debt taken out of Statute of Limitations, but by acknowledgment or promise in writing signed, or by part-payment.... 744, 1073
Act intended no alteration in legal construction of promises 1074
simply substituted written for oral evidence 1074
sufficiency of acknowledgment question for judge 40
acknowledgment must amount to express promise to pay debt 1074A
or to unqualified admission of subsisting liability, from which promise to pay on request may be implied 1074A
conditional promise insufficient, without proof of fulfilment of condition 1074B
whether admission to stranger sufficient 1075
effect of admission of some debt, not specifying amount 1075A
time of admission, and person to whom made, may be proved by parol 1075B
infant may acknowledge debt for necessaries 1075C
immaterial to what part of document signature attached 1075D
admission must be made before action brought 1075E
promise proved must correspond with that laid in statement of claim 1076-78
examples of insufficient acknowledgments ..... 1074A, n.
of sufficient acknowledgments ..... 1074A, n.
of conditional acknowledgments 1074B
acknowledgment by one joint contractor, executor or administrator, only binds himself 600-1, 744
how judgment entered and costs given in these cases 744
part-payment, what sufficient 1079
must be on account of *the* debt, and in part discharge of it 1079
no exception in favour of sale and delivery of goods 1080
items in open account 1081
part-payment of principal, or payment of interest 1082
payment may be proved by verbal admission 1083
identity of debt, when presumed 1083
effect of payment by one joint-contractor, executor or administrator, was not altered by 744
but now, by Mercantile Law Amendment Act, part-payment by one joint-contractor, &c., only binds himself 745-6
sect. 3, indorsement of part-payment on bill or note does not bar Statute of Limitations 691
sect. 5, ratification of promise by infant must have been in writing signed 1084
but even any such ratification cannot now be sued upon 1084
sect. 6, extends scope of sect. 4 of Statute of Frauds to similar matters other than guarantees 1085
representations as to credit of another must be by writing signed 1085
meaning of "ability" mentioned in that section 1086-87
sect. 7, though now repealed (see *Sale of Goods Act*), extended sect. 17 of Statute of Frauds to contract for goods not made, &c. 1020
under sect. 6, signature must be by party to be charged ..... 1107, n.
under sect. 1, signature may be by agent "lawfully authorized" by parol ..... 745, 1107, n.
under sect. 7 this also the case ..... 1020, 1107, n.

LOSS (see *Lost Instrument*) of ship, when presumed 204
of goods when carrier liable for 187
when innkeeper liable for 187
in action on policy, where averment of total, proof of partial sufficient ..... 271—7

LOST INSTRUMENT, presumed to be duly stamped 145, 148, 435
what search for, sufficient to let in secondary evidence ..... 429—34
whether sufficient search has been made for, is a question for judge .. 23A, 429

LOST INSTRUMENT—*continued.* PARAGRAPHS (§§)
person in whose custody it should be, must be called 430
his declarations, if he can be called, inadmissible 430
whether declarations admissible if addressed to the judge 430
place of proper custody should be searched 431
sometimes necessary to search several places 432
how when person having custody of instrument is dead 434
search need not be recent, or for purposes of cause 435
notice to produce need not be given, if loss admitted..... 455
probate of lost will when granted 436
action on lost bill formerly not maintainable 437
loss cannot now be set up, if indemnity given..... 437, n.
requiring attestation, how proved 1851
cross-examination as to contents of, allowed 1447
cross-examining party may interpose evidence to prove loss 1447

LUGGAGE, when carrier liable for loss of..... 187

LUNACY (see *Insanity*, *Lunatic*).
orders of Lord Chancellor in matters of, how proved (sub tit. "*Lunacy*") ..... 1601, n.
as to a trustee's, &c., admissibility and effect of, in certain cases.....1464, n.
reports of Masters in, how proved (sub tit. "*Lunacy*") .....1601, n.
licences, orders, and instruments by Commission of, how proved (sub tit. "*Lunacy*").....1601, n.
how Masters in, can enforce attendance of witness.....1327-28
inquisitions in, admissible against strangers, but not conclusive..... 1674

LUNACY ACT, 1890 (see *Table of Statutes*, 53 Vict. c. 5).

LUNATIC, in lucid interval competent as a witness 1375
may be summoned as witness by habeas corpus 1275
is coroner's inquest finding decided evidence of his insanity on an issue? .....1674, n.
effect of admissions by committee of..... 755
what orders respecting, are valid without being sealed..... 1100
in proceedings respecting, how justices can make witness attend .. 1319, n.
whether curator of Scotch or foreign may sue as such in England..1736, n.

LYING is contrary to nature..... 50
is a feature in the character of an enslaved people..... 53

MACHINE, copy made by, secondary evidence..... 418
presumed correct in India .....418, n.

MADMAN (see *Lunatic*).

MADNESS (see *Insanity*, *Lunacy*).

MAGISTRATE (see *Justices*).

MAHOMEDAN, how sworn .....1388, n.
law in India as to survivorship.....203, n.
as to legitimacy .....106, n.

MAKER (see *Bill of Exchange*).
indorsement of, by payee of promissory note, admits signature of maker 853

MALA FIDES, how far question for judge or for jury 38

MALADY, declaration of patient as to, admissible 580

PARAGRAPHS (§§)

MALICE, how far question for judge or for jury 38
when presumed 89-3, 118
collateral facts, when admissible to prove 340-48
in law and in fact, distinction between 118
the former will be presumed, the latter must be proved 118

MALICIOUS INJURIES (see *Malicious Prosecution*).
on an indictment for, when malice implied 80
costs may be allowed, though offence be a misdemeanor 1264
to property, when needless to allege or prove injury to particular person 294
when value must exceed 5*l.* 286
to trees in a park, &c., when value must exceed 1*l.* 286
elsewhere, when value must exceed 5*l.* 286
to sea-banks, mill-dams, &c., are local offences 281
to wills, records or legal documents in indictment for, needless to allege ownership 294
summary conviction for, how proved, and effect of 1555

MALICIOUS PROSECUTION, in action for, probable cause question for judge 28
when actual malice must be proved 118
jury may, but not bound to, infer malice from want of probable cause 118, n.
to sustain action for, is plaintiff entitled to copy of indictment?..1489 *et seq.*
evidence of plaintiff's bad character inadmissible 354
record conclusive evidence for plaintiff of acquittal 1667
but no evidence of defendant being prosecutor 1667
or of his malice or want of probable cause 1667
and defendant may still prove plaintiff's guilt..... 1667
recovery of damages in action for false imprisonment no bar to action for 1697

MALT, right of toll on, provable by hearsay..... 613

MAN-OF-WAR, log book of (see *Log Books*).

MANDAMUS to inspect public documents, when granted (see *Public Records*) 1493-1503
evidence taken in India under.....500-03, 1560
elsewhere in the colonies respecting offences against slave trade, under .....500, n, 1563
respecting offences committed by public officers .... 500, n.
witnesses, how made to attend under 1311

MANNER of witness, observations upon 52
of causing death, need not be set forth in indictment for murder 288

MANOR (see *Lord of Manor*).
waste lands within, presumed to belong to lord 122
custom of one, when provable by evidence of custom of another 320
boundaries of, when provable by like evidence 322
customs and boundaries of, when provable by reputation 610-14
by verdicts and judgments inter alios 1683
depositions of conventionary tenants of, when evidence of reputation 623
steward of, bound to produce what documents as a witness..... 460

MANOR COURT, presentments in, when evidence of reputation 623, 1773
inspection of rolls of, who entitled to, and how enforced 1494
judgments of, how proved 1572

MANSLAUGHTER, on indictment for murder, prisoner may be convicted of .....266, 269-70A, n.
acquittal for, bar to indictment for murder..... 1709
acquittal for murder, bar to indictment for..... 1708
indictment for, need not specify mode of killing..... 288
prisoner's deposition on oath before coroner admitted in evidence 899

MANUFACTURERS (see *Designs*). PARAGRAPHS (§§)

MANUSCRIPT (see *Writings, Private Writings*).

MAPS, how far admissible as evidence of reputation 622
when admissible, as admission by privies.....788, 1770c
Ordnance Survey not admissible as a public document—
in England 1770B
in Ireland.....1770B
Down Survey admissible however 1770
deposited with Clerks of Peace, inspection of (sub tit. "*Parliamentary Documents Deposit Act*, 1837").....1504-21, n.
certificates of correction of (sub tit. "*Companies Clauses Act*, 1847") ..... 1611, n.

MARINE (see *Seaman and Insurance*).
articles of war in service, judicially noticed..... 5

MARITIME LAW judicially noticed..... 5
presumptions recognized by 206-8A

MARK (see *Handwriting*) testator may have signed will under Statute of Frauds by 1060
testator may subscribe will under Wills Act, 1837, by 1060
witness may attest wills under either Act by 1060
witness who has seen party affix it to other papers has been allowed to prove 1863
effect of vendee marking goods in vendor's shop 1045
article bearing trade, presumed genuine 1180

MARKET, certificates by justices, that works of new are completed (sub-tit. "*Markets and Fairs*").....1611, n.
express condition excludes any implied warranty of goods sent to.... 1178
overt, custom in London for shop to be, judicially noticed 5

MARRIAGE (see *Husband and Wife, Married Woman*).
de facto, presumed valid 172
when presumed from cohabitation, and habit and repute..... 172
provable by reputation..... 578
except in petitions for damages by reason of adultery, and in indictments for bigamy, when strict proof necessary .....172, 578, n.
provable by parol, though registered 416
promise of, presumption respecting 177A
presumption from, of legitimacy 106
solemnisation of, when presumed regular.....143-4
testimony of husband and wife in criminal proceedings, excluded only in cases of lawful 1366
mistress supplied with goods for use of joint household cannot disprove marriage when husband sued for price..... 842
effect of Married Women's Property Act, 1882, on old law of presumptive agency 842
part performance under sect. 4 of Statute of Frauds is not effected by 1035
forcible, wife competent to prove 1371
in suit for nullity of, admission of former marriage by wife will not suffice.....768-69
when impotence presumed 194
decree in suit for jactitation of, how far judgment in remiss..1675, n., 1680
in suit for divorce, parties competent witnesses 1355A
but not bound to answer questions respecting adultery.....1355A
in suit for breach of promise of, parties competent witnesses 1355
but plaintiff's testimony must be corroborated .....1355 & n.
plaintiff's character, how far evidence 358
witness may express opinion whether parties were attached.. 1416

MARRIAGE—*continued.* PARAGRAPHS (§§)
in indictment for bigamy, first wife incompetent to prove 1363
after first marriage proved, second wife competent for or against prisoner 1366
on settlement appeal, where man proved his marriage with pauper, another woman was allowed to prove her previous marriage with man 1368
revokes will since Wills Act 1063
except will made in exercise of power of appointment..... 1063
wife's chattels real when vested in husband, on 1015
agreements in consideration of, must be by signed writing 1019
in which consideration must appear expressly or impliedly 1021
rule does not apply to mutual promises to marry 1035
when Equity will enforce a parol agreement in consideration of..... 1035
settlements on, may be made by infants when .....104, n.
proper custody of 432
proper search for 432
fact and time of, questions of pedigree 642
within what time offences against Marriage Acts must be prosecuted..76-8, n.
foreign sentences respecting, effect of 1726, 1735
in action for vexatious entry of caveat against, proof and effect of Registrar-General's declaration (sub tit. "*Marriage Acts*") ....1611, n.
registers of, under Registration Act, must be attested by two witnesses 1110, 1839-41, n.
what is their proper place of deposit (sub tit. "*Births, &c. Registration Acts*") .....1504-21, n.
how inspected .....1504-21, n.
how proved (sub tit. "*Birth, Marriage, or Death Registers*") 1504-21, n., 1601, n., 1611, n.
parish registers of, how proved (sub tit. "*Birth, Marriage, or Death Registers*") .....1601, n.
non-parochial registers of, in custody of Registrar-General (sub tit. "*Births, &c., Registers*") .....1504-21, n.
non-parochial, what they consist of .....1504-21, n.
contents and repositories of lists of them.....1504-21, n.
how inspected .....1504-21, n.
how proved in civil cases .....1601, n.
in criminal cases (sub-tit. "*Non-Parochial Registers*").....1596-7, n., 1601, n.
registers of, in Scotland, since 1854, how proved (sub tit. "*Birth, Marriage, or Death Registers*") .....1601, n.
registers of irregular Scotch .....1601, n.
registers of, in Dublin since The Marriages Ireland Act, 1844, how proved (sub tit. "*Births, &c. Registers*").....1601, n.
registers of, in Ionian Islands now deposited with Registrar-General (sub tit. "*Births, &c. Registers*") .....1504-21, n., 1595, n.
Indian registers of, must be attested by two witnesses, since 1852.... 1110
are deposited in Charles Street, St. James's Park (sub tit. "*Indian Records of Baptisms,*" *&c.*)..1486, n.
how proved (sub tit. "*Births, &c. Registers*")..1600, n.
registers of, of British subjects abroad, kept in Consistory Court (sub tit. "*Registers of Birth, &c.*") .....1486, n.
registers of, what they consist of .....1486, n.
kept by British consul abroad, prior to 28th July, 1849, how proved (sub tit. "*Births, &c. Registers*").....1593, n., 1601, n.
since that date, how proved.....1601, n.
certificate of British subjects abroad, granted by consul, proof and effect of 1622
registers of, their admissibility and effect 1774
foreign or colonial, when admissible 1593
inadmissibility of those kept at May Fair and at the Fleet (sub tit. "*Baptism, &c. Registers*") .....1592, n.
inadmissibility of those kept by clergymen in Ireland before 31st of March, 1845 (sub tit. "*Marriage Registers*").....1592, n.

MARRIAGE—*continued.* PARAGRAPHS (§§)
inadmissibility of those kept by Wesleyans, and not deposited with Registrar-General (sub tit. "*Dissenting Chapels*") ....1592, n.
inadmissibility of those kept by British or Swedish ambassador at Paris (sub tit. "*Marriage Registers*") .....1593, n.

MARRIED WOMAN (see *Husband and Wife*) presumption as to coercion of 190
presumption as to domicil of 210
when admissions of, are evidence against her husband 605
may be convicted of stealing husband's goods..... 190
how attendance of, as witness, can be enforced by recognizance 1235
when witness, expenses should be tendered to her, not to husband.... 1249
may sue for wages .....770, n.
may be sued for debts contracted before marriage, when .....1689, n.
may be sued with husband for such debts, when .....1689, n.
custom that in London she may be sole trader, judicially noticed 5
will of, made in pursuance of a power, effect of probate of ..1588, n., 1712

MARRIED WOMEN'S PROPERTY ACT, 1874 (repealed by Married Women's Property Act, 1882, *infra*).....830, 1689, n.
where marriage took place between July, 1874, and January, 1881, husband's liability for wife's contracts or torts restricted to amount of assets brought to him in marriage..... 830
effect of husband not denying assets..... 830

MARRIED WOMEN'S PROPERTY ACT, 1882 (see *Table of Statutes*, 4 & 46 Vict. c. 75).
regulates respective liabilities of husbands and wives married since January, 1883 .....830 & *Errata*

MARRY, mutual promises to, not within Statute of Frauds 1035
no action maintainable on promise made by infant to..... 1084
not even if ratified on infant coming of age.....1084, n.

MARSHALSEA, records of, where deposited.....1485, n.

MASTER (See *Servant, Employers' Liability Act*).
when criminally answerable for act or omission of servant 115
not liable for injury to domestic servant, when 1182
of prisoner, holding out inducement, excludes confession (see *Confession*) 873
differences between, and workmen, may be referred to arbitration 1293-1309, n.
attendance of witnesses, how enforced in such arbitration ....1293-1309, n.
of ship may pledge owners' credit for necessaries 208A

MASTER OF THE ROLLS, public records under his custody 1485
enumeration of them .....1485 & n., 1486 & n.
regulations as to inspection of them and fees ..... 1482 *et seq.*
have the public a right to inspect them? 1483
in what repositories at present kept .....1485 & n., 1486 & n.
how they are proved 1533

MASTERS IN HIGH COURT, witness, how made to attend before.... 1284
court will not anticipate their decisions 147

MASTERS IN LUNACY, may enforce the attendance of witnesses ..1327-28

MATERIAL ALLEGATION, must be proved as laid (see *Allegation, Variance*)..... 217, 289-96

MATERIAL ALTERATION in instrument (see *Alteration*).

MATRIMONIAL CAUSES COURT in Ireland, seal of, judicially noticed 6

PARAGRAPHS (§§)

MATRIMONIAL SUITS (see *Divorce Court*).
decrees in, are judgments in rem (sub tit. "*Matrimonial Suits Judgments*") ..... 1675, n.
as such, binding upon strangers 1676-7
foreign decrees in, effect of 1726, 1735

MATRONS, JURY OF, where prisoner pleads pregnancy ..... 554, n.
may be assisted by a surgeon ..... 554, n.
who must be examined in open Court 554, n.

MATTERS admitted (see *Admissions*).
judicially noticed (see *Judicial Notice*).
of public and general interest (see *Public and General Interest*).

MAY FAIR registers of marriages and baptisms, inadmissible (sub tit. "*Baptism, &c. Registers*") ..... 1592, n.

MAYOR'S COURT, judgments in, how proved 1572, 1575
judgment and execution against garnishee in suit of foreign attachment, when an estoppel for him 1692

MEANING OF WORDS will be judicially noticed, when 16
when question for judge, when for jury 47
what is the primary 1131
words must be interpreted in their primary, when 1131
may be explained by usage, when 1162
may not, when 1165
in documents question for judge 40-3
of term "children" 168
"family" 168
"heir" ..... 1131, n.
"cousins" 168
"nephew" ..... 1131, n.
"domestic servant" 34a
"month" 16, 1128
"not on merits" 1720
"presence" in Wills Act 1052-55
"mine" ..... 45, n.
"town" 45
"custom of the country" 1188
"cost-book principle" 5
"expenses" 1253, 1257
"Lady-Day and "Michaelmas" 1165
"money," "debentures," "furniture," "unmarried" in a will 168
"tidings" in insurance law 204

MEASUREMENT of distance, made as the crow flies 16

MEASURES, legal, judicially noticed 16

MEDICAL BOOKS.
not directly admissible in evidence 1422
may be referred to by physician, &c. 1422

MEDICAL MAN, communication to, not privileged 916
what representations to, are admissible in evidence 580-81
presumption against deed of gift to 151
warrants that he possesses competent skill 1183
entitled to what allowance as witness,
in criminal courts ..... *Appendix* (vi-x)
before coroner ..... 1290 & n.
attendance of, as witness before coroner, how enforced 1290
as an expert, may give his opinion on medical questions (see *Experts*) 1416, 1422
may refresh his memory by referring to medical books 1422
may assist a jury of matrons ..... 554, n.
admission by, of his being one, by acting as such 802-3

MEDICAL MAN—*continued.* PARAGRAPHS (§§)
admission by opponent of his being one, by treating him as such 802
whether confession made under inducement by, admissible ..873, n, 875, n.
registration of, how proved..... 1638
suing for drugs and attendance, must prove his registration 173
how far this proof is affected by the Rr.S.C. as to pleading 308
whether presumed to be physician, from acting as such 174
general manager of railway company may, on happening of accident to passenger, verbally engage..... 979
a surgeon in Navy is a seaman under the Wills Act 1062
when physician may sue for fees 803

MEDICAL REGISTER, when admissible 1638

MEDIUM, deed of gift to spiritual, when set aside 151

MEDIUM FILUM AQUÆ, when the presumed boundary 119

MEDIUM FILUM VIÆ, when the presumed boundary 119

MEETING-HOUSE (see *Dissenters*).

MEETINGS, admissibility of minutes of 1783
of creditors pass resolutions, in what manner 1552

MEMBER OF PARLIAMENT not liable to arrest, when 34n

MEMORANDUM, when may be used to refresh memory (see *Memory*) 1406-13
of contract excludes parol evidence..... 401-4
if incomplete or collateral, it does not 405-6, 1134
when necessary by Statute of Frauds (see *Statute of Frauds*) 1019-49
by Lord Tenterden's Act (see *Lord Tenterden's Act*) .. 1020
of acknowledgments 1073-79
of promises to pay debt contracted under age 1084
of representation as to ability of others 1085-87
by Sale of Goods Act by other Statutes (see *Writings*).

MEMORIAL (see *Enrolment*).

MEMORY, how witness may refresh 1406-13
by referring to written instrument, memorandum, or entry in book .. 1406
writing must have been made or recognized at or near the time of the fact 1406
when witness had distinct recollection of the fact..... 1407
if made subsequently, at instance of party, it cannot be used.....1408-09
can witness refresh, by copy of document?..... 1408
such copy must have been made by witness, or in his presence, or recognized by him when facts fresh in his memory 1410
witness may refresh, by informal examination taken down by him .. 894
writing does not become evidence and need not be admissible..... 1411
unstamped receipt..... 1411
notes of speech need not contain verbatim account of all that passed 1411
if witness blind, papers may be read to him 1411
independent recollection after reading paper, not necessary..... 1412
adversary should have an opportunity of inspecting paper..... 1413
by inspection, or examination upon it, he will not make it his evidence 1413
unless he questions as to independent entries 1413
if paper shown to witness to prove handwriting, and not to refresh, adversary not entitled to see it 1413
so if paper shown to witness to refresh, fails in doing so..... 1413
Scotch doctrine as to refreshing memory .....1413, n.
experts may refresh, by referring to professional treatises 1422
foreign lawyer to prove foreign law may refer to text-books, codes, &c. 1423
leading question allowed, when suggestion necessary to refresh..... 1405
how judge may refresh, as to matters judicially noticed 21
legal, what is, under "Prescription Act" 75A

PARAGRAPHS (§§)

MENACES (see *Duress*) former, admissible as evidence of malice on indictment for murder 347

MENIAL (see *Servant*).

MERCANTILE CONTRACTS, may be explained by parol (see *Parol Evidence, Usage*) 1158-64
incidents may be annexed to 1170

MERCANTILE CUSTOMS, judicially noticed 5

MERCANTILE LAW AMENDMENT ACT, 1856 (see *Table of Statutes*, 19 & 20 Vict. c. 97).
how it affects the Statute of Limitations 600
how it affects Lord Tenterden's Act 600, 1073
enables agent of party to sign acknowledgment to bar Statute of Limitations .....745, 1107, n.
prevents payment by one co-contractor from barring Statute of Limitations as to others 745-46

MERCHANDISE MARKS ACT, 1887 (see *Table of Statutes*, 50 & 51 Vict. c. 28).
raises presumption of warranty of genuineness 1180
limits time for proceeding summarily under the Act .....76-8, n.
indemnifies witnesses, when ..... 1455, n.

MERCHANT, entries by, in his books, when evidence for, in America, France, Scotland, and in our courts 709-13
effect of his not objecting to account rendered 810
customs of, when judicially noticed 5

MERCHANT SEAMAN (see *Seaman*).

MERCHANT SHIPPING ACT, 1894 (see *Table of Statutes*, 57 & 58 Vict. c. 60).
liability of shipowner, limited by 208
summary proceedings under, must be brought within six months ..76-8, n.
seaman under, need not give notice to produce his agreement with master 454
may prove its contents by parol 454
transfer of ship under, must be by bill of sale attested.... 998A, 1839-41, n.
agreement between master and seaman under, must be in writing attested .....1098, 1839-41, n.
cannot be signed by agent of master ..1107, n.
effect of erasures, interlineations, or alterations in .....1819, n.
indenture of apprentice to sea service under, must be attested by Justice.....1098, 1839-41, n.
but attesting witnesses to such documents need not be called (sub tit. "*Shipping Documents*") .....1839-41, n.
how witnesses made to appear before inspectors under .....1329, n.
registers of British ships kept under, how inspected .....1504-21, n.
how proved (sub tit. "*Ships*")..1601, n.
admissibility and effect of..1778-80, n.
admissiblity of depositions taken abroad under 1564-65
mode of proof of documents issued by Board of Trade under ....1596-7, n.
log-books kept by masters of ships under, how proved.....1600, n.
admissibility and effect of (sub-tit. "*Log-Books*")..1778-80, n.
documents registered in Record Office of Seamen, under,—
how inspected .....1504-21, n.
how proved (sub tit. "*Ships*") .....1601, n.
proof and effect of certificates issued by Board of Trade under 1623-30
of registration under 1623-30
of competency or service under 1623-30
instrument under, requiring attestation, need not be proved by attesting witness (sub-tit. "*Shipping Documents*").....1839-41, n.

MERCHANT SHIPPING ACT—*continued.* PARAGRAPHS (§§)
on trial of misdemeanor under, cost of witness may be allowed 1254
onus probandi of ship being seaworthy on accused .....372-4, n.
defendant competent witness when indicted for sending unseaworthy ship to sea .....1360, n.

MERGER, foreign judgment does not merge original cause of action 1746
of estate by operation of law, when not allowable 1014

MERITS, judgment not on, inadmissible 1719A
order of removal quashed "not on merits," effect of..... 1720
variances not material to real, may be amended.....248-51, n.

MESNE PROFITS (see *Recovery of Land*).

METER of gas or water presumed to register correctly.....183, n.

METROPOLIS MANAGEMENT ACT, 1855 (see *Table of Statutes*, 18 & 19 Vict. c. 120).

METROPOLIS VALUATION ACT (see *Table of Statutes*, 32 & 33 Vict. c. 67).

METROPOLIS WATER ACT, 1881 (see *Table of Statutes*, 34 & 35 Vict. c. 113).
inspection and copies of documents relating to company's affairs..1504-21, n.

METROPOLITAN BOARD OF WORKS (see *London County Council*).

METROPOLITAN COMMISSIONERS OF SEWERS (see *Sewers, Commissioners*).

METROPOLITAN VALUATION LISTS (see *Valuation Lists*).

METROPOLITAN WATER COMPANIES, proof of regulation of..1657-8, n.

MICHAELMAS in lease presumed to mean 29th September 1165
evidence of custom to show Old Style intended, inadmissible 1165

MIDDLESEX, registry of deeds in, how proved.....1599A, 1600, n., 1652B
proof of certificates of searches and memorials, given by registrar in..1652B
both these certificates must be attested by two witnesses..1839—41, n.

MIDWIFE, entry of a birth in book of, marked "paid," evidence of child's age 677

MILITIA ACT, 1882 (see *Table of Statutes*, 45 & 46 Vict. c. 49).
limitation of actions and proceedings under..... 73A
payment into Court under .....832—37

MILL-DAM, malicious injury to, is a local offence 281

MINE, acts of ownership in one part of, when evidence of title to another 324
meaning of "cost-book principle" not judicially noticed..... 5
meaning of "level" in mining language provable by usage .....1162, n.
what customs of mining provable by hearsay.....611, 613
how far declarant must have had competent knowledge 609, 611
rules established in, how proved .....1657-8, n.
how far possession of fee simple in land will raise inference of title to minerals 125
when owner of surface presumed entitled to support of minerals 121
to minerals themselves 125
co-adventurers in, presumed incapable of pledging each other's credit 185
question whether an excavation is a mine, is one of fact 47
to be determined by Secretary of State, when.....47, n.
every fresh subsidence in worked out, grounds for fresh action.....121, n.

PARAGRAPHS (§§)

MINES REGULATION ACTS, 1872 (see *Table of Statutes*, 35 & 36 Vict. cc 76 and 77).
in criminal proceedings under, who may be witness ..... 1360, n.
onus of proof (see § 375).
period of limitations ..... 76-8, n.
notices under, may be sent by post ..... 180, n.
meaning of term "mine" under, how determined ..... 47, n.

MINISTER (see *Parson, Ambassador*).

MINOR (see *Infant*).

MINUTES of record, not generally admissible 1570
admissible, if practice not to draw up formal record 1571
e. g. minutes of judgment on journals of House of Lords 1571
book of clerk of peace, in which removal orders entered 1571
minutes of Ecclesiastical Courts, Courts Baron, Sheriffs' Courts, Mayors' Courts, &c. 1572
admissible under other special circumstances 1573
of contract, do not exclude parol evidence 406
of proceedings of meetings of town councils, local boards &c., admissibility of 1783
of meetings of creditors 1552

MISCONSTRUCTION by judge, redressed by court 40
by jury, cannot be redressed 40

MISDEMEANOR, indictment for, when amendable (see *Amendment*) ..248-51
doctrine of election does not apply to 329A
prisoner charged with, entitled to copy of indictment 1488-90
prisoner charged with, may be convicted of attempt 269-70A
proof of conviction for previous 1612-14
committed in India, how examination of witnesses taken 500
against slave-trade, how examination of witnesses taken ..... 500, n.
committed abroad by public officer, how examination of witnesses taken ..... 500, n.
on indictment for, tender of expenses to witnesses unnecessary 1252
costs of prosecution for, when allowed 1254
amount of such costs ..... *App.* viii
costs of defence, when allowed 1260
when payable by prosecutor 1260
trial for, bar to indictment for felony on same facts 1707

MISDESCRIPTION on record may be amended 236

MISINTERPRETATION of spoken words, easy 861-62

MISNOMER in indictment, when amendable 252, 293
when material, if not amended 289-96
of prosecutor 293
of animals 290
of property stolen or injured 289
of persons mentioned in indictment 293
of prisoner 296
of legatee, effect of 1215-17
evidence receivable of testator's habit of calling legatee, by a 1210-11
when party estopped by his conduct from relying on a 846

MISPRISION (see *Treason*).

MISREPRESENTATION, acted upon, operates as an estoppel (see *Admissions*) 839-50

MISSAL, entry in, admissible in matters of pedigree 650
must be made by relative 650

PARAGRAPHS (§§)

MISTAKE, in legal effect of document, no defence ..... 80, n.
effect of admissions made by 819
of judicial admissions made by 838
witnesses sworn by, not liable to cross-examination 1429
of law, defeats judgment of foreign court, when 1729
when it subjects judge to action, as having acted without jurisdiction ..... 1669 *et seq.*
correction of, in instrument, does not render new stamp necessary 1823
does not invalidate instrument 1823
in will, when court will presume 1223
in proceedings may be amended (see *Amendment*).
danger of, in relying on oral admissions 861
on oral confessions 862
action to reform or rescind on account of, when sustainable 1139
of date in deed or will may be rectified by parol evidence 1150

MISTRESS (see *Cohabitation*), when presumed agent of protector 196
how far competent as witness for or against him 1366
witness may be asked whether she is plaintiff's 1440
of prisoner, holding out inducement to, excludes confession 873

MITIGATION OF DAMAGES, evidence of character when admissible in (see *Character*) 356-62
evidence in action for libel in 344

MIXED QUESTIONS (see *Functions of Judge and Jury*) 26

MOB, actions and expressions of, when evidence against party ..348, 583, 592

MODEL (see *Sculpture Copyright Acts*).

MODUS, payment of, for what period, bars right to tithes 74A
when provable by hearsay 613, 1683
when not 614
not provable by hearsay as to particular facts 617
whether provable against vicar, by receipts of lessee of vicarial tithes 789

MONASTERIES, what are not proper repositories for books concerning . 661
what are 662
lieger-books and chartularies of, in custody of Master of Rolls .... 1485, n.
how inspected 1483
how proved 1533

MONEY (see *Coin*), how described in indictment 287
meaning of term in will 168

MONEY HAD AND RECEIVED, action for, when sustainable against Corporation 981

MONEY LENT, I O U no evidence of 124
to wife, husband when considered not liable for 193

MONEY PAID INTO COURT (see *Payment into Court*).

MONOMANIAC may be competent witness 1375

MONTH, meaning of word at common law and in equity (see *Time*) ..16, 1128
in Ecclesiastical Courts 16
in mercantile transactions in the City of London 16
in bills of exchange or promissory notes 16
in statutes passed since 1850 16
in Rr. S. C. 16
in judgments or orders of Supreme Court 16

MONTH—*continued.* PARAGRAPHS (§§)
may be interpreted by evidence of usage .....1162, n., 1163
by the context..... 1128
what servants may be discharged on month's warning 34A, 177

MONUMENTS (see *Inscriptions*).

MORAVIANS, affirmation by, instead of oath 1389A
so of persons who have belonged to that sect 1389A
what registers of, in custody of Registrar-General (sub tit. "*Births, &c. Registers*") 1504-21

MORTGAGE equitable, not within Statute of Frauds..... 1038
effect of paying off 176A
of chattels, when valid..... 975
how affected by 13 Eliz. c. 5 150
proof of judgment mortgages in Ireland 1652

MORTGAGE DEBENTURE ACTS, 1865, 1870 (see *Debentures* and *Table of Statutes*, 28 & 29 Vict. c. 78, and 33 & 34 Vict. c. 20).
inspection of registers of debentures under .....1504-21, n.

MORTGAGED ESTATE when reconveyed by indorsement of receipt on mortgage..... 1013

MORTGAGEE must sue within what time for mortgage-money 1088
for land .....74A, n.
acknowledgment of mortgagor's title by, must be by writing signed to bar Statute of Limitations 747, 1088
acknowledgment of mortgagor's title by one, not binding on others..747, n.
not compellable to produce mortgagor's title-deeds 458, 918
or to give parol evidence of their contents 918
when presumed to authorize mortgagor to distrain for rent 176

MORTGAGOR must within what time sue to redeem a mortgage.... 74A, n.
acknowledgment of title of, by mortgagee, must be by signed writing 747, 1088
by one mortgagee, not binding on others .....747, n.
acknowledgment by, of mortgagor's right to mortgage money, must be by signed writing..... 1088
when presumed authorized to distrain for rent in mortgagee's name.. 176

MORTMAIN ACT, enrolment of indentures under, necessary 1119
date and fact of enrolment, how proved 1650
conveyances under, must be by attested deed 1110
must be proved by attesting witness (sub tit. "*Charity*") .....1839-41, n.

MOSAIC CODE, presumption of malice recognised in 180

MOTIVES, when collateral facts admissible to prove malicious..... 340
of witness, questions respecting, how far relevant.....1440-45
answers of witness respecting, how far open to contradiction 1440-45

MUNICIPAL CORPORATIONS (see *Corporations*).
books of, may be inspected, when .....1504-21, n.

MUNICIPAL CORPORATIONS ACT, 1882 (see *Table of Statutes*, 45 & 46 Vict. c. 50).
limitation of actions and proceedings under 73A
of proceedings under Part 12 of .....76-8, n.
costs of prosecuting under 1254
attendance of witnesses before Court, how enforced .....1293-1309, n.
by-laws made under, how proved .....1657-8, n.
books kept under (see *Corporation Books* and *Municipal Corporations*).

PARAGRAPHS (§§)

MUNICIPAL ELECTIONS (CORRUPT AND ILLEGAL PRACTICES) ACT, 1884 (see *Table of Statutes*, 47 & 48 Vict. c. 70).

MUNIMENTS OF TITLE (see *Title Deeds*).

MURAL INSCRIPTIONS (see *Inscriptions*).

MURDER, when malice presumed 80, 118
indictment for, need not specify mode of killing 288
means of death, if alleged, need not be strictly proved 288
prisoner indicted for, may be convicted of manslaughter ..266, 269-70A, n.
mother indicted for, may be convicted of concealing infant's birth..269-70A
acquittal for, bar to second indictment for manslaughter..... 1708
acquittal for manslaughter, bar to second indictment for..... 1709
acquittal for wounding with intent to, no bar to indictment for..... 1706
acquittal for, no bar to indictment for giving poison with intent to murder..... 1706
on indictment for, former menaces evidence to prove malice 347
depositions taken on charge of stabbing, assaulting, or robbing deceased admissible 467
dying declarations admissible (see *Dying Declarations*).....714-22
married woman can be convicted of 190
what facts raised presumption of child murder under old law..... 116, n.

MUSEUM, how far document produced from, admissible 654
British, not proper custody for an old grant to a priory 661

MUSIC, if printed and published, cannot be proved by parol..... 409

MUTABILITY, presumption against 196-7

MUTE (see *Deaf and Dumb Witnesses*).

MUTILATED DOCUMENTS, when evidence, coming from proper custody 1838
accidental mutilation of instrument, when fatal.....1827-30
mutilation of instrument by stranger, when fatal.....1827 *et seq.*

MUTINY ACTS (see *Army Act*, 1881).

MUTUALITY, when necessary in estoppels 99, 817-18
doctrine of, rejects judgment inter partes as evidence for stranger . 99, 1682

NAME, variance in, when amendable in indictment.....248-51, n.
of prosecutor, must be proved as laid or as amended..... 293
so of property stolen or damaged 289
so of animals mentioned in indictment 290
of persons, must be proved as laid or as amended 293
rules as to names of persons 293
e.g. of person "whose name is to jurors unknown"..... 293
of *alias* names, and Christian names 293
of illegitimate child 293
of peers 293
of foreigners of rank... 293
of parent and child of same name 293
of joint owners, trustees, tenants in common, &c..... 293
of prisoner, not matter of essential description 295
when identity of, may raise inference that party sued executed instrument sued on 1860
of name and residence, or of name and trade, will also do so 1858
presumption when parent and child bear the same 195
when party estopped by his conduct from relying on misnomer 846

NAME—*continued.* PARAGRAPHS (§§)
when confession implicates other persons by name 871
of client may be proved by his solicitor 934
of legatee, effect of mistaking 1215-17
does law attach greater weight to, than to description of legatee? 1215 *et seq.*
testator's habit of misnaming persons provable by parol 1210-11
of each contracting party must be in memorandum to satisfy Statute of Frauds 1025

NARRATIVES of past events inadmissible as hearsay 589, 593

NATIONS, LAW OF, judicially noticed 6

NATURAL CONSEQUENCES of act, party presumed to intend 80-3

NATURAL JUSTICE, foreign judgments repugnant to, inadmissible .. 1729
must be recognised by committees of clubs.....1730, n

NATURALISATION ACT, 1870 (see *Table of Statutes*, 33 & 34 Vict. c. 14).
regulations made under, how proved.....1557, n.
declarations and certificates of naturalisation, how proved .....1611, n.
registers of naturalisation, how proved .....1601, n.

NATURALNESS of witness, test of truth 52

NAUTICAL ASSESSORS, in trial before, experts inadmissible .....1421, n.

NAVAL DISCIPLINE ACT, 1866 (see *Table of Statutes*, 29 & 30 Vict. c. 109).
rule as to cumulative allegations recognised in.....269-70A, n.
within what time offenders under, must be indicted .....76-8, n.
enforces attendance of witnesses, how .....1293-1309, n.
in court martial for loss of ship, captain and crew comprise witnesses, when .....1360 *& Errata*

NAVAL STORES, possession of, raises presumption of guilt, when ..372-4, n.

NAVIGATION (see *Ship*), rules of, judicially noticed..... 6
other rules for preventing collisions, how proved (sub tit. "*Ships*").. 6 & n., 1601, n.
presumptions respecting, recognised in maritime law 206
experts may give opinion respecting unskilful..... 1421
exceptions to this last rule .....1421, n.

NAVY OFFICE, various documents of, in custody of Master of Rolls (sub tit. "*Admiralty*").....1485, n.
admissibility and effect of books of 1776

NECESSARIES supplied to infant, what are 46
question how far for judge, how far for jury 46
infant cannot bind himself by contract except for 104
written acknowledgment by infant of debt due for, bars Statute of Limitations.....1075c
presumption of wife's agency in ordering 192

NECESSITY, ground for admitting hearsay..... 607
testimony of wife against husband who has injured her.....1371-71A

NEGATIVE (see *Onus Probandi*) .....364 *et seq.*

NEGLIGENCE, how far question for judge, how far for jury.....37-7A
when presumed in carrier or innkeeper..... 187
when presumed from mere happening of accident 188

NEGLIGENCE—*continued.* PARAGRAPHS (§§)
in action for, admission by one defendant, no evidence against others.. 751
judgment against master, no evidence as against servant of his..... 1607
of fellow-servant, does not render master liable for injury to domestic servant..... 1182
when averment of, requires no proof..... 255

NEGLIGENT DRIVING, in action for, recovery of damages for injury to plaintiff's carriage, no bar to second action for compensation for personal injuries 1697

NEGOTIABLE SECURITY (see *Bill of Exchange*).
when scrip will be judicially noticed, as 5

NEGOTIATION (see *Compromise*).

NEIGHBOURS, declarations of, inadmissible in matters of pedigree 635
presumption respecting boundaries, as between 119-21

NEMO ALLEGANS SUAM TURPITUDINEM EST AUDIENDUS,
maxim not recognised in English Courts .....1347, n.

NEMO TENETUR PRODERE SEIPSUM, a maxim often carried too far..... 1454
maxim not strictly recognized in bankrupt law 898, 1458A
witness not compellable to criminate himself 1453-58
is he bound to answer questions degrading him?.....1459-62
must answer questions subjecting him to civil suit 1463

NEPHEW, meaning of the word in a will.....1131, n.

NEUTRALITY of ships, presumptions against..... 107
from carrying enemy's despatches 107
from spoliation of papers on capture.....107, 116
breach of, when presumed.....372-4, n.

NEW ASSIGNMENT, abolished by present rules of pleading .....301, n.
amendment substituted for 301

NEWSPAPER, advertisements in, when evidence of notice .....1665 *et seq.*
inference must be raised aliundè, that party has read advertisement 1665 *et seq.*
how this may be done 1666
proprietor of, how far criminally responsible for acts of servant....115, 906
may pay money into court as amends in libel, when 831
must be registered .....1504-21, n.
register of, may be inspected.....1504-21, n.
copies of entries in register, proof and admissibility of ..1601, n.
paragraphs in, cannot be primarily proved by parol 409
distinct paragraphs in, inadmissible when 732
libels in, discovery as to 1456

NEWSPAPER LIBEL AND REGISTRATION ACT, 1881 (see *Table of Statutes*, 44 & 45 Vict. c. 60).
costs of witness, may be allowed in prosecutions under.....1260, n.

NEW TRIAL, when granted for improper admission or rejection of evidence 1881-85
cannot be granted for ruling of judge respecting stamps 397
evidence admissible on former trial may be used on, when 763

NEW YORK CIVIL CODE, presumption as to continuance of life....200, n.
as to survivorship when parties die in same calamity..... 203
estoppels abolished by ..... 89, n.
confession made to priest inadmissible without consent of party confessing .....917, n.

NEW YORK CIVIL CODE—*continued.* PARAGRAPHS (§§)
information acquired by medical men, when inadmissible in civil suit.. 916
as to interpretation of instrument partly written, partly printed....1130, n.
as to how far a wife is a competent witness for or against husband .. 1367
as to refreshing memory of witness by writings 1406
as to contradicting and discrediting own witness .....1420, n.
as to proving own witness has made inconsistent statements .....1420, n.
as to compelling witness to answer respecting his previous conviction .....1437, n.
as to protecting witness from self-crimination .....1454, n.
as to comparison of handwriting .....1860, n.

NEW YORK CRIMINAL CODE, transaction before grand jury, how far held secret by.....943, n.

NEXT FRIEND (see *Prochein Amy*).

NEXT OF KIN, decision as to, in suit for administration, binding in suit for distribution 1078

NICKNAME, evidence of legatee being called by, admissible to explain will .....1210 *et seq.*

NISI PRIUS RECORD, with postea indorsed, not evidence of judgment 1570
exceptions to the rule 1573

NOBLEMAN, how to be described in indictment 293

NOISOME BUSINESS, by-law regulating, how proved (sub tit. "*Public Health*") .....1657-8, n.

NOLLE PROSEQUI makes co-defendant in criminal trial competent witness, when..... 1357

NOMEN GENERALISSIMUM, what is, in an indictment 290

NOMINAL DAMAGES, in case of, rule as to right to begin 383

NOMINAL PARTIES (see *Parties*) 741-2

NON-ACCESS, strict proof of, required to rebut presumption of legitimacy 106
husband and wife incompetent to prove 950

NON-COMPOS (see *Insanity, Lunacy, Lunatic*).

NON-PAROCHIAL REGISTERS, not evidence ..1592, n., 1595, n., 1601, n.
unless deposited with Registrar-General .....1592, n., 1595, n., 1601, n.
many, deposited in custody of Registrar-General (sub tit. "*Births, &c. Registers*") .....1504-21, n.
of what these consist .....1504-21, n.
inspection of lists and registers, how obtained .....1504-21, n.
in civil cases proved by certified copies, under rules as to notice, &c. (sub tit. "*Births, &c. Registers*") .....1601, n.
in criminal cases originals must be produced .....1596-7, n., 1601, n.
party must give opponent notice to use certified copies of (sub tit. "*Births, &c. Registers*") .....1601, n.

NON-PRODUCTION OF EVIDENCE, presumption from 116

NON-RESIDENCE, burthen of proof in proceedings against clergyman for..... 377

NONSUIT, judge on opening speech, and without hearing evidence, cannot enter a .....1719, n.
in County Courts, effect of .....1719 & n.
now no bar to future action .....1719 & n., & *Addenda*

PARAGRAPHS (§§)

NOTARY, when public seal of, judicially noticed..... 6
notarial instruments, how proved 424
affidavits sworn before, how proved 12, 1567-8

NOTE (see *Bill of Exchange*).
Judge's notes (see *Judge*).
note or memorandum (see *Memorandum, Memory, Statute of Frauds*).
bought and sold (see *Bought and Sold Notes*).

NOT GUILTY BY STATUTE (see *General Issue*) 311-15

NOTICE (see *Judicial Notice*) 4-21
of dishonour (see *Bill of Exchange*).
to produce (see *Notice to Produce*).
of action, to parties acting in pursuance of Statute 312
necessity for, question for judge 38
to produce notice of action, unnecessary 450
to admit (see *Notice to Admit*) 724A-24I
of bankruptcy in the Gazette, admissibility and effect of..1549, 1663A-4, n.
party intending to use certified extract of non-parochial register must give opponent (sub tit. "*Births, &c. Registers*").....1601, n.
of intention to prove devise by probate..... 1760
form and effect of such notice, and on whom served 1761
to quit domestic service, is a month's warning 34A, 177
to quit a yearly tenancy is a year, except where arrangement made .. 34
legal effect of 807
what amounts to waiver of, by landlord 807
to waiver of objection to, by tenant 809
legal effect of waiver of 807
to produce notice to quit, unnecessary 450
service of, on tenant's servant, sufficient .....182, n.
service of, proved by indorsement on copy in writing of deceased solicitor 698
receiving without objection, how far an admission..... 809
advertisements in Gazette and newspapers, when evidence of 1665-66
may be sent by post, when.....180 & n.
of objection to voter, under Election Act, how signed 1102
duplicate of such notice, stamped at Post-office, how signed..... 1102
of appeal from decision of Revising Barrister, how signed..... 1102
of appeal to quarter sessions, how signed, and what it must contain..1102A
of chargeability under Poor Law Acts, how signed and served.....1103-4
of appeal, under Poor Law Acts, how signed and served, and contents of 1103-4
given by London County Council, how authenticated 1105
how served .....180, n.
verbal, may be proved, though also written, unless writing necessary..414-15
of proceedings, how far necessary to validity of foreign judgment..1729-30

NOTICE TO ADMIT, rules of Court as to 724A
either party may give notice of intention to give in evidence any document 724A, 724B
form of notice to admit documents.....724A, n.
either party may give notice to admit facts nine days before trial 724H
such admission only available on the particular trial..... 724H
form of such notice .....724H, n.
form of admission of facts under notice .....724H, n.
admission of documents or facts, how proved..... 724H
party refusing to admit after such notice to pay costs of proof ..724A, 724H
unless judge certifies that refusal was reasonable.....724A, 724H
party giving unnecessary notice to admit documents, to pay costs.... 724H
no costs allowed for proving documents unless notice given 724A
except when omission saves expenses 724A
notice to admit documents must be given a reasonable time before trial..724B

NOTICE TO ADMIT—*continued.* PARAGRAPHS (§§)
effect of refusal, without objecting to sufficiency of 724B
effect of admission under, "saving just exceptions" 724B
admission of document under, waives objection to document on ground of interlineation 724B, 1819
dispenses with attendance of attesting witness 724B, 1847
effect of variance in description of document 724C
costs of proof not allowed if witness examined to other facts 724C
does not admit authority by which document had been written 724C
proof of inspection unnecessary, opportunity of inspecting sufficient.. 724D
how far necessary to identify document 724D
party admitting may rely on valid objection to admission of document..... 724D (1)
e. g. that it is merely secondary evidence..... 724D (1)
party may be required to admit foreign document..... 724E
ancient public documents to be proved by experts, not within rules .. 724E
affidavits not within rules 724E
costs of explaining and producing such documents allowed though no notice to admit 724E
caution required in admitting under notice 724F
otherwise, party may be entrapped into making too large an admission 724F
rules as to, in Probate Division ..... 724A (1), n.
in Divorce Court ..... 724A (1), n.
on Revenue side of Queen's Bench Division..... 724A (1), n.
in County Courts 724G
under Public Worship Regulation Act, 1874 ..... 724A (1), n.

NOTICE TO PRODUCE, *when necessary*, to let in secondary evidence..440-42, 1817
if document be in possession of adversary 440
evidence of this, what sufficient..... 440
instrument in hands of privy of adversary 441
notice must be in writing..... 442
and so far as civil proceedings are concerned, in a special form 442
form of notice in civil proceedings .....442, n.
on whom it may be served 442
what it should contain 443-44
time and place of service 445-47
proof of service 448
applies to new trials 447
waives objection if, on production of instrument, interlineations appear in it..... 1819
when not necessary :—
1. in case of duplicate originals or counterparts..... 449B
2. in case of a notice 449, 450-1
3. where defendant must know he will be charged with possession and called upon to produce instrument .....408, n., 449, 452
e. g. in trover for written documents 407, 452
or indictment for stealing documents 408, 452
4. where adversary has got possession by force or fraud 449, 453
5. in favour of merchant-seamen 449, 454
6. where adversary or his solicitor has admitted loss of instrument 449, 455
7. where adversary or his solicitor has instrument in court....449, 456
costs of, where it comprises unnecessary documents 456A
can solicitor be ordered to search papers in court?..... 456
party served with, not bound to produce document required 1817
what is the proper time for calling for production of documents under 1817
production of papers under, does not make them evidence 1817
unless party calling for them inspects them..... 1817
party refusing to produce document under, cannot put it in as his evidence 1818

NOTICE TO PRODUCE—*continued.* PARAGRAPHS (§§)
refusal to produce after, raises presumption that document was stamped 117
raises no other legal presumption against party 117
but may prejudice jury against him 117
renders it unnecessary to call attesting witness 1847

NOTORIETY (see *Hearsay*, *Reputation*), evidence of, when admissible.... 577

NOVELTY of a design for a manufacture, question for jury 45A

NUISANCE, existence of, question for jury 45A
committed by servant, when master criminally answerable for 115
defendants and wives competent witnesses on indictment for .....1360, n.

NULLITY OF MARRIAGE, admission by wife of former marriage will not suffice 768-9
when presumption of impotence arises 194
sentence of, will bastardize child *en ventre sa mère* .....1676, n.

NULLUM TEMPUS OCCURRIT REGI, when maxim defeated by presumption 130-2

NUL TIEL RECORD, on plea of, how record of same court proved 1535
of different court proved.. 1536
on trial of issue of, what amendments are allowable 237

NUMBER, allegation of, need not be proved (see *Variance*) 285
of legatees, effect of mistake in 1223

NUMBER OF WITNESSES, when more than one necessary.....952-71
to establish treason (see *Treason*) 952-58
when treason consists of personal injury to Sovereign..... 958
in treason, two must see copy of indictment, &c., delivered..... 1373
time for objecting to non-compliance with this regulation 1373
to prove perjury (see *Perjury*) 959-63
in case of breach of promise of marriage 964A, 1355
in cases of bastardy 964
general rule of law 965
to establish a claim against a dead man's estate..... 965
in Ecclesiastical Courts 966
corroboration of accomplices 967-71
of informers 971
of attesting witnesses required to verify particular documents (see *Attesting Witnesses*).

NUNCUPATIVE WILLS, excluded from Wills Act .....1050, n., 1062

OATH, should be administered reverently 1387
must be administered in form binding witness's conscience.....1388A
form of, in different religions.....1388, n.
witness, on so desiring, entitled to have administered, Scotch form of..1388
testimony must in general be given upon affirmation or 1378
exceptions :—
(1) in cases under the Criminal Law Amendment Act, 1885 ....1389B
(2) in cases under Prevention of Cruelty to Children Act, 1894 ..1389B
(3) certain aborigines in the British colonies .....1378, n.
when affirmation or declaration substituted for.....1382-89B
in cases of official, extra-judicial, or voluntary oaths .....1389, n.
person having no religious belief, may make solemn affirmation instead of 1382
rule requiring, extends to jurors, judges, peers, and sovereign 1379-81
what courts and persons competent to administer 1386
forms of administering .....1388 & n.

OATH—*continued.* PARAGRAPHS (§§)
depositions, to be admissible, must have been taken upon 464-5
examination of prisoners, purporting to have been taken upon, inadmissible 895-97
this rule of questionable policy 895
confessions made on, when admissible .....898—901
House of Commons and its Committees can administer..... 1281
answer by peer to bill in Equity, need not have been put in upon 1380
admissions on, not conclusive 857
but nearly so 857

OATHS ACT, 1888 (see *Table of Statutes*, 51 & 52 Vict. c. 46).
provisions of the 1382
enables persons objecting to be sworn to affirm 1382
form of affirmation under .....1382, n.
affirmation in Scotch form may be taken under, if so claimed by witness 1388
form of Scotch oath under .....1388, n.

OBJECTION to evidence, when and how taken 1881D
to competency of witness, time and mode of taking 1392-93
to any matter, how far waived by acquiescence 809-14

OBLIGEE (see *Bond*).

OBLIGOR (see *Bond*).

OBLITERATION OF WILL, effect of, under Wills Act 164-5, 1069

OBSTRUCTIONS, on a view by jury, may be ordered to be removed 563-5

OCCUPATION (see *Occupier, Use and Occupation*).

OCCUPIER, declaration by, against proprietary interest (see *Interest*) ..684-86
of premises, primâ facie owner 123, 685

OCULAR INSPECTION (see *Inspection by Jury*).....554 *et seq.*

OFFENCES (see *Crimes, Felony, Misdemeanor*) what are local.....281-2
punishment for, when barred by Statute of Limitations .....76-8, & n.

OFFENSIVE TRADES, proof of by-laws as to (sub tit. "*Public Health*") 1657-8, n.

OFFICE, acting in, when admission of appointment 801-3
appointment to, when presumed from acting 171
presumption arising from course of business in..... 176
entries and declarations in course of, when evidence (see *Course of Office or Business*) 697-713
actions to perpetuate testimony respecting claims to..... 544
effect of recognition of official character of others 801-3

OFFICE BOOKS (see *Public Records and Documents*).

OFFICE COPY (see *Copy*).

OFFICER, when instrument of appointment of, need not be produced..171, 461
signature of, need not be proved, when 7
committing offence abroad, how examination of witnesses taken ....500, n.

OFFICIAL ACTS, when privileged (see *Privileged Communications*) 939-48A
presumption of due execution of 143-7A

OFFICIAL CHARACTER of persons signing documents need not be proved, when 7
must be proved, when 703

PARAGRAPHS (§§)

OFFICIAL DOCUMENTS (see *Public Records and Documents*).

OFFICIAL RECEIVER IN BANKRUPTCY, appointment of, must be judicially noticed 1550
certificate of, as to acceptance of composition by creditor, conclusive evidence 1550
appointment of assistant, must be judicially noticed 1550
devolution of estate vested in, on death, resignation, &c., of.....1015
may administer oaths for certain purposes 1386

OFFICIAL REGISTERS (see *Public Documents*).
alphabetical list of documents which are .....1595 & n.
alphabetical list of documents which are *not*.....1592 & n

OLD STYLE, evidence of custom inadmissible to show feasts in lease refer to 1165

OLD WRITINGS (see *Ancient Writings*).

OLERON, laws of, as to dereliction .....207, n.

OMISSION in record, how far amendable (see *Amendment*).
to plead or traverse, when conclusive as an admission (see *Admissions*).822-23
in will, cannot be supplied by parol evidence 1156-57

OMNIA RITE ESSE ACTA, presumption as to, in case of awards by public officer (see *Presumptions*) 143-50, 1584

ONUS PROBANDI, devolves on the affirmant.....217, 364 *et seq.*
reasons for, and tests of rule .....364 *et seq.*
substance and not form of issue looked at 364
examples of rule 365-6
1st exception—when disputable presumption in favour of affirmative 367-70
when presumption of innocence throws on prosecutor or plaintiff proof of negative matter 113, 371
unless burthen of proof shifted by statute 371
instances of statutable shifting of proof..372-4 & n.
2nd exception—when facts peculiarly within knowledge of party.....376A
right to begin, importance of rules respecting 373
1st rule—party on whom onus probandi lies, must begin..... 379
1st exception—when defendant admits whole primâ facie case of plaintiff.....379-80
2nd exception—plaintiff seeking substantial unliquidated damages must begin 381-2
to what cases this exception does not apply 383
2nd rule—when any one of several issues lies on plaintiff, he must begin, if he will undertake to give evidence upon it .. 384
practice as to calling evidence in reply .....387 *et seq.*
when court will review decision of judge respecting right to begin .. 387
when plaintiff or prosecutor entitled to reply .....387 *et seq.*
when Attorney-General entitled to reply..... 390

OPERA, primary proof of publication of, is production of printed music.. 409

OPERATION OF LAW, surrender of lease by, what (see *Statute of Frauds*) 1005-13
when presumed 138
assignment by, in case of heir at law, administrator, executor de son tort, and married woman..... 1015
in cases of bankrupts, debtors, and convicts..... 1015
merger by, when not allowable 1014

PARAGRAPHS (§§)

OPINION, once entertained, presumed to continue 197
witness cannot, in general, speak to 1414, 1470-70A
when witness may testify as to his 1414-17, 1868
when experts may testify as to their (see *Experts*) 1417-25, 1470-70A
witness testifying as to his, may be guilty of perjury 962, 1416
of counsel, privileged from disclosure 911
of foreign counsel, also privileged 920

OPTIMUS INTERPRES RERUM USUS, application of maxim..1205 *et seq.*

ORAL admissions, to be received with great caution 216, 861
confessions to be similarly received 862
statements of deceased relatives admissible in matters of pedigree 648
against pecuniary interest, whether admissible 670
in course of office or business, whether admissible 708
contract, cannot waive in part or vary statutory written contract 1143
may perhaps wholly waive such contract before breach..1143-43A
testimony (see *Parol Evidence*, and *Viva Voce*).
of witness on former trial, how provable 546

ORDER OF PROOF (see *Onus Probandi*).

ORDER, what, may be made on an admission in pleadings 827

ORDERS (see *Rules*, *Standing Orders*) issued by Crown, Privy Council, or any principal department of government, how proved 1527
jurisdiction must appear on face of 147
of removal (see *Removal*).
of discharge of bankrupt, how proved, and effect of 1549, 1750
respecting other matters in bankruptcy 1459, 1748-52
of all competent tribunals, evidence in nature of reputation..... 624-27
e.g. of Commissioners of Sewers as to repair of sea-walls..... 626
interlocutory, inadmissible 626
in Council, when private, not judicially noticed 18
how proved..... 1527, 1663-64
when conclusive evidence 1664, 1771
of judges (see *Judge*).
of justices (see *Justices*).
of old Court of Chancery, how proved 1534, 1540-41
of inferior courts (see *Inferior Courts*).
under Diseases of Animals Act, 1894, effect of .....1778-80, n.

ORDERING WITNESSES OUT OF COURT (see *Witnesses*), practice as to 1400-2
Scotch practice as to separating witnesses after 1402

ORDNANCE STORES, party charged with possession of, must prove his authority .....372-4, n.

ORDNANCE SURVEY, English, inadmissible to prove title 1770B
Irish, also inadmissible for this purpose 1770B
sometimes admissible on questions other than title.....1770B

ORIGINAL DOCUMENTS, alphabetical list in which it is necessary to produce .....1596-7, n.

ORIGINALS (see *Counterpart*, *Duplicate Originals*).

ORTHOGRAPHY, of two writings may be compared..... 1871

OUSTER, judgment of, in quo warranto, against incumbent, conclusive upon those claiming title of office under him 1689

OUTGOING TENANT (see *Tenant*).

OUTLAWRY, judgments of, are judgments in rem.....1675, n.
in civil proceedings, now abolished .....1675, n.

PARAGRAPHS (§§)

OUTSTANDING SATISFIED TERMS, when presumed to be surrender.136-7
determination of, by 8 & 9 Vict. c. 112..... 136

OVERSEER, appointment of, presumed from acting 171
notices by, of chargeability and appeal under poor-law, how signed and served.....1103-4
relief given by, how far evidence of settlement 805

OVERT ACT (see *Treason*).

OVERTURES OF PACIFICATION (see *Compromise*).

OWNER of land, declaration of, against proprietary interests, when admissible against privies 684-86
conveyance of legal estates to, when presumed 133-5
not interfering, while stranger sells property, bound by sale 845
of ship (see *Ship*).

OWNERSHIP, presumptions as to (see *Presumptions, Boundaries*) 119-35
acts of, in one part of waste, mine or river, evidence of title to another.. 323-5 & n.
hearsay evidence of reputed, admissible 577
not necessary to allege, in certain indictments..... 294

OXFORD UNIVERSITY, court of, governed by statute law .....20, n.

OYSTERS, in indictment for stealing, how bed may be described 282
London customs respecting, provable by hearsay 613
oyster beds in Ireland, licences, how proved (sub tit. "*Fisheries, Ireland*") ..... 1601, n.
admission and effect of (sub tit. "*Oyster Fishery (Ireland) Act*") .... 1778-80, n.

PALACES, privileges of Royal, judicially noticed 5

PALACE COURT, records of, where deposited .....1485, n.

PALATINE COURTS, how attendance of witnesses compelled before .. 1293-1309, n.

PAPERS (see *Private Writings, Public Records and Documents, Writings, Ancient Writings, Spoliation*).

PARAGRAPHS, reading of some, does not let in others in same newspapers 732

PARAMOUNT (see *Title*).

PARAMOUR, admissibility of letters to, in suits for divorce 768-69
competent witness in Divorce Division 1355A
not bound to answer questions respecting adultery 1355A
wife of supposed, competent witness on like terms 1355A

PARDON, how proved 1526
renders it compulsory on witness to answer criminating questions 1458A
promise of, when it excludes confession 884-85

PARENTS may give evidence, how far, to bastardise their issue 950-51
presumption respecting parent and child, when name the same 195
against deed of gift from child to 151
not bound to pay debts of child, even for necessaries..... 195
attestation required to deed appointing guardian of children, by .... 1110, 1839-41, n.

PARAGRAPHS (§§)

PARIS, marriage registers kept by British ambassador at, inadmissible (sub tit. "*Marriage Registers, &c.*") .....1593, n.

PARISH, inspection of books of, by parishioners or strangers 1497
of registers of (sub tit. "*Births, &c. Registers*").1504-21, n.
registers are official documents (sub tit. "*Births, &c. Registers*").. 1595, n.
provable by examined or certified copies under seal of Register Office (sub tit. "*Births, &c. Registers*")....1601, n.
admissiblity of extracts from local registers certified by clergyman, superintendent registrars, &c.....1601, n.
what is the proper place of custody of 661
boundaries of, not judicially noticed 17
provable by reputation 613
by verdicts and judgments inter alios..... 1683
modus provable by reputation..... 613
must be alleged and proved on indictments for what offences 281
inhabitants of (see *Inhabitants*).
officers, appointment of, presumed from acting 171

PARK, stealing or destroying trees in, to value of £1 286

PARLIAMENT (see *House of Lords, House of Commons*).
privileges of, judicially noticed 5
presumption in favour of proceedings of 84
members of, not liable to arrest, when 34B
either House of, presumed to act within its jurisdiction 84
rolls of, in custody of Master of Rolls .....1485, n.
journals of, may now be proved, and how 7-8, 18, 1529
admissibility and effect of 1661
statements made in, not to be disclosed..... 946
admissibility and effect of Queen's speech in opening 1661
of addresses of either House of..... 1661
proof and effect of certificates of papers being published by order of (sub tit. "*Parliamentary Papers*").....1611, n.
of certificates of costs of private bills (sub tit. "*Parliamentary Costs*") .....1611, n.
time and place of sitting of, judicially noticed..... 18

PARLIAMENTARY ELECTIONS ACT, 1868 (see *Table of Statutes*, 31 & 32 Vict. c. 125).

PARLIAMENTARY AND MUNICIPAL REGISTRATION ACT, 1878 (see *Table of Statutes*, 41 & 42 Vict. c. 26).

PARLIAMENTARY WITNESSES OATHS ACT, 1871 (see *Table of Statutes*, 34 & 35 Vict. c. 83) 1281

PAROL EVIDENCE, not primary evidence to prove contents of documents (see *Best Evidence*) 396-403
when admissible though written evidence on same point (see *Best Evidence*) 404-17
inadmissible to vary writings:— 1132-57
especially where by statute transactions must be evidenced by writing 1026, 1133
rule extends to records, deeds, wills and instruments required by statute or common law to be in writing, as evidence of contracts 1133
does not apply to receipts or loose memoranda 1134
forgery, fraud, illegality, or want of execution, provable by parol 1136
so duress, or want or failure of consideration 1137
evidence of oral agreement, constituting a condition upon which the performance of written agreement depends, may be given.. 1135
admitted to prove that will was not executed the day it bore date.. 1150

PAROL EVIDENCE—*continued.* PARAGRAPHS (§§)
admitted to show amount of seaworthiness implied in marine insurance....1170-71
on equitable grounds to reform or rescind writings 1139
to show written agreement waived or discharged, when..1141-42
if agreement be by deed, inadmissible 1141
in case of statutory written agreement, how far 1143
of written agreements at common law 1141
of wills 1146
distinction between revocation of will by, and ademption of legacy by..... 1146
proof of collateral parol agreement admissible..... 1147
contemporaneous writings, admissible, when 1148
strangers may disprove written statements by parol 1149
when admissible to contradict recitals of formal matter in deeds .. 1150
to contradict recited date of instruments..... 1150
illustrations of rule rejecting, to vary writings 1151-57
cannot contradict or vary examinations of prisoners 893
how far admissible to add to examination of prisoners 893
admissible to explain writings:— 1158
1st. *where writing unintelligible or susceptible of two meanings*..... 1158
foreign language, shorthand, cypher, illegible writing..... 1159
provincial, local, technical, or obsolete language..... 1159
evidence of usage, when admissible to explain language in writing 1160-64
not admissible to contradict or vary what is plain 1165-67
admissible to annex incidents 1168
e.g. days of grace allowed on bills 1168
holidays, incident to contracts for hiring and service 1168
title to heriot, though not expressed in lease 1168
title of lessee to an away-going crop .. 1168
rule annexing incident applies to all contracts respecting transactions where known usages prevail 1170
examples (see *Annexing Incidents*) 1170-86
the usage must not be repugnant to contract 1187
doctrine of expressum facit cessare tacitum 806, 1187
the usage need not be immemorial or uniform..... 1188
meaning of "custom of the country" with reference to husbandry 1188
where trade established for a year or two..... 1188
party against whom usage adduced may prove:—
1. its non-existence 1189
2. its illegality or unreasonableness 1189
3. that it formed no part of agreement..... 1189
evidence on these points may be given by way of anticipation.. 1189
explaining documents by usage, dangerous 1190-92
whether conversations admissible to explain ambiguous contract 1193
2nd. *where necessary to identify persons or things mentioned in writings* 1194
circumstances surrounding author of instrument admissible.. 1194
illustrations .....1195—1200
grounds for quashing order of removal..... 1200
intention must ultimately be determined by language of instrument 1201
question not what party intended, but what his words express. 1201
declarations of intention, generally inadmissible 1202
except 1. when description alike applicable to two subjects.. 1202, 1206 *et seq.*
2. to rebut or fortify an equity (see *Rebutting an Equity*) 1227-31

PAROL EVIDENCE—*continued.* PARAGRAPHS (§§)
except 3. where document impeached on ground of fraud or forgery 1135
when declaration of intention receivable, it matters not when or how made 1209
ancient documents explained by acts of author 1204
collateral statement made by author sometimes admissible .. 1210
e.g. writer's habit of misnaming persons 1210
distinction between latent and patent ambiguities 1212
declarations of intention cannot explain patent ambiguities.. 1212
not always admissible to explain latent ambiguities 1212
1. where, from extrinsic evidence, it appears that persons or things are not described with legal certainty 1214
2. where part of description suits one claimant and part another 1215-17
3. where one person or thing not accurately specified..1218-19
doctrine of falsa demonstratio non nocet 1218-21
description by way of exception or limitation, material..... 1224
summary of rules as to parol evidence to explain writings .. 1226
when admissible to rebut an equity (see *Rebutting an Equity*) 1227-30

PARSON, communications to, not privileged 879, 916, 917
confessions induced by spiritual exhortation of, admissible 879
attendance of witnesses on inquiry under Clergy Discipline Act against.. 1287
liability on such inquiries to cross-examination of 1358
presumption against deed of gift to 151
entries in books of deceased, when admissible for successor 688
admissions by, when receivable against successor 788
admission of being, from acting as such 801
presumption of being, from acting as such 173
returns made by, to governors of Queen Anne's Bounty, admissible ..1772A
suits against, when and how affected by Statute of Limitations....76-8, n.
burthen of proof in suits against for non-residence 377
deed of relinquishment by, must be enrolled 1119
mode of enrolling 1653
how proved 1653

PART-ACCEPTANCE takes case out of Sale of Goods Act, 1893 1020
meaning of (see *Statute of Frauds*).....1045-49

PART-OWNER, admission by, effect of 750

PART-PAYMENT takes debt out of Statute of Limitations, when (see *Limitations, Lord Tenderden's Act*) 1073, 1079-82
by one co-contractor does not bar Statute of Limitations as to others, 745-46
payment of dividend under Bankruptcy does not bar Statute of Limitations 1079

PART-PERFORMANCE takes case out of sect. 4 of Statute of Frauds, when.....1019-43
marriage does not, under sect. 4 of Statute of Frauds, amount to 1035

PARTICULARITY, effect of averment stated with needless 258-64

PARTICULARS of complaint made in case of outrage, inadmissible 581
of facts cannot be proved by hearsay in matters of public interest 617

PARTIES to record may testify (see *Competency*) 1349
though they have addressed the jury as advocates..... 1391
on whose behalf action brought or defended, may testify (see *Competency*) 1349
husbands or wives of, may testify (see *Competency*) 1351-52
may be examined by opponents prior to trial (see *Interrogatories*) 521-42
provisions on this subject under Rules of Supreme Court, 1883..521-42

PARTIES—*continued.* PARAGRAPHS (§§)
not entitled to allowances as ordinary witnesses 1248
may be allowed special costs for detention, when 1248
how far allowed to defeat judgments, by proving fraud 1713
may be ordered out of Court, if witnesses 1400
effect of persons being made, without their knowledge or consent 1686
identity of, how established 1857-60
character of person suing or sued as executor or trustee, administrator, unless specifically denied 307
judgments inter partes, conclusive for or against, when 1684-90
estoppels by, binding on privies 90
admissions by, when conclusive (see *Admissions*).
evidence against privies (see *Privies*) 787-92
admissions by nominal, effect of, as against real parties 741
how to deal with defence setting up release by nominal plaintiff 741
when privileged from arrest (see *Arrest*) 1330-41A
cannot attack character of own witnesses 1426
may contradict them, when (see *Witnesses*) 1426
may prove that they have made inconsistent statements, when 1426

PARTITIONS, under 8 & 9 Vict. c. 106, must be by deed 992

PARTNERS, presumption of continuance of partnership 196
presumption where partnership continued after expiration of term .. 196
fact of partnership provable by acts of, without producing deed 405
sharing in the profits of a business does not *per se* constitute a partnership 184
but is strong evidence of it 184
dissolution of, how far provable by notice in Gazette or newspaper .. 1666
inference must be raised aliundè that party had read the notice 1666
how this may be done 1666
presumed to be interested in equal proportions 184
presumed authority of, to accept bills, &c. 185
to pledge each other's credit 185
how far they can bind each other by guarantees 185
or by submission to arbitration ..... 185, n.
books kept by, when evidence for party who wrote them 812
admissions by one, when binding on firm 743-54
not admissible to prove partnership itself 753
acts and declarations of one, when admissible against others 598
how far admissible after dissolution 598
part-payment by one does not take debt out of Statute of Limitations as to others 600, 745-46
nor does written acknowledgment by one 600, 744
how far, if acknowledgment in name of firm 601
how judgment entered and costs given in these cases 744
what remedy against admission by one in fraud of others 749
how far party estopped from denying partnership, by allowing his name to be used by firm 840-43
how described in indictment 293
meaning of "cost-book" among, not judicially noticed 5

PARTNERSHIP (see *Partners*).

PARTY (see *Parties*).

PARTY-WALL, presumption as to property in 120

PASS-BOOK, entries in, not conclusive against bankers 859

PASSENGERS' ACT, 1855 (see *Table of Statutes*, 18 & 19 Vict. c. 119), in proceedings under, ship presumed within statute ..... 372-*t*, n.

PATENT AMBIGUITIES, what are ..... 1212 *et seq.*
declarations of intention, inadmissible to explain 1212

PARAGRAPHS (§§)

PATENTS, how proved (see *Letters Patent*) ..... 1601, n.
judge to interpret specification of 40
infringement of, question for jury, when 45A
rule regulating evidence on action for infringement of ..... 315A, n.
proof and effect of judge's certificate that validity of, came in question 1611, n.
inutility of, presumed from non-user ..... 139-42, n.
licensee cannot dispute validity of 848
in contract for sale of, what warranties not implied 1181

PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883 (see *Table of Statutes*, 46 & 47 Vict. c. 57).
seal of patent office, judicially noticed ..... 6, n.
patents for inventions, how proved ..... 1601, n.
specifications, disclaimers, &c., how proved ..... 1601, n.
copies of patents, &c., sent to Scotland and Ireland ..... 1601, n.
certified copies of those copies admissible ..... 1601, n.
registers of patent office, contents of 1775A
may be inspected and copies furnished ..... 1504-21, n.
how proved ..... 1504-21, n., 1601, n.
admissibility and effect of 1775A
include registers kept under repealed Acts ..... 1775A, n.
certificate of judge, admissibility and effect of ..... 1611, n.
of comptroller, admissibility and effect of ..... 1611, n.
of registration of designs to be granted by comptroller .. 1611, n.
in action for infringing patent, inspection, when granted 562
particulars of infringement and objection to validity must be delivered ..... 315A, n.
evidence confined to such particulars ..... 315A, n.
costs in these cases ..... 315A, n
notices under Act, how served ..... 180, n

PATERNITY, where disputed, evidence of resemblance between child and alleged father admitted, when 335

PAUPER (see *Removal, Settlement of Paupers*).
notice of chargeability of, how signed and served 1103-4
proof and admissibility of certificate of chargeability of (sub tit. "*Poor Law*") ..... 1611, n.
deposition of, as to settlement inadmissible 568
relief given to, when evidence of settlement 805
examination by justices as to settlement of, need not have separate caption to each 892
no order for removal of, can be made on uncorroborated evidence of .. 964B
though party sue in formâ pauperis, his witness not bound to obey subpœna unless expenses tendered ..... 1242, n.

PAWNBROKERS' ACT, 1872 (see *Table of Statutes*, 35 & 36 Vict. c. 93).
presumption of ownership arises from possession of pawn tickets 123
when persons charged under, must prove lawful excuse for their condition ..... 372-4, n.
how special contracts may be made under 1099
pawnbroker, when criminally responsible for act or omission of servant 115

PAWNEE has implied power to sell pledge, when 1186

PAYEE (see *Bill of Exchange, Specialties*).

PAYMENT, when presumed from bill of exchange being in hands of drawee 178
from promissory note being in hands of maker 178
from receipt for posterior claim 178
when striking balance on set-off is equivalent to 1081

PAYMENT—*continued.* PARAGRAPHS (§§)
of interest or part-payment of capital, takes debt out of Statute of Limitations, when (see *Limitations, Lord Tenterden's Act*) 1079-83
by one co-contractor, does not bar Statute of Limitations as to others .. 745-46
may be proved by parol, though receipt taken 415
receipt only primâ facie evidence of 859, 1134
effect of indorsement on deed of 96
effect of statement in operative part of deed of 96
indorsement of, by payee, on bill or note, does not bar Statute of Limitations 691
on bond or specialty does, when 692
whether necessary to prove aliundè the date of indorsement 693-96A
of rent, not conclusive admission of landlord's title 103

PAYMENT INTO COURT may be made in all cases 831
but must always be pleaded 832-37
except in actions against justices 73A, 315
how pleaded by way of amends in case of libel 831
when actions brought against parties for acts done in execution of office, or in pursuance of statute ..... 831, n.
admits plaintiff's claim to character in which he sues 803
does not necessarily admit cause of action 832-7
may now be accompanied by defence denying right of action 832-7
not so in actions for libel or slander 832-7
rules of Supreme Court relating to ..... 831, n.
admits deed in action of covenant, though execution denied 1849

PEACE, offers made to purchase, inadmissible 795-96
should not operate as admission of cause of action 795
caution respecting such offers 797

PEACE OFFICER (see *Constable, Police*).

PEACE PRESERVATION (IRELAND) ACTS (see *Table of Statutes*, 19 & 20 Vict. c. 36, Ir., 28 & 29 Vict. c. 118, Ir., and 38 Vict. c. 14, Ir.), proclamations, notices, &c. under, proved by Gazette .. 1663A-4, n.

PECUNIARY INTEREST (see *Interest*) 669-82

PEDIGREE, why hearsay admissible in questions of 635
declarations must proceed from relations by blood or marriage 635
whether declarations of bastard admissible 636
declarations of husband after wife's death 638
hearsay upon hearsay, admissible, if all declarations from relations .. 639
general repute in family admissible 639
relationship of declarant must be proved by extrinsic evidence 640
degree of relationship need not be proved 640
declarant must be dead or incapable of being examined 641
if so, his declarations admissible though living witnesses might be called 641
relationship and death of declarant, questions for judge 23A
declarations must be made ante litem motam (see *Lis Mota*) 628-34
what are matters of pedigree :— 642-47
questions of descent and relationship 642
fact and time of births, marriages, and deaths 642
evidence must be required for some genealogical purpose 645
e. g. to support defence of infancy, letters by deceased father of defendant stating time of son's birth, inadmissible 645
hearsay of what facts admissible 643-44
inadmissible 643-44
hearsay evidence of locality 646
forms in which hearsay admissible :— 648-57
oral declarations of deceased relatives 648
family conduct, as recognition of legitimacy, or illegitimacy 649

PEDIGREE—*continued.* PARAGRAPHS (§§)
notice or non-notice, or descriptions, in will 649
entries in Bibles, &c..... 650
correspondence of relatives, recitals in family settlements or deeds 651
inscriptions on tombstones, family portraits, engravings on rings, charts of pedigree 652
mural monuments provable by copy 438, 653
document must be recognized by family 654
its publicity presumption of recognition 654
pedigree compiled from register not shown to be lost, how far evidence 655-56
armorial bearings admissible 657
experts from Heralds' College should explain them 657
recitals of relationship in private Acts, cogent evidence of 1660
inquisition occasionally of value as evidence in cases of..... 1767

PEDOMETER presumed to work accurately..... 183

PEER, sitting in judgment, may give verdict on honour..... 1380
might have answered bill in Chancery upon protestation of honour .. 1380
cannot be examined in any court, except upon oath 1380
whether vivâ voce, or by interrogatories, or by affidavit 1380
if he refuse to be sworn, he will be guilty of contempt..... 1380
though witness in trial before parliament he may take part in verdict.. 1379
as much a juror as a judge in such trials..... 1379
how to be described in indictment 293
when claimant of future title as, may bring action to perpetuate testimony..... 544

PEERAGE, presumption with respect to limitation of a..... 212

PEERAGES, inadmissible 1785

PELL RECORDS, in custody of Master of Rolls (see *Master of the Rolls*)..1485, n.

PENAL ACTION, within what time it must be brought 75B

PENALTIES, within what time actions for, must be brought 75B
difference between liquidated damages and, question for judge 40
questions exposing witness to, he is not bound to answer..... 1453
extent of this protection (see *Witnesses*).....1453-58
documents exposing witness to, he is not bound to produce..... 458

PENDENCY of action, cannot be pleaded by one joint debtor 1691
of proceedings in error or appeal, does not prevent judgment from being a bar 1721

PERAMBULATION evidence of boundaries, when..... 618
statements by perambulators when admissible..... 618

PERJURY, number of witnesses to prove 959-63
one witness, and confirmatory circumstances 959
how, when several assignments of, in same indictment..... 960
whether prisoner can be convicted of, on circumstances alone 961
where prisoner has made two opposite statements on oath 962
what collateral facts may be proved by one witness 963
witness speaking to belief, may be guilty of.....962, 1416
committed before grand jury, how to be dealt with 943
on indictment for, in affidavit, deposition, or answer, the original document must be proved 1535
in a criminal trial, how record of trial proved ..1612-14
in a trial, record evidence that trial was had 1668
what sufficient proof of prisoner having been sworn..143-4
will convict be allowed copy of deposition, for purpose of assigning?..1489, n., 1535

PERJURY—*continued.* PARAGRAPHS (§§)
dying declarations inadmissible as to 715
amendments, when allowable indictments for 252
materiality of matter sworn to, question for judge 45
court may award costs to witness on trial of, or of subornation of 1254

PERMISSIVE OCCUPATION, questions respecting, for jury 45A

PERPETUATING TESTIMONY, mode of 543-45
Ord. xxxvii., R. 35, and 21 & 22 Vict. c. 93 544
depositions, how taken 545
when admissible 545

PERSONS LAWFULLY AUTHORISED (see *Agent*).

PERSONAL SERVICES, warranties implied on contracts for 1183
death usually terminates contract for 1184

PERSONALTY, what is, though annexed to land 1041-42
presumption as to ownership of, from possession 123
original will no evidence of title to 1589
exception to this rule 1589

PERSONATION ACT, 1874 (see *Table of Statutes*, 37 & 38 Vict. c. 36).
offence against, cannot be tried at Quarter Sessions ..... 1714, n.

PETITIONING CREDITOR, when estopped from disputing bankruptcy .. 800

PETTY BAG OFFICE, is now part of Enrolment Department of Central Office ..... 1647, n.
records in, provable by office copies ..... 1542, n.
what records are deposited in ..... 1542, n.
proof and effect of certificates of documents being enrolled in ..... 1647, n.

PETTY LARCENY (see *Larceny*).

PETTY SESSIONS (see *Justices*).

PEVERIL, records of abolished Court of, where deposited ..... 1485, n.

PEW, entries in vestry-books, when evidence to support title to 1777

PHARMACEUTICAL CHEMISTS, registration of, how proved 1638

PHARMACY ACTS (see *Table of Statutes*, 15 & 16 Vict. c. 56, and 31 & 32 Vict. c. 121).

PHOTOGRAPH evidence to establish identity ..... 1612-14, n.

PHYSICIANS (see *Medical Man*), inspection of books of College of 1498-99
may sue for fees, when 802-3

PICTURE, writing required to evidence contract to paint a ..... 1044, n.

PICTURES of ancestors admissible in cases of pedigree 652

PILOT, presumption against owner of ship, though pilot on board 208
fault or incapacity of, how far exempts owner from liability ..... 208 & n.

PLACARDS, how contents of, provable 418

PLACE, allegations of, unnecessary in body of indictment 280-1
sufficient to state venue in margin ..... 280, n.
exception in indictment for local offences 281
what are local offences 281-2
allegations of, in civil actions, immaterial 280
of deposit for writings, what is proper (see *Custody*) 429-34, 659-63

PLACE—*continued.* PARAGRAPHS (§§)
of birth or death, may be proved by register under Registration Act, when 1775
when and how far provable by traditions of relations 646-47

PLAINTIFF, competent witness for himself (see *Competency*) 1349
compellable to testify for opponent (see *Competency*) 1349
cannot split his demand 1703

PLAY (see *Dramatic Piece*).

PLEADING, objects of present rules of ..... 299 *et seq.*

PLEADINGS (see *Issue, General Issue, Amendment*).
now regulated by the Rr. S. C. 1883 299
what they consist of 300
general issue is practically abolished 303
except "not guilty by statute" 311-15
rules of 301-8
are intended to prevent either party being taken by surpise 299
allegations not denied taken to be admitted (see *Admissions*) 301, 824
allegations not denied deemed to have been denied, when 829
new assignments abolished ..... 301 & n.
effect of joinder of issue 302
may be amended 220, 226-42
effect only of documents need be stated in 1786
illegality or insufficiency in law of any contracts must be pleaded specially 306
doubtful effect of this last rule 308
representative character, when disputed, must be denied specifically .. 307
ought want of jurisdiction to be pleaded? 310
of one co-defendant no evidence for or against the others 754
record, apart from rules, can be amended so as to raise real question in dispute 241
admissions in, when and how far conclusive (see *Admissions*) .. 821-30, 1753
how proved 1586
estoppels generally not binding unless pleaded 91

PLEADING GUILTY (see *Guilty* and *Confessions*).

PLEADING OVER, effect of, as an admission (see *Admissions*).

PLEDGE, witness not bound to produce documents which he holds as a .. 458
when pawnee has implied power to sell a 1186

PLUNKET, LORD, his observations on Statute of Limitations 79

POACHING, within what time prosecution must be commenced ..... 76-8, n.
proof of place must correspond with allegation 282
what sufficient allegation of locality 281-2

POLICE (see *Constable*).
appointment of, presumed from acting 171
credibility of testimony of 57, 68-9
confessions made under inducement by, inadmissible 873
duty of, with respect to taking confession of prisoner 874, 882
what costs allowed to, as witnesses in criminal trial ..... *App.* vi *et seq.*

POLICIES OF MARINE INSURANCE ACT, 1868 (see *Table of Statutes*, 31 & 32 Vict. c. 86) its provisions 999

POLICY, PUBLIC, excludes what evidence (see *Privileged Communications*) 908-29
of insurance (see *Insurance*).

POLYGAMY (see *Bigamy*).

PARAGRAPHS (§§)

POOR-LAW, orders made by late Board touching settlement, &c., of paupers, effect of 1762
seal of late Board, judicially noticed ..... 6, n.
of Irish Commissioners judicially noticed ..... 6, n.
provisions governing validity of orders of late Irish Commissioners .. 1106
attendance of witnesses before Irish Commissioners, how enforced.... 1293-1309, n., & *Errata*
Act, when it allows inspection of documents.....1504-21, n.
valuation in Ireland, public documents.....1595, n.
how proved .....1600, n.
effect of, in evidence 1777

POOR-RATE BOOKS, how probably proved .....409, 1600, n.
may be inspected, when.....1504-21, n.
furnish what proof 147A

POPULATION RETURNS in custody of Master of Rolls.....1485, n.
how proved..... 1533

PORT-DUTIES, presumed legal from long enjoyment 130

PORTRAITS, family, admissible in cases of pedigree 652

POSSESSION, presumption of ownership from.....123, 685
what constitutes letting into 103
what constitutes recent.....127A-7o
declaration by person in, against his own interest, admissible 684-87
presumption of guilt from recent possession of stolen property ..63, 127A-B
of guilt from possession of coining tools, bank-note paper, &c. .....372-4, n.
of fraud, from vendor of chattels remaining in 150
of forged notes or bad money, admissible on charge of uttering 345
of bill of exchange by drawee, presumption of payment from 178
of agent, when possession of principal, so as to necessitate notice to produce 430
ancient (see *Ancient Possession*) 658-67

POST, letters sent by, presumed to reach destination in due course 179
when this presumption is conclusive by statute or rules of Court ..180 & n.
what citations in Scotland may be served through the 180
what notices and orders may be sent by .....180 & n.
can depositions under commission be sent by?..... 1579

POST-DATED CHEQUE, BILL, &c., may now be given in evidence .. 850

POSTEA, indorsed on Nisi Prius record, cannot, in general, prove verdict 1570
evidence of fact of trial 1573
e.g. to let in testimony of witness since deceased .. 1573
perhaps to support indictment against witness for perjury 1573

POSTING OF LETTERS, when presumed from ordinary practice 182

POST LITEM MOTAM (see *Lis Mota*).....628-34

POSTMAN, admission of being, from acting as such 801

POST-MARK evidence of letter being in the post at time and place specified 179
how proved..... 1417

POST-MASTER GENERAL, orders, regulations, and instruments issued by, how proved 1527

POST MORTEM EXAMINATION, fee to medical man for, by coroner's order, making .....1290, n.

PARAGRAPHS (§§)

POST-MORTEM INQUISITION, fee to medical man for making examination ..... 1290, n.
mode of proving return to inquisition 1582
how far evidence against stranger 1674

POST-OFFICE, appointment of person employed in, presumed from acting 171
books of, admissible as public documents (sub tit. "*Public Offices*") 1590-7, n.
provable by examined or certified copies (sub tit "*Public Books*") ..... 1600, n.
when letters presumed to have been put in 179, 182
Treasury warrants relating to, how proved ..... 1527, n.

POST-OFFICE (PROTECTION) ACT, 1884 (see *Table of Statutes*, 47 & 48 Vict. c. 76).

POSTPONEMENT OF TRIAL from temporary insanity or illness of witness ..... 472-8, n.
of attesting witness 1843A
in consequence of amendment ..... 248-51, n.
whether, can be made to allow child to be instructed ..... 1377, n.

POTATOES not within sect. 4 of Statute of Frauds 1042

POWER OF ATTORNEY, when agent must be appointed by 985
mode and effect of granting, by Joint Stock Company to execute deeds 989

PRACTICE, as to postponement of trial (see *Postponement of Trial*).
as to amendments (see *Amendment*) 221-53
as to admitting accomplices, and requiring confirmation 967-71
as to the order of proof, and right to begin and reply (see *Onus Probandi*).
as to calling for production of documents at trial ..... 1816 *et seq.*
of conveyancers, judicially noticed 5
of superior courts of law, judicially noticed 19
of other courts, how far judicially noticed 20

PRAYER-BOOK, entry in, admissible in matters of pedigree, if made by relative 650

PREAMBLES OF STATUTES, admissibility and effect of 1660

PREFERENCE, when presumed fraudulent in bankruptcy law 83

PREGNANCY, jury of matrons, where prisoner pleads ..... 554, n.
medical man may assist such jury ..... 554, n.
presumption as to age for 105
of witness may be ground for admitting deposition, when ..... 481, n.

PREJUDICE, offers made without, inadmissible 774, 795-97

PRELIMINARY INQUIRIES ACT, 1851 (see *Table of Statutes*, 14 & 15 Vict. c. 49) how witnesses made to attend before inspectors under.. 1329, n.

PREROGATIVE COURT OF CANTERBURY (see *Ecclesiastical Courts*).

PREROGATIVES OF CROWN judicially noticed 5

PRESCRIPTION (see *Customs*).
private prescriptive rights, whether provable by reputation 615
Act, within what time title to incorporeal rights must be claimed under ..... 75A & n.
taking case out of, by consent or agreement by deed or writing.. 1092
right to passage of air for windmill not within ..... 75A & n.
claim of a free fishery within the waters of another, not within 75A & n.

PRESENCE, meaning of, in Wills Act, as to attestation 1052-55

Vol. I. ends with § 971.

PARAGRAPHS (§§)

PRESENTATIONS TO LIVINGS, right to, not provable by hearsay .. 614
register of, who entitled to inspect..1498-9

PRESENTMENT of cheque, bill, or note payable on demand, time allowed for.....30 *et seq.*
within what hours allowable.. 32
in Manor Court, when admissible as reputation 623
in other cases 1773
when steward compellable to produce as witness 460

PRESUMPTIONS, different kinds of 70
legal, must be pointed out by judge 25, 111
legal, conclusive or disputable 70
conclusive, on what founded 71, 107-8
when conclusive by statute 72-9
at common law 80-108
particular conclusive :—
of schemes for endowed schools being duly made 72
of validity of valuation lists in metropolis 72
of bill of exchange being a foreign bill, when..... 72
as to smuggling..... 116
of payment, from non-claim within six years (see *Limitations*) ..73, 79
of title, from undisputed enjoyment 74A, 79
of religious opinions, from usage for twenty-five years 75G
of innocency, from non-prosecution (see *Limitations*)..... 76-8
of knowledge of law, both civil and criminal 80
of malice in deliberate publication of calumny 83
in false representation..... 83
of plaintiff's right of action when defendant wilfully neglects to plead..... 83
of fraud in deed delaying creditors under bankrupt law 83
that testator approved of will, when..... 160
of criminal intent, from what acts..... 80-2
that party intends natural consequences of his acts 80-3
in favour of judicial proceedings 84-6
in favour of regularity of what formal proceedings 85
of proceedings leading up to deed under 21 & 22 Vict. c. 72 86
in favour of records 85
in favour of awards 86
that deeds in absence of fraud were executed on good consideration 86
that goods have been shipped, when bill of lading negotiated.... 86
in favour of ancient instruments 87-8, 667
estoppels (see *Estoppel*) .....89—102
admissions in judicio, and admissions acted upon (see *Admissions*).
respecting infants (see *Infant*) 104
respecting age of child-bearing 105
respecting legitimacy 106
from carrying enemy's despatches in neutral ship 107
from spoliation of papers on capture of neutral ship 107
disputable, nature and principles of :— 109-10
of law and of fact, distinction between..... 111
distinction often overlooked 111
of innocence 112-14
when met by some counter-presumption 114
exceptions to presumption of innocence 115-15A
of guilt in odium spoliatoris 116
from destroying evidence..... 116
from withholding evidence 116, 372-4, 555A, 804
from fabricating evidence 117
from client not allowing solicitor to disclose confidential communications 117
of innocence or guilt, how far affected by evidence of character..349-63
of unlawful intent, when raised..... 118
when not 118

PRESUMPTIONS—*continued.* PARAGRAPHS (§§)
respecting boundaries (see *Boundary*) 119
land between high and low water mark 119
ownership of a several fishery..... 119
the soil of unnavigable rivers 119
the soil of navigable rivers and arms of the sea 119
not applicable to great non-tidal inland lakes.... 119
owners of surface and of minerals 121
ownership of waste lands..... 122
encroachments on waste land by tenant 122A
houses let out in flats 121
right of lateral support, when houses or closes adjoining 121
of ownership, from possession.....123-7
of title, from long enjoyment.....127, 131
of regularity, from lapse of time 128-30
of legal origin, from long usage..... 131
of grants from the Crown 130-31
of dedication to the public 131
of conveyance of legal title 132-5
of surrender of lease by operation of law..... 138
of surrender of outstanding terms 136-7
of title, from acquiescence in claims 139-42
against stale demands 139-42
of inutility of patent, from non-user .....139-42, n.
of consent, from general acquiescence.....139-42
of guilt, from recent possession 127A-7c
of guilt, from possession of coining tools, &c. .....372-4, n.
of breach of neutrality, from sale of ship .....372-4, n.
omnia ritè esse acta 143-4
as applied to official or judicial acts 143-7A
cannot give jurisdiction to inferior tribunals, justices, &c. .. 147
as applied to the publication of highway rates and poor rates.... 147A
to private acts 148
that bills and notes are founded on good consideration..... 148
that lost instruments were duly stamped 148
that reversion was got in, where leasehold dealt with as freehold. 148
respecting knowledge of contents of deeds 150
execution of deeds..... 149
fraudulent deeds void by the Statute of Elizabeth ..150-50A
alterations in deeds.....164, 1819
deeds of gift, and voluntary settlements 151, 158
negotiation with heirs apparent and reversions 153
apportionment, of periodical payments, &c..... 159
charitable grants 155
incumbrances paid off by tenant for life 154
joint-tenancy 157
equitable fraud 151
execution, alteration, revocation, and construction of wills (see *Wills*) 160-68, 1056
mistakes in wills 1215-23
attestation clause, in wills 1056
abatement of legacies in wills..... 166
bequest of annuities 166
cumulative legacies and double portions 1227
satisfaction of debts by legacies 1228
legacies to executors 167
undisposed of residuary estate 167
emblements..... 167
meaning of words "children," "cousins," "family" 168
meaning of "moneys," "furniture," "debentures," "unmarried" 168
that documents were made on day they bear date 169
exceptions to this rule (see *Date*) 169, 582, 693-96A

PRESUMPTIONS—*continued.* PARAGRAPHS (§§)
of due appointment, from acting in public office 171
of validity of marriage de facto 172
of marriage, from cohabitation 172
even though commenced in adultery 172
exceptions to this rule 172
respecting professional men, from their acting as such.....173-4, 801
from usual course of trade or business.....176-82
of conversion in trover, from demand and refusal 176
that contract was made in accordance with usage 181
that contracts are to be performed within reasonable time 177A
that bills found in hands of drawee have been paid 178
that all rent due has been paid if receipt for last quarter produced 178
as to what constitutes a debt or a loan 178
respecting right to determine tenancy from year to year 178
right of mortgagor to distrain for rent as bailiff of mortgagee 176
mortgages which have been paid off..... 176A
the hiring of servants 177
the accurate working of scientific instruments..... 183
e.g. clocks, watches, pedometers, thermometers, aneroids, anemometers, gas and water meters.. 183
partners 184-5
agents 186
surgeons and apothecaries 174
terms of tenancy and service 176-7
transmission of letters by post..... 179
notices sent by post from offices of Supreme Courts ... 180
notices and documents sent by post under Bankruptcy Act 180
other notices served through the post..... 180
carriers and innkeepers 187
negligence 187-8
master of steam-vessels, when accident occasioned by collision 206
infants (see *Infant*)..... 182
capacity of infant witness 1377
coercion of married women 190-1
agency of wife.....192-3
impotence..... 194
parent and child when they bear the same name..... 195
continuance of human affairs 196-7
of partnership, &c..... 196
of opinions 197
of life .....198—201
survivorship.....202-3
the foundering of ships..... 204
the seaworthiness of ships 205
dereliction 207
liability of shipowner, though pilot on board 208
for repairs or stores ordered by master 208A
domicil 209-10
copyhold property 211
the limitation of a peerage 212
the capacity of deaf and dumb witnesses 1376
religious belief in witnesses 1385
the refusal to answer questions 1467
of international comity 213
effect of, in shifting burthen of proof (see *Onus Probandi*) 367-70
of fact, nature and principles of:— 214-16
against testimony of accomplice 216
verbal admissions 216, 861
of account stated from production of I O U..... 124

PRESUMPTIONS—*continued.* PARAGRAPHS (§§)
are questions for jury aided by advice of judge 216
what raised by equity, against apparent intention of instrument (see *Rebutting an Equity*) 1227-28
distinction between legal presumptions and rules of construction.. 1231

PRETENCES (see *False Pretences*).

PREVENTION OF CRIME (IRELAND) ACT, 1882 (see *Table of Statutes*, 45 & 46 Vict. c. 25, Ireland).
enforcing attendance of witness under .....1323, n.

PREVENTION OF CRUELTY TO CHILDREN ACT, 1894 (see *Table of Statutes*, 57 & 58 Vict. c. 41).
children may give evidence not on oath as to offences summarily punishable under 1389D
such evidence must be corroborated 1389D
child may be punished for giving false evidence.....1389D

PREVIOUS CONVICTION (see *Certificates, Conviction*) 1437, 1612-14
admissible to rebut evidence of prisoner's good character..... 352

PRIEST, Roman Catholic, confession to, not privileged 879, 916-17

PRIMARY EVIDENCE (see *Best Evidence*).

PRIMARY MEANING (see *Meaning*), of words, what is 1131
words must be interpreted in their, when..... 1131

PRINCIPAL (see *Agent, Accessory*).
effect of recognition by, of unauthorised act of agent 605, 985, 1108
debtor, admissions by, when evidence against surety 785-86
felon, confession by, no evidence against accessory 904
record of conviction of, no evidence of his guilt, as against accessory.. 1693

PRINT, instrument partly in writing and partly in, how interpreted 1130

PRINTED NAME, when sufficient signature 1029, 1060

PRINTER TO CROWN OR PARLIAMENT, what documents printed by, want no proof 7-8, 1524, 1527, 1529

PRIORITY OF DEED, presumption as to 148

PRISON books, admissible as public documents .....1595, n.
how proved .....1596-7, n.
in case of Irish prisons .....1663-4, n.
effect of 1776
register of baptisms and marriages inadmissible (sub tit. "*Baptism, &c. Registers*").....1592, n.
person confined in, may be summoned as witness by habeas corpus, or judge's warrant or order (see *Attendance of Witnesses*) 1272-76
no proof required of handwriting of Governor of Holloway .....14, n.

PRISON ACT, 1877, for England (see *Table of Statutes*, 40 & 41 Vict. c. 27).
rules under, how proved .....1527, n., 1663A-4, n.
seal of Prison Commissioners under, judicially noticed..... 6, n.

PRISON ACT, IRELAND, 1877 (see *Table of Statutes*, 40 & 41 Vict. c. 49).
rules under, how proved .....1663A-4, n.
seal of General Prisons Board under, judicially noticed .... 6, n.

PARAGRAPHS (§§)

PRISONER, when evidence of character of, admissible for 351
against 352
if witness called to character of, on charge of felony, not capital, prosecutor may prove previous conviction 352
made to attend as witness, by habeas corpus (see *Attendance of Witnesses*) 1272-76
by order of judge, when 1276
in County Courts, when ..... 1276, n.
when entitled to a copy of the indictment 1488-90
may enforce attendance of witnesses 1260
provision for paying the expenses of such witnesses 1260
when court may order costs of, to be paid by prosecutor 1260
when court will order property found on, to be restored 1260A
confessions by (see *Confessions*).
examination of, by magistrate 888-96
by coroner 901
writings in possession of, operate as admissions, when 812
errors in name of, may be corrected 295

PRIVATE ACTS OF PARLIAMENT, how proved 7-8, 1523
admissibility of recitals in 1660

PRIVATE RIGHTS, not provable by reputation 615
unless perhaps in the case of prescriptive right 615

PRIVATE WRITINGS, when evidence as part of res gestæ (see *Hearsay, Conspirators*) 588, 595
rules governing the interpretation of 1131-32
contemporaneous, admissible to explain each other 1148
contents of, not provable by parol (see *Best Evidence*) 396
cross-examination as to contents of, allowed, though not produced .. 1447
mode of proceeding in such case 1447-49
this rule is probably applicable to criminal trials 1449-50
when necessary to show that they come from proper custody 659-60
what is proper custody of 432-4, 660-63
inspection and production of, before trial, how obtained:— ..... 1786 *et seq.*
either party may inspect documents referred to during proceedings by his adversary 1787-90
rule as to other documents 1791-92
former practice on this point 1793-95
rule as to professional privilege 1793-93A
lien is no ground for objection to production 1794
inspection might be granted to obtain evidence to answer opponent's case 1795
instances under former law 1795-95A
inspection is not limited to documents that may be admissible in evidence 1797
when production may be ordered 1798
practice in action referred to official referee 1798
in action referred to ordinary arbitrator 1798
mode of discovery (see *Discovery*).
inspection generally confined to applicant and his solicitor 1809
when interpreter or experts may inspect 1809
inspection in Probate and Admiralty Divisions 1810
in Bankruptcy Courts 1810A
in County Courts 1811-13
under Friendly Societies' Acts 1814-15
what sufficient excuse for non-production of, at trial (see *Secondary Evidence*) 428-62
when lost, what search sufficient to let in secondary evidence (see *Lost Instrument, Custody*) 429-35
when lost, presumed to be duly stamped 117, 145, 148
if in hands of opponent, when and what notice to produce necessary (see *Notice to Produce*) 440-56A, 1816

PRIVATE WRITINGS—*continued.* PARAGRAPHS (§§)
party served with notice, not bound to produce 1816
after notice, what is the proper time for calling for production .. 1817
production of papers upon notice, does not make them evidence .. 1817
unless opposite party inspects them 1817
party refusing to produce document after notice, cannot put it in as his evidence 1818
alteration in, effect of (see *Alteration*) 1819-37
mutilated documents, when admissible, if coming from proper custody 1838
what must be attested (see *Attesting Witness*).....1839-41, n.
necessity of calling attesting witness (see *Attesting Witness*)....1842-56
proof of identity of party to suit with person executing instrument (see *Identity*) 1857-60
modes of proving handwriting (see *Handwriting*) 1862-78

PRIVIES (see *Public Records and Documents, Strangers*).
different kinds of.....90, 787
in blood, as heir or co-parcener 90, 787
by estate, as feoffees, donees, lessees, assignees, joint tenants, and successive bishops, rectors, and vicars 90, 787
in law, as executors, administrators, lords by escheat, tenants by the courtesy, tenants in dower, husbands suing, or defending in right of their wives 90, 787
estoppels binding upon..... 90
unless privy would be aggrieved or defrauded by conduct of his party 90
admissions evidence against 787-94
e. g. declarations of ancestor admissible against heir 787
of intestate against administrator 787
of landlord against tenant 788
of bishop, rector, or vicar against successor 788
but declarations of executor not admissible against special administrator .....787, n.
nor of tenant against reversioner 789
how far declarations of lessee of tithes against vicar..... 789
of tenant in action for recovery of land against landlord defendant 789
of assignor of chattel against assignee 790
only when identity of interest between them 790
as where assignee is mere representative of assignor..... 790
or has acquired title with notice of admission 790
or has purchased stale demand 790
e. g. indorsee taking bill after due, or without consideration 791
declaration of prior holder of bill inadmissible, when 791
possession of, when possession of party, so as to make notice to produce necessary..... 441
judgments inter partes binding on, when.....1682-90

PRIVILEGE of copyright (see *Copyright*).
of witness, as to not answering questions (see *Witnesses*).....1453-58A.
of witnesses, parties, counsel, and solicitor, as to arrest (see *Arrest*)..1330-41
of Parliament, judicially noticed 5
of royal palaces, judicially noticed 5

PRIVILEGED COMMUNICATIONS,
rebut presumption of malice 118
when admissible 908-51
1. communications between husband and wife 909A
extent and meaning of rule 909A-10A
2. *made to legal adviser*, principle of exclusion 911-23
who are included in rule as legal advisers 911, 920
counsel or solicitor..... 911
interpreter, intermediate agent, solicitor's town agent, foreign counsel, barrister's or solicitor's clerks 920

PRIVILEGED COMMUNICATIONS—*continued.* PARAGRAPHS (§§)
perhaps executor of solicitor, as to papers of client coming to his hands ... 922
medical men not within rule ... 916
clergymen and Roman Catholic priests not within rule ... 916
propriety of extending rule to clergymen ... 917
clerks, bankers, stewards, confidential friends, not within rule. 916
perhaps licensed conveyancers ... 916
privilege, that of client ... 922
rule, how applicable when *legal adviser* interrogated ... 913
communication need not relate to litigation commenced or anticipated ... 913
must relate to matters within ordinary scope of legal adviser's duty ... 913
trustees and mortgagees, how far protected from producing title-deeds of cestuis que trust, or mortgagors ... 918
rule applies though client stranger to suit ... 919
documents in hands of solicitor to trustees of bankrupt ... 919
party not bound to produce document need not disclose its contents ... 919
where solicitor has violated his trust ... 922
documents not inadmissible because illegally taken from him. 922
solicitor must have been acting as legal adviser ... 923
no regular retainer necessary ... 923
person not solicitor, consulted as such ... 923
rule, how applicable when *client* interrogated ... 924-25
has been held to extend to any communication before any dispute ... 924-25
rule, when solicitor acting for opposite parties ... 926
protection remains for ever, unless removed by client ... 927
protection does not extend to crimes ... 912, 929
exceptions to rule ... 930
illustration of these exceptions ... 931-37A
solicitor turning informer as co-conspirator ... 931
statements made before retainer, or after employment ceased. 931
solicitor consulted, but not employed, being under-sheriff .. 932
offers of compromise made between parties in presence of solicitor ... 932
information communicated to solicitor from collateral quarters. 932
questions asked solicitor as to matters of fact ... 933
solicitor may prove client's handwriting ... 934
may identify his client as having sworn an affidavit ... 935
must state facts upon which his opinion of testator's capacity founded ... 935
must state address of client who is concealing his residence .. 935
rule does not extend to unnecessary communications ... 936
solicitor as attesting witness must prove execution by client.. 936
cannot state whether document intrusted to him was duly stamped ... 937A
or had erasure upon it ... 937A
3. *judges, arbitrators, and counsel*, not bound to testify as to matters in which they have been judicially or professionally engaged 938
reasons for, and extent of, rule ... 938
4. *secrets of State*, excluded from public policy ... 939
communications to government for detecting crimes ... 939
channels of information—informers ... 940-41
proceedings of grand jurors ... 942-43
of petty jurors, grounds of verdict ... 944
of Property Tax Commissioners ... 945
statements within walls of parliament ... 946
official communications to government officers ... 947-48A
5. how far evidence can be rejected on grounds of *indecency, or of injury to feelings or interest of strangers* ... 949

PRIVILEGED COMMUNICATIONS—*continued.* PARAGRAPHS (§§)
non-access could not be proved by husband or wife 950
how far parents can bastardise their issue 951
effect of plea of justification 341
jury must determine whether communication made bonâ fide 44
court will decide whether the occasion justified the communication 44

PRIVY (see *Privies*).

PRIVY COUNCIL (see also *Judicial Committee of Privy Council*).
orders issued by, how provable 1527, 1662

PRIVY SEAL judicially noticed 6

PRIZE, judgment of Court of Admiralty on questions of, conclusive, when .....1675, n.
of foreign Courts of Admiralty, effect of 1725A, 1733

PRIZE-FIGHT, parties attending a fatal, guilty of manslaughter 968
do not require corroboration as accomplices..... 968

PROBABILITY, what constitutes 61
of statement, one test of truth 61

PROBABLE CAUSE, question for judge 28
in suit for malicious prosecution jury may, but not bound, to find malice from want of .....118, n,

PROBATE, what it is 1588
what proof required before it will be granted 1588
when granted in case of will lost or destroyed..... 436
how proved, when granted 425, 1589
how proved, when lost or destroyed 1589
revocation of, how proved .....1589, n.
when evidence of will, in case of realty.....1759-61
if proved in solemn form, and heir and devisees cited 1759
if notice of proving devise by, given 1760
conclusive and sole evidence of executor's title 1588
exception in case of will of wife made in pursuance of a power..1588, n., 1712
stamp on, how far proof of assets 860
grant of, is a judgment in rem .....1675, n.
is it evidence for defendant, on indictment for forging the will 1677
does not exclude evidence of testator's insanity, where executor's title not impeached 1677
may be defeated by proof that testator is alive 1714
granted by diocesan, how defeated before January 11, 1858 1714
effect of foreign 1738
proving devise by 1760
not evidence to prove appointment of testamentary guardians..... 1761

PROBATE, OLD COURT OF, seal of, judicially noticed..... 6
also of registries of 6
probate granted by, how proved 425
documents of, where deposited and how inspected..... 1487

PROBATE DIVISION, seal of, judicially noticed .....1590, n.
powers of, judicially noticed 19
has same rules of evidence as other Divisions of High Court 575, 966A
proceedings in, when taken or sworn abroad, how proved 12
notice to admit documents in .....724A (1), n.
attendance of witnesses in, how enforced..... 1283
scale of remuneration to witnesses in.....*App.* iii
probate granted by, how proved 425, 1589
exemplification granted by registrar of 425, 1589
effect of Scotch confirmation of executors sealed by .....1588, n.

PROBATE DIVISION—*continued.* PARAGRAPHS (§§)
commissions to examine witnesses granted by 518
inventory exhibited in, how far admission of assets 860
documents of, where deposited and how inspected 1487
original wills, where deposited and how inspected 1487
calendars of grants of probate and administration, how inspected 1487
register of, how proved ..... 1600, n.
what decisions of, judgments in rem ..... 1675, n.
can grant probate of wills relating to realty 1759-61
can compel discovery, when 1810
can enforce production of wills, &c., when 1810

PROBATIS EXTREMIS PRÆSUMUNTUR MEDIA, application of maxim 128

PROCESS, service of, how proved in High Court 1586A
in County Courts 1586B
in Courts of summary jurisdiction 1586C

PROCHEIN AMY (see *Guardian*), admissions by 742
not a party within rule making judgment evidence for or against parties 1686

PROCLAMATIONS judicially noticed ..... 5 & n., 8
how proved 1527
admissibility and effect of recitals in 1660
of foreign states, how proved 10, 1528
of colonies 9, 1528
when presumed posted by authority 143-4

PROCTOR (see *Solicitor*).

PROCURATION, what documents may, or may not, be signed by .. 1107 & nn.

PROCURING EVIDENCE, costs of, when allowed 1247

PRODUCTION of documents before trial (see *Discovery, Private Writings, Public Records and Documents*).
at trial (see *Notice to Produce*).
when witness not bound to produce documents 458-59, 1464
witness called to produce a document need not be sworn 1429
if unsworn, cannot be cross-examined 1429
of wills may be enforced by Court of Probate, when 1810
of articles, to be identified by jury 555-57
presumption from non-production of evidence 116, 376A, 555A, 804
presumption of title to documents from production 124

PROFESSIONAL confidence (see *Privileged Communications*) 911-37A
men, presumptions respecting, from acting as such 173-5, 801-3
entitled to what allowance as skilled witness ..... 1247 & *App.* i-ix
treatises may be referred to by experts to refresh memory, when .. 1422-23

PROFITS A PRENDRE, when barred by Prescription Act ..... 75A & n.
how taken out of Prescription Act ..... 75A, n., 1092
must be created or assigned by deed 973-74
how far sect. 4 of Statute of Frauds applies to 1038

PROHIBITION, on motion for, Queen's Bench will reject intendment that inferior Court will outstep its duty 147

PROLIXITY in affidavits, effect of 1396c

PROMISE (see *Breach of Promise, Confession*). PARAGRAPHS (§§)
excludes confession, when 872-86
does not exclude evidence of facts ascertained by confession 902-3
must be by signed witing if made:—
1. by executor or administrator to pay out of his own estate..... 1019
2. by any man to answer for default of another..... 1019, 1030B-34
to pay debt barred by Statute of Limitations (see *Lord Tenterden's Act*) 744-46, 1074-78
no one document need contain, in cases within Statute of Frauds, 1026 *et seq.*
how far, need appear on face of document falling within Statute of Frauds 1022-23
what, when it falls within Statute of Frauds, must appear on face of written document containing 1024-25
ratification of, by infant, no longer valid (see *Infant*) 1084

PROMISSORY NOTE (see *Bill of Exchange*).

PROOF, defined 1
burden of (see *Onus Probandi*) 364-90
when unnecessary (see *Judicial Notice, Presumption*).

PROPER CUSTODY (see *Custody*) 432-4, 659-63

PROPERTY, presumption of, from possession 123
finding of, in consequence of confession, admissible when 902
found on prisoner, when court will restore 1260A
on indictment for malicious injury to, unnecessary to allege or prove intent to injure or defraud any particular person 294

PROPERTY TAX COMMISSIONERS, how far bound to secrecy..... 945

PROPOSAL IN WRITING, not acted upon, need not be produced 405-6

PROPRIETARY INTEREST (see *Interest*) 684-87

PROSECUTIONS (see *Indictment, Malicious Prosecution*).

PROSECUTOR, name of, must be proved as laid (see *Variance*) 293
misnomer of, how amended (see *Amendment*).....248-51 & n.
rules for describing, in indictment..... 293
when more than one, what sufficient description 293
not competent witness when he has addressed jury as advocate 1391
no legal right to address jury as advocate 1391
may be ordered out of court when a witness 1400
wife of, admissible for or against prisoner 1365
inducements by, will exclude confession, when (see *Confession*) 873
expenses of, when allowed in felonies 1254
in misdemeanors 1254
in offences against the coinage .....1253, n.
in misdemeanors under Debtors Act, 1869 .. 1255
scale of such allowances as fixed by Home Secretary.....*App.* vi
rewards granted to, for activity and zeal, when.....1257A
may be ordered to pay prisoner's costs, when..... 1260
in trials for rape, bad character of prosecutrix, when evidence 363
when specific immoral acts of, may be proved..363, 1441
may be cross-examined as to immoral conduct 1441

PROTECTION OF WITNESS, as to self-crimination (see *Witnesses*).. 1453-64
as to arrest (see *Arrest*) 1330-39

PROTECTOR, consent of, to dispossession of tenant in tail, must be by deed enrolled 1122
mode of proof of such enrolment 1650A

PARAGRAPHS (§§)

PROTEST, of bills of exchange, must be attested by two witnesses, when ..... 1110, 1839-41, n.
when presumed 806
of foreign bill, how proved 424

PROVIDENT SOCIETIES (see *Friendly Societies*).
acknowledgment of registry of, by whom granted, and effect of (sub tit. "*Industrial and Provident Societies Act*") ..... 1611, n.

PROVINCIAL AND UNITED DIOCESAN COURTS, IRELAND (see *Diocesan Courts, Ireland*).

PROVISIONAL COMMITTEE of intended company, liabilities of 843

PROVISO, burthen of proving, in certain cases 375-6A

PROVOCATION, evidence of, in mitigation of damages in action for libel 344

PROXIES in bankruptcy, how appointed 1101
difference between voting letters and 1101

PUBLIC AUTHORITIES PROTECTION ACT, 1893 (see *Table of Statutes*, 43 & 44 Vict. c. 42).
provisions of 73A
payment into court under ..... 831, n.

PUBLIC CONVEYANCES (see *Licence*).

PUBLIC DOCUMENTS may, under Evidence Act, 1851, be proved by examined or certified copies 1599A
alphabetical list of what are ..... 1601, n.
alphabetical list of registers, &c., admissible in evidence as ..... 1595, n.
alphabetical list of registers not admissible in evidence as not being 1592 & n.

PUBLIC AND GENERAL INTEREST, hearsay admissible in matters of 607
why received 608, 617
distinction between matters of public, and those of general, interest .. 609
in public matters, reputation from any one admissible 609
in general matters, declarant must have competent knowledge 609
when such knowledge will be presumed 609
examples of matters of 613
not of 614
is reputation admissible respecting private prescriptive rights? 615
hearsay as to particular facts inadmissible 617
reputation admissible, without proof of exercise of right 619
against public rights 620
forms in which hearsay admissible:— 621-27
oral declarations 621
recitals in deeds, copies and abstracts of deeds 621
maps, how far 622
presentments and depositions in manor courts 623
verdicts, judgments, decrees, and orders of courts 624-27
not interlocutory orders 626
declarations post litem motam inadmissible (see *Lis Mota*) 628-34

PUBLIC HEALTH ACT, 1875 (see *Table of Statutes*, 38 & 39 Vict. c. 55).
limitation of actions and proceedings under ..... 76-8, n.
limitation for laying informations under ..... 76-8, n.
when, in proceedings under, burthen of proof lies on defendant .. 372-4, n.
notices and proceedings under, may be served by post ..... 180 & n.
inspection of rates under ..... 1504-21, n.
of mortgages on rates, and of register of voters ..... 1504-21, n.
by-laws made under, how proved ..... 1657-8, n.
rate-books kept under, how proved (sub tit. "*Rate Books*") ..... 1600, n.

PUBLIC HEALTH ACT, 1875—*continued.* PARAGRAPHS (§§)
proceedings at local board meetings, how proved 1783
contracts exceeding £50 made by urban sanitary authority required to be in writing and sealed, under 995

PUBLIC HEALTH, IRELAND, ACT, 1878 (see *Table of Statutes*, 41 & 42 Vict. c. 52).
limitation of actions and proceedings under ..... 76-8, n.
limitation for laying informations under ..... 76-8, n.
notices and proceedings under, may be served by post ..... 180 & n.
by-laws made under, how proved ..... 1657-8, n.
contracts exceeding £50 made by urban sanitary authority required to be in writing and sealed, under 995

PUBLIC HISTORIES, when admissible 16, 1785

PUBLIC HOUSE, liability of keeper of, for lost goods ..... 187 & n.

PUBLIC MEETING, proof of resolutions at 417

PUBLIC OFFICE, presumption as to course of business in 179

PUBLIC OFFICER, presumption of appointment of, from acting 171
instrument of appointment need not be produced 171
proof of awards by 1584

PUBLIC PLACE, in indictment for stealing fixtures in, property need not be alleged 294

PUBLIC POLICY excludes what evidence (see *Privileged Communications*) 908-51
what admissions are held conclusive on grounds of 856

PUBLIC RECORDS ACT, 1838 (see *Table of Statutes*, 1 & 2 Vict. c. 94).

PUBLIC RECORDS, IRELAND, ACT, 1867 (see *Table of Statutes*, 30 & 31 Vict. c. 70, *Ireland*).

PUBLIC RECORDS AND DOCUMENTS, what included under this head 1479
mode of obtaining inspection and copies of:— 1480-1522
general records of realm under charge of Master of the Rolls 1480-85
whether public have a right to inspect them 1483
present repositories of public records 1484
enumeration of those in custody of Master of the Rolls ..... 1485, n.
repositories of other public documents ..... 1486, n.
of wills 1487
inspection and exemplification of *records of Supreme Courts*, right of public 1488
even where subject concerned against Crown 1488
provided they be required as evidence 1488
prisoner not entitled to copy of indictment for felony 1488
may claim to have it read slowly in open court 1488
rule does not extend to treason 1488
to misdemeanors 1488
the rule highly unjust 1488
copy of depositions, when demandable 1488
copy of record of acquittal or conviction, when demandable 1489-90
copy of trial by court-martial, when demandable 1490A
right to inspect records of bankruptcy courts 1491
records in central office of supreme courts 1491A-91C
departments of central office ..... 1491A, n.
right to inspect *records of inferior courts* 1492
how far applicant must be interested 1492
course to be pursued in case of refusal 1492
Queen's Bench Division will grant mandamus for production of, to every person interested 1493

PUBLIC RECORDS AND DOCUMENTS—*continued.* PARAGRAPHS (§§)
what amount of interest necessary 1493
inspection of *semi-public documents at common law* 1494-1501
enumeration of several such documents 1494-99
if in foreign language or scientific, interpreters and experts may be called in under order of inspection 1809
inspection will be refused to persons having no interest 1498-99
no court will force a man to allow inspection of documents, in order to support a prosecution against him 1500
quo warranto not a criminal proceeding within this rule 1500
but indictment, to try a right, is 1500
must officer of court allow inspection of documents to support action against him 1501
court of law will not interfere without affidavit of demand and refusal .. 1502
how, if inspection offered as a favour, but not as a right 1502
inspection of what *documents governed by statutes* :— ..... 1504-21, n.
alphabetical list of documents, as to which such right of inspection exists ..... 1504-21, n.
proof of public records and documents :— 1523-1629
enumeration of several such documents 1523-31
contents of, not provable by parol (see *Best Evidence*) 399-400
when original record required to be produced, rule or order necessary 1532
of records and quasi-records of superior courts 1534
when original record must be produced 1535
when record used to be proved by exemplification under great seal 1536
may be proved by exemplification under seal of particular court 1537
by office copy (see *Copy*) 1538-44
by examined copy (see *Copy*) 1545
records and judicial proceedings of the old Admiralty Court 1546
of Ecclesiastical Courts 1546
of Court of Stannaries 1546
of Courts of Quarter Sessions .. 1546
of inferior Courts 1547
statutable proof of records and proceedings of particular tribunals, and of particular judicial documents 1547
statutable proof cumulative, not substitutionary 1547
of proceedings of Courts of Bankruptcy 1548-53
of County Courts 1554
of Courts-Martial 1555A
of records and proceedings of Foreign and Colonial Courts .. 1556
of Irish documents in England 1557
of English documents in Ireland 1557
of English or Irish documents in the Colonies 1557
of proceedings of Scotch Bankruptcy Court in England and Ireland 1559
mode of proving documents coming from abroad 1560-66
colonial depositions, colonial warrants 1562
depositions taken in India respecting misdemeanors 1563
depositions under Merchant Shipping Act, 1894 1564-65
affidavits sworn abroad under Bankruptcy Act, 1883 1553
used in Probate, Divorce, and Admiralty Division 12
before envoys, consuls, &c. 11, 1567-8
examinations, affidavits, &c., sworn abroad under Rules of Supreme Court, Ord. xxxviii. 12
"deliverances" under Bankruptcy Act for Scotland 13
record, to be admissible, must in general be finally completed ... 1570
e.g. indictment, indorsed true bill, inadmissible 1570
so, Nisi Prius record, with postea indorsed, to prove verdict .. 1570
record need not be enrolled on parchment 1571

PUBLIC RECORDS AND DOCUMENTS—*continued.* PARAGRAPHS (§§)
minutes of judgment admissible, where formal record never drawn up 1571
e.g. minutes of judgment on journals of House of Lords..... 1571
book of Clerk of Peace, in which removal orders entered 1571
minutes of Ecclesiastical Courts, Courts Baron, Sheriff's Courts, Mayor's Courts, &c. 1572
when records admissible, though not finally completed 1573
1. if former trial before same court at same sittings 1573
2. if received when required as evidence, cannot have been formally completed..... 1573
3. if object merely to establish fact that trial has been had.. 1573
e.g. to let in testimony of witness since deceased 1573
to support indictment against a witness for perjury 1573
how much of the proceedings must be proved..... 1574
record may be alone proved, if object merely to prove its existence 1574
preliminary proceedings necessary to be proved, if record relied on as proof of facts therein stated 1574
what preliminary proceedings must be proved in giving evidence:—
of decrees in Chancery 1574A
of judgments of Ecclesiastical Courts, and Admiralty Division .. 1575
of late Insolvent Debtors' Court and other inferior Courts.....1575B
of depositions in Chancery taken under old law 1576
under new system 1577
if ancient 1585
of depositions under special commissions 1578
proof of transmission of depositions 1579
of inquisitions, surveys, extents, &c..... 1582
of examinations by commissioners or examiners..... 1580
of awards 1583
of awards by public officers..... 1584
of depositions in bankruptcy 495
of ancient records 1585
proof of writs and warrants..... 1586
of orders or certificates of judges 1586
of summons and process in County Courts 1586B
of process in Courts of Summary Jurisdiction.....1586C
of process in High Courts 1586A
of Rules of Supreme Court 1587
of rules of inferior courts..... 1587
e. g. of late Insolvent Debtors' Court..... 1587, n.
of examination of prisoner taken by justices or coroner (see *Confession*) 888-93, 1581
of deposition of witness taken by justices or coroner (see *Deposition*) 479-79A, 492, 1581
of probate of wills.....425, 1588-89
of letters of administration 1590
proof of official registers 1591
why admissible 1591
must be such as law requires to be kept for public benefit 1592
what are not official registers .....1592, n.
enumeration of official registers..... 1592, n.
foreign and colonial registers 1593
entries must be made promptly by proper person in proper mode.. 1594
what register and public documents must be proved by originals 1596-7, n.
may be proved by examined or certified copies under Lord Brougham's Act (see *Copy*) ..439, 1599A-1600
by certified copies under special Acts (see *Copy*).....1601 & n.
proof of certificates (see *Certificates*) .....1611 & n.

PUBLIC RECORDS AND DOCUMENTS—*continued.* PARAGRAPHS (§§)
of enrolment of deeds, &c. (see *Enrolment*) 1646-54A
of by-laws (see *By-laws*) 1654B-59
admissibility and effect of public records and documents :— 1660
enumeration of several such records and documents 1660-66
admissibility and effect of judicial records and documents :— 1667-1766
judgment conclusive against all the world of its existence, date, and legal consequences 1667
illustrations of this rule 1667
judgments inter alios evidence, where record matter of inducement 1668
judgments, when admissible to protect judge 1669-72
conclusive of facts stated, even those necessary to give jurisdiction 1669-72
this rule does not protect justices acting ministerially 1672
e. g. justice issuing warrant of distress to enforce rate 1672
judgment, when admissible to bind opponent on facts determined 1673
1. *judgments in rem :—* 1674-81
such judgments defined 1674
alphabetical list of, what are ..... 1675, n.
what are not 1674
how far conclusive without being pleaded 1673
how far binding upon strangers 1676-77
conclusive in civil cases of facts adjudicated, unless want of jurisdiction, fraud, or collusion be proved 1676
but not of facts on which adjudication rests, if such facts put directly in issue in subsequent suit 1678
conclusive on parties of facts directly in issue and determined 1678
effect of conflicting 1679
are they binding in criminal cases? 1680-81
2. *judgments inter partes :—* 1682-1710
not admissible for or against strangers 1682
except on public subject as evidence of reputation 1683
then binding on parties, and admissible against strangers 1683
always admissible against parties or privies 1684
not conclusive unless pleaded as estoppel 1684
but cogent evidence, and why 1684
where two suits on different principles 1685
who are parties within this rule 1686
all individually named in record 1686
prochein amy of infant not a party, but infant is 1686
where person sui juris made party without consent 1686
how such person should proceed on hearing of action 1686
are persons, on whose behalf action brought or defended, parties? 1687-88
who are privies within this rule 1689
who are not 1693
judgment against one joint debtor admissible for other 1691
may be pleaded and proved in bar without satisfaction 1691
judgment and satisfaction against one joint and several debtor, may be pleaded as estoppel by other 1691
pendency of action on joint contract or trespass, effect of, on second suit 1691
judgment when admissible for garnishee 1692
criminal prosecution inadmissible in civil action 1693
unless admissible as evidence of reputation 1693
judgment in civil action inadmissible in criminal prosecution 1693
record of principal's conviction, inadmissible on trial of accessory 1693
verdict for or against tenant for life, not evidence for or against reversioner 1693
verdict against lessee not evidence against lessor 1693
when record conclusive as an admission 1694

PUBLIC RECORDS AND DOCUMENTS—*continued.* PARAGRAPHS (§§)

judgment on plea of guilty, evidence against prisoner in civil action 1694
judgment must have decided point in issue in second suit.... 1695
the two actions need not be in same form, if issues same 1695
identity of writs immaterial, if issues different 1695
illustrations.....1696-98
plaintiff in first suit may be defendant in second, if points in dispute the same 1699
defendant after pleading set-off, bringing action for demand. 1699
judgment, when not conclusive in cross-action 1700
if suits merely relate to same transaction or property 1700
running-down cases 1700
test of admissibility, will same evidence sustain both actions? 1701
plaintiffs cannot split their demands 1702
illustrations in superior courts..... 1703
in County Courts..... 1704
judgment on one indictment, when conclusive on second ..1705-10
indictment for burglary and stealing goods of A., no bar to indictment for burglary and stealing B.'s goods. 1705
burglary and stealing—burglary with intent to steal..... 1705
larceny—obtaining same goods under false pretences..... 1705
other examples 1706-8
acquittal for murder, second indictment for manslaughter .. 1709
indictment for compound offence, second indictment simple offence included therein 1709
indictment for simple offence, second indictment for compound offence including the former 1709
how to act, if indictment for simple offence preferred by mistake..... 1709
rules applicable to judgments in rem and inter partes: 1711-13
1 judgments not evidence of matters collateral or to be inferred. 1711
2. judgments inadmissible against stranger on proof of fraud.... 1713
is it admissible against innocent party? 1713
admissible against guilty party?..... 1713
3. judgment inadmissible on proof of want of jurisdiction 1714-18
what offences not cognisable at Quarter Sessions .....1714, n.
summary convictions, want of jurisdiction 1715
adjudication must disclose facts sufficient to give jurisdiction.. 1715
illustrations 1715
facts showing jurisdiction, when implied 1718
4. judgments inadmissible, unless final..... 1719
when not on merits 1719A
orders of removal quashed not on merits..... 1720
judgments inadmissible, on proof of reversal..... 1721
effect of pendency of writ of error or an appeal..... 1721
effect of judgments will sometimes vary, as pronounced in favour of one or other party 1722
admissibility and effect of foreign judgments.....1724-46
term includes those of Irish, Scotch, colonial, and foreign Courts. 1724
how far rules identical with those governing home judgments.... 1724
proof of jurisdiction of foreign tribunals 1725-25A
how far necessary to plead facts showing jurisdiction, when relying on judgment as an estoppel or justification 1725
jurisdiction of foreign prize courts.....1725A
of foreign Courts on questions of marriage or divorce.....1726-26B
of foreign Courts over real property in this country.. 1727
what plea to jurisdiction of foreign Court, must contain 1728
foreign judgments repugnant to justice 1729
or obviously erroneous 1729
want of notice of foreign suit 1731

PUBLIC RECORDS AND DOCUMENTS—*continued.* PARAGRAPHS (§§)
foreign judgments in rem, when conclusive:— 1733-38
foreign Courts of Admiralty, on questions of prize..... 1733
foreign sentences as to marriage or divorce 1735
as to guardianship 1736
as to bankruptcy and insolvency..... 1737
powers of guardians strictly local 1736
effect of foreign probates or letters of administration..... 1738
they do not entitle parties to sue in England 1738
foreign judgments, inter partes, when pleaded as a defence 1736
1. when adverse to party bringing second action 1739
2. when in his favour, and he has sued again on original cause of action 1740-40A
foreign judgments inter partes, when sued upon 1741-46
when such judgments may be sued upon 1741
are they conclusive when sued upon? 1742-45
foreign judgment conclusive if it comes collaterally in question .. 1745
does not merge original cause of action..... 1746
admissibility and effect of proceedings in bankruptcy 1747
effect of publication in Gazette of order of adjudication....1549, 1747A
of receiving order .....1549, 1747A, n.
of certificate of appointment of trustee 1748
of order releasing trustee 1749
of order of discharge of bankrupt 1750
of certificate of official receiver that Court has approved of composition or scheme 1748
of certificate of facts by President of Board of Trade 1751
admission and effect of answers, demurrer, and pleas in Chancery under old system 1753
of bills in Chancery 1753
of depositions 1754-55
of judge's orders, as a bar to fresh summons 1756
of dismissal of affiliation summons by justices.....1757A
of awards..... 1758
of probates on trials relating to realty 1759-61
notice of proving devise by probate must be given..... 1760
of orders of late Poor Law Board, or of Local Government Board, on questions touching settlement, removal, and chargeability of paupers 1762
of denoting stamps affixed by Commissioners of Inland Revenue.. 1763
of recitals in judicial documents..... 1764
of orders under Trustee Act, 1893 .....1764, n.
of orders under Irish Encumbered Estates Act, 1849.....1764, n.
of writs of fieri facias 1766
of inquisitions..... 1767
of Domesday-book..... 1768
of visitation books at Heralds' College 1769
of Irish Down survey 1770
of ordnance survey in England or Ireland 1770n
of surveys and maps 1770o
of terriers 1772
of returns from incumbents of livings 1772A
of court rolls 1773
admissibility and effect of official registers and public documents:— 1592, 1774
list of such registers and books 1774-85

PUBLIC REGISTERS, alphabetical list of what are.....1595, n.
are not....1592, n., 1593, n.

PUBLIC RIGHTS, reputation, admission as to (see *Public and General Interest*) 607-34

PUBLIC RUMOUR, evidence of, when admissible..... 577

PARAGRAPHS (§§)

PUBLIC SCHOOLS ACT, 1868 (see *Table of Statutes*, 31 & 32 Vict. c. 118; see also *Endowed Schools Act*).
presumption in favour of requisitions of 72

PUBLIC STORES, possession of, raises presumption of guilt, when..372-4, n.

PUBLIC WORKS in England or Ireland, seal of commissioners of, judicially noticed ..... 6, n.
orders of commissioners, how proved (see sub tit. "*Drainage*") ....1601, n.

PUBLIC WORSHIP REGULATION ACT, 1874 (see *Table of Statutes*, 37 & 38 Vict. c. 85).
attendance of witnesses under, how enforced .....1293-1309, n., & *Errata*

PUBLICAN (see *Victualler*).

PUBLICATION of libel by agent, when principal responsible for 115, 906
of former libels, when admissible to prove malice 340
mode of, in action for libel, evidence of animus 343
of by-laws of railway company, how proved 1656
of rates, when presumed 147A

PUNISHMENT, witness not bound to answer questions tending to subject him to 1453-66
witness is not compellable to produce document tending to subject him to 1464

PURCHASER, admissions by vendor after sale, not evidence against.... 794
encouraged by owner to buy land of another, shall hold against owner 845
when title of, cannot be disputed by vendor 849
when bound by judgment against vendor..... 1689
tenant does not surrender his lease by agreeing to become 1008
of property in his own name, trustee for party paying purchase-money 1017A
exceptions to this doctrine of resulting trusts 1017A

PURCHASING PEACE, offers made for, when inadmissible 774, 795-6
caution respecting such offers 797

PUTATIVE FATHER, declarations of, inadmissible in questions of pedigree.....645, n.
competent witness in affiliation case 1358

PUTTING OFF trial (see *Postponement of Trial*).
counterfeit coin (see *Coin*).

QUAKERS, affirmations may be made by 1389A
so, by persons who have been Quakers 1389A
what registers of, in custody of Registrar-General (see sub tit. "*Births, &c. Registration*") .....1504-21, n.
admissibility of registers of marriages of .....1774, n.

QUALIFICATION, proof of, when dispensed with by opponent's admission 802
in proceedings against persons for acting without, burthen of proving that they possess it lies on them.....372-5

QUALIFYING WITNESSES to give evidence, costs of, when allowed.. 1247

QUALITY, allegations of, usually immaterial 288
warranty of, when implied in sale of goods 1178-81

QUANTITY, in indictments, allegations of, usually immaterial 285-7

PARAGRAPHS (§§)

QUARREL, proof that accused and deceased had a, admissible as evidence of malice on indictment for murder 347

QUARTER SESSIONS, alphabetical list of offences not triable at....1714, n.
may amend criminal proceedings .....248-51, n.
appeal to Queen's Bench from, confined to questions of law .....47 & n.
record of, in criminal matters, how proved 1546
on removal orders, provable by book of Clerk of Peace 1571
judgment of, on orders of removal, when conclusive 1676
when not conclusive 1720
attendances of witnesses before, how enforced.....1234-45, 1246B, 1264
witnesses attending before, privileged from arrest..... 1334

QUEEN (see *Crown*, *Sovereign*).

QUEEN ANNE'S BOUNTY, returns by parson to governor of, may be proved as an admission.....1772A

QUEEN'S BENCH DIVISION (see *Revenue side of Queen's Bench Division*).
appeal to, from Quarter Sessions confined to points of law .....47 & n.

QUEEN'S PRISON, Holloway prison now regarded as the .....14, n.
that it is situated in England, will be judicially noticed 17

QUESTION (see *Answer*, *Leading Question*).
confession obtained by, not inadmissible 881

QUIET ENJOYMENT, covenant for, implied in lease 1175

QUINTILIAN, his advice as to cross-examination .....1428, n.

QUI SENTIT COMMODUM, SENTIRE DEBET ET ONUS. application of maxim to privies 90

QUI TAM ACTION, within what time it must be brought 75B
defendant admissible witness in 1358

QUO WARRANTO, judgment of ouster in, against incumbent, binding on claimants under him 1689
inspection of documents to support, when allowed..... 1500

RAILWAY AND CANAL TRAFFIC ACT, 1854 (see *Table of Statutes*, 17 & 18 Vict. c. 31).
contracts for carriage, when valid under 1093

RAILWAY COMMISSIONERS, seal of, judicially noticed ..... 6, n.
signatures of, require no proof .....1596-7, n.
may enforce attendance of witnesses.....1329, n.
may send notices through post.....180, n.

RAILWAY COMPANIES SECURITIES ACT, 1866 (see *Table of Statutes*, 29 & 30 Vict. c. 108).
authorizes inspection of company's books in certain cases .....1504-21, n.

RAILWAY DEBENTURE STOCK,
not an interest in lands within Statute of Frauds.....1039A-40
not included in term "debentures" in will..... 168

RAILWAYS (see *Joint Stock Companies*).
evidence of George Stephenson rejected, as to possible speed on 62
liabilities of provisional committeemen..... 843
by-laws of, how proved .....1600, n., 1655-56
inspection of accounts of railway companies .....1504-21, n.
of other books of such companies .....1504-21, n.

RAILWAYS—*continued.* PARAGRAPHS (§§)
orders and documents of abolished commissioners of, how proved..1596-7, n.
of Board of Trade respecting, how proved..1596-7, n.
plans and book of reference of, deposited with clerks of peace, how inspected (sub tit. "*Parliamentary Documents Deposit Act*")..1504-21, n.
how proved.....1601, n.
modification of works on, how authorized by certificates.....1611, n.
proof and effect of certificates to modify construction of works ....1611, n.
must pay surgeon for attending servant injured by accident, though verbally engaged 979

RAILWAYS REGULATION ACT, 1871 (see *Table of Statutes*, 34 & 35 Vict. c. 78).

RAPE, boy under 14 cannot commit..... 104
nor be guilty under Criminal Law Amendment Act of carnal knowledge of girl under 13..... 104
nor of an assault with intent to commit 104
may be principal in rape in second degree .....104, n.
or may be convicted under Criminal Law Amendment Act of criminal assault, or assault with intent to commit 104
girl under 13 cannot consent to sexual intercourse..... 104
consent of girl between 13 and 16 reduces felony to misdemeanor 104
on charge of having or attempting to have carnal knowledge of girl between 13 and 16, costs of witness allowed 1254
presumptive evidence against, anecdote 215
acquittal of prisoner as principal in, no bar to indictment for aiding others 1706
acquittal on charge of, no bar to indictment for assault with intent .. 1706
wife competent against husband indicted as accessory to, on her 1371
recent complaint by prosecutrix, how far admissible.....568, 581
bad character of prosecutrix, admissible to impeach her veracity 363
when specific immoral acts of prosecutrix may be proved 363, 1441
prosecutrix may be cross-examined as to immoral conduct 1441

RASURE (see *Alteration*).

RATE cannot be primarily proved without production of rate-book..... 409
what presumption recognized in favour of.....147-7A
when action lies against justice for issuing distress warrant on invalid. 1672

RATE-BOOK, how proved in the case of highway rates..... 147A
in the case of poor-rates 147A
admissibility and effect of 147-7A, 1777

RATEABLE ABATEMENT of legacies, doctrine of 166

RATED INHABITANTS (see *Inhabitants*).

RATIFICATION after full age of promise by infant is void (see *Infant*) 1084
of unauthorized act of agent by principal, effect of 605, 985, 1108

READING OF DOCUMENT, rule as to reading whole 727-31, 1128
by witness to refresh his memory (see *Memory*) 1406-13
by opponent, when he must put it in 1413

READY-FURNISHED HOUSE, what is implied in demise of 1176

REAL PROPERTY LIMITATION ACTS, 1833, 1874 (see *Table of Statutes*, 3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57, and *Limitations*).

PARAGRAPHS (§§)

REALTY, presumption as to ownership of, from possession of 123
what incidents are annexed to contracts for sale of 1174
to demise of 1175
in this country, how affected by foreign judgments 1727
will affecting, provable by probate, when 1759-61

REASONABLE belief, care, cause, hours, notice, suspicion, time, how far question for judge or for jury (see *Functions of Judge and Jury*).
time, presumption as to, when contract is silent..... 177A

REBUTTING AN EQUITY, means the rebutting presumptions raised by equity against apparent intention of instrument .....1227 *et seq.*
instances of such presumptions:—
legacies not cumulative, when sums and motives correspond 1227
against double portions, when child provided for by settlement and will 1227
that portionment of legatee by parent is ademption pro tanto of legacy 1227
that debt due from testator is satisfied by legacy 1228
that purchaser is trustee for party paying purchase-money..... 1228
parol evidence and declarations of intention admissible to rebut an equity 1227
may be met by counter-parol evidence to fortify presumption..... 1229
but such evidence inadmissible in first instance 1229
distinction between legal presumption and rules of construction.....1230-31
the former may be rebutted, and if so, supported by parol evidence 1231
with the latter no evidence receivable on either side 1231

RECALLING WITNESSES, judge has discretionary power of 1477
when he will or will not exercise such power 1477

RECEIPT, thirty years old, requires no proof 88
oral evidence of payment is still admissible though one given 415
in general only primâ facie evidence of payment.....741, 859, 1134
when conclusive evidence..... 843
of payment indorsed on mortgage, effect of, by building societies, &c. 1013
effect of production by solicitor of deed acknowledging 96
effect of statement in operative part of deed of 96
unstamped, may be consulted to refresh memory 1411
of goods, what will take case out of Sale of Goods Act.....1045-49
for last quarter's rent, primâ facie evidence of antecedent payments.. 178
of part payment, indorsed by payee on bond or specialty, effect of, on Statute of Limitations 169, 690-96A
on bill or note, effect of, on same statute.. 691
by deceased agent, &c. when admissible as against interest (see *Interest*) 682-83

RECEIVER, entries against interest made by deceased, admissible 673
how far necessary in such case to prove appointment..... 683
of stolen property, not affected by confession of thief 904
how far affected by acquittal of thief 1693
acquitted of receiving goods from A. B., may be indicted for receiving goods generally 1706
married woman cannot be convicted of receiving from husband 190
possession of other stolen property, how far evidence against 345-6
guilty knowledge of, when presumed 345-8
count for receiving stolen property may be joined with count for stealing 333
appointed by foreign court, whether recognized here 1727

RECENT COMPLAINTS, proof of, how far admissible 581

PARAGRAPHS (§§)

RECENT POSSESSION OF STOLEN PROPERTY, raises presumption of guilt 127A-7C
such presumption sometimes erroneous 63
what amounts to 127A
to what charges presumption of guilt that arises from, is applicable.. 127C

RECIPROCITY, necessary element is estoppel 99, 817
rule of, when testimony given in former trial is tendered 467-70

RECITALS in deed, how far partly estopped by 97-8
when evidence of meaning of operative words in deeds 1128
in writs and warrants, when unnecessary 84
admission and effect of, in statutes and proclamations 1660
in private Acts 1660
in judicial documents 1764
in family deeds, as evidence in cases of pedigree 651
in deeds and leases, as evidence of reputation. 621
of deeds in other deed, when waiver of calling attesting witness to former 1849
when formal may be contradicted by parol 1150

RECOGNITION of relationship by family conduct, admission in pedigree cases 649
of unauthorised acts of agent by principal 1108
of official character of opponent by treating him as entitled thereto .. 801-3

RECOGNIZANCE, witness made to attend by (see *Attendance of Witness*) 1234-38
within what time debt or scire facias upon, must be brought 75B, 1090
taken out of Statute of Limitations by written acknowledgment or part payment ..... 692, 1090 *et seq.*

RECOLLECTION (see *Memory*).

RECORD OFFICE, in England or Ireland, present repositories of 1484
seal of, judicially noticed ..... 6, n.
enumeration of records deposited in 1485
regulation as to inspection of them and fees ..... 1482, n.
have the public a right to inspect them? 1483
records in, how proved 1533

RECORD OFFICE OF SEAMEN (see *Seaman*).

RECORD OF TITLE ACT (IRELAND), 1865 (see *Table of Statutes*, 28 & 29 Vict. c. 88).

RECORD OF TITLE OF LANDED ESTATES COURT IN IRELAND, seal of, judicially noticed 6

RECORDS, when amendable in criminal cases (see *Amendment*) 248-53
in actions 221-44
inspection, proof, admission, and effect of (see *Public Records and Documents*).
of courts of justice are presumed correct 85
jury cannot examine, to give opinion as to erasures 47
on indictment for stealing or destroying, unnecessary to allege property 294

RECORDERS are unable to try certain offences ..... 1714, n.

PARAGRAPHS (§§)

RECOVERY OF LAND, in actions for, plaintiff must rely on his own title 125
in actions for, possession sufficient title against wrong-doer 125
how defendant may entitle himself to begin 379-80
judgment evidence for or against plaintiff in action for mesne profits.. 1696
in second action for same premises against same defendant 1688

RECRIMINATION, how far allowed in discrediting witnesses 1473

RECTIFICATION OF INSTRUMENT, when allowed in equity 1139

RECTOR (see *Parson*).

RE-EXAMINATION OF WITNESSES (see *Witnesses*) 1474-75

REFEREE (see *Arbitrator, Attendance of Witnesses*).

REFERENCE (see *Award*).
by one instrument to another, effect of..... 1026
by signed letter to memorandum of agreement, satisfies Statute of Frauds, when 1025
by will to other writings, effect of 1061, 1213
to third person for information (see *Admissions*) 760

REFORMATORY SCHOOLS, certificate of, how proved.....1611, n.
rules of, how proved.....1601, n.
warrant of detention in, how proved.....1601, n.

REFORMATORY SCHOOLS ACT, 1866 (see *Table of Statutes*, 29 & 30 Vict. c. 117).

REFORMING WRITINGS, when action lies for 1139

REFRESHING MEMORY of judge, as to matters judicially noticed .. 21
of witness (see *Memory*) 1406-13
of expert (see *Experts, Memory*) 1422-23

REFUSAL (see *Demand and Refusal*).

REGIMENTAL BOOKS, records in, proof and admission of (sub tit. "*Army Documents*") .....1601, n.

REGIMENTAL EQUIPMENTS AND STORES, possession of, raises presumption of guilt, when .....372-4, n.

REGISTERS, public (see also *Public Registers*), what are .....1595, n.
what are not .....1592, n., 1593, n.
inspection of, when allowed (sub tit. "*Births, &c. Registration Act*") (see *Public Records and Documents, Copy*).....1504-21, n.
entries in, how proved 439, 1596-7
admissibility and effect of 1774-80
of births, baptisms, marriages, deaths and burials (see those Titles).
under Burials Act, 1864, how proved (sub tit. "*Births, &c., Registers*") .....1601, n.
of marriages in Ionian Islands now deposited with Registrar-General (sub tit. "*Births, &c. Registration Acts*") .....1504-21, n.
of medical men, admissibility and effect of 1638
of veterinary surgeons 1638
of pharmaceutical chemists, and chemists and druggists, how proved.. 1638
of dentists 1638
of sea fishing boats, admissibility and effect of 1778-80
of British ship, admissibility and effect of (sub tit. "*Merchant Shipping*") 1778-80
of licences under Licensing Act, 1872, proof and effect of .....1601, n.
of stock, what are evidence 1777

PARAGRAPHS (§§)

REGISTER-OFFICE, seal of, judicially noticed ..... 6, n.
registers of, how proved (sub tit. "*Births, &c. Registers*") .....1601, n.

REGISTERED LETTER, notices under Bankruptcy Act must be sent by, when 180
what summonses, warrants, &c., may in Scotland be served by 180

REGISTRARS OF BANKRUPTCY COURTS, signature of, judicially noticed 14

REGISTRAR OF COUNTY COURTS (see *County Courts*).

REGISTRAR OF DESIGNS, seal of, judicially noticed (see *Patents, Designs, and Trade Marks Act*, 1883) ..... 6, n.

REGISTRAR IN LUNACY may give office copies of what documents (sub tit. "*Lunacy*") .....1601, n.

REGISTRAR OF SEAMEN (see *Seaman*).

REGISTRATION (see *Enrolment, Certificates*).
of assurances of lands in Ireland, seal of, judicially noticed..... 6, n.
of life annuities and rent-charges, when necessary..... 1125
of deeds and wills in Yorkshire and Middlesex, permissive 1127
how proved.....1652A
of companies under old Joint Stock Companies Act, how proved 416
of chapels for marriages, when presumed.....143-4
of trade marks (sub tit. "*Patents, &c. Act*"), (see 46 & 47 Vict. c. 57) .....1611, n.
medical men must prove, when 173
can prove, how 1638

REGISTRATION OF BURIALS ACT, 1864 (see *Burials Act*, 1864).

REGULARITY presumed from lapse of time 128
with respect to judicial and official acts 143-5
what private acts 148-50

REGULATION OF RAILWAYS ACT, 1873 (see 36 & 37 Vict. c. 48).

REGULATIONS (see *Rules*).
issued by the Crown, Privy Council, or any Principal Department of Government, how proved..... 1527

REJECTION of evidence by judge improperly, effect of 1882A
the evidence should be formally tendered to judge.....1882A

RELATIONS, declarations of deceased, admissible in matters of pedigree..635-40
parol evidence of what testator meant by, inadmissible 1203

RELATIONSHIP of declarant, necessary in matters of pedigree..... 635
must be proved by evidence independent of declaration 640
questions of, are matters of pedigree..... 641
recital of, in private Act, cogent evidence of pedigree 1660
witnesses not incompetent by Scotch law on ground of.....1347, n.

RELEASE by nominal party, effect of, on real party.....741-43
remedy of real party..... 741
by bankrupt's partner, when void 748

RELEVANCY (see *Issue, Collateral Facts*).
what latitude as to, allowable on cross-examination (see *Witnesses*)..1434-45

RELIEF, effect of giving, as to settlement of pauper 805

PARAGRAPHS (§§)

RELIGIOUS BELIEF unnecessary in witness (see *Competency*) 1382
affirmation may be made by persons having no 1382
defect of, never presumed 1385

RELIGIOUS WORSHIP, certificate of registration of places of.....1611, n.

REMAINDERMAN not affected by admissions of tenant for life..... 768
title of, must be evidenced by deed 973-4
when judgment for one, evidence for party next in succession 1689

REMAND of accused by justices, limited to what time 35

REMANET, when cause made a, subpœna must be re-sealed and re-served 1241

REMOTENESS OF EVIDENCE ground for rejecting it, when..... 316

REMOVAL (see *Settlement of Paupers*).
grounds for quashing order of, may be shown by parol 1200
order of, unappealed against or confirmed on application, conclusive against strangers 1678, 1722
as to all facts stated in it, necessary to decision 1678
quashed on appeal, conclusive between contending parties alone.. 1722
and only as to point that appellants were not then bound to receive pauper 1722
when not a bar to a second order of removal 1720
effect of entry by sessions that order is quashed "not on merits".. 1720
may be defeated by showing want of jurisdiction in justices 1715
e.g. by showing no complaint by parish officers 1715
provable by book of clerk of peace..... 1571

REMUNERATION (see *Attendance of Witnesses*).

RENEWAL OF WRITS, how proved 1586

RENT, presumption from payment of last quarter's..... 178
payment of, not conclusive admission of landlord's title 103
receipt of, when and how far proof of reversioner's title 123
acceptance of, when confirmation of invalid lease in Ireland 808, 993
after expiration of old lease, raises presumption of new tenancy from year to year..... 176
whether demand of, is waiver of notice to quit, is question of fact .. 807
within what hours demand or tender of, must be made 32A
amount of, cannot be proved by parol, when 402
within what time action for, must be brought 74
suing or distraining for, when waiver of forfeiture 807
stated in memorandum of lease cannot be varied by contemporaneous oral agreement 1152
apportionment of 159

RENT-CHARGE must be registered in Enrolment Department of Central Office, when 1125
proof of enrolment of deed granting 1651

REPAIRS, landlord not bound to do, without special contract 1175
not done by landlord under contract, will not justify tenant in quitting 1175
lease in Ireland implies agreement by tenant to do .....1175, n.
certified under Ecclesiastical Dilapidations Act, 1871 .....1611, n.

REPLEADER will be ordered by Court, where judicial admission made by mistake 838

PARAGRAPHS (§§)

REPLEVIN, landlord or person in whose right cognisance made, bound by judgment in 1688
judgment in, for plaintiff, bar to action of trespass, when 1696
in action of, special damages recoverable 1696
within what time action for, must be brought 73
bond now granted by registrars of County Courts and exempt from stamp ..... 1850, n.
jurisdiction of sheriffs with respect to, has ceased ..... 1850, n.

REPLY, practice as to calling evidence in 385-7B
plaintiff's affidavits in, confined to matters strictly in reply 389
when plaintiff or prosecutor entitled to 387n-7D
when Attorney or Solicitor-General entitled to ..... 390 & n.
only Attorney and Solicitor-General, and not representative of either, entitled to ..... 390 & n.
this privilege of Attorney and Solicitor-General inexpedient 390
person refusing to, on question put, how far evidence of acquiescence .. 814-16
to inquiries, how far admissible to prove search for document 430
for witness ..472-8, n., 517, 576
for attesting witness .. 1855
to prove denial by bankrupt 576

REPORTS of inspectors under Companies Act, how proved ..... 1601, n.
of Commissioner or Surveyor General of Woods and Forests, how proved 1531

REPOSITORY (see *Custody*).

REPRESENTATION, when law will infer malicious or fraudulent intent from false 83
respecting credit, &c. of another, must be by writing signed .... 1085 *et seq.*
acted upon, when it operates as an estoppel (see *Admissions*) 839-50
of a dramatic piece, what constitutes, question for jury 47

REPRESENTATIVE (see *Agent, Executor, Administrator*).

REPUTATION, when admissible as to character of party (see *Character*).
of witness (see *Character*) 1470A-76
to prove marriage, admissible 172, 578
except in cases of adultery, and on indictment for bigamy 172, 578
in matters of public and general interest (see *Public and General Interest*) 607-34
in matters of pedigree (see *Pedigree*) 635-57
when original evidence 576-78
verdicts, judgments, decrees, &c., when admissible, as in nature of .. 624-27, 1683
awards inadmissible 626A, 1758

RES GESTÆ, what constitute (see *Hearsay*) 583
question for judge 583
what declarations and acts admissible as part of 583-88
even as evidence for declarant 585
declarations accompanying acts, evidence of declarant's knowledge, belief, or intention 586
are no proof of the acts themselves .. 586
declarations accompanying irrelevant act inadmissible 587
the declarations and acts must illustrate, or be connected with, the main fact 588
need not be contemporaneous with it 588
but narratives of past events inadmissible 589

RES INTER ALIOS ACTÆ (see *Collateral Facts, Issue*), inadmissible .. 317-19, 1682

PARAGRAPHS (§§)

RESCINDING WRITINGS, when action for, lies 11, 39

RESEMBLANCE, evidence of, between child and alleged father, when admissible in cases of disputed paternity 335

RES JUDICATA (see *Public Records and Documents*).

RESOLUTIONS, read at meetings, can be proved by parol 417
published in newspapers, cannot 409
passed at meetings of corporations, when admissible 1781
passed at meeting of creditors, how proved 1552

RESTITUTION of conjugal rights, effect of wife's confession of adultery in suit for 768-69

RESTRAINT, admissions made under, when admissible 798

RESULTING TRUST (see *Trusts*) 1017-17c, 1229

RETAINER, regular, not necessary to protect communications between solicitor and client 923
of solicitor by corporation, must be under seal 984

RETURN by sheriff, when conclusive as against him or bailiff 854
when not 854
by parson to Governor of Queen Anne's Bounty admissible ..1772a

REVENUE (see *Inland Revenue*).

REVENUE SIDE OF QUEEN'S BENCH DIVISION,
judgments in informations in, are judgments *in rem* (sub tit. "*Condemnations*") ..... 1675, n.
conclusive, even against strangers, if convictions 1676-77
how far conclusive, if acquittals 1722
witness to character inadmissible for defendant in 354
remaining in Court after order to withdraw 1401
defendants are competent witnesses in 1359
law officers of Crown entitled to reply in ..... 390, n.
Rules of the Supreme Court relating to discovery and inspection do not apply to proceedings in 1792

REVERSAL, judgment defeated by proof of 1721

REVERSION must be evidenced by deed 973-74
title to, when proved by receipt of rent 123
dealings with, formerly regarded with suspicion by Court of Chancery 153
this rule in Equity abolished by statute, where transaction without fraud or unfair dealing 153
verdict for or against tenant for life, no evidence for or against reversioner 1693
not affected by admissions of tenant for life 758

REVISING BARRISTER, attendance of witness before, how enforced .. 1293-1309, n.
notice of appeal from, must be in writing, signed 1102
orders and decisions on appeal from, how proved 1540-41

REVIVAL OF WILL, how effected 1072

REVOCATION of will, how effected (see *Will*) 1063-71
when presumed 165
when parol evidence admissible to prove or disprove 1146
how it differs from ademption of legacy 1146
of probate or letters of administration, how proved ..... 1589, n.
effect of 1759
onus of proving, on whom it lies 1064
voluntary settlement should contain power of 158

PARAGRAPHS (§§)

REWARD, when allowed for activity in apprehending felons 1257A

RIGHT OF ACTION, when presumed 83

RIGHT OF COMMON (see *Common*).

RIGHT OF WAY (see *Way*).

RIGHT TO BEGIN (see *Onus Probandi*) 378-84
on the hearing of Appeals appellant begins ..... 378, n.

RIGHT TO REPLY (see *Onus Probandi, Reply*) 387

RIGHTS, incorporeal, must be evidenced by deed 973-74
how affected by Statute of Limitations ..... 75A & n.
what, provable by reputation 613-15
what, not provable by reputation 614-15
are private prescriptive, provable by reputation? 615
mere private, not provable by reputation 616
proof of exercise of, not necessary to let in evidence of reputation 619
public, may be disproved by reputation 620
of public to inspect records in custody of the Master of the Rolls 1483
to inspect and copy records of superior Courts 1488
of inferior Courts 1492

RINGS, inscription on, evidence in cases of pedigree 652

RIOT, on indictment for riotously demolishing houses, churches, machinery, &c., place must be proved as laid 281
on trial for, costs of witnesses may be allowed 1254

RITE ESSE ACTA, presumption as to (see *Presumption*) 143-50

RIVER, presumption as to right of soil of 119
may be rebutted by evidence of acts of ownership in other parts of .. 323

ROAD (see *Highway*), order of justices for diverting, is a judgment *in rem* 1675, n.
when verdicts and judgments evidence of reputation, as to liability to repair 1683
law of the, judicially noticed ..... 5, n.

ROBBERY, on trial for, dying declarations of party robbed inadmissible 715
acquittal for, bar to indictment for assaulting with intent to rob 1708
for larceny 1708
is an acquittal for larceny a bar to indictment for? 1709
on indictment for, prisoner may be convicted of larceny 269-70A
or of assault with intent to rob 269-70A
not a local offence 281
can married woman aiding her husband be convicted of highway? .. 190
depositions taken on charge of assault and, admissible on trial for murder 467

ROLL OF SOLICITORS, inspection of ..... 1504-21, n.

ROLLS (see *Court Rolls, Master of the Rolls*).

ROMAN CATHOLIC, how sworn in Ireland ..... 1388, n.
bishop can prove matrimonial law of Rome 1425
priest, confession to, not privileged 916-17

ROUTINE (see *Course of Office or Business*) 697-713

ROYAL PALACES, privileges of, judicially noticed 5

ROYAL PROCLAMATIONS (see *Proclamations*). PARAGRAPHS (§§)

ROYAL SIGN MANUAL, whether judicially noticed 14
certificate of Sovereign under, inadmissible..... 1784

RULES (see *Supreme Court Rules*).
of Irish prisons, how proved.....1663A-4, n.
of superior Courts, when judicially noticed 19
when presumed to be reversed.....143-4
provable by office copies 1534, 1587
of equity, when judicially noticed (see *Chancery Division*)..... 5
conflicting with rules of law, must prevail 5
of law, to be explained to jury by judge 23
of pleading (see *Issue, General Issue, Pleadings*).
of inferior Courts, how proved 1587
of late Poor Law Board and of Local Government Board, how inspected and proved.....1504-21, n., 1527
of Bankruptcy Court, judicially noticed 19
made under Bankruptcy (Ireland) Amendment Act, 1872, judicially noticed 19
under Gas and Water Works Facilities Act, 1873, judicially noticed .....19, n.
under The Crown Office Act, 1877, judicially noticed .....19, n.
under The Summary Jurisdiction Act, 1879, judicially noticed..19, n.
under The Naturalization Act, 1870, how proved 1527
under The Prison Act, 1877, how proved .....1527, n., 1595-7
under The Land Transfer Act, 1875, judicially noticed .....19, n.
under Landlord and Tenant (Ireland) Act, judicially noticed .. 19
of Volunteer Corps, how proved (sub tit. "*Army*").....1601, n.
of reformatory schools, how proved .....1601, n.
of industrial schools, how proved .....1601, n.
of loan societies, how proved .....1601, n.
of friendly societies, how proved .....1601, n.
of building societies, how proved .....1601, n.
of savings banks, how proved.....1600, n.
of coal-mines and collieries, and certain factories, how proved (sub tit. "*Mines*") .....1657-8, n.
of water companies, how proved (sub tit. "*Metropolis Water Act*").1657-8, n.
of Incorporated Law Society, how proved .....1596-7, n.
for preventing collisions at sea, and respecting lights, fog-signals, steering and sailing, how proved .....5, n., 1601, n.
presumption of wilful default, if damage caused by non-observance of these rules .....5, n., 206
of evidence, enforced in foreign Courts, not recognized here 49
of construction, how they differ from legal presumption 1231

RUMOUR, evidence of, when admissible.....577 *et seq.*

RUNNING BLOCKADE, presumption from 107

RUNNING DOWN, in cross-actions for, verdicts sometimes for both plaintiffs 1700

RUSSELL GURNEY'S ACT of 1867 (see *Table of Statutes*, 30 & 31 Vict. c. 35), provisions of 1260
gave prisoner right to have witnesses bound over 1260

SACRILEGE, proof respecting place must correspond with allegations .. 281

SAILING RULES, how proved .....5, n., 1601, n.

SAILOR (see *Seaman*).

PARAGRAPHS (§§)

SALE, what must be by writing under Statute of Frauds (see *Statute of Frauds*).
of goods through a broker, what is best evidence of 420-3
in a London shop, is sale in market-overt 5
what incidents annexed by common law to contracts of 1174, 1177-80
when pawnee has implied power of 1186
a lien gives no right of 1186
of ship must be by bill of sale (see *Bill of Sale*) 998A
bill of sale of personal chattels must be filed in Central Office, when .. 1120A
must be attested by one or more witness 1110
witness need not be solicitor 1110

SALE OF GOODS ACT, 1893 (see *Table of Statutes*, 56 & 57 Vict. c. 71).
provisions of 1026
construction of 1021, 1026
signature to order book sufficient to satisfy the 1025

SALE OF INCUMBERED ESTATES, seal of former Commissioners for, judicially noticed ..... 6, n.

SALVORS must prove dereliction, how 207
cannot claim more than a moiety of property saved ..... 207, n.
injury to or loss of their vessel presumed to have been caused during service of 206

SAMPLE, effect of sale by 1178

SANCHO PANZA, his judgment in a case of rape 215

SANITARY AUTHORITIES (see *Health*).

SANITY (see *Insanity*, *Lunacy*, *Lunatic*).
presumed till contrary proved 197, 370
can a man's acquaintances express their opinions respecting his? 1416
opinions of physicians admissible respecting 1417
letters to party inadmissible to prove his, unless acted on by him .. 573
formerly aliter in Ecclesiastical Courts 575
is a coroner's inquest admissible as to? 1674
of testator, how far probate evidence of 1677

SATISFACTION, judgment without, against one joint-debtor, may be pleaded by another 1691
judgment with, against joint and several debtor, may be pleaded as estoppel by other 1691
of debt by legacy, when presumed 1228

SATISFIED TERMS, outstanding, when determined 136-7

SAVINGS BANKS, rules of, how proved ..... 1600, n.

SCALE OF COSTS allowed to witnesses in civil cases ..... *App.* i—v
in criminal cases ..... *App.* vi *et seq.*

SCANDALOUS MATTER may be ordered to be struck out of affidavit .. 1396a
or affidavit may be taken off the file when containing 1396a

SCHEDULE, omission by insolvent of debt from, admission that it is not due 804
indictment of bankrupt for omission from, when no bar to second indictment 1706

SCHOOL BOARDS, inspection of books of (sub tit. "*Elementary Education Act*") ..... 1504-21, n.
minutes of meetings of 1781

PARAGRAPHS (§§)

SCHOOLS, ENDOWMENT (see *Endowed Schools Act*) committee of, may enforce attendance of witness .....1293-1309, n., 1329, n., & *Errata*
schemes for, presumed duly made 72

SCHOOLS, INDUSTRIAL AND REFORMATORY, certificates of, how proved .....1611, n.
order of detention in, how proved .....1601, n.
rules of, how proved .....1601, n.

SCHOOLS, PUBLIC (see *Public Schools Act*).

SCIENCE, experts may give opinions on questions of 1417-22

SCIENTER, question of, is for jury 38
when allegation of, is surplusage, in action for breach of warranty .. 255

SCIENTIFIC INSTRUMENTS, working accuracy of, generally presumed 183

SCIENTIFIC WITNESSES (see *Experts*).

SCIRE FACIAS upon recognizance, within what time must be brought..75B, 1090
taken out of Statute of Limitations by written acknowledgment or part payment.....692, 1090 *et seq.*

SCOTCH FORM, oath, if desired may be administered in 1388
but witness must desire this form 1388
formula for administration of oath in .....1388, n.

SCOTLAND, laws of, not judicially noticed 5
how proved 1423
rules of evidence enforced in, not recognized here 49
particular laws of:—
presumption as to marriage from habit and repute..... 172
as to letters being duly posted .....182, n.
as to continuance of life .....198 & n.
that child was born dead, if not heard to cry.....104, n.
that occupier of house where dog is kept is owner of dog 123
no presumption against double portions, recognised in.....1227, n.
deposition of witness abroad admissible without proof of absence.....515-16, n.
merchant's books admissible on behalf of merchant, when 712
as to dying declarations 719
as to admissibility of hearsay when relator dead .....568, n.
penitential confessions to priest inadmissible 870, 917
torture in, abolished in time of Queen Anne 886
as to proof of perjury .....962, n.
requires representations respecting credit of another now to be in writing 1085
requires guarantees now to be in writing .....1050B, n.
as to mode of accepting bills of exchange .....1094, & *Errata*
as to days of grace allowed on bills .....1168, n.
does not allow writings to be varied by parol evidence.....1132, n.
allows waiver of written agreement by words only after part performance .....1142, n.
implies warranty of title on sale of specific chattels 1177
usually implies no warranty of quality or sufficiency on sale of goods .....1178, n.
as to proof of registers of births, deaths, and marriages (sub tit. "*Births, &c., Registers*") .....1601, n.
of irregular Scotch marriages .....1601, n.
as to service of citations by registered letter 180

SCOTLAND—*continued.* PARAGRAPHS (§§)
as to enforcing attendance of witnesses in inferior Courts .....1316, n.
as to taking proof under Commissions .....500, n., 515-16, n.
as to competency of witnesses.....1347, n.
usually allows parties to be witnesses .....1347, n.
as to right of reference to oath .....1347, n.
as to practice when judge called as witness.....1379, n.
as to admission of evidence of bad character of plaintiff in action for defamation .....359, n.
as to liability of carriers.....187, n.
as to worrying sheep or cattle by dogs 123
as to form of taking oaths .....1388, n.
Oaths Act extends to .....1388, n.
as to amendments in summary proceedings.....248-51, n.
as to limitation of time for instituting proceedings .....76-8, n.
for suing or prosecuting sheriffs, magistrates, &c. .....73A, n.
for prosecuting traitors .....76-8, n.
separates witnesses ordered out of Court from one another 1402
as to examining witness remaining in Court without permission ..1402, n.
examination of witness in initialibus not now required by .....1404, n.
doctrine of refreshing memory 1412
as to proving own witness has made inconsistent statements 1426A
as to cross-examination of witnesses 1431-32
as to protecting witnesses from self-crimination..... 1453
as to recalling witnesses 1477
as to bills of exceptions on ground of admission or rejection of evidence 1882A
as to confirmations of executors.....1588, n.
as to proof of registers of lodging houses (sub tit. "*Common Lodging Houses*") .....1601, n.
as to proof of Crown leases, &c., recorded in Scotland (sub tit. "*Public Offices*") .....1600, n.
Documentary Evidence Act, 1845, does not extend to.....7-8, n.
deliverances, &c. under Scotch Bankruptcy Act, admissible in England and Ireland w[illegible] proof 13
their effect 1559
admissibility of judgments and judicial proceedings of Courts of..1724, 1741
effect of divorce in, of persons married in England 1726
can curator bonis of lunatics appointed in, sue in England for debts due to estates.....1736, n.
witnesses in, how made to attend before Commission from England or Ireland..... 1312
how made to attend in England or Ireland in criminal cases..... 1261
in civil actions tried in Supreme Court 1262
English County Courts should be granted powers of enforcing attendance of witness in .....1063, n.
may be ordered by English Courts of Bankruptcy to be examined in Scotland 519

SCRIP, in joint-stock companies, not goods within § 17 of Statute of Frauds .....1039A-40, n.
when judicially noticed as a negotiable security..... 5

SCRIVENER, communications to solicitor employed as, privileged 912

SCULPTURE COPYRIGHT ACTS, assignments and consents under, need not be attested by two witnesses .....1110, n.
cannot be signed by agent of proprietor .....1107, n.

SCURRILITY IN AFFIDAVITS, effect of.....1396c

PARAGRAPHS (§§)

SEA, presumption as to ownership of sea-shore 119
grant of sea-shore presumed from acts of ownership, when 130
land between high and low water presumed extra-parochial 119
on indictment for malicious injury to sea-banks, place must be proved as laid 281
prescriptive liability to repair sea-walls provable by hearsay 613

SEA FISHERIES ACTS, 1868 & 1883 (see *Table of Statutes*, 31 & 32 Vict. c. 45, & 46 & 47 Vict. c. 22).
registers under, admissibility and effect of ..... 1778-80, n.

SEA FISHING SERVICE (see *Fishing Boats*).

SEALS, what, judicially noticed 6, 12
of what public and official documents, primâ facie require no proof .. 7-8
what is sufficient sealing of a deed 149
when due sealing will be presumed 149
what transactions must be evidenced by instrument under (see *Deed*) .. 972-98
of corporations, whether to be proved after thirty years 89

SEAMAN, agreement between master of merchant ship and, must be in writing 1098
must be in form sanctioned by Board of Trade 1098
must be signed by seaman in presence of an attesting witness 1098
must be read over and explained to seaman 1098
if altered, alteration must be attested ..... 1839-41, n.
may be proved without calling attesting witness .. 1839-41
release of, how to be attested and proved ..... 1098, n.
need not give notice to produce his agreement with master 454
may prove its contents by parol 454
has claim for illness caused by ship being unseaworthy 1182A
documents in Record Office, how inspected (sub tit. "*Merchant Shipping*") ..... 1504-21, n.
how proved (sub tit. "*Ships*") .... 1601, n.
proof and effect of certificate of competency of service of masters or mates 1623
will of, how far excepted out of Wills Act 1050, 1062
how executed, if it relate to pay, prize money, &c. 1051
invalided, returning home as passenger, is within the Wills Act 1062
attendance of, as witness in civil Court, enforced by habeas corpus .. 1275
in Admiralty Division, how enforced 1283
in Naval Courts-Martial, how enforced ..... 1293-1309, n.
special allowance may be made to witness detained on shore:—
(a) in High Court 1248
(b) in County Court ..... *App.* v
death of, how proved 1776

SEAMEN'S CLOTHING ACT, 1869 (see *Table of Statutes*, 32 & 33 Vict. c. 57).
limitation of actions and proceedings under 73A
accused under, must justify his conduct ..... 372-4, n.
payment into Court under ..... 831, n.

SEARCH for writings, sufficiency of, question for judge 23A, 429
what sufficient to admit secondary evidence (see *Lost Instrument*) 429-34
for subscribing witness, what sufficient 1855
for other witness, what sufficient ..... 472-8, n., 517
how far answers to inquiries evidence in these cases .. 430, 472-8, n., 1855

SEA-SHORE (see *Sea*).

SEA-WORTHINESS (see *Ship*, *Seaman*).

PARAGRAPHS (§§)

SECONDARY EVIDENCE, what constitutes 394
inadmissible, while primary is in party's power 428A
of documents, when admissible:— 428-63
1. when writing destroyed or lost 428c, 1447
what search for lost instrument sufficient (see *Lost Instrument*) 429-34
what proper custody of instrument (see *Custody*) ..432-4, 660-4
effect of loss or destruction of will, as to probate 436
negotiable security 437
2. when production of original, impossible, or highly inconvenient 438
e. g., mural monuments 438, 653
records and entries in public books and registers 439
3. when adversary refuses to produce original after notice 440
adversary is held to have possession of original, when 440
notice to produce original, must be served, when and how (see *Notice to Produce*) 440-66A
what notice must contain 443
4. when witness, not bound to produce original, refuses 457
witness is not bound to produce document, when 457-61
5. when appointment of public officer is in writing 461
6. when evidence required is result of voluminous facts, accounts, &c. 462
7. for examination on the voire dire 463
of oral testimony, when admissible ..... 4[illegible]-54[illegible]
witness must have been duly sworn in judicial proceeding ..... 46[illegible]
to which opponent was bound to submit ..... 46[illegible]
and in which he had right to cross-examine ..... 46[illegible]
testimony given in former judicial proceeding, when admissible..464-78, 763
rule of reciprocity 467-70, 569
admissible if witness incapable of being called 464
failure of attempt to engraft exception on this rule 471
witness incapable of being called, when 472-8
dead 472-8
or beyond jurisdiction of Court 472-8
or cannot be found after diligent inquiry, how far..... 472-8
answers to inquiries after witness, when admissible..472-8, n.
or insane 472-8
or ill, how far ..... 472-8 & n.
or kept out of the way by opponent 472-8
depositions taken before committing magistrate 479A-81
11 & 12 Vict. c. 42, s. 17 ..... 479A
form of such depositions 479A
when admissible, and how proved 479A-83, 489-90
how proved to be inadmissible 483
proper mode of taking..... 484-87
how entitled 487
depositions taken before coroner 492-94
in bankruptcy, when admissible..... 495, 519
other statutable depositions 496-98
when depositions in same suit may be substituted for vivâ voce testimony 499-500
examinations and depositions taken in India 500
in the colonies 500
Act of 1 Will. 4, c. 22 ..... 500, n.
commissions to examine witnesses under that Act ..... 500, n.
examinations under commission, when admissible 499-518
commissions from Probate or Divorce Division 518
Courts enforcing discovery (see *Parties, Discovery*) 521-42
actions to perpetuate testimony 543-45
vivâ voce testimony in former suit, how proved 546
depositions, open to what objections 548-49
depositions in aid of suits in foreign Courts..... 1313
no degrees in 550

Vol. I. ends with § 971.

SECONDARY EVIDENCE—*continued.* PARAGRAPHS (§§)
unless law has substituted particular species of 552
copy of copy inadmissible 553

SECRECY, solemn promise of, does not exclude confession 881

SECRETARY OF STATE, correspondence between, and agent of government privileged 947
proclamation, orders, and regulations issued by, how proved 1527

SECRETING (see *Concealment*).

SECRETS OF STATE privileged (see *Privileged Communications*) ..939, 947-48
reports by Inspector-General of Prisons to Lord Lieutenant of Ireland are 947

SEDUCTION, in action for, loss of service ostensible cause of action 356
disgrace and sorrow real cause of action 356
bad character or conduct of party seduced admissible in mitigation .. 356
but proof must be confined to what occurred previous to seduction .. 357
party seduced may be cross-examined as to previous misconduct 1441
if she deny facts imputed, cannot be contradicted 1441
unless the evidence goes to disprove the paternity 1441

SEISIN, presumption of, from possession 123, 685

SEIZURE, condemnation in revenue side of Queen's Bench Division, conclusive as to legality of 1722
or by Commissioners of Excise, Inland Revenue, or Customs 1722
is an acquittal conclusive proof of illegality of? 1722

SELECT COMMITTEE OF HOUSE OF COMMONS may administer oaths, when 1286

SELF-CRIMINATION, rule of protection as to (see *Witnesses*) 1453-58A
excuses the non-production of documents 458
bankrupt not protected from 1458A

SELF-DISCREDITING WITNESS is not incompetent .....1347, n.
declaration of deceased attesting witness in disparagement of his signature, inadmissible 569

SEMIPLENA PROBATIO, instances of, in Roman law 712, 868

SENIORITY, what evidence of, admitted in questions of pedigree 644
presumption as to survivorship or contemporaneous death arising from 202-3

SENSES, evidence addressed to, most satisfactory (see *Inspection by Jury*). 544
sometimes mislead 61

SENTENCE (see *Public Records and Documents*).

SEPARATION, judicial (see *Divorce*).

SEPARATIST, affirmation by (see *Oaths Act*).

SERVANT (see *Agent, Employers' Liability Act*).
when hiring of, presumed to be for a year 177
domestic, reasonable notice to quit is a month's warning.....34A, 177
this rule inapplicable to farm servants.....34A, 177
who is a domestic, or menial 34A
warranty by, at time of sale, when binding on master 603
admission by, at other times, not evidence against master 603
declarations of, inadmissible in matters of pedigree 635
master when criminally answerable for act of 115
master not impliedly bound to protect domestic, from injury 1182
judgment against master for negligence of, no evidence against servant of his misconduct 1667
but evidence of amount of damages awarded against master 1667

PARAGRAPHS (§§)

SERVICE of subpœna, when and what sufficient 1242-44
of notice to produce, when and what sufficient (see *Notice to Produce*) .. 441-48
when not necessary 449-56
of notice to quit, proved by indorsement of deceased solicitor on copy .. 698
of notices through the post, when sufficient ..... 180 & n., 1586A
of process, how proved in County Courts 1580B
in Courts of summary jurisdiction 1586C
written contract for, explainable by evidence of usage as to holidays .. 1168
when presumed to be for a year 177
when presumed to terminate on death of master or servant 1284

SESSIONS (see *Quarter Sessions*).

SET OF TEETH, writing required to evidence contract to supply .... 1044, n.

SET-OFF, what admissions are evidence of 726
may be converted into payment by striking a balance 1981

SETTLED LAND ACT, 1882 (see *Table of Statutes*, 45 & 46 Vict. c. 38).
judicial notice of seal of Commissioners under ..... 6, n.

SETTLEMENT CERTIFICATES 30 years old require no proof 88

SETTLEMENT DEEDS, when completed, so as to render subsequent alteration fatal 1831A
on marriage may be made by infants, when ..... 104, n.
voluntary, should contain power of revocation 158
absence of such power not primâ facie evidence of mistake. 158
when avoided by bankrupt law 83

SETTLEMENT OF PAUPERS (see *Removal*).
depositions of paupers as to, inadmissible 568
dying declarations of paupers as to, inadmissible ..... 714, n.
hearsay, in cases of, inadmissible 645
declarations of rated parishioners evidence against parish 752, 756
how far provable by evidence of giving relief 805
examination by justices as to, need not have separate caption to each .. 892
adjudication of, unappealed against, or confirmed on appeal, judgment in rem ..... 1675, n., 1679

SEVERAL (see *Joint Contractors*).
articles bought at one time, though at several prices, one contract within sect. 17 of Statute of Frauds 1044

SEWERS COMMISSIONERS, inspection of books of 1498-99
attendance of witnesses in compensation cases with ..... 1329, n.

SEXUAL INTERCOURSE between husband and wife, when presumed .. 106
boy under 14 presumed incapable of 104
effect of consent to by girls under 13 and 16 respectively 104

SHAREHOLDER (see *Joint Stock Companies*).
registration of, when admissible 1781
person who has held himself out as, cannot deny his character in action for calls 844
when held to be, from having paid calls 844

SHARES (see *Joint Stock Companies*).
transfer of, under Companies Clauses Consolidation Act, must be by deed 986
in companies, not goods within sect. 17 of Statute of Frauds .. 1039A-40, n.
when interest in lands, within sect. 4 of same statute .. 1039
title to, how proved by certificates of proprietorship 1631-37
form of such certificate, under Companies Clauses Consolidation Act .. 1631-37
infant holder of, when liable to action for calls ..... 104, n.

PARAGRAPHS (§§)

SHEEP, nomen generalissimum, in an indictment 290
presumption as to ownership of dogs worrying, in Ireland, Scotland, and England 123

SHERIFF, presumption of being, from acting as such 171
admission by indemnifying creditor, when evidence against 756
by deputy-sheriff, in action against sheriff for misconduct of deputy 756
when not liable to person who has given wrong name 846
may be sued for false return, though plaintiff has accepted sum levied on account 854
not liable to action for arresting privileged witness 1340
or for an escape ..... 35A & n., 1668, n.
but liable in trespass for detaining witness, after order for discharge.. 1340
parol assignment by, of leasehold premises taken in execution, void .. 1015
must produce writ of execution and judgment to justify seizure, when 729
in action against, judgments against third persons, when admissible.. 1668
effect of writ of fi. fa. as evidence 1766
return by, when conclusive as against him or bailiff, and when not .. 854
jurisdiction of, with respect to replevins, has ceased ..... 1850, n.

SHERIFF'S COURT, judgments and proceedings of, how proved 1572

SHIELD, ARMORIAL, when admissible in matters of pedigree 657

SHIFTING OF PROOF by statute, when 372-5

SHIP, sale of, must be by bill of sale 998A
what bill of sale must contain 998A
it does not require a stamp ..... 998A, n.
it may be proved without calling attesting witness (sub tit. "*Shipping Documents*") ..... 1839-41, n.
mortgage of ..... 998A, n.
seaworthiness of, relative term 1171
parol evidence admissible to show amount of, implied in marine insurance 1171
warranty of seaworthiness of, implied in voyage policy 1171
not implied in time policy 1171
unseaworthiness of, when presumed 205
question for jury 45A
questions on which experts may give opinions .. 1421
hearsay evidence inadmissible as to 571
dereliction of, presumption against 207
loss of, when presumed 204
neutrality of, presumptions against 107
from carrying despatches of enemy 107
from spoliation of papers on capture 107, 116
from entering blockaded port 107
when presumed to be employed in smuggling 116
action on policy for loss of (see *Insurance*).
unskilful navigation of, question on which experts may give opinions. 1421
rule as to passing each other 5
rule as to passing of steam-vessels 5
other rules for preventing collisions at sea, how proved .... 6 & n., 1601, n.
effect of non-observance of them ..... 6 & n., 206
presumptions recognised in cases of collision 206
admissions by one part-owner, not evidence against others 750
by ship-owner, when evidence in action by master for freight 756
possession of, when sufficient title against wrong-doer 123
view of, may be ordered by Admiralty Division, when 562

SHIP—*continued.* PARAGRAPHS (§§)
register of, kept under Merchant Shipping Act, 1894, how inspected.. 1504-21, n.
how proved ..1601, n.
admissibility and effect of..1778-80, n.
register of shipping at Lloyd's inadmissible as public document ..1592, n.
underwriter presumed to know contents of..... 181
proof and effect of certificate of registry of 1623
of competency or service of master or mate of..... 1623
owner of, when liable for orders given by master 208A
for negligence in navigation 208
for injuries sustained by crew.....1182A
presumption against, though pilot on board .....208 & n.
person indicted for sending unseaworthy ship to sea, is a competent witness .....1360, n.
onus of justification lies on him .....372-4, n.
on court-martial for loss of, captain and crew competent witnesses, when .....1360, n.

SHIPMENT, what is evidence of 86

SHIP'S HUSBAND, authority of, to bind owners, when presumed 208A

SHIPWRECKED GOODS, possession of, raises presumption of guilt, when .....372-4, n.

SHOP, in London, is a market overt..... 5

SHOP BOOKS (see *Account Books*).

SHOPMAN (see *Agent*).

SHOP MARKS used in will may be interpreted by parol 1196

SHORE (see *Sea*).

SHORT-HAND may be interpreted by parol..... 1159

SICKNESS OF WITNESS under examination, effect of..... 1469
when ground for postponing trial .....472-8, n.
when sufficient to let in depositions at common law ....472-8, n.
under statute ..479A-81, 488
of attesting witness, when ground for postponing trial.....1813A
when an excuse for non-performance of contract 1184

SIGHT, bill of exchange payable at, has no days of grace 1168

SIGN MANUAL, whether judicially noticed..... 14
certificate of sovereign under, inadmissible 1784

SIGNATURES, how proved (see *Handwriting*).
what judicially noticed.....7-8, 11-14
if 30 years old, require no proof..... 88
of chairman, to books of proceedings, need not be affixed at meetings. 1782
of justices must be affixed to depositions 479A, 484, 487
to examinations 888A, 889
of accused should be obtained, if possible, to examination ....888A, n., 889
of witness should be affixed to depositions before justices 479A, 484, 487
of coroner must be affixed to depositions and examinations.....492, 901
of drawer of bill, admitted by acceptance..... 851
of indorser, though same person as drawer, not admitted by acceptance 851

SIGNATURES—*continued.* PARAGRAPHS (§§)
of maker of promissory note, admitted by indorsement of payee..... 853
of client may be proved by solicitor 934
place of, what sufficient within Statute of Frauds 1028
mode of, what sufficient within Statute of Frauds 1029
place and mode of, to wills under Wills Act (see *Wills*) 1057-60
what required for particular notices.....1101A-5A
for other documents (see *Writings*).

SILENCE, when evidence as an admission (see *Admissions*).....809-16
as a confession.....814-16, 907
of witness, on being asked criminatory questions, effect of 1407

SIMILARITY of name and residence, or name and trade, will identify party 1358
of name alone will justify presumption of identity, when..... 1860

SIMPLICITY in narrative, test of truth..... 52

SITTINGS, legal, commencement and ending of, judicially noticed 16

SKILL (see *Experts*), what is reasonable, question for jury.....37-7A
when artisans and artists warrant that they possess proper 1184

SKILLED WITNESSES (see *Experts*).

SLANDER (see *Libel and Slander*).

SLAUGHTER HOUSES, by-laws respecting, how proved .....1657-8, n.

SLAVE, value of testimony of 53
mandamus to examine witnesses respecting offences against slave trade .....500, n.

SLEEP, confession made while talking in, doubt as to admissibility of ..881, n.

SMUGGLING, presumptions respecting..... 116
when onus of proving innocence lies on defendant .....372-4, n.
within what time prosecutions must be brought.....76-8, n.
employment in preventive service, when presumed..... 171

SOCIETIES (see *Building Society*, *Friendly Society*, and *Industrial and Provident Society*).

SODOMY, though agent be under 14, patient may be convicted of.....104, n

SOIL OF RIVERS, presumption as to ownership 119

SOLD NOTE (see *Bought and Sold Notes*).

SOLDIER, will of, how far excepted out of Wills Act 1050-51, 1062
attendance of, as witness in civil Court enforced by habeas corpus.... 1275
before courts-martial, how enforced .....1293-1309, n.
proof and effect of certificate of previous acquittal, or conviction of:—
before courts-martial (sub tit. "*Army Act*").....1611, n.
before civil Courts.....1611, n.

SOLEMNIZATION OF MARRIAGE, when presumed regular 143-4

SOLICITOR, generic name for attorneys and proctors..... 19
communications to, privileged (see *Privileged Communications*) 911-37A
same rule applies to clerk of 920
to town agent of..... 920

SOLICITOR—*continued.* PARAGRAPHS (§§)
when estopped from denying title of client 848
admission made by, how far binding on client (see *Admissions*).....772-82
rules of Court as to notices to admit by (see *Notice to Admit*) ....724A & n.
service of notice to produce on, sufficient..... 442
for defendant must attest warrants of attorney and cognovits (see *Warrants of Attorney*) 1111
competent to testify, though he has addressed jury as advocate..... 1391
when witness, seldom ordered out of Court 1400
entitled to what allowance in civil Courts .....*App.* i—v
in criminal Court...*App.* vi *et seq.*
before examining magistrates.....*App.* vi
cannot be compelled to produce client's document without leave 457
privileged from arrest, when (see *Arrest*) 1230-39
privileges of, judicially noticed 19
impliedly undertakes to exercise reasonable skill 1183
how far negligence of, is a question for judge or jury 37A
inspection of rolls of, and other books respecting.....1504-21, n.
proof of certificate of..... 1639
appearance of name of, in Law List, sufficient 1639
admission of parties being, from speaking of him as such..... 173
may make special agreement for payment 1097
such agreement must be in writing, and fair and reasonable 1097
may make verbal agreement to charge nothing if action lost 1097
notice to produce bill of, unnecessary 450
bound to answer respecting fraud committed by him, when..... 1455
cannot be convicted of fraud, if he has disclosed offence on oath..... 1455
cannot recover costs from corporation, unless retained under seal 984
suing in name, but without authority, of client, effect of..... 1086
agent must be authorized by deed to appoint 985
presumption against deed of gift to 151
contract between, and articled clerk must be enrolled 1126
no implied authority to bind partner by drawing bills 185

SOLICITOR-GENERAL, when entitled to reply .....390 & n.

SOLICITORS' REMUNERATION ACT, 1881 (see *Table of Statutes*, 44 & 45 Vict. c. 44).

SOLOMON, his judgment in the case of the two harlots..... 215

SOVEREIGN, traitor compassing death of, or bodily harm to, to be indicted, arraigned, and tried as if charged with murder..... 958
protective provisions of Statute of Treasons do not apply to such case. 958
high misdemeanour to aim fire-arms, &c. at, with intent to injure or alarm .....958, n.
is she admissible as witness? 1381
if admissible must be sworn..... 1381
certificate of, under sign manual, inadmissible 1784
grant from, when presumed.....130-1
proclamation of, judicially noticed (see *Proclamations*) .....5 & n, 8, 1527
great and privy seal of, judicially noticed 6
whether sign manual of, judicially noticed 14
accession and demise of, judicially noticed 18
how far affected by Statutes of Limitation 74
admissibility and effect of speech of, in opening Parliament 1661

SPAIN, LAW OF, as to days of grace allowed on bills .....1198, n.
as to presumption respecting loss of ship .....204, n.

PARAGRAPHS (¶¶)

SPEAKER OF HOUSE OF COMMONS, warrant by, need not contain recital 84
proof and admission of certificate of, of costs allowed on taxation for private bills (sub tit. "*Parliamentary Costs*")..1611, n.
of papers being published by order of Parliament (sub tit. "*Parliamentary Papers*") .....1611, n.

SPECIAL ALLOWANCES may be made to expert and scientific witnesses—(a) in High Court 1247
(b) in County Court .....*App.* iv
may be made to seamen detained on shore as witnesses—(a) in High Court 1248
(b) in County Court .....*App.* v

SPECIAL DAMAGES recoverable in replevin 1696

SPECIAL EXAMINER (see *Examiner*).

SPECIALTIES, consideration for, presumed..... 86
within what time action on, must be brought 75n, 692, 1090
indorsement on, of part payment, or of payment of interest by deceased payee, admissible for his representatives 690-92
to support replication of acknowledgment to plea of Statutes of Limitation 692
whether necessary to prove aliundè date of indorsement upon..169, 693-96A

SPECIFIC PERFORMANCE, when mistake in written agreement provable by parol in suit for 1140

SPECIFICATIONS OF PATENTS, how proved (sub tit. "*Patent Office*") .....1601, n.
construed by judge 40
many deposited in Petty Bag Office 1542

SPELLING, proof of handwriting by comparison of 1871

SPIES (see *Informer*).

SPIRITUAL COURTS (see *Ecclesiastical Courts*).

SPIRITUAL EXHORTATIONS, confession induced by, admissible..879, 916-17

SPIRITUAL MEDIUM, deed of gift to, when set aside 151

SPLITTING DEMAND, not allowed to plaintiff 1792-04

SPOLIATION OF PAPERS, presumption from.....107, 116
accidental, effect of 1828-29
by stranger, effect of 1827

SPORTING RIGHTS, when amounting to interest in lands..... 1038
must be created, &c. by deed, when 973-74

SPOT IN DISPUTE, view of.....558-66

SQUARE, in indictment for stealing fixtures in any, property need not be alleged..... 294

STABLE-KEEPER bound by declarations of servant, when..... 603

STAGE-COACH (see *Coach*).

STAKEHOLDER, holding document, must be subpœnaed, when 441

STALE DEMANDS, presumption against 139-42, 709-10

STAMP (see *Seals*). PARAGRAPHS (¶¶)
presumed on lost instrument 145, 148, 435
also on instrument not produced after notice 117, 148
how question of want or insufficiency of, is affected by the new rules of pleading 309
when parol evidence admissible to show whether required or not 1149
question of sufficiency of, to be decided by judge 23
proper amount of, Commissioners of Inland Revenue will decide, on application 1763
on bill or promissory note purporting to be foreign, when sufficient .. 72
on probate, how far evidence of assets 860
receipt inadmissible for want of, may refresh memory of witness 1411
solicitor cannot state whether client's deed was duly stamped..... 937A
counterpart of lease sealed by lessor deemed the original as regards the 426
counterpart admissible as secondary evidence, though unstamped 426
contracts under sect. 4 of Statute of Frauds, must be stamped..... 1043
under sect. 17 exempt 1043
between Metropolitan coach-masters and drivers or conductors exempt 1099A
under Pawnbrokers Act, 1872, exempt 1099
replevin bonds exempt 1850
bills of sale of ships exempt ..... 998A, n.
what are material alterations in instrument, with respect to stamp laws 1822-23
laws respecting, frequently oppressive 397
less oppressive now than formerly 397
no objection for want of, allowable in criminal court ..... 397, n.
what documents may be read in civil courts, though unstamped, on payment of penalty 397
omission or insufficiency of, must be noticed by officer of Court 397
the same rule applies to proceedings by arbitration 397
ruling of judge respecting, final..... 397
when documents are "duly stamped" ..... 397, n.
denoting stamp affixed by Commissioners of Inland Revenue, effect of.. 1763

STAMP ACT, 1870 (see *Table of Statutes*, 33 & 34 Vict. c. 97).

STAMP OFFICE, books of, admissible as public documents (sub tit. "*Public Offices*"; see *Inland Revenue*) ..... 1595, n.

STAMPED SIGNATURE, when sufficient 1029, 1060

STANNARIES, attendance of witnesses before Court of, how enforced.. 1293—1309, n.
seal of Court of, judicially noticed 6
signature of registrar of, when judicially noticed 14
records of judicial proceedings of Court, how proved..... 1546

STAR CHAMBER, proceedings of, in Record Office 1485

STATE, acts of, when judicially noticed..... 6
how proved 1526-7
secrets of, excluded by public policy (see *Privileged Communications*) .. 938, 947-48
acts of foreign, or colonial, how proved 10, 1528

STATE-PAPER OFFICE, records of, where deposited 1484

STATEMENT OF CLAIM OR DEFENCE (see *Pleadings*).

PARAGRAPHS (¶¶)

STATEMENTS, when party may show that his witness has made inconsistent 1426
when he may show that his opponent's witness has done so..... 1445
how to proceed if contradictory statement in writing 1446
1. in civil causes 1446-48
2. in criminal cases—depositions 1447-49
witness must first be cross-examined as to circumstances..... 1445
made post litem motam, inadmissible, when (see *Lis Mota*) 628-34
made by children, inadmissible, when incompetent as witnesses..... 568
when admissible as evidence of bodily or mental feelings 580-82
as part of res gestæ (see *Res gestæ*).....583-91

STATES, FOREIGN (see *Foreign States*).

STATIONERS' HALL (see *Copyright*).

STATUTE OF DISTRIBUTIONS (see *Table of Statutes*, 22 & 23 Vict. c. 10).
word "children" used in, means legitimate child 168

STATUTE OF FRAUDS (see *Table of Statutes*, 29 Car. 2, c. 3), wise in principle, badly drawn 1000
must be pleaded specially..... 306
sect. 1, what it enacts .....1001 & n.
not applicable to demises under seal 1001
what leases, estates and interests in land must be in writing signed 1001
writing must be signed by party, or by agent authorised in writing .....1001, n., 1107, n.
sect. 2, excepts leases not exceeding three years .....1001 & n.
effect of parol lease for more than three years..... 1002
sect. 3, how leases, estates, and interests in lands assigned or surrendered 1002-5
writing must be signed by party, or by agent authorised in writing .....1003, 1107, n.
surrender by operation of law, what 1005-13
does not depend on intention 1005
acceptance of new void lease 1007
voidable lease 1007
agreement to purchase by tenant 1008
cancellation of lease 1009
new interest granted to stranger, tenant giving up possession 1010
of bankrupt's lease, by trustee 1012
trustees of Industrial or Benefit Building Society vacating mortgage. 1013
when no merger by operation of law. 1014
assignment, by act of law—death, marriage, bankruptcy.... 1015
sects. 7, 8, 9, what trusts must be created, or assigned by writing signed 1016
resulting trusts excepted 1017
when such trusts arise (see *Trusts*) 1017A-17c
signature must be by party himself .....1016, 1107, n.
sect. 4, what it enacts 1019
not applicable to deeds..... 1019
writing may be signed by party or by agent orally appointed..1019, 1107, n.
sect. 17, now replaced by Sales of Goods Act, 1893, s. 4 1020
provisions of above-mentioned enactments 1020
extend to sale of goods not yet in existence..... 1021
to satisfy either sect. 4 of Statute of Frauds or sect. 4 of Sale of Goods Act, 1893, consideration must appear in writing 1021
except as to guarantees 1021, 1031
this rule of very questionable policy 1021

STATUTE OF FRAUDS—*continued.* PARAGRAPHS (§§)

rejected in many States of America ....1021 & n.
consideration need not be stated in wr ng or express terms ..1022-23
sufficient if it can be collected by reasonable intendment 1024
writing may be signed by party, or by agent orally appointed.. 1021, 1107, n.
one party to the contract cannot sign as agent for the other....1020, n.
how much of contract must be in writing.....1024-25
names of both contracting parties must appear 1025
contract need not to be comprised in single document 1026
may be made out from correspondence 1026
or by signed letter referring to writings 1026
entire contract must be collected from writings 1026
verbal testimony inadmissible to supply omissions in contract.... 1026
parol evidence received to show situation of parties, identity, explain language, or fix date 1026
letter addressed to third party will suffice 1027
memorandum after action brought insufficient 1027
place of signature immaterial 1028
mode of signature, initials, printed signature 1029
need not be signed by both parties..... 1029
written proposal accepted by parol 1029
special promise by executor or administrator to answer damages out of own estate must be by writing signed 1019
guarantee must be in writing signed.....1030B
writing may be signed by party or by agent appointed by parol .....1107 & n.
consideration for guarantee need not now appear in writing.. 1030
what constitutes a guarantee 1031-34
provisions as to guarantees extended by Lord Tenterden's Act .....1085 *et seq.*
agreement in consideration of marriage must be by writing signed. 1035
what is such an agreement 1035
agreement not to be performed within year, must be by writing signed 1036
what is such an agreement 1036-37
contract for sale of lands or any interest therein must be by writing signed 1038
what is an interest in lands.....1038-43
shares in companies possessed of real estate not 1039
nor debentures 1039A-40
whether growing crops are 1041-42
contracts for sale of goods, &c., of 10*l.* value required to be in writing signed 1020
requirement extends to goods not actually made, &c. 1020
does not apply to agreement to procure goods for another, and to take them to a certain place.. 1044
nor to fixtures 1044
does apply to several articles purchased at one time, at distinct prices 1044
to agreement by artist to paint a picture ... 1044, n. & *Errata*
to contract by dentist to make a set of teeth ..1044, n.
shares in companies not goods, wares, and merchandise within it .....1039A-40, n.
exceptions to rule requiring writing:—
1. when part payment, or earnest money given 1020
2. when acceptance and actual receipt of part of goods..... 1020
whether acceptance proved, question for jury 45A, 1045
meaning of acceptance and actual receipt.....1045-49
must be intended by both parties to change right of possession 1045
marking goods by vendee in vendor's shop not sufficient 1045

STATUTE OF FRAUDS—*continued.* PARAGRAPHS (§§)
horse transferred from sale to livery stable 1046
bailee of goods selling them on his own account 1047, 1049
constructive delivery of ponderous goods, key of warehouse.. 1048
acceptance by purchaser of warrant or delivery order 1048
goods delivered to carrier or wharfinger named by vendee .. 1049
distinctions between sect. 4 and sect. 17 (now sect. 3 of Sale of Goods Act, 1893) of Statute of Frauds..... 1043
contracts under former must be stamped, under latter exempt .. 1043
sect. 4 applies to contracts of any value, and in some cases to those part performed..... 1043
provisions as to sale of goods do not apply to contracts under 10*l.*, or where part payment, or part acceptance 1043
when contracts under sect. 4 will be supported, if part performed.. 1043
sect. 5, devises of real estate, how signed and attested under 1052
agreement under, may be totally abandoned before breach, by oral contract 1143
cannot be partially abandoned by oral contract.. 1144

STATUTE OF WILLS (see *Wills* and *Table of Statutes*, 7 Will. 4 & 1 Vict. c. 26).

STATUTES, public, judicially noticed 5, 1523
local and personal Acts, when judicially noticed 7-8, 1523
when proved by copy purporting to be printed by Queen's printer 7-8, 1523
private Acts, how proved 7-8, 1523
construction of, question for judge 40
Irish statutes prior to Union, how proved 1524
foreign statutes, how proved 1525
admissibility and effect of recitals in public statute 1660
in private Acts 1660
when printed copy erroneous, judge will refer to Parliament roll 21
within what time action must be brought against party, acting under any local or personal Act..... 73A
power of pleading general issue by (see *General Issue*).....311-13

STATUTES OF LIMITATION (see *Limitation*).

STATUTORY DECLARATIONS, law as to .....1389, n.

STEALING (see *Larceny*).

STEAM VESSEL, rules as to passing each other..... 5
presumption of wilful default, in case of accident, while neglecting these rules 5

STEPHENSON, his evidence as to possible speed on railway rejected.... 62

STEWARD, entries against interest made by deceased, admissible 673
how far necessary in such case to prove that he filled the office 683
communications made to, not privileged 916
of a borough what documents bound to produce as witness 460

STOCK, transfer of, proved by bank books..... 1777
contract for sale of, not within sect. 17 of Statute of Frauds (now sect. 3 of Sale of Goods Act, 1893).....1039A-40 & n.

STOCK EXCHANGE, broker presumed to act in accordance with rules of 181

STOCKBROKERS (see *Broker*).

STOLEN GOODS, recent possession of, raises presumption of guilt.... 63, 127A-B
this presumption sometimes erroneous 63

PARAGRAPHS (¶¶)

STORES, presumption from possession of Her Majesty's .....372-4, n.

STRANGER (see *Privies*, *Public Records and Documents*).
alterations made by, in instruments, when fatal.....1827-29
refusing to produce documents, when secondary evidence admissible.. 457
estoppels not enforceable by, or binding on.....99, 817-18
recitals in private statutes, no evidence against 1660
when evidence in matters of pedigree 1660
judgments, how far evidence against 1667-8
judgments *in rem.*, how far binding upon 1677-8
judgments *inter partes*, inadmissible for or against, in proof of facts adjudged..... 1682
exception, when admissible in nature of reputation 1683
inquisitions, how far evidence against 1767
admissions by, generally rejected (see *Admissions*)..... 740
when evidence 759-65
confessions made under inducements by, how far admissible 875-77
declarations of, inadmissible in matters of pedigree 635
admission to, of debt, does it bar Statutes of Limitation? 1074-74a
to a document, may contradict it or vary it by parol..... 1149
has no right to inspect certain documents 1493-99

STREET (see *Highway*).
the word not judicially noticed 17
meaning of, question for jury, when..... 45a
in indictment for stealing fixtures in any, property need not be alleged..... 294

STYLE, evidence of custom inadmissible to show feasts in lease refer to Old 1165
of composition of two writings may be compared 1871

SUBMISSION (see *Award*).

SUBORNATION OF PERJURY, witnesses may be awarded costs on trial of 1254
of witnesses may be proved or disproved on any trial 338

SUBPŒNA, witnesses made to attend by (see *Attendance of Witnesses*)..1239-49
production of documents, when enforced by subpœna duces tecum..1239-40
witness producing document under, need not be sworn..... 1429
witness producing document under, if not sworn, cannot be cross-examined..... 1429
may be sealed in blank, and filled up afterwards 1835
differs from subpœna duces tecum in what 1241a
writ of, only good for one sitting 1241
must state what particulars in ordinary actions 1240-43
service of, must be made a reasonable time before trial..... 1242
within twelve weeks from date 1242
in what manner, and how proved..... 1244
when witness must answer, though he has not been served with ..1242, n.

SUBSCRIBING WITNESS (see *Attesting Witness*).

SUBSEQUENT ASSENT by principal to unauthorised act of agent..985, 1108

SUBSTANCE of issue must, but need only, be proved (see *Allegations, Variance*) 218
of former examination, when witness can speak to 547

SUBSTITUTION of bequest, and not revocation, when intended....1064, 1070

PARAGRAPHS (§§)

SUGGESTIONS FOR AMENDING THE LAW OF EVIDENCE:—
to abolish right of Attorney-General and Solicitor-General to reply in political trials 390
to abolish the doctrine laid down in Slatterie *v.* Pooley .....410-11, n.
to allow proof of sanity or insanity by evidence of treatment by relatives 571-74
to abolish law in equity, which admits parol evidence against a plaintiff seeking specific performance, but rejects it for him..... 1140
to admit entries made by tradesman or merchant in his shop books .. 713
to limit rule rejecting confessions on ground of inducement held out.. 872, 884
to admit confessions purporting to have been taken on oath 895-96
to repeal law which requires prisoner under examination to be twice cautioned by justices.....888A-90
to abolish law which requires that consideration for contract should appear in writing signed under Statute of Frauds 1021
to render law uniform as to mode of appointing agents..... 1109
to render communication to clergymen and medical men privileged..916-17
to abolish rule, requiring two witnesses to each overt act in treason .. 954
to abolish days of grace for paying all bills and notes .....1168, n.
to limit the admissibility of usage to explain contracts..... 1190
to enable inferior Courts to issue subpœna beyond their jurisdiction .. 1264, 1268
to direct Queen's Bench Division to enforce obedience to such subpœna by attachment..... 1268
to extend to other Courts power, now extended to all divisions of High Court, of bringing witnesses from Scotland or Ireland 1262
to empower examiners of High Court to enforce attendance of witnesses 1285
to establish an uniform mode of enforcing attendance of witnesses.... 1329
to render all defendants in criminal proceedings competent witnesses .....1360, n.
to empower Court to disallow vexatious cross-examination.....1360, n.
to abolish rule in Revenue causes rejecting witnesses who have remained in Court after order to withdraw 1401
to modify the rule which protects witnesses from self-crimination 1454
to allow prisoners copies of indictments 1488
to protect instruments from being vitiated by unauthorised or accidental alterations of strangers.....1827-29

SUICIDE, dying declarations of, admissible against accessory 717
not presumed..... .....112 & *Errata*

SUIT (see *Action*).

SUMMARY CONVICTIONS (see *Convictions*).

SUMMARY JURISDICTION ACT, 1879 (see *Table of Statutes*, 42 & 43 Vict. c. 49), powers given by 1258-59
rules made under, judicially noticed .....19, n.
justices under, may allow costs of prosecutor and witnesses.....1258-59
onus of proof under 375

SUMMONS, when attendance of witnesses enforced by (see *Attendance of Witnesses*).
dismissed at chambers, effect of 1756
how proved in County Courts 1586n

SUNDAY, what days of the month fall on, judicially noticed .....16, n.

SUPERIOR COURTS (see *Courts of Law, Chancery Division, Supreme Court*).

SUPPLETORY OATH, when necessary in Roman law 712

PARAGRAPHS (§§)

SUPPORT, right to, from adjoining lands 121
houses 121
from subjacent soil 121
from lower stories 121

SUPPRESSION OF EVIDENCE, presumption from 116, 555A, 804

SUPREME COURT, (see *Courts of Law*), seal of, judicially noticed..... 6
seal of each division of, judicially noticed 6
seal of principal and district registries of, judicially noticed 6
rules of, when judicially noticed..... 19
records of, how proved 1534
proceedings of, when judicially noticed 19
signature of judges of, when judicially noticed 7, 8, 14
judges of, do not judicially notice inferior courts 20
costs in (see *Costs*).
jury trials in (see *Jury*, *Trials by Jury*).
notices sent from offices of, may be transmitted by post 180
presumption respecting service of such notices 180

SUPREME COURT RULES, 1883, how proved 1534, 1587
rules as to amendments (see *Amendments*) 221
do not affect criminal proceedings 222-5, 245
or divorce or matrimonial causes 222-5, 245
but apply to civil proceedings on Crown side of Queen's Bench Division 222-5, 245
to proceedings on Revenue side of Queen's Bench Division 222-5, 245
to High Court having jurisdiction in bankruptcy 245
to Admiralty actions 245
to probate actions 245
to County Courts having jurisdiction in bankruptcy .. 245
rules as to pleadings (see *Pleadings*) 301-8
as to proceedings in lieu of demurrer 91, 306, 828
as to mode of proof of service of notice to produce 448
as to form of notice to produce 442-43
as to costs where notice contains unnecessary documents 456A
as to examination of witnesses before Examiners or Commissioners (see *Depositions*, *Examiner*, *Commission*) 504
as to interrogatories (see *Interrogatories*) 521-42
as to inspections (see *Inspection*, *View*) 560
only to apply to civil proceedings..... 566
as to actions for perpetuating testimony 543-44
as to admissibility of shop books in evidence 711-12
as to notices to admit (see *Notice to Admit*) 724A-24I
as to admissions in pleading (see *Admissions*) 826-29
as to payment into and out of Court (see *Payment into Court*) ..831, n.
as to inquiries and accounts 711, 812
as to the form and service of subpœnas (see *Subpœna*) ..1239-40, 1244
as to renewal of writ 1586
as to evidence by affidavit (see *Affidavit*) 1395-96G
as to public records 1485, 1491A, 1538
as to Central Office (see *Central Office of Supreme Court*) 1539
as to place, time, and mode of service of process 1586A
as to discovery and inspection of documents (see *Private Writings*) .....1786—1810
as to mode of trial 21n-1c
as to appeals 1881D
as to costs (see *Costs*).

SUPREME COURT OF JUDICATURE ACTS, 1873, 1875 (see *Table of Statutes*, 36 & 37 Vict. c. 66, and 38 & 39 Vict. c. 77).

PARAGRAPHS (§§)

SUPREME COURT OF JUDICATURE (IRELAND) ACT, 1877 (see *Table of Statutes*, 40 & 41 Vict. c. 57, Ir.).

SURETY, admission by principal, when evidence against 785-86
may plead equitably that he is discharged by giving time to principal. 1153
judgment against, evidence for him to prove amount he has paid for principal 1667
but no evidence of principal's default 1667

SURGEON (see *Medical Man*).

SURGICAL CERTIFICATE of age under Factory and Workshop Act.. 1640-45
burthen of proof of age in proceedings under ..... 372-4, n.

SURPLUSAGE, definition of 255
need not be proved 255
instances of 255-62

SURRENDER (see *Statute of Frauds*).
of lease, by operation of law, what 1005-13
when presumable 138
when signed writing necessary as evidence of 1003
when deed necessary 991
of unsatisfied terms, when not presumed 137
of satisfied terms, no longer presumed, such terms ceasing by statute.. 136
of copyholds, admissibility of 1773
of incorporeal rights, must be by deed 973-74

SURROGATES, appointment of, presumed from acting 171

SURROUNDING CIRCUMSTANCES of parties to suit, when relevant.. 316
evidence to explain deeds and wills ..... 1194—1200

SURVEYORS, testimony of, often partisan 68
warrant that they possess competent skill 1183

SURVEYS, how proved 1582
when necessary to prove commission 612, 1582
when not 1582-84
when evidence, as admission by privies 788, 1770c
Irish Down Survey admissible as public document 1770
Ordnance Survey inadmissible both in England and Ireland 1770n

SURVIVORSHIP (see *Death*, *Life*).
presumptions respecting 202-3

SUSANNAH and the elders, precedent for ordering witnesses out of court 1402

SUSPICION, reasonableness of, question for jury 29

SWORN, witness called to produce a document need not be 1429
other witnesses must be (see *Oath, and Competency*) 1378-80
witness objecting to be, because he has no religious belief, or taking oath contrary to it, may affirm 1382

TAVERN, presumption respecting keeper of 187

TAXING MASTERS OF SUPREME COURT, attendance of witness before, how enforced ..... 1284, n.
may administer oaths 1386

TECHNICAL TERMS, in writing, may be explained by parol 1161
primâ facie, to be understood in their technical sense 1131
to be explained by jury 40

TEETH (see *Set of Teeth*). PARAGRAPHS (§§)

TELEGRAM, instructions for, duly transmitted, will satisfy Statute of Frauds 1027, 1029
in America even verbal instructions for, sufficient ..... 1027, n.
Company may be sued for transmitting a libellous ..... 981, n.

TENANCY (see *Tenant, Landlord, Lease, Use and Occupation*).
terms of, cannot be proved by parol, if there be a lease 402
fact of, provable by parol, without producing lease, when 406
must be created by deed, when 991-92
must have been created by signed writing, when 1001-4
how assigned or surrendered since 1st October, 1845 992
before that date 1003
how and when surrendered by operation of law (see *Statute of Frauds*) 1005-13
how and when assigned by operation of law 1015
how and when surrendered or assigned in Ireland ..... 1003, n.
what incidents annexed to, by common law 1175
by evidence of usage 1168
by statute in Ireland ..... 1175, n.
cannot be shown by usage to have reference to Old Stylo 1165
from year to year, when presumed 176
presumption as to, when determinable 34, 176, 809

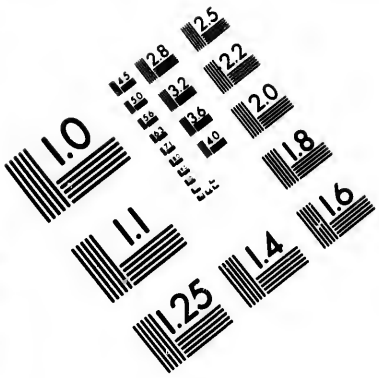
TENANT, when estopped from denying landlord's title (see *Estoppel*) ..101-3, 847
encroaching on waste, presumed to act for landlord 122A
holding over, presumptive effect of 197
admissions by, how far evidence against landlord 789
admissions by landlord, how far evidence against 788
forfeiture by, when waived by landlord suing or distraining for rent .. 807
by landlord accepting rent 807
by landlord misleading tenant 847
when not waived by landlord's passive acquiescence .. 809
receiving notice to quit without objection, effect of, as an admission .. 809
surrendering lease by operation of law (see *Statute of Frauds*) 1005-13
stealing chattels or fixtures exceeding value of £5 286
title of, to away-going crop, may be proved by usage 1168
cannot quit without notice, though premises out of repair 1175
may quit furnished apartments without notice, when 1176
at will, convertible into tenant from year to year, by payment of rent 993, 1001
in tail, consent of protector to disposition of, must be by deed enrolled 1122
in dower, when bound by judgment of ancestor 1689
by the courtesy, when bound by judgment of ancestor 1689
for life, verdict for or against, no evidence for or against reversioner .. 1693
effect of paying off an incumbrance by 154

TENANTS IN COMMON (see *Joint Tenants*).
how described in indictments 293
when persons held to be, contrary to primâ facie view 1198
admissions by one, not receivable against others 751

TENDER, evidence of, when admissible under general issue in action against justices 315
when invalid as being conditional 45A
whether conditional, question for jury 45A
of rent, within what hours it must be made 32A
of expenses to witnesses, when necessary (see *Attendance of Witnesses*).
necessity for formal tender of evidence 1882A

TENTERDEN, LORD (see *Lord Tenterden*).

TERM, outstanding, surrender of 136-7



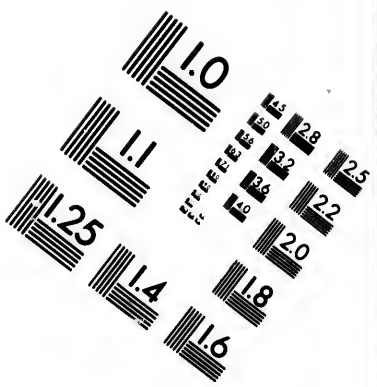
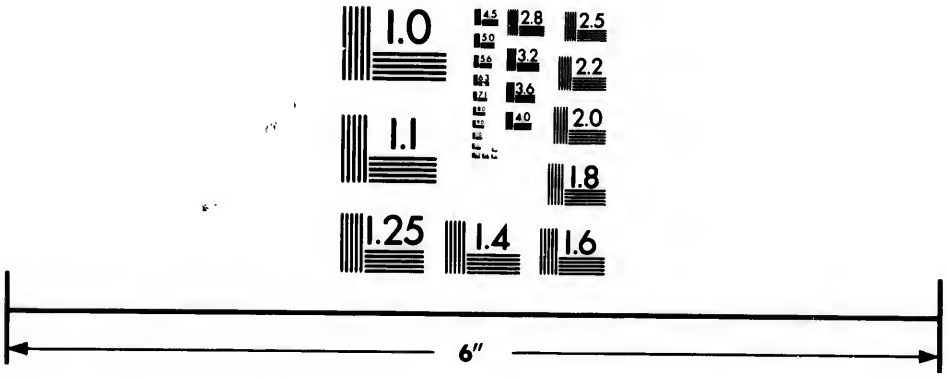
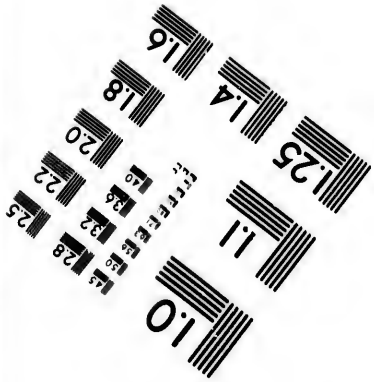
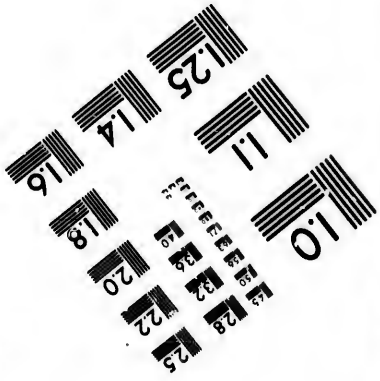


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

TERMS, meaning of particular (see *Meaning*). PARAGRAPHS (§§)

TERRIERS, what and when admissible .....1595, n., 1772
what is the proper place of custody of 661

TESTAMENT (see *Will, Bible*).

TESTATOR, declarations of intention of, generally inadmissible 1203
admissible, when will impeached for fraud or forgery 1136
when description in will is applicable to two subjects....1207-8
to rebut an equity (see *Rebutting an Equity*) 1227-28
if declarations admissible here legally immaterial, when and how made 1209
ademption of legacy by 1146, 1229-30
circumstances surrounding, to be considered in interpreting wills ..1194-99
his habit of misnaming persons or things, provable by parol 1210-11
insanity of, may be proved, notwithstanding probate, when 1677
judgment against, binding on executor 1689
admissions by, evidence against executor..... 787
presumed to know contents and effect of will 160
other presumptions respecting 160-68
competency of, question for jury 45A
what amounts to undue influence over, question for jury..... 45A

TESTIMONY, actions to perpetuate (see *Perpetuating Testimony*) 543-45
faith in, on what it depends (see *Belief*) 50-69
of enslaved people, value of..... 53
of women 54
of children 55
of foreigners 56
of policemen and constables 57, 68
of skilled witnesses 58, 68, 650, 1877
of accomplices 25, 967-70
of persons in their own favour 963-65
degrees of (see *Best Evidence*).

TESTS OF TRUTH, what are the best..... 52

THAMES CONSERVANCY, by-laws of, how proved .....1657-8, n.

THANKSGIVING, days of, judicially noticed 18

THEATRE (see *Dramatic Piece*).
onus of proving licence of (see 6 & 7 Vict. c. 68) .....372-4, n.
consent of author to performance in 377
ticket of admission to, revocable 973-74

THEFT, presumption of, from recent possession of stolen property..63, 127A-7B

THERMOMETER presumed to register accurately..... 183

THIEF, confession by, not evidence of theft, as against receiver 904

THIRD PERSONS (see *Strangers*).

THREAT excludes confession, when (see *Confession*) 873-85
does not exclude evidence of facts ascertained by confession 902
former, admissible, as evidence of malice, on indictment for murder .. 347

THREATENING LETTER, on indictment for sending, duty of jury .. 43
other threatening letters admissible, when 347

THRESHING MACHINES, in prosecutions for accidents by, negligence of owner presumed, when .....372-4, n.

TIDE (see *Sea*).

PARAGRAPHS (§§)

TIDINGS, absence of, for 7 years, raises presumption of death 200
for reasonable time, raises presumption of loss of ship 204

TIMBER, when within sect. 4 of Statute of Frauds 1041-42

TIME (see *Limitations*), definition of 16
questions of reasonable, whether for judge or jury (see *Functions of Judge and Jury*) 30-6
inference of law as to reasonable, where contract is silent 177A
formal averments of, should be omitted in civil pleadings 278-9
should be omitted in indictments ....280, n., 284, n.
if inserted, need not usually be proved as laid .....280, n., 284, n.
of serving notice to produce 445-48
of serving subpœna 1242
what is the regular, for calling for production of documents at the trial 1817
for objecting to competency of witness 1392
statement of, in stating written agreement, cannot be varied by subsequent oral contract 1145
in written agreement cannot be varied by contemporaneous oral contract 1151
of birth, marriage, and death, are matters of pedigree 642
how far provable by registers (see *Birth*, *Marriage*, and *Death Registers*).
computation and course of, judicially noticed 16
regularity presumed from lapse of 128
of gestation, how far judicially noticed 16

TITHES, title to, how affected by Statutes of Limitation 74A
entries by deceased rectors or vicars, respecting 688
are receipts of, by lessees of vicarial tithes, evidence of modus as against vicar? 789

TITHE COMMISSIONERS, agreements and awards confirmed by, how proved ..... 1601, n.
ecclesiastical documents deposited with, how proved ..... 1601, n.
duties of, now discharged by Board of Agriculture ..... 6, n.

TITLE, within what time, must be disputed (see *Limitations*).
when presumed from possession 123
from receipt of rent 123
statement by possessor of land in disparagement of his own, admissible 684-87
warranty of, when implied in contracts of sale of real estate 1174
in demises of real estate 1175
on sale of chattels 1177
paramount, eviction by, tenant may show 102
of peer, how described in indictment 293
of foreigner of rank, how described 293

TITLE DEEDS, witness and party not bound to produce his own ..458, 1464
trustee not compellable to produce his cestui que trust's 918
solicitor not compellable though allowed to produce his client's ..458, 919
stealing, destroying, or concealing, not punishable, if disclosed on oath 1455

TOLLS presumed legal from long enjoyment 130
what claims of, provable by hearsay 613
when verdicts and judgments inter alios admissible to prove 1683
of turnpike, agreement to let, need not be under seal .....993, n.

TOLZEE (see *Foreign Attachment*).

TOMBSTONE, inscriptions on, evidence in cases of pedigree 652
provable by copy 438, 653

PARAGRAPHS (§§)

TOOLS for coining, forging, housebreaking, &c., on indictment for having in possession, defendant must prove lawful excuse .....372-4, n.

TORTS, in actions for, admission of one defendant no evidence against others 751
corporations liable for, when 981

TORTURE, old practice of 886
when abolished 886

TOTAL LOSS, under allegation of, plaintiff may recover for partial loss 271-7

TOWN, limits of, provable by hearsay..... 613
how far meaning of word, question for judge or jury 47

TRADE (see *Board of Trade* and *Course of Office or Business*).
mode of carrying on in one place, when evidence of such mode in another 322
usage of, may explain written instrument, when (see *Parol Evidence*).1160-69, 1187-92

TRADE-MARKS (see *Shop Marks*), presumed genuine as against vendor, when 1180
registration of, under Patents, Designs, and Trade Marks Act, 1883..1611, n.
effect of .....1611, n.
proof of .....1611, n.

TRADER by custom in London, married woman may be 5

TRADESMEN, entries by, in shop-books, when evidence for, in America, Scotland, France, Supreme Court, and other Courts 709-13

TRADE UNION ACT, 1871 (see *Table of Statutes*, 34 & 35 Vict. c. 31).
compliance with Act, how proved .....1611, n

TRADES UNIONS, certificate of registry of, how far admissible ....1611, n.

TRADING company (see *Joint Stock Companies*).
corporation (see *Corporation*).

TRADITION, how far evidence in matters of pedigree (see *Pedigree*) ..635-57
of public and general interest (see *Public and General Interest*) 607-34

TRAITOR (see *Treason*).

TRANSFER, of goods, by symbolical delivery 1048
of stock, proved by bank-books 1777
of shares under Companies Clauses Consolidation Act, 1845, must be by deed..... 986
of incorporeal rights must be by deed.....973-74
of chattels, when irrevocable 975
of ship must be by bill of sale..... 998A
of land, by deed 991-92
of property, when presumed fraudulent in bankruptcy law..... 33

TRANSFER OF LAND ACTS, 1862, 1875 (see *Table of Statutes*, 25 & 26 Vict. c. 53, and 38 & 39 Vict. c. 87).
seal of Land Registry Office judicially noticed ..... 6, n.
presumption recognised by, as to ownership of minerals.....125, n.
registrar under, may enforce attendance of witness.....1293-1309, n.
register kept under, inspection of.....1504-21, n.
rules made by Lord Chancellor under, judicially noticed .....19, n.

PARAGRAPHS (§§)

TRAVELLING EXPENSES, when allowed to witnesses in Civil Courts *App.* i—v
when allowed to witnesses in Criminal Courts ..... *App.* vi *et seq.*

TRAVERSE, effect of omitting to, as an admission (see *Admissions*) 826-30

TREASON, within what time prosecutions for, must be commenced ..76-8, n.
number of witnesses necessary to establish 25, 952-58
is wife competent witness against husband in prosecution for? 1372
when indictment for, charges several overt acts, sufficient to prove one 266
no overt act of, evidence, unless laid in indictment, or proof of overt acts laid 326, 656
judicial confessions of, conclusive 866
extra-judicial confessions of, corroborative evidence only..... 867
unless overt act charged be personal injury to the Sovereign 867, 958
copy of indictment and list of witnesses and jurors, must be delivered, when 1373, 1488
the delivery must be in the presence of two witnesses 1373
names, abodes, and professions of witnesses and jurors must be stated in lists 1374
not necessary to specify the particular house or street 1374
time for objecting to non-compliance with these regulations 1373
compassing death, or wounding of Sovereign, triable as murder..958, 1373
protective clauses of Statute of Treason, do not apply to such case .. 958, 1373, 1488
can prisoner charged with, be brought up as witness by habeas corpus? 1274
married woman may be convicted of 190
in misprision of, defendant must prove discovery on his part, if knowledge traced to him 377

TREASURY, instruments issuing from, may be signed by two Commissioners..... 1106
proclamation orders and regulations issuing from, how proved 1527
signatures to official letters of Lords of, not judicially noticed 14
when appointment of Lords of, presumed from acting 171

TREATISES may be referred to by experts to refresh memory, when..1422-23

TREATMENT (see *Conduct*).

TREATY, British, how proved..... 1526
of foreign state, or of British colony, how proved 10, 1528
for compromise effect of admissions during 774-82, 795-97
TREES (see *Boundary*), presumption of ownership in 120
stealing or maliciously damaging, in a park, &c., above the value of 1*l.* 286
elsewhere, above the value of 5*l.* .. 286
when within sect. 4 of Statute of Frauds.....1041-42

TRESPASS, in action of, admission of one defendant no evidence against others 751
sheriff or party not liable to action of, for arresting privileged witness 1340
recovery in, when bar to subsequent action for money received 1696
judgment for defendant on plea of spot being his, how far bar to action of 1698
within what time action for, must be brought 73
in action of, costs not recoverable without certificate of judge, when .. 38
evidence of possession sufficient against wrong-doer 123

TRIAL, when put off, for temporary insanity, or illness of witness .... 472-8, n.
of attesting witness 1843a

TRIAL—*continued.* PARAGRAPHS (§§)
when put off to enable important witness to become capable of giving evidence 1375
whether it can be allowed that child witness may receive instruction.....1377, n.
in consequence of amendment allowed 243, 248-51
duty of judge to regulate the mode of examining witnesses at 1399
to settle questions respecting right to begin 387
day of, cannot be proved by parol 399
what is proof of 85, 399
new (see *New Trial*), application for, rules respecting.....1881-82B

TRIAL BY JURY (see *Jury, Functions of Judge and Jury*).
present law as to, in civil actions in High Court 21B-1C
rules do not apply to proceedings for divorce, &c. 21C
powers of judge and jury should be kept distinct on..... 22
duties of judge on..... 23-6
costs in, to follow event unless judge otherwise orders.....39-9B
meaning of *event* 39B

TRINITY MASTERS, view of ship by, when ordered by Court of Admiralty 562

TROVER, demand and refusal presumptive evidence of conversion 176
parol demand admissible, though demand in writing also made 415
for written instruments, notice to produce unnecessary 407, 452
sustainable against corporation, where goods wrongfully taken by their agent 981
by party having mere possession as against wrong-doer .. 123
judgment for defendant in, when bar to action for money from sale of goods 1696

TRUCK ACT, agreements under, must be in writing signed by artificer.. 1095
under 23rd section signature of agent will not suffice .....1107, n.

TRUSTEE ACT, 1893 (see *Table of Statutes*, 56 & 57 Vict. c. 53).
effect of recitals, investing orders under .....1794, n.

TRUSTEE OF BANKRUPT (see *Bankrupt* and *Bankruptcy Courts*).
property of bankrupt vests in, on appointment 1015
so of debtor in cases of composition 1015
appointment of, how proved 1550
admission and effect of..... 1748
release of, by order of Board of Trade 1749
may disclaim lease, when..... 1013
also other property 1013
character of, suing or sued, must be specially denied 307
admission of character of, by opponent having treated him as such .. 802
admission by, before appointment, whether evidence against him 755
written admission of bankrupt not binding on 817

TRUSTEES for public, when estopped from disputing their deeds 94
admissions by one, how far evidence against others 750
admissions by cestui que trust, when evidence against 756-57
not compellable to produce title-deeds of cestui que trust..... 918
in indictment, what sufficient description of 293
when presumed to have conveyed legal estate to beneficial owner 134
satisfied terms outstanding in, when determined 136-7
bound to answer respecting frauds committed by them, when..... 1455
cannot be convicted of fraud, if they have disclosed offence on oath..1455, n.
wife's admissions, when admissible against..... 766B
of property conveyed for religious purposes, must be appointed by attested deed (sub tit. "*Charity*") .....1110, 1839-41, n.
presumption against deed of gift to 151

PARAGRAPHS (§§)

TRUSTS, creation of, must be evidenced by writing signed, under Statute of Frauds 1016
letter acknowledging the trust sufficient 1016
grants and assignments of, must be by writing signed 1016
resulting trusts excepted from Act 1017
these trusts arise:—
1. when estate purchased by one, is paid for by another 1017A
this presumption may be rebutted by parol, or by declarations of intention 1229-31
if so rebutted, may be fortified by counter parol evidence 1229
2. when conveyance made in trust only partially declared 1017B
3. in cases of fraud 1017C
how far provable by parol 1018

TRUTH, evidence of witness's character for, when admissible 1473
what are the best tests of 52
exhortations to speak, have caused confessions to be rejected 884
may be pursued too keenly, may cost too much 915

TURNIPS, sale of, not within sect. 4 of Statute of Frauds 1042

TURNPIKE ACTS, inspection of what books allowed by .....1504-21, n.
agreement to let tolls under, need not be under seal .....993, n.

UMPIRE, if appointed, award how proved 1583

UNCONSCIONABLE BARGAINS, when set aside 153

UNDER-SHERIFF has same power to amend record as judge 242
presumption of being, from acting 171
admission by, when evidence against sheriff 756
witness attending, on writ of inquiry, privileged from arrest (see *Arrest*) 1334

UNDERSTANDING, imbecility, or want of, renders witness incompetent 1357
formerly presumed that deaf and dumb witnesses were without 1376
of witness as to meaning of words, when evidence in actions of slander 1414

UNDERWOOD, when sale of, within sect. 4 of Statute of Frauds 1042

UNDERWRITER (see *Insurance*).

UNDUE INFLUENCE, presumption of, when 151-2

UNITED STATES, LAW OF (see *New York Civil Code*).
differs from that in England, as to cross-examination 1432
as to effect of alteration of instrument by stranger 1828-29
admits as evidence entries by tradesmen in their own shop-books....709-10
what facts it recognises without proof 14, 20
implies warranty on sale of chattels in certain cases 1177
does not require consideration to appear in writing signed under Statute of Frauds 1021
does not require contracts by corporation to be evidenced by deeds.... 976
as to evidence of opinion on subject of sanity 1416

UNIVERSITY, sentence of expulsion from, judgment in rem (sub tit. "*Deprivation*") .....1675, n.
practice and proceedings of courts of, not judicially noticed, when ..20, n.
calendars inadmissible 1785
court of, of Oxford, governed by statute law .....20, n.
of Cambridge, rules, by which court of, governed, must be proved .....20, n.

PARAGRAPHS (§§)

UNKNOWN PERSON, how described in indictment 293

UNLIQUIDATED DAMAGES, when plaintiff seeks, he must begin ..381-2

UNMARRIED, meaning of term in will 168

UNNATURAL CRIME, when boy may be convicted of .....104 & n.

UNPUBLISHED WRITINGS, when evidence on charge of sedition.... 596

UNSEAWORTHINESS (see *Ship*).

UNSOUNDNESS (see *Horse*).

URBAN SANITARY AUTHORITY, seal of, judicially noticed ..... 6, n.

USAGE (see *Custom*) for 25 years, when conclusive of religious trusts 75c
of trade, when presumed to be known 181
when contract presumed subject to 181
when admissible to explain writings 1160-64
to annex incidents (see *Parol Evidence*) 1168-72
under ancient grants, &c., when admissible to explain 1204-5
not admissible to contradict what is plain in writings 1165-67
where inconsistent with contract 1187
or impliedly excluded from contract..... 1187
need not be immemorial or uniform 1188
where trade established for a year or two 1188
meaning of "custom of the country," as applied to husbandry 1188
party against whom usage adduced may prove:—
1. its non-existence 1189
2. its illegality or unreasonableness 1189
3. that it formed no part of agreement 1139
evidence on these points may be given by way of anticipation 1189
explaining documents by, dangerous.....1190-92
raises presumption of legal origin, when 128

USE AND OCCUPATION, how it may be proved..... 405
when grantor by parol of incorporeal hereditament may sue for 973-74
when it lies by or against corporation, though no demise under seal 101, 981a
contract, if in writing, must be produced..... 401

USER, acts of, when admissible to explain ambiguity in ancient grant, &c. 1204-5
when admissible to raise presumption of dedication of highway..... 131
when inadmissible to raise presumption of grant 131

USHER, no rigid presumption as to hiring, for a year 177

USURY, laws relating to, repealed .....1696, n.
acquittal in penal action for, evidence in action on bond where usury pleaded 1696

UTTERING, on indictment for, other utterings, &c., admissible to prove guilty knowledge or intent 345
can married woman be convicted of?..... 191

VALUATION (METROPOLIS) ACT, 1869 (see *Table of Statutes*, 32 & 33 Vict. c. 67).

VALUATION LISTS of property in Metropolis, how inspected ..1504-21, n.
how proved.....1601, n.
effect of 1777
presumed duly made..... 72

PARAGRAPHS (§§)

VALUATIONS IN IRELAND, under poor law (see *Poor Law*) 1777

VALUE, allegations of, need not be proved in general (see *Variance*) 285
must be proved, where value an essential element of offence 286
e.g. bankrupt fraudulently removing or concealing property worth 10*l.* 286
absconding with property worth 20*l.* 286
a person maliciously injuring property exceeding 5*l.* in 286
tenant stealing chattel or fixture let to him exceeding 5*l.* in 286
stealing in dwelling-house to value of 5*l.* 286
stealing or maliciously damaging trees in a park, &c., exceeding 1*l.* 286
or trees elsewhere exceeding 5*l.* 286
when value of each article should be separately alleged 286
of coin, judicially noticed 16
Sale of Goods Act, 1893, affects sales of goods of 10*l.* or upwards in .....1020 & n.

VARIANCE, evidence must correspond with allegations 217
sufficient, if substance of issue be proved 217
abuses of old law of 219-20
amendment of, when allowable (see *Amendment*) 221-53
surplusage, definition of 255
need not be proved 255
instances of.....256-62, 268-70A
distinction between unnecessary averments, and those stated with needless particularity 258-62
cumulative allegations in criminal cases immaterial 265-70A
several intents—compound intents in criminal cases 267-8
how far intent must be proved as laid 268
party charged with felony or misdemeanour may be convicted of attempt 269-70A
cumulative allegations in civil cases immaterial.....271-7
formal allegations need not be proved 278-9
what are formal allegations 278-9
averments of place 278-80
what are local offences.....281-3
averments of time 284
of number and value..... 285-6
of quality..... 288
of mode of killing 288
matter of essential description must be proved as laid.....289-96
name or nature of property stolen or damaged 289
description of animals by generic term 289-90
of forged instrument..... 291
names of persons injured.....293, 294
of persons mentioned in indictment 293
of joint owners 293
of prisoner 295
between bought and sold notes, effect of (see *Bought and Sold Notes*) ..421-3
between document produced and that described in notice to admit.... 724c

VENDEE (see *Purchaser*).

VENDOR, admission by, after sale, not evidence against purchaser..... 794
when estopped from denying title of vendee 849
warranty of title to real estate, when implied by 1174
of quality or fitness of goods sold by, when implied 1178-79A
no warranty of title to chattel implied by 1177

VENDOR AND PURCHASER ACT, 1874 (see *Table of Statutes*, 37 & 38 Vict. c. 78).
presumptions under 129

VENISON, possession of, raises presumption of poaching, when ....372-4, n.

PARAGRAPHS (§§)

VENUE, what offences are local 281-3
need only be stated in margin of indictment ..... 280, n.

VERACITY OF WITNESS, how impeached by evidence of bad character.. 363, 1470-72
how sustained by evidence of good character.... 1473

VERBAL (see *Oral*).

VERDICT, presumption of validity of..... 85
jurors cannot prove mistake or misbehaviour in regard to 944
when evidence in nature of reputation 624, 1683
how proved..... 1570-73
defects in pleading, how far cured by 85

VERITAS NOMINIS TOLLIT ERROREM DEMONSTRATIONIS, how far a safe maxim 1215

VESSEL (see *Ship*).

VESTING BY OPERATION OF LAW, how effected..... 1015

VESTRY BOOKS admissible as official documents ..... 1595, n.
effect of, in evidence 1777

VESTRY CLERKS, presumption of appointment of, from acting 171

VETERINARY SURGEONS, proof and admission of registers of 1638

VETERINARY SURGEONS ACT, 1881 (see *Table of Statutes*, 44 & 45 Vict. c. 62).

VEXATIOUS PROSECUTIONS, prosecutor may be ordered to pay costs of prisoner in 1260

VICAR (see *Parson*).

VICE-WARDEN OF STANNARIES (see *Stannaries*).

VICTUALLER, implied warranty that provisions are wholesome by 1178
demise to, may be interpreted by usage in trade..... 1168

VIEW, of locus in quo, or of chattel, when jury allowed 558-66
extent of power of Court to order 563-65
early instance of ..... 558, n.
of ship, when ordered by Court of Admiralty..... 562

VINTNER, implied warranty by, that wine is wholesome 1178

VISITATION BOOKS, at Heralds' College, admissible in case of pedigree ..... 657, n., 1769
but copies of such books inadmissible 1769

VISITOR, sentence of expulsion or deprivation by, judgment in rem (sub tit. "*Deprivation*") ..... 1675, n.

VIVÂ VOCE, in absence of agreement, evidence always taken..... 1394

VOIRE DIRE, competency of witness ascertained on (see *Competency*) .. 1393
secondary evidence of documents admissible on 463, 1393

VOLUMINOUS FACTS, results of, provable by secondary evidence 462

VOLUNTARY, confessions must be (see *Confessions*) 872
whether confessions voluntary, question for judge 23A, 872
settlements, when avoided by bankruptcy law..... 83
should contain power of revocation 158

PARAGRAPHS (§§)

VOLUNTEER CORPS, rules for management of, how proved (sub tit. "*Army*") ..... 1601, n.

VOTERS, declaration of, against own votes, admissible on trial of election petitions 756
person bribing, estopped from denying his right to vote 856
notice of objection to parliamentary, how signed 1102
inspection of lists of, under Parliamentary Voters Registration Act, 1843 ..... 1504-21, n.
registers of parliamentary, admissible ..... 1595, n.

VOTING LETTER used for what purposes in bankruptcy proceedings .. 1101
must be signed and attested 1101
difference between proxies and 1101

WAFER GREAT SEAL judicially noticed 6

WAFER PRIVY SEAL judicially noticed 6

WAGER, no ground of action 949
evidence in support of indecent, inadmissible 949

WAGES, married woman may sue for ..... 770, n.
presumption of time of hiring from 177

WAIVER of written agreement, when parol evidence admissible to prove 1141-45
in case of statutory written agreements, how far 1143
of written agreements at common law 1142
of deed, can only be effected by deed 1141
of notice of dishonour, when presumed from drawer's subsequent conduct 806
of one objection, when presumable from party taking another 807
of forfeiture or notice to quit, by landlord suing or distraining for or accepting rent 807
by landlord having misled tenant 847
not effected by landlord's silent acquiescence 809
of notice to quit, legal effect of 807
in part, by witness of his protection against self-crimination, effect of 1265-66
by witness, of his right to his expenses, effect of 1266
by client, of his right to exclude communication to his solicitor, effect of 927
what amounts to 927

WALES, many equity records of Welsh Courts in custody of Master of Rolls 1485

WALL (see *Sea*).
presumption as to ownership of 120
inscriptions on, provable by oral evidence 438

WAR, existence of, when judicially noticed 18
provable by recital in public statute 1660
admissibility and effect of foreign declaration of, sent to Secretary of State 1661
articles of, how proved 5, 1530
require no proof of cumulative allegations ..... 269-70A, n.

WARD, presumption against deed of gift to guardian by 151

PARAGRAPHS (§§)

WARD IN CHANCERY, when solicitor must furnish address of 935

WAREHOUSEMAN, when estopped from denying title of bailor 848
delivery of goods to, amounts to acceptance within Statute of Frauds, when 1048
no rigid presumption as to hiring for a year 177

WARLIKE STORES, possession of, raises presumption of guilt, when..372-4, n

WARNING prisoner against confession (see *Caution*).
on what, servant may be discharged 34A, 177

WAR OFFICE, some of the papers of the, now in Record Office..... 1485

WARRANT, proof of 1586
jurisdiction must appear on face of 147
how far evidence of fact recited in 720
attendance of witnesses, when enforced by (see *Attendance of Witnesses*).
of distress, to enforce invalid rate, when action lies against justices for issuing 1672
foreign, proof of, under Extradition Act 1560
issuing from Treasury, how signed 1106
from Commissioners of Customs, how signed 1106
of English or Irish Local Government Board, how signed .....1106, n.
issued by Speaker, need contain no recital 84

WARRANTIES IMPLIED, carrier by land of road-worthiness of carriage..... 1172
carrier by sea impliedly warrants ship sea-worthy..... 1172
of sea-worthiness, in voyage-policy 1171-72
not in time-policy 1171
not of lighters in marine-policy 1171
not of goods in voyage policy 1172
of quiet enjoyment in lease 1175
what, of title, in contracts for sale of estates 1174
in demises of real property..... 1175
in sales of goods and chattels..... 1177
in sales of copyright .....1177, n.
what, of fitness and quality, in demises, and in sales of goods.....1175-79
of genuineness, in article bearing trade-mark 1180
none of utility or novelty, in contract for sale of a patent 1181
by artist or artisan, of possession of competent skill 1183
of authority to bind principal, in agent's contract..... 1185

WARRANTS OF ATTORNEY and cognovits must be filed in Central Office 1120A
how inspected when filed.....1491B
how attested 1111-17
must be attested by solicitor expressly named or adopted by defendant 1111
solicitor need not be certificated..... 1112
must be other than one acting for plaintiff 1112
should explain nature and effect of instrument 1113
need not read it to client unless desired 1113
attestation clause must state distinctly:—
1. that witness is solicitor to party executing..... 1114
2. that he subscribes as such 1114
instances of insufficient attestation clauses 1114
of sufficient 1115
rule does not apply, where party executing, is himself a solicitor 1116
but extends to warrants of attorney executed abroad 1116A
rule extends to all cognovits 1116A
but only to warrants of attorney to confess judgment in personal actions.....1116A

WARRANTS OF ATTORNEY—*continued.* PARAGRAPHS (§§)
strangers or sureties cannot set up improper attestation 1117
must be proved by attesting witness .....1839-41, n.
due registration of, how proved .....1120, n.

WARRANTY by servant, at time of sale, evidence against master, when . 603
aliter, as to admission made at another time .. 603
in action for breach of, when scienter may be rejected as surplusage.. 255
amendment of statement of claim alleging, when allowed 235

WASTE presumed to belong to lord of manor, when 122
approvement of, by lord, presumption respecting 122
digging gravel in, by lord, presumption respecting 122
enclosed by tenant, presumed to be for landlord 122A
lying by highway, presumption as to ownership of 119
reputation respecting boundaries of, when inadmissible 614
acts of ownership in one part of, when evidence of title to another .. 323
allegation of, will not let in evidence of bad husbandry 298
when tenant for life may not commit equitable 156
of assets, what evidence of, in action against executor or administrator 823

WATCH presumed to go correctly 183

WATER, in action for diverting, effect of merely denying obstruction .. 1697
right to, when barred by Prescription Act.....75A, n.
how taken out of Prescription Act .....75A, n., 1092
register of meter is evidence of quantity supplied .....183, n.
fraudulent abstraction of, proof of .....372-4, n.

WATER COMPANIES, proof of regulations of (sub tit. "*Metropolis Water Act*") .....1657-8, n.

WAY, RIGHT OF, when barred by Prescription Act .....75A, n.
how taken out of Prescription Act .....75A, n., 1092
must be granted and assigned by deed 973-74
reputation respecting private, inadmissible 614

WAY-GOING CROP, custom as to, when admissible to explain lease .. 1168

WEEK, meaning of, in theatrical contract may be proved by usage....1162, n.

WEIGHTS AND MEASURES ACT, 1878 (see *Table of Statutes*, 41 & 42 Vict. c. 49).

WEIGHTS AND MEASURES judicially noticed 16
proof of verification of local standard .....1611, n.
when verification presumed..... 144A
account of local verified standards to be kept by Board of Trade ..1611, n.

WELSH COURTS (see *Wales*).

WESLEYAN register of births, marriages, and burials, when inadmissible (sub tit. "*Dissenting Chapels*") .....1592, n.

WHARFINGER, when estopped from denying title of bailor 848
delivery of goods to, amounts to acceptance within Statute of Frauds, when 1048

WHOLE, of admission or confession, must be taken together 725, 870
jury need not give equal credit to every part 725, 871
of answer and examinations, rule in equity as to reading..... 730
of an entire document must be put in evidence 727
of an entire correspondence, how far necessary to read 732
of a document must be read, to interpret it properly 726, 1128

PARAGRAPHS (§§)

WIDOW, does the rule of law, protecting communications between husband and wife, apply to? 910A

WIFE (see *Husband and Wife, Married Woman*).

WIGRAM, V.-C., his rules for interpretation of wills .....1131, n.

WILLS, parol evidence, how far admissible to explain (see *Parol Evidence*) 1194-1231
declarations of intention, how far admissible to explain (see *Parol Evidence*).
evidence as to errors of draughtsmen in, generally inadmissible..... 161
proof may be given by parol evidence that date they bear was not real date of 1150
lost or destroyed, probate of, when granted..... 436
made by British subject out of United Kingdom, probate when granted 1062A
in other cases probate of, when granted 1062A
presumptions respecting:— 160-8
that testator knew contents of will executed by him 160
exception to this presumption..... 160
when this presumption is conclusive..... 161
that separate sheets of paper form part of one will, when 162
that, if testator might have seen, he did see, witness subscribe .. 163
that will was properly attested 163
that alterations and erasures in, were made after execution..... 164
this doctrine inapplicable to the filling up of blanks 164
that will has been destroyed by testator, if traced to him and not forthcoming 165
that a testator subsequently insane was not insane when will destroyed by him 165
that will found defaced among testator's papers was intentionally mutilated by him 165
but not that destruction of will is revocation of codicil..... 165
that specific bequests were intended to pass in their entirety 166
that annuities and legacies abate rateably, if assets deficient 166
that annuity bequeathed was for life of annuitant..... 166
that legacy to executor was given to him in that character..... 167
that executors are trustees of undisposed of residue for next of kin 167
presumption failing next of kin 167
as to meaning of "children," "cousins," "family," "unmarried" 168
as to meaning of "moneys," "furniture," "debenture" 168
that emblements were intended to pass to devisee 167
for other presumptions respecting wills made prior to 1st January, 1838 .....160, n.
no presumption of undue influence recognised in respect to..... 156
may be in pencil, in letter, but query if on slate.....1050, n.
Vice-Chancellor Wigram's rules for the interpretation of .....1131, n.
thirty years old, require no proof 87, 1845-45A
Wills Act, 1837 (see *Table of Statutes*, 7 Will. 4 & 1 Vict. c. 26).
came into operation 1st January, 1838 1050
provisions of, contrasted with Statute of Frauds..... 1052
applies to all wills of freehold, copyhold, or personal estate..... 1052
to appointments by will in exercise of a power..... 1050
two attesting witnesses sufficient, but necessary..... 1052
testator must make or acknowledge signature in contemporaneous presence of witness 1052
will must be signed "at foot or end" 1052, 1057

WILLS—*continued.* PARAGRAPHS (§§)
injustice caused by over strict construction of these words 1057
remedied by 15 & 16 Vict. c. 24 1057
witnesses need not sign at precise end of will 1058
attesting witnesses must sign at same time 1052
presence means mental as well as bodily presence 1053
how far witnesses must subscribe in presence of testator 1054
what sufficient acknowledgment of will 1055
when Court will presume due execution 1056
mode of signature by testator and witnesses, what sufficient ..1057-62
how far documents may be incorporated in will by reference 1061
wills by soldiers and seamen, how far exempted from Act ..1051, 1062
seamen and marines as to pay, prize money, &c., how executed 1051
Indian Wills Act, what sufficient execution under .....1050, n.
how wills of Englishmen may be made in foreign countries 1062A
revocation of wills under Wills Act:— 1063
by marriage, when 1063
not by presumption of intention, on ground of alteration of circumstances 1063
by subsequent will or codicil 1063-66
by writing, declaring intention to revoke, executed as a will 1063
by burning, tearing, or otherwise destroying will.....1063, 1066-67
effect of cancelling will 1069
of obliterations or of erasures in wills 1069
Wills Act applies to all revocations and alterations of wills after 1st January, 1838, though wills made before that date..... 1070
erasures or obliterations must be made animo revocandi 1070
when substitution, not revocation intended 1070
distinction between revocation of will and ademption of legacy .. 1146
revival of wills under Wills Act 1072
when not provable by affidavit .....1395, n.
sufficient to call one attesting witness to 393, 1854
except when relating to real estate 393, 1854
of realty, provable by probate, when.....1759-61
of married women, under a power, effect of probate of ..1588, n., 1712
with indorsement of probate granted, when evidence of executor's title 1589
in general no evidence of title to personalty..... 1589
where deposited at present .....1487, n.
how inspected, and copies of, obtained..... 1487
production of, may be enforced by Court of Probate, when..... 1810
since 1st January, 1838, infants under 21, incapable of making.. 104
before that date, boys of 14 and girls of 12, might make, when .. 104
enrolment of, in Yorkshire and Middlesex, when permitted..... 1127. 1652A-2B
how proved 1652A
copy of enrolment of, when evidence of will 1652A
registration of, in Ireland, proof and effect of..... 1652
on indictment for forging, is the probate evidence for defendant? 1677
for stealing or fraudulently destroying or concealing need not state property..... 294
defendant cannot be convicted, if he has disclosed offence on oath 1455
witness not bound to produce will, under which he claims as devisee..... 459
descriptions in, when evidence in matters of pedigree 649-51

WINDING-UP ACTS (see *Joint-Stock Company*).

WINDMILL, right of passage of air for, not within Prescription Act 75A & n.
the grant of such right cannot be presumed from user 132

WINDOWS (see *Light*). PARAGRAPHS (§§)

WITHDRAWING JUROR, effect of 1719

WITHHOLDING EVIDENCE, presumption arising from 116, 555A, 804
when allowable (see *Privileged Communications, Witnesses*).

WITHOUT PREJUDICE, offers made, inadmissible 774-82, 795

WITNESSES, when more than one necessary (see *Number of Witnesses*) 952-70
mode of enforcing attendance of (see *Attendance of Witnesses*)....1232, 1329
commission to examine, under Rules of Supreme Court, 1883 (see *Commission*) 504-14
exempted from arrest, when (see *Arrest*) 1330-40
when prisoners (see *Prisoner*) 1272-76
protected from action of defamation 1330
must be tendered their expenses in civil causes 1246, 1249
not in criminal cases 1252
costs for special detention of, when allowed..... 1247
procuring and qualifying, to give evidence, when allowed 1247
scale of allowance to (see *Allowance to Witnesses*).
allowed expenses, when, in felonies 1254
in misdemeanors..... 1254
in offences against the coinage .....1253, n.
in misdemeanors under Debtors Act or Bankruptcy Act 1255
in Courts-Martial 1252
when brought from one part of the kingdom to another 1252
on being called by prisoner..... 1260
may receive special award for activity, when 1257A
may bring action for costs and charges, when..... 1250
must return conduct-money, when 1251
serving process on, in court, contempt 1341
keeping witnesses away from court, contempt..... 1341
intimidating witness, misdemeanor 1341A
competency of (see *Competency*) 1342-92
question for judge 23A
demeanour of, observations respecting 52
depositions of, when admissible (see *Depositions*).
examination of :— 1394-1478
must generally be viva voce and in open court 1394-95
when affidavits may be used 1395-96A
mode of, left much to discretion of judge 1399, 1405
when *ordered out of court* :— 1400-2
upon motion of either party at any period of trial 1400
parties not usually included in order to withdraw, but may be 1400
so prosecutors, solicitors, medical men, and experts 1400
remaining in court after order to withdraw, contempt 1401
but no ground for rejection of testimony..... 1401
except in revenue causes, where witness inflexibly rejected .. 1401
this exception of questionable policy..... 1401
rule of remote antiquity, and of great value 1402
Susannah and the Elders .....1402 & n.
practically adopted in Scotland with improvements 1402
theoretically in both Houses of Parliament..... 1402
when competency of witness settled, sworn in cause 1403
examination in chief :— 1404-27
leading questions in general not allowed 1404
what is a leading question 1404
allowed if witness obviously hostile or interested 1404
of court rather than of party 1404

WITNESSES—*continued.* PARAGRAPHS (§§)
allowed also where suggestion necessary to refresh memory 1405
e.g. where names forgotten 1405
to identify a party 1405
to enable witness to contradict another as to contents of lost letter 1405
when witness is of tender age 1405
allowed likewise whenever justice plainly requires it 1405
when and how witness may refresh his memory (see *Memory*) ..1406-13
must depose to facts within his own knowledge 1406, 1414
need not speak with certainty as to facts 1415
cannot, in general, speak to belief or opinion 1414
may speak to belief or opinion on some subjects 1416
e.g. respecting handwriting or identity 1416
as to whether husband and wife attached to each other.. 1416
as to sanity of testator, or perhaps of any one 1416
rule especially applies to experts (see *Experts*) 1417-25
party cannot discredit his own, by general evidence 1426
may contradict him by other evidence if adverse 1426
by leave of judge may prove that he has made contradictory statement 1426
this rule applies to all courts, civil or criminal 1426
and to all persons appointed to receive evidence 1426
but examiner cannot give leave 1427
special application must be made to court 1427
cross-examination of:— 1428-69
excellent test of truth 1428
Quintilian's and Alison's rules as to cross-examination .....1428, n.
Lord Abinger's axiom on same subject.....1428, n.
Mr. Hawkins' ability as a cross-examiner 52
when witness is not liable to cross-examination,
if called under subpœna duces tecum to produce document, and not sworn 1429
if sworn by mistake, whether of counsel or officer 1429
if examination in chief stopped by judge 1429
but liable to cross-examination, if sworn, though not examined in chief 1429
not usual to cross-examine as to character 1429
prosecutor not bound to call witnesses on back of indictment 1430
usually does, and if not, court will, that prisoner may cross-examine 1430
court will sometimes call witness not on back of indictment, for same purpose 1430
how far prosecutor may re-examine in such case 1430
mode of conducting cross-examination 1431-51
leading questions may be put, within what limits 1431
how far, if witness obviously favourable to cross-examining party 1431
cross-examination not limited to matters on which witness has been examined in chief 1432
aliter in America 1432
course of proceeding, where witness called on both sides 1433
what latitude as to relevancy allowable on cross-examination..1434-45
judge may disallow vexatious and irrelevant question 1434A
irrelevant questions cannot be put for mere purposes of contradicting 1435
if inadvertently put and answered, answer is conclusive 1435
cannot be asked respecting own adultery 1355A
may be asked as to alleged crimes or improper conduct on his part 143
answer of witness on these points usually conclusive..... 1437
exception in case of actual conviction 1437
proof of, if witness denies fact, or refuses to answer.. 1437
if by certificate 1437

WITNESSES—*continued.* PARAGRAPHS (§§)
answers of, may be contradicted if questions be relevant 1438
if irrelevant, they cannot 1438
what are relevant questions 1438
questions as to motives, interest, or conduct of witness 1440-41
tending to impeach impartiality of witness 1442
as to witness being offered or receiving a bribe 1441
being plaintiff's mistress 1440
as to inconsistent former statements of witness 1445
the particular occasion must be designated ....1445, n.
as to witness having before expressed different opinion.. 1445
irrelevant to ask what opinion witness has given of merits of cause 1445
rule as to non-production of documents cross-examined upon.... 1446
how if document lost or destroyed 1447
cross-examining party may interpose evidence to prove loss 1447
must original be produced to cross-examine upon? 1448
will a copy suffice if original be a record? 1448
old rules for cross-examination in Crown Court respecting depositions 1449
decisions on these rules 1450
general rule for cross-examining as to former statement 1451
right of party to see documents shown to witness on cross-examination 1452
what questions witness may refuse to answer:— 1453
those tending to expose him or wife to criminal charge, penalty, or forfeit 1453
same rule in all British tribunals 1453
where fact forms single remote link which may implicate him.... 1454
protection carried too far 1454
sounder rule in New York ..... 1454, n.
confined there to questions subjecting witnesses to punishment for felony ..... 1454, n.
exceptions recognised by statutes in this country 1455
how far Court must determine as to tendency of answer 1457
if prosecution or forfeiture barred by time or pardoned, privilege ceases 1458A
how far rule extends in bankrupt law 1458A
whether bound to answer questions directly degrading 1459
where transaction is material to issue 1459
where not directly material, but put to test character of witness 1460
distinction between transactions of recent or remote date.... 1460
must answer questions indirectly degrading 1462
subjecting him to civil suit 1463
when bound to produce documents 1464
when not 458-60
privilege of refusing to answer is that of witness, not of party..1465-66
counsel cannot make the objection 1465-66
judge not bound to warn witness, but often does 1465-66
may claim protection at any stage of inquiry 1465-66
inference to be drawn from witness refusing to answer..... 1467
answers of, when excluded, or not compelled, on grounds of policy (see *Privileged Communications*) 908-17, 1468
effect of death or illness of, under cross-examination..... 1469
modes of impeaching credit:— 1470-72
1. by disproving his testimony 1470
2. by proof of inconsistent statements made by 1470
3. by evidence of reputation as to his character for veracity 1470
extent of this inquiry 1470A-73
character of impeaching witness may be impeached in turn.. 1473
how far this plan of recrimination may be carried 1473
evidence of general character (see *Character*) 350

WITNESSES—*continued.* PARAGRAPHS (§§)
re-examination of:— 1474
what questions can be put in re-examination 1474
may be re-examined to irrelevant facts, if cross-examined to them 1475
evidence of good character where witness's character is impeached 1476
judge has discretionary power of recalling 1477
when he will exercise such power 1477
practice of confronting 1478
secondary proof of former testimony of, when admissible (see *Secondary Evidence*) 464-551
list of, must be delivered to party charged with treason (see *Treason*) 1373
death of, lets in deposition 472-8

WOMEN, credibility of testimony of 54
when presumed past child-bearing 105
attendance of married women can be enforced by recognizance 1235
if witness married woman, expenses should be tendered to her 1249
jury of, when prisoner pleads pregnancy ..... 554, n.

WOODS AND FORESTS, reports of Commissioners of, how proved 1531

WORDS, alleged and proved in slander, variance between, when amendable 232-33
must be interpreted in their primary sense, if possible 1131
what is their primary sense 1131
meaning of, when judicially noticed (see *Meaning*) 16
when question for judge, when for jury 40
spoken, may be easily misinterpreted 861-62

WORK AND LABOUR, contract for, is not within s. 17 of Statute of Frauds 1044

WORKMAN (see *Employers' Liability Act*).

WORKS (see *Public Works*).

WORKS OF ART (see *Copyright, Sculpture Copyright Acts*).
what documents concerning copyright in, may be signed by agents.. 1107, n.
what may not ..... 1107, n.

WORSHIP, certificate of registration of places of.. ..... 1611, n.

WOUNDING with intent, person acquitted on indictment for, may be indicted for murder, on death of person assaulted 1706

WRECK, what constitutes ..... 614, n.
right of lord of manor to, not provable by hearsay ..... 614, n.
royal grant of, raises inference of right to sea-shore 130
presumption of guilt from possession of goods taken from ..... 372-4, n.

WRITS, proof of 1586
inspection of, in hands of officer, not allowed, when 1501
how far evidence of facts recited in them 1765
when presumed to be duly issued 84
need not contain recitals, when 84
of summons and execution, renewal of, how proved 1586
may be sealed in blank, and filled up afterwards 1835

PARAGRAPHS (§§)

WRITINGS, tending to criminate witness, he is not bound to produce..1464, 1500
contents of, not provable by parol, when (see *Best Evidence*) 396
variance between writings produced, and recitals on record, amendable (see *Amendment, Variance*).
when may be used to refresh memory (see *Memory*) 1406-13
need not for that purpose be admissible 1411
though not produced, cross-examination as to, allowed in civil causes.. 1446
mode of proceeding in such case 1446
presumed to be made on day of date 169
exceptions 169
by whom to be construed (see *Functions of Judge and Jury*) 40-5
if thirty years old, require no proof 87-8
to interpret, whole must be read together 726, 1128
written words of greater effect than printed formula, if construction doubtful 1130
to be construed in primary sense, unless peculiar sense necessary 1131
what is primary sense of words 1131
cannot be varied by parol (see *Parol Evidence*) .....1132 *et seq.*
may be explained by parol 1158
may be reformed or rescinded, when 1139
by deed, when necessary as evidence of title (see *Deed*).....972-95A
signed writings, when necessary under Statute of Frauds (see *Statute of Frauds*) 1901-49
under Lord Tenterden's Act (see *Lord Tenterden's Act*) ..1020, 1073-87
to take case out of Statute of Limitations (see *Lord Tenterden's Act*) .. 744, 1073-87
out of Real Property Limitation Acts (see *Limitations*) .. 1088
out of Prescription Act 1092
to take debt on specialties out of Limitation Acts 1090
special contracts with railway or canal companies must be by..... 1093
acceptance of bill of exchange must be evidenced by 1094
special agreement respecting solicitor's remuneration 1097
special contracts with pawnbrokers 1099
agreement for stoppage or deduction of artificers' wages 1095
inventory to protect lodgers' goods from distress 1096
disclaimer of lease or property by trustee of bankrupts..... 1913
indentures of apprentice to sea service, or sea fishing service 1098
agreements with merchant seamen, how signed 1098
with drivers or conductors of hackney carriages in London or Dublin, how signed 1099A
orders relating to lunatics, how signed..... 1100
voting letters, and appointment of proxies in bankruptcy 1101
notices to quit a holding in Ireland 1101A
what other notices must be in writing signed 1102-5B
notice of objection to voters, parliamentary 1102
of appeal from revising barrister 1102
to Quarter Sessions 1102A
of chargeability of pauper, and of grounds of appeal....1103-4
notices, &c. given by London County Council, how signed 1105
under Companies Act, 1862, how signed 1105A
warrants of treasury, how signed 1106, 1527
orders and regulations issued by certain departments of Government, how signed 1527
rules, orders, and regulations of English or Irish Local Government Boards.....1106, n.
documents from Commissioners of Customs, how signed 1106
what writings must be signed by party himself .....1107 & n.
may be signed by agent appointed in writing .....1107, n.
by parol .....1107, n.
effect of rules on this subject..... 1109
what writings must be attested (see *Attesting Witness*).

WRITINGS—*continued.* PARAGRAPHS (§§)
warrants of attorney and cognovits, how extended (see *Warrants of Attorney*) 1111
public (see *Public Records and Documents*).
private (see *Private Writings*).
unpublished, when evidence on charge of sedition 596
spoliation of, presumption from 107, 116
withholding of, presumption from.....116, 804
no notice to produce necessary in trover for.....407, 452
on indictment for larceny of 408, 452
identity of, in such cases, provable by parol 407
parties to written agreement may prove parol contemporaneous agreement on collateral matter..... 1135

WRITTEN INSTRUMENT (see *Writings*).

WRONG-DOER, when proof of possession sufficient title against 123
proof of receipt of rent, sufficient title against .. 123

YEAR, agreement not to be performed within, must be by writing signed 1019
the consideration must appear expressly or impliedly in the writing .. 1021
what is such an agreement 1036-37
hiring for a, when presumed 177

YEAR TO YEAR, tenancy from, when presumed 176
how determinable 34
tenancy at will, how converted into tenancy from 993, 1001

YORKSHIRE, deeds, conveyances, and wills, may be registered in..1127, 1652A
certificate of registration and searches must be signed by registrar and sealed 1652A
proof and effect of certificates indorsed on instruments registered in ..1652A
proof and effect of certificate of searches in office books 1652A
any person may require copy of or extract from enrolled documents, &c. 1652A
proof and effect of such office copies 1652A

YORKSHIRE REGISTRIES ACT, 1884 (see *Table of Statutes*, 47 & 48 Vict. c. 54).
directions under, respecting old registers, &c. 1652A
respecting copies of old enrolled bargains and sales.....1652A
such copies signed and sealed by registrar to be as good evidence as old attested copies 1652A

ZEAL, danger of relying on zealous witness 52, 68
proof of indomitable, in illustrating this branch of the Law....*intra—passim*

AMERICAN INDEX.

[REFERENCES ARE TO PAGES.]

A.

ABBREVIATIONS,
parol evidence of, 808[5].
judicially noticed, 21[25].
ABORTION,
dying declarations in, not admissible, 470[3].
ABSENCE,
presumption of death from, 183[3]. (See DEATH.)
from jurisdiction as a disability, 1229[15].
ACCIDENT,
res inter alios may negative, 257[19].
ACCOMPLICES,
evidence of, admissible, 635[4].
matter for judicial comment, 635[7].
will warrant conviction, 635[4].
ACCUSED PERSONS,
presumed innocent, 183[22]. (See INNOCENCE.)
ACTAE, RES INTER ALIOS. (See RES INTER ALIOS.)
rule as to, 257[1].
meaning of, 257[1].
illustrations of, 257[1].
exceptions to, 257[5].
ACTING IN PUBLIC CAPACITY,
presumption from, 183[46].
ACTION,
consequences of, presumption as to, 183[6].
ACTS OF STATE,
judicially noticed, 21[7].
how proved, 1179[1].
ADMISSIBILITY OF EVIDENCE,
is matter of law, 26.
facts on which it depends are to be decided by the court, 26, 52[5].
general rule respecting, — the best evidence must be given, 358[1]. (See BEST EVIDENCE.)
ADMISSIONS,
by parties to a suit, 554[1].
in former trial, 554[2].
in a void instrument, 544[2].

ADMISSIONS — *continued.*
by persons identified in legal interest, 554[4].
by persons jointly interested, 554[4].
may be in any form, 554[1].
by agents, 554[4].
to whom made, 554[4].
by conduct, 554[4].
are circumstantial evidence, 554[4].
by statements in presence, 554[4].
statements in letter, 554[4].
a necessary qualification, 554[5].
in view of compromise, 554[7].
must be "without prejudice," 554[8].
sacrifice for peace not admissible, 554[9].
collateral fact admitted, may be proved, 554[11].
effect of, 554[3].
how far conclusive, 554[3].
primary evidence of contents of written documents, 554[3].
in equity answers, 554[2].
if acted on, may be conclusive, 554[14].
are a *levamen probationis*, 554[1].
judicial effect of, 554[3].
are evidence at all times, 554[1].
criminal, 588[1]. (See CONFESSIONS.)
whole of, must be taken together, 554[1].
will not prove execution of attested instrument, 1229[11].

ADULTERY,
continuance of, when presumed, 183[32].
wife not a competent witness in proceedings instituted in consequence of, against husband, 910[19].

ADVERSARY,
leading questions may be put to, 978[32].
may be contradicted, if own witness, 978[30].
may be examined *ex adverso*, 978[30].
(See CROSS-EXAMINATION; WITNESS.)

ADVERSE CLAIM,
admits execution of attested instrument, 1229[20].

ADVERSE WITNESS,
may be asked leading questions, 978[31].
may be examined *ex adverso*, when, 978[31] *et seq.*
(See CROSS-EXAMINATION; WITNESS.)

ADVOCATE. (See ATTORNEY.)
a competent witness, 910[17].

AFFILIATION, ORDER OF,
corroborative evidence required in application for, 635[4].

AFFIRMATIVE,
of facts or propositions; onus of proving lies on the party who asserts, 276[1].
(See BURDEN OF PROOF.)

AGE OF WITNESS,
how far testimony of children admissible, 910[4].
AGENT,
statements by, 391[28].
AGREEMENT, SUBSEQUENT,
parol evidence of, 808[28].
ALMANAC,
may be referred to as evidence, 21[28].
ANCIENT DOCUMENTS,
comparison of handwriting, in cases of, 1229[59].
or ancient possession, 428[1].
witnesses presumed dead, 183[16].
presumed accurate, 183[15].
copies must be proved, 1229[22].
ANCIENT POSSESSION,
declarations concerning, 428[1].
proper custody, 428[2].
corroboration, 428[2].
ANSWER,
cannot be suggested to witness, when, 978[25].
ANTE LITEM MOTAM,
meaning of, 427[12].
declarations of deceased members of family admissible, 427[1].
prima facie proof of relationship of declarant sufficient, 427[6].
declarations as to public matters must be, 412[9].
APPOINTMENTS, OFFICIAL,
acting in public capacity, evidence of, 183[46].
APPROVERS. (See ACCOMPLICES.)
evidence of, 635[4].
ASSAULT,
husband or wife witness in case of, 910[19].
ASSUMPTION,
presumption of law is rather an, 183[19].
of fact not permitted in question, when, 978[26].
ATHEISM,
formerly a ground of incompetency to give evidence, 910[11].
disbelief in future state not necessary, 910[12].
no bar to dying declaration, 470[18].
ATTESTED COPY,
in proof of public documents, 1179[1] *et seq.*
by act of Congress, 1179[8], 1179[18].
judicial construction of, 1179[18].
not exclusive, 1179[20].
applied to registry of deeds, 1179[31].
extends to civil causes, 1179[19].
to equity records, 1179[20].
and courts of probate, 1179[19].
but not to Federal courts, 1179[19].

ATTESTED INSTRUMENTS. (See DOCUMENTS.)
proof of, 1229[6].
ATTESTING WITNESS,
not necessary to call, 1229[10].
unless attestation required by law, 1229[10].
at common law, must be called, 1229[6].
one sufficient, unless, &c., 1229[14].
if all unavailable, handwriting proved, 1229[16].
need not call in case of ancient documents, 1229[21].
aliter in Massachusetts, 1229[23].
possession to be proved in such cases, 1229[24].
handwriting of obligor required in certain cases, 1229[10].
need not call witness if adverse claim, &c., 1229[20].
office copy need not be proved, when, 1179[46].
may be contradicted, 978[27], 978[29].
or discredited, 978[32].
(See WITNESS.)
ATTORNEY. (See SOLICITOR.)
a competent witness, 910[17].
account book of, is a "shop book," 463[5].
admissions by, 391[28].
communications to, privileged, 622[4].
(See CLIENT; PRIVILEGED COMMUNICATIONS.)
what is covered thereby, 622[5].
must be information gained from client professionally, 622[4].
and confidentially, 622[4].
if fraudulent, not privileged, 622[7].
privilege extends to title-deeds, 622[6].
reason of rule, 622[10].
who is a legal adviser, 622[8].
retainer not essential, 622[5].
protection of client coextensive, 622[11].
client may waive, 622[15].
by answering, 622[16].
but not by taking the stand, 622[16].
or by calling the attorney as a witness, 622[16].
AUXILIARY FACTS,
when admitted, 218[4].

B.

BAPTISMAL RECORD, evidence of, 1179[41].
BARRISTER. (See ATTORNEY.)
a competent witness, 910[17].
BASTARDY,
corroborative evidence required in proceedings in, 635[4].
evidence of character not admissible in suits for, 257[28].
BEGIN, RIGHT TO,
decided by rule of court, 274[14].
principles by which it is governed, 276[14].

BELIEF, RELIGIOUS,
want of, formerly a ground of incompetency, 910[11].
(See ATHEISM.)
BEST EVIDENCE,
must be given, 358[1].
rule ambiguous as stated, 358[1].
not true, best evidence *may* be given, hearsay, &c., 358[1].
or that it *must* be given, 358[1].
less credible witness not rejected, 358[3].
proof of words though speaker in court, 358[5].
a fundamental principle of English law, 358[1].
its extended application doubted, 358[1].
this rule very often misunderstood, 358[1].
assumed scope of rule, 358[1].
present scope of rule, 358[7].
substitutionary evidence rejected, 358[6].
parol evidence of documents, not allowed, 358[7].
but admission is probably sufficient, 358[17].
no degrees of secondary evidence, 358[18].
rule does not apply to public documents, 1179[48].
written instruments, 358[7].
due diligence,
(*a*) own possession, 358[8].
amount of proof, 358[10].
good faith the test, 358[11].
what included, 358[12].
degrees in secondary evidence, 358[18].
telegrams, secondary evidence, 358[15].
(*b*) adverse possession, 358[17].
(*c*) possession in a stranger, 358[19].
duplicates, not within rule, 358[23].
proof of contents, how made, 358[24].
BIAS,
of witness, material to issue, 978[35].
BIBLE, FAMILY,
may be evidence of pedigree, 427[9].
BIGAMY, PROSECUTIONS FOR,
exemption from, by seven years' absence, 183[32].
conflicting presumption of continuance of life and innocence, 183[38].
BILL OF LADING,
parol evidence, rule applies to, 808[11].
how far conclusive, 808[11].
BILL OF PARCELS,
not under parol evidence rule, 808[12].
BIRTHS,
how proved, 427[1], 463[26].
statements of, hearsay, 391[30].
BIRTHS, REGISTERS OF,
public documents, 1179[41].
how provable, 1179[16], 1179[41].

BODY,
parts of, when exhibited, 365[6].
BONES,
may be exhibited, 365[6].
BOOK-ENTRY,
Massachusetts rule as to, 452[7].
BOOKS,
tradesmen's, to refresh memory, 463[9].
BOOKS OF ACCOUNT,
when admissible, 463[9].
by statute, 463[21].
should be those of original entry, 463[11].
entries on personal knowledge, 463[15].
as to collateral facts, 463[21].
must be contemporaneous, 463[18].
nature of charge, 463[20].
confirmation *aliunde*, 463[21].
preliminary inquiries for the court, 463[22].
weight in evidence for jury, 463[24].
BOUNDARY,
public, reputation as to, 412[1].
private, reputation as to, 412[2].
statements of witnesses, 412[2].
quasi public matter, 412[2].
Massachusetts rule, 412[6].
BREACH OF PROMISE OF MARRIAGE,
character evidence admissible in, 257[33].
BUILDING MATERIALS,
specimens of, admissible, 365[3].
BURDEN OF ESTABLISHING,
never shifts, 276[2], 276[5].
negative allegations, 276[5].
criminal cases, 276[6].
proceedings not at common law, 276[7].
BURDEN OF EVIDENCE,
shifts, 276[10].
he who asserts must prove, 276[11].
aliter of matters within knowledge of other party, 276[5].
presumptions of law shift this burden, 276[12].
in particular issues, 276[18].
BURDEN OF PROOF, OR ONUS PROBANDI,
natural principles regulating, 276[1].
legal rules affecting, 276[1].
test for determining, 218[4].
principles regulating, 276[1].
general rule,
lies on the party who asserts the affirmative, 276[1].
fallacy of the maxim that a negative is incapable of proof, 276[3].

BURDEN OF PROOF, OR ONUS PROBANDI — *continued.*
when shifted by presumption, 276[12].
lies on the party who has peculiar means of knowledge, 276[5].
sometimes cast on parties by statute, 276[6].
phrase of double meaning, 276[1].
burden of establishing, 276[1]. (See BURDEN OF ESTABLISHING.)
burden of evidence, 276[1]. (See BURDEN OF EVIDENCE.)
BUSINESS,
declarations by deceased persons in course of, admissibility of, 463[25].
must be contemporaneous, 463[28].
if an entry, must be original, 463[25].
and based on personal knowledge, 463[31].
declarant must be dead, 463[30].
insanity or absence sufficient to admit, when, 463[30].
so in all cases, 463[30].
modern extension of rule, 463[33].
how far part of *res gestæ*, 463[29].
as evidence of collateral facts, 463[27].
proof of entry, 463[32].
presumptions from course of, 183[48].
in private offices, 183[48].

C.

CARELESSNESS,
not a ground for legal relief, 183[6].
CAUSATION,
in *res gestæ*, 391[9].
CERTIFIED COPIES,
proof by, 1179[42].
proof of execution, when, 1179[46]. (See PUBLIC DOCUMENTS.)
CHANGE,
presumption against, 183[30].
CHARACTER, EVIDENCE OF,
of parties,
not receivable, 257[27].
exceptions, 257[27].
criminal proceedings, 257[29], 257[35]. (See CRIMINAL PROCEEDINGS.)
when character is in issue, 257[33].
character for veracity, 257[36].
"reputation is character," 257[37].
must be *ante litem motam*, 257[52].
who may testify, 257[53].
rule criticised, 257[40].
relic of compurgation, 257[40].
apt to be misunderstood, 257[49].
community defined, 257[48].
proof of, may be contradicted, 257[37].
but not by proof of particular acts, 257[37], 257[41].
exceptions on cross-examinations, 257[39], 257[47].
proof of prior conviction, 978[39].

CHARACTER, EVIDENCE OF — *continued.*
of witnesses, 257[86].
evidence of general bad character for veracity, 257[46].
"English rule," 257[48].
good character in rebuttal, admissible when, 257[49].
of lower animals, by particular facts, 257[42].
CHASTITY,
evidence to impeach in cases of rape, admissibility of, 257[85].
evidence of, in other cases, 257[88].
particular acts admissible when, 257[89].
lack of, cannot impeach veracity, 257[47].
CHECK,
stubs not shop-books, 463[12].
CHIEF, EXAMINATION IN,
leading questions not in general allowed on, 978[26].
exceptions, 978[31].
CHILDREN,
presumptions as to capacity to commit crime, 183[18].
when under seven years of age, 183[18].
between seven and fourteen, 183[18].
testimony of, rules as to admitting, 910[4]. (See INFANTS.)
conversation in presence of, still private, 622[8].
CIPHERS,
resemblance of, by expert, 1229[29].
CIRCUMSTANTIAL EVIDENCE,
what is, 183[1].
force of, 183[1].
CITIZEN,
corporation not a, 183[19].
CIVIL CASES,
dying declarations in, 470[8].
record in, how authenticated. (See PUBLIC DOCUMENTS.)
CLAIM, ADVERSE. (See ADVERSE CLAIM.)
CLERK,
communications to, of attorney, when privileged, 622[18].
CLIENT,
communications by, to attorney, &c., privileged, 622[4].
privilege of,
coextensive with that of lawyer, 622[15].
may be waived, 622[15].
by answering, 622[16].
but not by taking the stand, 622[16].
or calling the attorney as a witness, 622[16].
(See ATTORNEY; PRIVILEGED COMMUNICATIONS.)
CLOTHES,
whether fit, question of real evidence, 365[16].
COGNIZANCE, JUDICIAL. (See JUDICIAL COGNIZANCE.)
COIN,
res inter alios may prove knowledge of counterfeiting of, 257[10].
standard of, judicially noticed, 21[27].

COLLATERAL AGREEMENTS,
not under parol evidence rule, 808[12].
COLLATERAL DOCUMENTS,
proved by parol, 808[12].
COLLATERAL FACTS,
will be presumed, in order to give validity to instruments, 183[44].
confession of, admissible, 588[21].
contradiction of, not permitted, when, 978[45].
test of, 978[58].
COLLATERAL ISSUES,
evidence tending to raise, must be rejected, 257[1], 978[58].
test of, 978[58].
COLLATERAL QUESTIONS. (See COLLATERAL FACTS; COLLATERAL ISSUES.)
COMMON AGENT,
communications to, not privileged, when, 622[5].
COMMON CALAMITY,
presumption of survivorship in cases of death from, 185[42].
COMMON LAW,
judicially noticed, 21[8].
presumed to be *lex fori*, when, 52[11].
COMMUNICATIONS, OFFICIAL,
how proved, 1179[8].
COMMUNICATIONS, PRIVILEGED. (See PRIVILEGED COMMUNICATIONS.)
COMPARISON OF HANDWRITING,
proof by, at common law, 1229[42].
not universally admitted, 1229[42].
exceptions, 1229[59].
ancient documents, 1229[59].
documents in evidence, 1229[60].
standard of, must be proved, how, 1229[45].
COMPASS,
variations of, judicially noticed, 21[87].
COMPETENCY, 910[1]. (See WITNESS.)
COMPETENT EVIDENCE, 2[5].
COMPLAINT,
in rape, when admitted, 391[46]. (See RAPE.)
COMPROMISE,
admissions in view of, 554[7].
generally excluded, 554[7].
must be expressly so made, 554[8].
collateral fact may be proved, 554[11].
COMPURGATION,
character evidence remnant of, 257[40].
CONCLUSIVE PRESUMPTIONS, 183[1]. (See PRESUMPTIONS.)
are usually fictions, 183[19].
and part of the substantive law, 183[2].

CONCLUSIVE PRESUMPTIONS — *continued.*
infancy a presumed bar, 183[18].
publication of libel presumed malicious, 183[18].
statute of limitations, 183[2].
ignorance of law, 183[3].
presumption of intent, 183[6].
malice in murder, 183[7].
in other connections, 183[15].
other conclusive presumptions, 183[15].
ancient documents, presumed accurate, 183[15].
attesting witnesses presumed dead, 183[16].
CONDITIONS,
parol evidence of, 808[25].
CONDUCT,
presumption as to, 183[6].
information on which based, not hearsay, 391[43].
admissions by, 554[4].
usually circumstantial evidence, 554[4].
statements in presence, 554[4].
confessions by, circumstantial evidence, 588[4].
CONFESSIONS,
defined, 588[1].
distinguished from admissions, 588[1].
force of, 588[6].
receivable with caution, 588[6].
what is undue influence, 588[18].
when rejected, 588[19].
weight of, for jury, 588[27].
written, are within best evidence rule, 588[8].
evidence against the party making, 588[1].
must be voluntary, 588[10].
exception, "state's evidence," 588[11].
who are "persons in authority," 588[17].
what confessions are voluntary, 588[10].
is for court, 588[24].
must be corroborated, 588[9].
inadmissible, may prove admissible facts, 588[21].
may extend to probative facts, 588[1].
by conduct, admissible, when, 588[4].
are circumstantial evidence, 588[4].
so of statements in presence, 588[4].
form of, immaterial, 588[2].
evidence on former trial, 588[2].
documentary, 588[3].
under promise of secrecy, 588[12].
gained by fraud, 588[12].
or eavesdropping, 588[12].
during intoxication, 588[12].
aliter of confessions during sleep, 588[13].
are open to rebuttal, 588[6], 588[28].
are a *levamen probationis*, 588[28].

CONFESSIONS — *continued.*
judicial, 588[2].
extra judicial, 588[2].
inducement to confess, effect of, 588[10].
instances of false, 588[6].
CONFIDENTIAL COMMUNICATIONS,
rules as to the admissibility of, 622[1].
CONGREGATION,
admission by, 554[6].
CONSCIENCE,
courts of, 463[4].
CONSEQUENCES,
of acts, presumption that doer intends, 183[6].
CONSIDERATION,
true, may be proved, 808[22].
recital of, not conclusive, 808[22].
CONSPIRACY,
evidence of acts and declarations of parties charged with, admissible against each other, 391[28].
communications to attorney, in view of, not privileged, 622.[7]
CONSTABLE,
appointment of, presumed, 183[46].
CONSTRUCTION OF INSTRUMENTS,
determined by judge, 52[1].
CONTEMPORANEOUS,
statements part of *res gestæ*, must be, 391[6].
not in strictest sense, 391[6].
CONTENTS, PROOF OF. (See DOCUMENTS.)
CONTINUANCE OF PARTICULAR STATE OF THINGS,
presumption of, 183[30].
CONTRADICTION,
on immaterial points, not permitted, 978[45].
what points are material, 978[53].
CONTRADICTORY STATEMENTS. (See INCONSISTENT STATEMENTS.)
CONVICTION,
proof of, when admissible against witness, 978[39].
CONVICTIONS BY MAGISTRATES,
the maxim "omnia præsumuntur," &c., how applied to, 183[44].
COPIES,
various kinds of, used for proof of documents. (See PUBLIC DOCUMENTS.)
CORPORATIONS,
presumption as to members of, 183[19].
not citizens, 183[19].
CORROBORATIVE EVIDENCE. (See QUANTITY OF EVIDENCE.)
when required, 635[1].
in perjury, 635[1].
in bastardy, 635[4].

CORROBORATIVE EVIDENCE — *continued.*
treason, 635[1].
seduction, 635[4].
divorce, 635[4].
accomplices, 635[4].
what is corroboration, 635[6].
cause for comment, 635[7].

COUNSEL. (See ATTORNEY.)
communications to, privileged from disclosure, 622[4].
competent witness, 910[17].

COUNTERFEIT PAPER,
res inter alios may prove passing of, 257[10].

COUNTY OFFICES,
judicially noticed, 21[18].

COURSE OF NATURE,
judicially noticed, 21[29].

COURT. (See JUDGE.)
functions of, 52[1].
hearsay rule does not apply to, 391[81].
may order production of documents, 1229[8].
leading questions may be asked by, 978[26].
or permitted by, 978[26].
may refuse to permit degrading questions, 978[41]. (See CROSS-EXAMINATION.)
re-cross-examination to new matter is in discretion of, 978[54].
so of subsequent examinations, 978[55].

COURTS OF CONSCIENCE,
origin of "shop-books" rule, 463[4].

COURTS OF JUSTICE,
matters of which they take notice *ex officio*, 21[1].
seal of, when judicially noticed, 21[2].
practice of, when so noticed, 21[22].
will judicially notice own records, 21[22].
and own officers, 21[23].
(See JUDICIAL NOTICE.)
presumed in a special sense to know the law, 21[4].

COURTS OF REQUEST. (See COURTS OF CONSCIENCE.)

COURTS OF UNITED STATES. (See U. S. COURTS.)

COVIN,
presumption against, 183[23].

CREDIBILITY, 978[30]. (See WITNESS.)

CREDIT,
to whom given, how far provable by shop-book, 463[21].

CRIMINAL PROCEEDINGS,
rules of proof in, 183[22].
onus of proof lies on prosecutor, 276[6].

CRIMINAL PROCEEDINGS — *continued.*
evidence of character admissible in, 257[29].
may be rebutted, 257[29].
does not extend to particular facts, 257[37].
except on cross-examination, 257[39].
must be reputation before accusation, 257[32].
CROSS-EXAMINATION, 978[32].
or examination *ex adverso*, advantages of, 978[53].
as to offences against morality, 978[39].
as to previous conviction, 978[39].
as to previous statements in writing, 978[44].
as to inconsistent statements, 978[44].
practice as to, 978[46].
leading questions allowed on, 978[53].
when allowed, 978[32].
object of, 978[35].
if not had, direct evidence inadmissible, 978[32].
otherwise of examination on *voir dire*, 978[33].
scope of, as to case, 978[33].
co-extensive with whole case, 978[37].
bias, interest, &c., 978[38].
restricted to direct examination, 978[37].
bias, &c., still competent, 978[35].
scope of, as to credit, 978[39].
may extend to particular acts of misconduct, when, 978[39].
disgracing questions must be answered, 978[39].
is in discretion of court, 978[41].
contradictory statements, 978[44].
immaterial answer final, 978[45].
matters considered material, 928[52].
explanation to be first called for, 978[46].
CUMULATIVE EVIDENCE,
defined, 2[4].
CUSTODY, PROPER,
documents must be produced from, to be admissible as evidence of ancient possession, 428[3].
CUSTOM HOUSE,
registers at, how proved, 1179[2].

D.

DATE,
may be proved by almanac, 21[28].
DE BENE,
evidence admitted, 218[2].
DEAF AND DUMB PERSONS,
when they may be witnesses, 910[1].
DEAFNESS,
affects admissions, 554[6].

DEATH,
presumption of, from absence, 183[88].
time, not settled, 183[88].
at the end of seven years, 183[83].
matter of proof, 183[88].
by common calamity, 183[41].
no presumption as to, 183[41].
immediate prospect of, dying declarations must be made in, 470[9].
matter of proof, 470[9].
whether death occurs, immaterial, 470[12].
circumstances of, declarations as to, 470[4].
does not admit matrimonial confidences, 622[2].
DEATHS, REGISTERS OF. (See PUBLIC DOCUMENTS.)
DEBTS,
presumption of continuance of, 183[30].
DECEASED PERSONS,
bodies of, exhibited, 365[19].
DECENCY,
evidence against, 622[26].
DECEPTION,
confession gained by, admissible, 588[12].
DECLARATION,
form of, in pedigree, immaterial, 427[8].
DECLARATIONS BY DECEASED PERSONS,
when admissible, on matters of public and general interest, 412[1].
on questions of pedigree, 427[1].
against interest, 452[1].
may be beneficial, 452[4].
declarant must be dead, 452[5].
nature of the interest, 452[6].
form of declaration, 452[7].
not admissions, 452[8].
in the course of business, 463[26].
DECLARATIONS, DYING,
admissibility of, 470[1].
charge must be death of declarant, 470[6].
cases *contra*, part of *res gestæ*, 470[7].
for or against the accused, 470[4].
a restricted rule, 470[1].
why may declare, 470[4].
expectation of death, 470[9].
opinion excluded, 470[16].
minor considerations, 470[17].
confined to circumstances of death, 470[8], 470[6].
of husband or wife, admissible, 910[20].
do not extend to cases of abortion, 470[8].
nor to civil cases, 470[8].
admissibility is not unconstitutional, 470[17].
form of, immaterial, 470[6].

DECLARATIONS, DYING — *continued.*
in a document, 470[5].
by signs, 470[6].
declarant as to, may be impeached, 470[13].
or corroborated, 470[14].
must be competent as a witness, 470[13].
but leading questions may be asked, 470[6].
substance of, required, 470[6].
confined to criminal cases, 470[8].
must be part of *res gestæ*, 470[4].
DEED,
how proved at common law, 1179[1] *et seq.*
impeachable for duress, menace, fraud, covin, or collusion, 808[20].
DEEDS, ENROLMENT OF. (See PUBLIC DOCUMENTS.)
DEFICIENCY OF INTELLECT,
a ground of incompetency, 910[1].
DEGRADING QUESTIONS,
witness may be asked, 978[89].
DELAY,
evidence likely to produce, excluded, 2[5], 257[21], 257[54].
DELIVERY,
of letters, presumption as to, 183[49].
DEMEANOR OF WITNESS,
effect of, in estimating credibility of, 365[2].
DEMURRER TO EVIDENCE,
raises a question for the court, 52[8].
DEPARTMENT, HEAD OF,
judicially noticed, 21[6].
discretion of, as to state secrets, 622[17].
DEPUTY SHERIFFS,
not judicially noticed, 21[10].
DESTROYED DOCUMENT,
secondary evidence of, may be given, 358[7].
presumption of guilt arising from, 183[25].
DIARY,
not entry in course of business, 463[27].
DIRECT EXAMINATION,
defined, 978[24].
warrants veracity of witness, 978[24].
witness cannot be led on, 978[25]. (See LEADING QUESTIONS.)
witness cannot be discredited on, 978[25].
exceptions to rule,
own case, 978[29].
surprise, 978[28], 978[30]. (See SURPRISE.)
necessary witness, 978[26], 978[29].
adversary, 978[30], 978[32].
reason of rule, 978[24].
"own witness," who is, on, 978[26].

DIRECT EXAMINATION — *continued.*
or examining as to new matter, 978[34].
scope of, 978[33].
impeach veracity of adverse witness, 978[32].
bias, interest, &c., 978[35], 978[33].
wider range, 978[37].
sustain impeached witness, 978[32].

DISCHARGE,
parol evidence of, 808[28].

DISCONTINUANCE,
presumption against, 183[30].

DISCOVERY,
of documents in possession of opposite party, 1229[1].

DISCREDITING WITNESSES,
the adversary's, 978[39].
evidence may be given of general bad character of witness for veracity, 257[36].
not of particular facts, 257[37].
statements inconsistent with his evidence, 978[44].
the party's own, at common law, 978[26].

DISCRETION OF JUDGE,
as to the reception of evidence, 52[1].

DISGRACE, QUESTIONS TENDING TO,
whether witness bound to answer, 978[39].
is in discretion of court, 978[41].

DISHONOR, NOTICE OF,
sufficiency, for court, 52[5].

DIVISIONS OF COUNTRY,
political, judicially noticed, 21[20].
geographical, judicially noticed, 21[33].

DIVORCE,
does not admit matrimonial confidences, 622[2].
corroboration required in actions for, 635[4].

DOCTOR. (See PHYSICIAN.)

DOCUMENT, VOID,
may be an admission, 554[2].

DOCUMENTS,
confessions may be, 588[8].
dying declarations may be, 470[5].
public, defined, 1179[1].
ancient, prove themselves, 183[16].
contents of, how proved, 358[7].
and to text of foreign law, 52[14].
admission sufficient, 358[17].
how obtained when wanted for evidence, 1229[1]. (See PRODUCTION OF DOCUMENTS.)

DOCUMENTS — *continued.*
when in possession of opposite party, 358[17], 1229[1].
court may order direct production, when, 1229[8].
notice to produce, 358[17].
effect of, at law, 358[17].
when in possession of third party, 358[19].
by *subpœna duces tecum*, 358[19].
cases in which production of, will be excused, 358[5].
admissibility and legal construction of, is for court, 52[1].
all other questions respecting, for jury, 52[2].
execution of, how proved, 1229[5].
attested documents, 1229[6].
subscribing witness must be called, 1229[6].
may be contradicted, 1229[14].
exceptions, ancient documents, adverse claim, &c., 1229[15].
possession in case of ancient documents required, 1229[22].
if all attesting witnesses unavailable, by proof of handwriting, 1229[18].
handwriting of obligor to be proved, 1229[18].
official bonds not so proved, 1229[21].
admission not sufficient, 1229[11].
office copy sometimes admitted without proof, 1179[46].
documents not attested, 1229[5].
presumption against party withholding, 183[26].
inspection of, 1229[1].
discovery of, in possession or power of opposite party, 358[17], 1229[1].
proof of public, 1179[1]. (See PUBLIC DOCUMENTS.)
secondary evidence of lost, 358[18], 1179[48]. (See BEST EVIDENCE.)
degrees in, 358[18].
admitted when, 358[7].
execution must be proved in case of, 1179[46].

DRUNKENNESS. (See INTOXICATION.)
incompetency of witnesses from, 910[9].
confession made in a state of, 588[12].

DUE DILIGENCE,
question for court, 52[5].

DURATION OF LIFE,
presumption as to, 183[32].
judicially noticed, 21[29].

DURESS,
parol evidence of, 808[20].
confessions induced by, not admissible, 588[10].

DUTY, DISCHARGE OF,
presumption of, 183[44].

DYING DECLARATIONS, ADMISSIBILITY OF. (See DECLARATIONS, DYING.)
in general, 470[1].
may be documents, 470[5].
relevant, how impeached, 470[13].

E.

ELOIGNING INSTRUMENTS OF EVIDENCE,
presumptions arising from, 183[25].
ENCYCLOPÆDIAS,
not evidence *per se*, 391[82].
not to be read in evidence as of right, 391[82].
ENGINEERS, GOVERNMENT,
reports of, 1178[7].
ENTRY,
in course of business to be contemporaneous, 463[28].
does not include a diary, 463[27].
EPITAPH,
evidence from, 427[9].
EQUITY. (See CHANCERY.)
answers in, considered as admissions, 554[2].
records in, how authenticated, 1179[20].
EVIDENCE,
original sense of the word, 2[1].
definition, 2[1].
admissible evidence, 2[5].
real evidence, 365[1]. (See REAL EVIDENCE.)
pre-appointed or pre-constituted evidence, 1229[6]. (See PRE-APPOINTED EVIDENCE.)
secondary, degrees in, 358[18].
substitutionary, rejected, 358[7].
withholding, presumption as to, 183[25].
quantity required, 635[1]. (See QUANTITY, &c.)
double meaning, 2[8].
distinguished from proof, 2[8].
cumulative, 2[4].
demurrer to, 52[8].
admitted *de bene*, 218[2].
EXAMINATION,
of infants by judge, to ascertain competency, 910[4].
of witnesses,
direct examination, or examination in chief, 978[24].
cross-examination, or examination *ex adverso*, 978[32].
re-examination, 978[58].
EXAMINATION, CROSS. (See CROSS-EXAMINATION.)
EXAMINATION, DIRECT. (See DIRECT EXAMINATION.)
EXAMINATION OF ADVERSE WITNESSES. (See CROSS-EXAMINATION.)
EXAMINATION OF FRIENDLY WITNESSES. (See DIRECT EXAMINATION.)
EXAMINATION SUBSEQUENT TO CROSS-EXAMINATION. (See RE-DIRECT EXAMINATION; RE-CROSS EXAMINATION.)
EXAMINED COPIES,
proof of public documents by. (See PUBLIC DOCUMENTS.)

EXCLAMATIONS,
part of *res gestæ*, 391[7].
may be articulate or inarticulate, 391[7].
EXECUTION. (See DOCUMENTS.)
of public documents, how proved, 1179[46].
of private documents, 1229[5].
EXECUTION OF ATTESTED INSTRUMENTS. (See DOCUMENTS.)
proof of, 1229[6].
EXECUTION OF UNATTESTED INSTRUMENTS.
proof of, 1229[5].
EXECUTIVE, SUPREME,
amenable to legal process, 622[18].
judicially noticed, 21[7].
EXECUTOR,
has burden of establishing will, 276[8].
EXEMPLIFICATIONS, PROOF OF DOCUMENTS BY,
proof of public documents. (See PUBLIC DOCUMENTS.)
EXPERIMENTS,
court may order, 365[16].
EXTRINSIC EVIDENCE,
to contradict or explain written instruments, when receivable, 808[18].

F.

FACT,
in English law, weight of evidence is matter of, 52[1].
presumptions of, 183[19]. (See PRESUMPTION.)
includes mental condition, 2[1].
difficult of definition, 2[1].
defined, 2[1].
FACT, MATTER OF,
distinguished from "matter of law," 52[1].
not always for the jury, 52[1].
FACT, MISTAKE IN,
parol evidence of, 808[16].
FACTS IN ISSUE,
what are, 218[1].
evidence applies to, 218[1].
cannot be assumed, in question, 978[26].
FACTS RELEVANT TO ISSUE,
defined, 2[6].
evidence applies to, 218[1].
vary with particular case, 218[1].
FAST DAYS,
judicially noticed, 21[28].
FEAST DAYS,
judicially noticed, 21[28].

FELONY,
conviction of, may be proved against witness, 978[39].
children under seven, presumed incapable of committing, 183[18].
rule when age is between seven and fourteen, 183[18].
FICTIONS OF LAW,
use of, 183[19].
instance of modern, 183[19].
FOREIGN LANGUAGE,
proved as fact, 21[26].
FOREIGN LAWS,
must be proved as facts, 52[8].
how proved, 52[9].
expert evidence as to, 52[9].
interstate laws are, 52[10].
presumptions as to, 52[10].
how proved, 52[10], 52[13].
statutory provisions, 52[16].
to whom proved, 52[14].
FORGERY,
evidence of other uttering, 257[11].
FRAUD,
presumption against, 183[46].
not a presumption of law, 183[46].
communications in view of, not privileged, 622[7].
parol evidence of, 808[21].
confession gained by, admissible, 588[12].

G.

GENERAL INTEREST, MATTERS OF,
provable by derivative evidence, 412[1].
GENERAL KNOWLEDGE, MATTERS OF,
judicially noticed, 21[27].
GEOGRAPHY,
judicially noticed, 21[20].
GESTATION,
term of, noticed, 21[30].
GOOD FAITH,
presumed, 183[44].
GOVERNMENT,
form of, judicially noticed, 21[15].
symbols of, judicially noticed, 21[2].
engineers, reports of, 1179[8].
GRAND JURORS. (See JUROR.)
proceedings of, privileged from disclosure, 622[20].
GRANT.
lost grant presumed, 183[47].

H.

HANDICRAFTSMAN,
declarant in "shop-books" must be, 463[1].
HANDWRITING, PROOF OF,
generally, 1229[26].
by resemblance to that of supposed writer, 1229[26].
different forms of proof, 1229[26].
(1) witnesses of writing, 1229[27].
once is sufficient, 1229[27].
a mark within the rule, 1229[29].
can refresh recollection, 1229[29].
must have formed an opinion, 1229[30].
degree of certainty required, 1229[32].
reasons may be given, 1229[35].
(2) acquaintance by correspondence, &c., 1229[35].
authenticity to be established, 1229[36].
circumstances may suffice, 1229[38].
letters in reply not an instance, 1229[37].
(3) "comparison of hands," 1229[38].
objectionable feature stated, 1229[38].
states allowing, 1229[42].
standard, how established, 1229[45].
function of the court, 1229[47].
experts essential, 1229[50].
states rejecting, 1229[52].
exceptions, 1229[59].
ancient documents, 1229[59].
documents in evidence, 1229[60].
by the court, 1229[64].
province of court and jury, 1229[66].
testing evidence of witness by irrelevant documents, 1229[47], 1229[49].
HEARSAY EVIDENCE,
defined, 391[28].
rule as to, applies to the court, 391[29].
but not on preliminary questions, 391[31].
standard books excluded, 391[32].
mortality tables, 391[33].
does not exclude all statements, &c., 391[33].
excludes statement in probative capacity, 391[33].
may be used to refresh memory, 391[34].
not admissible because best evidence, 391[31].
ordinarily inadmissible, 391[28].
exceptions, 391[34].
exclamations of pain, 391[34].
statements to physician, 391[35].
compared with *res gestæ*, 391[37].
sanity, 391[38].
fraud or undue influence, 391[39].
other mental states, 391[41].

HEARSAY EVIDENCE — *continued.*
knowledge, 391[43].
as related to motive, 391[45].
other instances, 391[46].
fresh complaint in rape, etc., 391[46].
scope of rule against, 391[33].
facts in issue, 391[33].
statements by a testator, 391[36].
information, 391[44].
reputation, 391[49].
market value, 391[51].

HISTORY, MATTERS OF,
when evidence, 21[39].

HISTORY, WORKS OF,
not evidence, *per se*, 391[32].
not to be read in evidence as of right, 391[32].

HOMICIDE,
presumption of malice from, 183[7].

HOSTILE WITNESS. (See ADVERSE WITNESS.)

HOSTILITY,
in a witness, authorizes leading questions, 978[31].
and examination *ex adverso*, 978[31].

HUSBAND AND WIFE,
when competent witnesses for or against each other, 910[19].
communications between, privileged from disclosure, 622[1]. (See PRIVILEGED COMMUNICATIONS.)
sexual intercourse between, testimony of, not receivable to disprove, 622[36].

I.

IDIOCY,
presumed in person deaf and dumb from birth, 910[1].
a ground of incompetency, 910[1].

IGNORANCE OF LAW,
no excuse for violation of, 183[3].
presumption against, 183[3].
matter of public policy, 183[3].
common misconstruction sustained, 183[6].

ILLEGALITY,
presumption against, 183[23], 183[44].
parol evidence of, 808[20].
confession gained by, admissible, 588[12].

ILLEGITIMACY,
presumption against, 622[26].
how rebutted, 622[26].
declarations of deceased persons, admissible to prove, 427[3].
provable as pedigree, 427[22].

IMMATERIAL AVERMENTS AND STATEMENTS,
need not be proved, 218[4].
unless they affect what is material, 218[4].
IMMATERIAL POINT,
leading questions as to, permitted, 978[26].
IMMATERIAL QUESTION,
may be leading, 978[26].
IMMATURITY OF INTELLECT,
a ground of incompetency, 910[4].
IMMORALITY,
presumption against, 183[28].
IMPEACHMENT,
of veracity of witness, 257[36] *et seq.* (See VERACITY.)
IMPRISONMENT,
may be inquired into, on cross-examination, 978[39].
INCAPACITY,
parol evidence of, 808[21].
INCOMPETENCY, 910[1]. (See WITNESS.)
a question for the court, 910[21].
is discretion reviewable, 910[24].
weight for jury, 910[25].
INCONSISTENT STATEMENTS BY WITNESSES,
cross-examination as to, 978[44].
if point immaterial, answer final in, 978[45].
chance for explanation to be offered, 978[46].
contradiction permitted, when, 978[44].
veracity and bias are material in, 978[52].
discretion of court in, 978[51].
do not admit evidence of character, 257[37].
INCORPOREAL HEREDITAMENTS,
lost grant presumed, 183[47].
INDIAN,
may testify, 910[14].
INDICTMENT,
may be inquired into on cross-examination, 978[39].
INDORSEMENT,
of payment must be against interest, 452[5].
INDUCEMENT TO CONFESS,
confession made in consequence of, not receivable, 588[10].
nature of inducement which will have this effect, 588[18].
INFAMY,
incompetency from, 910[20].
INFANTS,
capacity of, as witnesses, 910[4].
examination of, by judge, 910[4].
capacity of, to commit crime, 183[18].
exhibition of, not permitted, when, 365[5].
INFERIOR COURTS,
judges of, how far noticed, 21[23].

INFORMATION,
not hearsay, 391[44].
as to offences, source of, privileged, 622[25].
INNOCENCE,
extent of this presumption, 183[22].
meaning of, 183[22].
part of substantive law, 183[22].
a presumption of law, 183[22].
INSANITY,
incompetency of witness from, 910[1].
presumption against, 276[18].
continuance of, presumed, if once shown to exist, 183[32].
in criminal causes to be proved by government, 276[18].
admits declarations in course of business, 436[30].
matter of fact, 591[36].
INSPECTION,
real evidence afforded by, 365[1].
of documents in the custody of opposite party, 1229[1].
by bill of discovery, 1229[1].
by *subpœna duces tecum*, 358[19].
by direct order of court, 1229[8].
INTELLECT,
incompetency from deficiency of, 910[1].
immaturity of, 910[4].
question for court, 910[5].
INTENDMENTS OF LAW. (See PRESUMPTIONS.)
INTENT,
presumed from acts, 183[6].
admissibility of evidence otherwise irrelevant to prove, 391[41].
res inter alios may show, 257[6].
INTEREST,
declarations by deceased persons against, 452[1].
declarant must be dead, 452[5].
incapacity not sufficient, 452[5].
interest must be pecuniary or proprietary, 452[6].
Massachusetts rule, 452[7].
collateral advantage immaterial, 452[4].
aliter in certain cases, 452[5].
public, matters of, proof of, 412[1]. (See PUBLIC MATTERS.)
private, matters of, proof of, 412[2].
INTERNATIONAL LAW,
public, judicial notice of, 21[4].
INTERPRETER,
communications to attorney through, privileged from disclosure, 622[18].
INTERSTATE LAWS,
how proved, 52[10], 52[18].
INTOXICATION,
a ground of incompetency, 910[9].
confession made during, admissible, 588[12].

INVOICE BOOK,
not a shop-book, 463[12].
IRREBUTTABLE PRESUMPTIONS. (See CONCLUSIVE PRESUMPTIONS; PRESUMPTIONS.)
IRREGULARITY,
presumption against, 183[43].
ISSUE,
evidence must be solely directed to matters in, 218[1].
sufficient to prove substance of, 218[4].

J.

JEWS,
may testify, 910[14].
JUDGE. (See COURT.)
may be a witness, when, 910[14].
JUDICIAL ACTS,
presumptions in favor of, 183[44].
JUDICIAL COGNIZANCE,
defined, 21[1].
acts of state, 21[2].
official seals, 21[2].
chief executive, 21[6].
public proclamations, &c., 21[7].
high officials, 21[18].
coordinate branches of government, 21[18].
general elections, 21[19].
statutory geography, 21[20].
public laws, 21[4], 21[6], 21[8].
common and statute, 21[4].
law of nations, 21[4].
law merchant, 21[4].
judicial cognizance of, by Federal courts, 21[15].
of another state, 21[4].
but not private statutes, 21[13].
nor local regulations, 21[14].
municipal corporations, 21[11].
railroad laws, 21[12].
statutory modifications, 21[13].
"Federal Question," 21[17].
foreign laws, 21[17].
rules of practice, 21[22].
seals, &c., 21[4].
of courts, 21[4].
of notaries public, 21[5].
court records, 21[22].
inferior judges and judicial officers, 21[18], 21[23].
course of nature, 21[28].
divisions of time, 21[28].

JUDICIAL COGNIZANCE — *continued.*
language and abbreviations, 21[25].
unusual words must be proved, 21[26].
matters of general knowledge, 21[27].
instances, 21[27].
current coin, legal weights, &c., 21[27].
geographical divisions, &c., 21[33].
historical facts, 21[30].
common properties of matter, 21[35].
miscellaneous matters, 21[36].
no well-defined rule, 21[36].
judge may refuse to take, 21[39].
may refer to any source, 21[24], 21[39].
use of histories, &c., 21[39].
general considerations, 21[39].
JUDICIAL EVIDENCE. (See EVIDENCE, JUDICIAL.)
JUDICIAL MATTERS,
privileged from disclosure on grounds of public policy, 622[20].
JUDICIAL NOTICE,
of what matters courts take, 21[1]. (See JUDICIAL COGNIZANCE.)
JUDICIAL RECORDS,
of courts of record, how proved. (See PUBLIC DOCUMENTS.)
of courts not of record, how proved. (See PUBLIC DOCUMENTS.)
JUROR,
may be a witness, 622[25].
evidence of, not receivable to impeach verdict, 622[23]. (See PRIVILEGED COMMUNICATIONS.)
petty, evidence of, not admissible to impeach verdict, 622[23].
aliter of gross misconduct, 622[24].
may show matters passed on, 622[25].
grand, evidence of, not admissible to impeach verdict, 622[20].
or to explain the vote, 622[21].
aliter when demanded by public policy, 622[22].
JURY,
fear of, 27.
JUSTICE OF THE PEACE,
appointment of, presumed from acts, 183[44].
JUSTICE, PUBLIC. (See PUBLIC JUSTICE.)

K.

"KILLING,"
interpretation of phrase, 183[7].

L.

LADING, BILL OF. (See BILL OF LADING.)
LANGUAGE,
parol evidence of technical, 808[5].

LANGUAGE — *continued.*
judicially noticed, 21[25].
so of customary abbreviations, 21[25].
but not of slang or special phrases, 21[26].
or of foreign countries, 21[26].

LARCENY,
presumption of, from possession of stolen property, 183[29].

LAW,
connection between, and fac' 2[2].
presumption against ignorance of, 183[3].
judicially noticed, when, 21[8].
of another state, when judicially noticed, 21[9].
local, when so noticed, 21[14].
is a question of fact, 2[2].
misconstruction of, when excused, 183[5].

LAW, MATTER OF,
what is, 52[1].
is for court, 52[1].

LAW MERCHANT,
judicially noticed, 21[4].

LAW OF EVIDENCE. (See EVIDENCE, ENGLISH LAW OF.)

LAW OF NATIONS,
judicially noticed, 21[4].

LAWS, FOREIGN. (See FOREIGN LAWS.)
must be proved as facts, 21[17].

LEADING QUESTIONS,
general rule — on material points are allowed on cross-examination, but not on examination in chief, 978[25].
reasons for this, 978[25].
what are, 978[25].
are within discretion of the court, 978[21].
admissible in dying declarations, 470[6].
may be asked on examination *ex adverso*, 978[32].
or when adversary is a witness, 978[32].

LEDGER,
may be a shop-book, 463[11].

LEGAL RELEVANCY, 2[7].

LEGISLATURE,
documents of, how proved. (See PUBLIC DOCUMENTS.)
journals of, judicially noticed, 21[10].

LEGITIMACY,
presumption of, 183[18].
how rebutted, 622[26].

LETTER,
put into post, presumed to have reached its destination, 183[49].
postmark of, not proof of deposit, 183[49].
mailing, proof of delivery, 183[49].
statements in, when admissions, 554[4].

LEVAMEN PROBATIONIS,
admissions constitute, 554[1].
confessions constitute, 588[28].
LEX FORI,
presumption as to, 52[10].
LIBEL,
publication presumed malicious, 183[18].
character evidence admissible in actions for, 257[33].
LIBEL, PUBLICATION OF,
presumed malicious, 183[18].
LIBELLANT,
evidence of, must be corroborated, 635[4].
LIBELLEE,
admission of, must be corroborated, 635[4].
LIFE,
no *præsumptio juris* relative to its duration, 183[32].
when presumption of continuance ceases, 183[33].
continuance of, presumed, 183[32].
LIMB,
exhibited, real evidence, 365[6].
LIMITATIONS, STATUTE OF,
indorsements of payment as to, 452[5].
LIS MOTA,
what is, 427[12].
(See ANTE LITEM MOTAM.)
LOCOMOTIVE,
fires by, *res inter alios* may prove, 257[23].
LOST DOCUMENT,
secondary evidence of, may be given, 358[7].
LOST GRANT,
presumed, 183[46].
LUNATIC,
competency of, to give evidence, 910[3].
presumption of sanity, 183[32].

M.

MAGNETIC NEEDLE,
variations of, judicially noticed, 21[37].
MAHOMETAN WITNESS,
competent, 910[13].
MAILING,
evidence of delivery, 183[49].
MALICE,
presumption of, 183[7].
MARK,
instead of writing, proof of, 1229[6].

MARKET VALUE,
of Confederate notes, not judicially noticed, 21[30].
not hearsay, 391[61].
MARRIAGE, PROMISE OF,
character evidence admissible, 257[33].
MARRIAGE REGISTERS,
proof of. (See PUBLIC DOCUMENTS.)
MATERIAL POINTS,
leading questions not permitted as to, 978[25].
MEDICAL BOOKS,
hearsay, 391[32].
MEMORANDA,
to refresh the memory of witnesses, when admissible, 978[1].
primary recollection, 978[1].
original memorandum, when, 978[3].
made by another, 978[5].
must be contemporaneous, 978[7].
may be in any form, 978[8].
subject of, 978[9].
production of, 978[10].
secondary recollection, 978[11].
MEMORANDUM BOOK,
when admissible, 463[11].
MEMORY,
memoranda to refresh, when admissible, 978[1].
when exhausted, leading questions admissible, 978[26].
MENTAL DERANGEMENT,
competency of witnesses suffering from, 910[1].
MENTAL STATE,
matter of fact, 2[1].
presumed to continue, 183[32].
MERSEY,
judicially noticed, 21[34].
MESSAGES OF PRESIDENT,
how proved, 1179[4].
MISCONDUCT,
presumptions against, 183[28].
evidence of juror admissible in case of, 622[24].
MISCONSTRUCTION,
of law, excused, when, 183[5].
MISDEMEANOR,
proof of conviction of witness of, 978[30].
MISREPRESENTATION,
parol evidence of, 808[21].
MISSISSIPPI RIVER,
judicially noticed, 21[34].
MOHAMMEDAN. (See MAHOMETAN.)
competent witness, 910[18].

MONOMANIAC, EVIDENCE OF,
admissibility of, 910[1].
MORTALITY TABLES,
admissible, 391[33].
MORTGAGE,
deed may be shown to be a, 808[19].

N.

NARRATIVE,
not part of the *res gestæ*, 391[28].
NATURE, COURSE OF,
judicially noticed, 21[29].
NECESSARY WITNESS,
may be discredited, when, 978[27].
examined *ex adverso*, when, 978[27].
NEGLECT OF DUTY,
presumption against, 183[28].
NEGLIGENCE,
for the court, in some cases, 52[8].
NEWSPAPER,
judge may resort to, 21[39].
quotations, evidence of value, 391[52].
NON COMPOS MENTIS,
not a competent witness, 910[1].
NON-ACCESS,
proof of, 622[26].
NOTARY PUBLIC,
seal of, when judicially noticed, 21[5].
NOTES,
value of Confederate, not judicially noticed, 21[30].
NOTICE,
of what matters courts take judicial, 21[1]. (See JUDICIAL COGNIZANCE.)
proof of, not hearsay, 391[34].
of dishonor, sufficiency of, for court, 52[5].
NOTICE TO PRODUCE,
necessary to let in secondary evidence, 358[17].
under what circumstances it may be dispensed with, 358[18].
object of, 358[17].
if a document be in court, it may be called for without giving, 358[18].
need not itself be demanded, 358[18].
form of action may constitute, 358[18].
NOTORIOUS, MATTERS DEEMED,
need not be proved, 21[1].
(See JUDICIAL COGNIZANCE.)

O.

OFFICE,
course of business in, presumptions from, 183[48].
OFFICE COPIES,
proof of public documents by. (See PUBLIC DOCUMENTS.)
OFFICIAL ACTS,
presumptions in favor of, 183[44].
OMNIA PRÆSUMUNTUR ESSE RITE ACTA,
importance of this maxim, 183[44].
general view of, 183[44].
instances of the application of, 183[44].
ONUS PROBANDI, 276[1]. (See BURDEN OF PROOF.)
ORDER OF EVIDENCE,
discretionary, 978[55].
"OWN WITNESS,"
what constitutes, 978[26]. (See WITNESS.)
OWNERSHIP,
possession raises presumption of, 183[24].
declarations as to, 452[1].
ancient documents as to, 452[1].

P.

PAGANS,
competent, when, 910[13].
PANTHEISM,
believer in, competent as a witness, 910[13].
PAROL EVIDENCE,
no degrees of, 358[13]. (See SECONDARY EVIDENCE.)
not in general admissible to contradict, vary, or explain written instruments, 808[1].
exceptions, 808[9].
may be used in case of receipts, 808[9].
or in case of bill of parcels, 808[12].
aliter of a bill of lading, 808[11].
cannot prove public document, 1179[48].
unless absence is accounted for, 1179[48].
instances, 1179[48].
(See PAROL EVIDENCE RULE.)
PAROL EVIDENCE RULE,
rule stated, 808[1].
includes written evidence, 808[1], 808[2].
scope of rule, 808[1], 808[18].
applies only between parties and privies, 808[1].
"vary, contradict or control," 808[2].
negotiable instruments, 808[4].
"ascertained purport," 808[4].
deliberate embodiment of agreement, 808[6].

PAROL EVIDENCE RULE — *continued.*
incomplete delivery, 808[25].
does not extend to receipts, 808[9].
or collateral agreements, 808[12].
or bills of parcels, 808[12].
but, *semble*, extends to a bill of lading, 808[11].
does not bind strangers, 808[1].
but merges all prior negotiations, 808[2].
or ante-contractual conversations, 808[3].
reason of, stated, 808[18].
as applied to fraudulent contracts, 808[21].
to contracts procured by duress, 808[20].
to illegal agreements, 808[20].
or under incapacity, 808[21].
to conditional agreements, 808[19].
to discharged instruments, 808[28].
to contracts modified by subsequent agreement, 808[23].
what evidence is admissible by, 808[5].
to explain technical or peculiar language, 808[5].
to describe the subject-matter, 808[5].
to identify the subject-matter, 808[5].
or persons referred to, 808[5].

PARTICULARS,
of complaint in rape, not admissible, 391[41].
cases *contra*, 391[48].

PECUNIARY INTEREST,
declarations by deceased person against, admissible, 452[1].
in Massachusetts, must be in writing, 452[7].
interest must be, when, 452[7].

PEDIGREE,
hearsay receivable to prove matters of, 427[1].
must be *ante litem motam*, 427[1], 427[12].
not receivable as to collateral matters, 427[4].
but extends to particular facts, 427[1].
declarant must be dead, 427[13].
reason of rule, 427[9].
persons qualified as to, 427[5].
wife's sister not qualified, 427[8].
reputation as to, admissible, 427[11].
may be original evidence, 427[11].
declaration in any form, admissible, 427[8].
inquiry must relate to, 427[4].

PERJURY,
must be proved by at least two witnesses or proofs, 635[1].
reason usually assigned for this, 635[1].

PERSONAL INJURY,
husband and wife competent witnesses at common law against each other in charges for, 910[10].

PHOTOGRAPH COPY,
accuracy of, judicially noticed, 21[35].

PLACES,
judicially noticed, 21[20].
PLAN,
organized, *res inter alios* may show, 257[16].
PLEADINGS,
evidence excluded by state of, 218[1].
burden of proof, *prima facie* determined by, 218[1], 218[4].
immaterial averments in, may be disregarded, 218[4].
relation of, to evidence, 218[1].
PLENA PROBATIO,
in shop-books, 463[1].
PLURALITY of WITNESSES, 635[1].
PLYMOUTH,
colony law of "shop-books," 463[4].
POLICY, PUBLIC,
rejection of evidence on grounds of, 910[14].
POLITICAL MATTERS,
privileged from disclosure on grounds of public policy, 622[17].
POSSESSION,
presumption of right from, 183[24].
presumption strengthened by length of enjoyment, 183[24].
prima facie evidence of property, 183[24].
POSSESSION, ANCIENT,
proof of, by ancient documents, 428[1].
POSSESSION OF STOLEN PROPERTY, PRESUMPTION OF GUILT FROM,
sometimes shifts the burden of proof, 183[29].
possession must be *recent*, 183[29].
explanation of possession by the accused, 183[29].
admissible through *res inter alios*, 257[9].
POST MARK,
not evidence of deposit in mail, 183[50].
POST OFFICE,
presumption as to regularity in, 183[51].
due delivery of letter, 183[51].
PRE-APPOINTED OR PRE-CONSTITUTED EVIDENCE,
law of attestation, an instance of, 1229[6].
PREJUDICE, COMMUNICATIONS MADE WITHOUT. (See Admissions.)
not receivable in evidence, 551[8].
PRELIMINARY FACTS,
a question for the court, 52[5].
PRELIMINARY INVESTIGATION,
witness on, need not be cross-examined, 978[88].
PRESUMPTION,
original signification of, 183[2].
legal signification of, 183[2].
different meanings of, 183[2], 183[19].
confusion arising from, 183[2].
(See Presumptions.)

PRESUMPTIONS,
of law, and fictions of law, 183[19].
of law, 183[19].
defined, 183[19].
distinguished from presumption of fact, 183[19].
instances, 183[19].
presumption of death, 183[2]. (See DEATH.)
of ownership, 183[24].
of legitimacy, 183[18].
may be created by statute, 276[11]
shift burden of proof, 183[21].
presumption of fact must be strong to raise, 183[2].
grounds of, 183[2], 183[20].
of fact, 183[19].
defined, 183[19].
are of varying weight, 183[19].
of law and fact usually met in practice,
against ignorance of law, 183[8].
from the course of nature, 183[48].
against misconduct, 183[28].
in favor of validity of acts, 183[44].
from possession, 183[24], 183[29].
from habits and usages, 183[48].
of continuance, 183[30].
in disfavor of spoliator, 183[25].
as to members of corporations, 183[18].
as to withholding evidence, 183[26].
various meaning of term, 183[2], 183[19].
presumption of fact, 183[2], 183[19].
presumption of law, 183[2], 183[19].
sanity in criminal cases, 276[2]. (See SANITY.)
presumption of innocence, 183[2]. (See INNOCENCE.)
legal interpretations and intendments, 183[7].
presumption of malice, 183[7]. (See MALICE.)
statement of burden of proof, 183[7]. (See BURDEN OF PROOF.)
presumption against fraud, 183[28].
against change, 183[29], 183[30].
of life, 183[32], 183[38], 183[40].
of death, 183[38].
against illegality, 183[28].
of regularity, 183[48], 183[49].
as to *lex fori*, 52[10].
as to death by common calamity, 183[41].
positive law paraphrased, 183[20].
presumption of innocence, 183[22]. (See INNOCENCE.)
ignorantia legis, &c., 183[3].
consequences of action, 183[6].
PREVIOUS CONVICTIONS,
when receivable in evidence,
of witnesses, 978[29].
PREVIOUS STATEMENTS,
cross-examination as to, 978[44].

PRIMA FACIE CASE,
burden of proof shifted by, 276[8]. (See BURDEN OF PROOF; PRESUMPTIONS.)
PRIMA FACIE EVIDENCE,
what, 276[8].
PRIMARY AND SECONDARY EVIDENCE,
general rule,—secondary evidence not receivable until the non-production of the primary is accounted for, 358[7].
PRIVATE WRITINGS,
production of, how secured, 1229[1].
in control of opponent, 1229[1].
at common law, 1229[1].
equitable relief, 1229[1].
statutory relief, 1229[1].
judicial relief, 1229[3].
in hands of third party, 1229[4].
execution of, how proved, 1229[5].
documents not attested, 1229[5].
attested documents, 1229[6].
case of preappointed evidence, 1229[6].
rule applies to a mark, 1229[9].
to documents involved in suit, 1229[8].
sufficiency of admissions, 1229[11].
number of witnesses required, 1229[14].
evidence of, not conclusive, 1229[14].
exceptions to rule, 1229[15].
unavailable witness, 1229[15].
what proof required, 1229[18].
"own claim," 1229[20].
official bonds, 1229[21].
ancient documents, 1229[21].
corroboration required, 1229[24].
proof of contents, 1229[25].
execution, proof of, still required, 1229[25].
proof of handwriting in, 1229[26].
PRIVILEGE OF WITNESSES,
not to answer questions tending to disgrace, 978[89].
PRIVILEGED COMMUNICATIONS,
universally recognized, 622[1].
not receivable in evidence, 622[1].
reason of this rule, 622[1].
cases to which it applies, 622[1].
1. political, 622[17].
state secrets, 622[17].
extend to documents, 622[18].
2. judicial, 622[20].
jury secrets, 622[20].
of petit jurors, 622[22].
of grand jurors, 622[20].
(See JUROR.)

PRIVILEGED COMMUNICATIONS — *continued.*
public justice, 622[20].
source of information, 622[23].
(See PUBLIC JUSTICE.)
3. professional, 622[4].
to legal adviser, 622[4]. (See ATTORNEY.)
who are, 622[8].
collateral facts, 622[10].
limitations on the rule, 622[10].
what communications, confidential, 622[12].
applies to clerk, 622[18].
but not to student, 622[9].
agent, 622[12].
interpreter, 622[18].
privilege, a question for court, 622[17].
privilege does not extend to any listener, 622[14].
unless in confidential relations to communicant, 622[4].
privilege may be waived by client, 622[14].
applies to title-deeds, 622[6].
and other documents, 622[6].
4. social, 622[1].
between husband and wife, 622[1].
privilege is personal, 622[8].
not affected by presence of children, 622[8].
nor by death or divorce, 622[2].
extends to fact of non-communication, 622[1].
and to reported statements, 622[2].
(See HUSBAND AND WIFE.)

PROBABLE CAUSE,
when a question for the court, 52[5].

PROBATE COURT,
records in, how authenticated, 1179[19].

PROCLAMATION,
judicially noticed, when, 21[7].

PRODUCE, NOTICE TO, 358[17].

PRODUCTION OF DOCUMENTS,
at common law, 1229[1].
by bill of discovery, 1229[1].
by *subpœna duces tecum*, 1229[4].
by statute, 1220[1].

PROFESSIONAL MATTERS,
when privileged from disclosure on grounds of public policy, 622[1].
(See PRIVILEGED COMMUNICATIONS.)

PROOF,
meaning of term, 2[3].
burden of, 276[1].
lies on party affirming, 276[1].
(See BURDEN OF PROOF.)

PROPER CUSTODY,
production of documents from, rule as to, 428[1].
in ancient possession, 428[1].
PROPRIETARY INTEREST,
declarations against, admissible, 452[1].
in Massachusetts, oral declarations may be, 452[7].
PROSECUTOR,
burden of proof on, 276[6]. (See BURDEN OF PROOF.)
PUBLIC DOCUMENTS, 1179[1].
defined, 1179[1].
proof of, 1179[1].
acts of state, 1179[1]. (See STATE.)
executive papers, 1179[2].
American State papers, 1179[4].
legislative acts, 1179[8].
foreign, 1179[8].
interstate, 1179[10].
domestic, 1179[13].
judicial records, 1179[14].
foreign, 1179[14].
other foreign documents, 1179[16].
interstate, 1179[18].
federal, not, 1179[19].
probate courts, are, 1179[19].
courts of chancery, are, 1179[20].
justices of peace, are, 1179[20].
certificate of judge, 1179[21].
attestation of clerk, 1179[26].
seal, 1179[28].
relevancy essential, 1179[28].
domestic, 1179[33].
inferior tribunals, 1179[37].
federal courts, 1179[38].
state records in federal courts, 1179[39].
of court itself, 1179[39].
interstate records not judicial, 1179[29].
relevancy equally requisite, 1179[33].
domestic public documents, not judicial, 1179[40].
office copies, 1179[42].
"best evidence rule," 1179[43].
how attested, 1179[44].
must be legally recorded, 1179[46].
record — not facts — required, 1179[46].
execution of, 1179[46].
best evidence rule applies to, 1179[43].
PUBLIC HISTORY, MATTERS OF,
judicially noticed, 21[30].
PUBLIC INTEREST,
matters of, provable by hearsay evidence, 412[1].
(See GENERAL INTEREST; PUBLIC MATTERS.)

PUBLIC JUSTICE,
communications injurious to, privileged, 622[20].
but a judge may be a witness, 910[14].
(See PRIVILEGED COMMUNICATIONS.)
PUBLIC MATTERS,
declarations as to, 412[1].
must be by qualified persons, 412[9].
declarant must be dead, 412[9].
should be *ante litem motam*, 412[9].
may be by reputation, 412[10].
private facts not so proved, 412[1].
quasi public matters, 412[2].
private boundary, 412[2].
Massachusetts rule, 412[6].
PUBLIC OFFICERS,
presumption of due appointment of, 183[44].
PUBLIC OFFICES,
presumptions from course of business in, 183[48].
PUBLIC POLICY,
evidence rejected on grounds of, 622[1].
matters thus excluded,
political, 622[17].
judicial, 622[20].
professional, 622[4].
social, 622[1].
(See PRIVILEGED COMMUNICATIONS.)
PUBLIC PROSECUTOR,
privilege as to disclosures, 622[25].
PUBLIC WRITINGS, 1178[1].
(See PUBLIC DOCUMENTS; WRITINGS.)
PUBLICATION OF LIBEL,
presumed malicious, 183[18].

Q.

QUANTITY OF EVIDENCE,
required, one witness usually sufficient in English law, 635[1].
exceptions,
treason, 633[1].
perjury, 633[1].
accomplices, 635[4].
bastardy, 635[4].
divorce, 635[4].
(See CORROBORATION.)
QUANTUM OF EVIDENCE. (See QUANTITY OF EVIDENCE.)

R.

RACE,
on questions of, real evidence, 365[5].
RAPE,
evidence of character of prosecutrix admissible in, 257[55].

RAPE — *continued.*
complaint of woman admissible, 391[46].
but not particulars, 391[46].
must be recent, 391[46].

REAL EVIDENCE,
defined, 365[1].
a useless distinction, 365[1].
resemblance, 365[8].
race, color, &c., 365[6].
personal injuries, 365[6].
right of the court to compel, in cases of, 365[7].
how enforced, 365[14].
experiments in court, 365[15].
out of court, 365[17].
in criminal cases, 365[19].
in cases of circumstantial evidence, 365[20].
admission discretionary, 365[21].
cannot be reported, 365[22].
instances of correct use, 365[19].
inspection, 365[19].
"view," 365[17].
phrase of two meanings, 365[1].
prisoner compelled to furnish, 365[20].
mixed real evidence, 365[2].
witness, 365[2].
document, 365[2], 365[20].

REASONABLE AND PROBABLE CAUSE,
is a question for the judge, 52[5].

REBUTTABLE PRESUMPTIONS, 183[10]. (See PRESUMPTIONS.)

REBUTTAL,
confessions open to, 588[28].
on re-examination, 978[53].
character evidence admissible in, when, 978[54].
corroborative statements admissible in, when, 978[54].
generally inadmissible, 978[54].

RECEIPT,
is a declaration against interest, 452[1].
parol evidence rule does not apply to, 808[9]. (See PAROL EVIDENCE RULE.)
of stolen goods, knowingly, proof of larceny, 183[29].
res inter alios may prove, 257[9].

RE-CROSS-EXAMINATION,
relation of, to re-direct examination, 978[54].
is in discretion of court, 978[54].
examinations subsequent to, in discretion of court, 978[55].

RE-DIRECT EXAMINATION,
confined to explanation and rebuttal, 978[53].
scope of, varies with cross-examination, 978[53].
new matter on, in discretion of court, 978[54].

RE-DIRECT EXAMINATION — *continued.*
character evidence, when admissible on, 978[54].
corroborative statements, when admissible on, 978[54].
generally inadmissible, 978[54].
RE-EXAMINATION,
practice as to, 978[53]. (See RE-DIRECT EXAMINATION.)
REFRESHING MEMORY OF WITNESSES,
rule stated, 978[1].
memorandum need not be by witness, 978[6].
may testify mediately or directly, 978[11].
hearsay may be used in, 391[80].
tradesmen's books may be used in, 463[9].
REGISTERS, OFFICIAL,
how proved. (See PUBLIC DOCUMENTS.)
REGISTRARS OF BIRTHS, MARRIAGES, AND DEATHS,
how proved. (See PUBLIC DOCUMENTS.)
REGULARITY,
presumed, 183[48].
RELEVANCY,
defined, 2[6], 218[3].
instances of, 218[3].
may be established after admission, 218[2].
logical and legal, distinguished, 2[7].
not sole test of admissibility, 257[1].
RELEVANT,
evidence must be, 2[6].
character evidence must be, 257[81]. (See FACTS RELEVANT TO ISSUE.)
REPLY, EVIDENCE IN, 978[63].
REPORTS, OFFICIAL,
not public documents, 1179[7].
REPUTATION,
is character, 257[37].
of witness for veracity, 257[45]. (See VERACITY.)
not hearsay, when, 391[49].
REPUTATION, EVIDENCE OF,
admissible in questions of public rights, 412[10].
public boundary, 412[1].
private boundary, 412[2].
admissible in cases of pedigree, 427[11].
may be original evidence, 427[11].
REQUEST, COURTS OF. (See COURTS OF CONSCIENCE.)
RES GESTÆ,
defined, 391[1].
declarations may constitute, 391[2].
or be facts in the, 391[3].
or part of a fact in the, 391[7].
an extended development, 391[9].
Com. *v.* M'Pike, 391[10].

RES GESTÆ — *continued.*
Ins. Co. *v.* Moseley, 391[10].
negligence cases, 391[15].
the sounder doctrine, 391[19].
narrative excluded, 391[28].
must characterize fact, 391[26].
discretion, 391[27].
statements by agents, &c., distinguished, 391[28].
must not be confounded with hearsay, 391[7].
may consist of words or acts, 391[1].
words accompanying an act may be proved as part of, 391[7].
rule as to, 391[7].
must be contemporaneous, 391[6].
and explanatory, 391[26].

RES INTER ALIOS ACTA ALTERI NOCERE NON DEBET,
meaning of this rule, 257[1].
extent of it, 257[1] *et seq.*
instances illustrative of the rule, 257[1].
exceptions to the rule, 257[5].
show bodily or mental state, 257[5].
show organized plan, 257[16].
negative accident, 257[19].
in case of stolen goods or forgery, 257[7].
modern relaxation of rule, 257[20].
instances, 257[22].

(See ACTÆ, RES INTER ALIOS.)

RETAINER,
not essential to privilege, when, 622[5].

RIGHT TO BEGIN,
rules as to, 276[14].
is a rule of practice, 276[14].
Massachusetts rule, 276[14].
generally follows burden of establishing, 276[14].

ROSTER,
is a public document, 201.

RUMOR,
when evidence, 391[44], 391[45].

S.

SALES,
evidence of value, 391[52].

SCRIVENER,
statements to, not privileged, 622[8].

SEAL,
judicially noticed, when, 21[2].

SECONDARY EVIDENCE,
not receivable till non-production of primary accounted for, 358[7].
when admissible, 358[7].

SECONDARY EVIDENCE—*continued.*
no degrees of, 358[13].
proof of public documents, 1179[48].
SECRECY,
confessions under promise of, admissible, 588[12].
SECRETS,
of state, privileged from disclosure, 622[1].
(See PRIVILEGED COMMUNICATIONS.)
SEDUCTION,
corroboration required in, 635[4].
SELF-HARMING EVIDENCE.
admissions, 554[1].
confessions, 588[1].
SEMI-PLENA PROBATIO,
in shop-books, 463[1].
SEPARATION OF WITNESSES, 978[18].
how enforced, 978[16].
discretion, how far reviewable, 978[28].
SERMON,
statements in, not admissions, when, 554[6].
SERVANT,
not entitled to declare as to pedigree, 427[6].
SEXUAL INTERCOURSE,
male under fourteen, presumed incapable of, 183[16].
absence of opportunity for, may be proved on question of legitimacy, 622[26].
presumption of legitimacy from fact of, irrebuttable, 622[26].
presumed from marriage, 622[26].
husband or wife not admissible to disprove, 622[26].
(See PRESUMPTIONS.)
SHIPWRECK,
presumption of survivorship where deaths by, 183[41].
none in English law, 183[41].
(See PRESUMPTIONS.)
"SHOP-BOOKS,"
admissibility of, 463[1].
must be fairly kept, 463[7].
must be contemporaneous, 463[2].
must be books of account, 463[2].
suppletory oath required, 463[1].
oath of executor, &c., required, 463[2].
death or equivalent disability will admit, 463[2].
handwriting must be proved, when, 463[2].
preliminary proof to court, 463[7].
oath and form of entry, 463[3].
oath verifies book, 463[1].
books may be kept in any form,
scope of rule, 463[5].
extends only to 40 shillings, 463[8].

"SHOP-BOOKS" — *continued*.
applies to tradesmen and handicraftsmen, 463[8].
semble, extends to professional charges, 463[2].
modified by statute, 463[7].
development, how affected, 463[9].
history of rule, 463[1].
SIGNATURE,
evidence of, 1229[5].
of attesting witness, must be proved, 1229[18].
of obligor or testator, 1229[10].
SIGNS,
parol evidence of, 808[5].
dying declarations by, 470[6].
SILENCE,
self-harming evidence supplied by, 554[4], 588[4].
SLANDER,
character evidence admissible in, 257[88].
SLAVERY,
abolition of, judicially noticed, 21[30].
SLEEP,
statements during, not admissions, 554[6].
confessions during, not admissible, 588[18].
SOCIAL,
matters, judicially noticed, 21[35].
(See JUDICIAL COGNIZANCE.)
matters, privileged from disclosure on grounds of public policy, 622[1].
(See PRIVILEGED COMMUNICATIONS.)
SOLICITOR,
may be a witness either for or against client, 910[17].
(See ATTORNEY.)
SOVEREIGN,
whether he may be a witness, 622[18].
SPECIAL VERDICTS,
in presumption of malice, 183[7].
SPOLIATOR,
presumptions in disfavor of, 183[25].
instances of, 183[25].
eloigning instruments, &c., 183[25].
extent of, as against the spoliator of documents, 183[25].
STATE,
seal of, judicially noticed, 21[2].
officials, judicially noticed, 21[18].
executive of, judicially noticed, when, 21[7], 21[18].
bodily or mental, exclamations as to, 391[34].
acts of, how proved, 1179[1].
secrets of, privileged, 622[17]. (See PRIVILEGED COMMUNICATIONS.)
"STATE PAPERS,"
how proved, 1179[4].
privileged, when, 622[17].

STATE'S EVIDENCE,
confessions by, 588[11].
STATEMENTS,
prior, used to contradict witness, 978[44].
of a testator, not hearsay, 391[38].
fact of, how proved, 391[38].
to physician, 391[36]. (See PHYSICIAN.)
for medical treatment, 391[36].
part of *res gestæ*, 391[1].
in presence, may constitute admissions, 554[4].
statements in a letter, 554[4].
confessions, 588[4].
privileged, what, 622[1].
inconsistent. (See INCONSISTENT STATEMENTS.)
contradictory. (See CROSS-EXAMINATION; INCONSISTENT STATEMENTS.)
STATUTE,
burden of proof sometimes imposed by, 276[6], 276[18].
STATUTES,
public, judicially noticed, 21[8].
private, not so noticed, 21[14].
municipal regulations, 21[14].
statutes of another state, 52[10].
burden of proof sometimes imposed by, 276[6], 276[18].
require certain evidence, when, 276[6].
(See STATUTE.)
STOLEN PROPERTY,
possession of, presumption of larceny from, 183[29].
receipt of, knowingly, proof of, 391[48].
by *res inter alios*, 257[9].
SUBJECT-MATTER,
parol evidence of, 808[5].
SUBPŒNA DUCES TECUM,
when used, 358[19]. (See DOCUMENTS.)
SUBSCRIBING WITNESS,
when he must be called, 1229[6]. (See ATTESTING WITNESS.)
SUBSTANCE OF ISSUE,
sufficient to prove, 218[4].
SUBSTITUTIONARY EVIDENCE,
rejected, 358[5].
SUFFERING,
statements of, 391[34].
SUNDAY,
judicially noticed, 21[29].
SUPERIOR COURTS,
judicially notice inferior tribunals, 21[19].
SUPPLETORY OATH,
nature and effect of, 463[1].
when required in "shop-books," 463[1].
handwriting may be proved, when, 463[2].
of executor, &c., admissible, when, 463[2].

SUPPRESSING INSTRUMENTS OF EVIDENCE,
presumption arising from, 183[28].
SURPRISE,
relaxes the rule as to discrediting own witness, 978[30].
SURVIVORSHIP,
presumption of, where several persons perish by a common calamity, 183[41].
no presumption as to, 183[41].
SYSTEM,
res inter alios may show, 257[16].

T.

TAX COLLECTOR,
office of, judicially noticed, 21[18].
TELEGRAM,
original document in case of, 358[15].
regularity in, 183[52].
TESTATOR,
statements by, 391[38].
TESTIMONY,
distinguished from evidence, 2[6].
TOMBSTONE,
evidence from inscription on, admissible in pedigree, 427[9].
TOPIC,
witness may be led to, 978[26].
TRADESMAN,
declarant in "shop-books," must be, 463[1].
TRADESMEN'S BOOKS,
may be used as memoranda to refresh memory, 978[9].
TRAVEL,
distances, &c., of, judicially noticed, 21[36].
TRAVERSE JUROR. (See JUROR.)
TREASON FELONY,
two witnesses required in certain cases of, 635[1].
TREASON, TRIALS FOR,
number of witnesses required in, 635[1].
TREATIES,
judicially noticed, 21[7].
TRIAL BY JUDGE AND JURY,
respective functions of judge and jury, 52[1].
TRUST,
absolute deed may be shown a, 808[20].

U.

U. S. COURTS,
records of, how authenticated. (See PUBLIC DOCUMENTS.)
take cognizance of state law, 21[15].
UNSOUND MIND, PERSONS OF,
when incompetent as witnesses, 910[1].

V.

VALIDITY OF ACTS,
presumptions in favor of, 183[4].
VALUE,
how proved, 391[51].
VERACITY,
of witness, relevant fact, 257[45].
how proved, 257[45].
reputation as to, 257[45].
opinion as to, 257[45].
how impeached and tested, 257[45].
of "own witness," how impeached,
own case, 978[29].
surprise, 978[30].
necessary or adverse witness, 978[27].
inquiry into, may extend to general character, 257[46].
of female witness not impeachable by unchastity, 257[47].
evidence of, not admitted by contradictory statements, 978[54].
nor by mere contradiction, 978[54].
VIEW,
real evidence afforded by, 365[17].
VOICE,
exhibition of, not permitted, 365[16].

W.

WEAPON,
inspection of, real evidence, 365[19].
WEDLOCK,
child born in, legitimacy of, 183[18], 635[4].
(See LEGITIMACY; PRESUMPTIONS.)
WEIGHTS AND MEASURES,
standard of, judicially noticed, 21[27].
WIFE,
admissibility of evidence of, 910[19].
WILL,
parol evidence of fraud, &c., 808[21].
burden of establishing, in case of, 276[7].
may be declaration in pedigree, 427[8].

WITHHOLDING,
evidence, presumption as to, 183[25].
"WITHOUT PREJUDICE,"
communications made, not receivable in evidence, 554[7].
(See ADMISSIONS.)
WITNESS,
incompetency of, 910[1].
how ascertained, 910[1].
grounds of, in English law,
want of reason and understanding, 910[1].
immaturity of intellect, 910[4].
intoxication, 910[9].
policy of law,
infamous crime, 910[20].
atheist, 910[11].
single judge, 910[14].
attorney, 910[17].
husband and wife, 910[16].
want of religion, 910[11].
belief in future state not essential, 910[12].
interest, 910[21].
legatee incompetent as attesting witness, 910[21].
rule of our law as to, number of, 635[1].
exceptions, 635[1].
at common law, 635[1].
by statute, 635[1].
ordering out of court, 978[18].
may be led to the desired topic, 978[26].
leading questions to, 978[26].
(See LEADING QUESTIONS.)
discrediting adversary's, 978[26].
party's own, 978[26].
called for merely formal purposes, 978[27].
(See DIRECT EXAMINATION.)
examination and cross-examination of, rules for conducting, 978[24], 978[32].
adverse. (See ADVERSE WITNESS.)
attesting. (See ATTESTING WITNESS.)
less credible, not rejected, 358[8].
prior statement of, used to impeach, 978[44].
veracity of. (See VERACITY.)
may be instructed as to nature of oath, 910[5].
WORDS,
accompanying an act, may be proved as part of *res gestæ*, 391[7].
meaning of, question for court, 21[25].
judicially noticed, 21[25].
speaking of, not hearsay, 391[88].
spoken, may be proved, though speaker in court, 358[6].
WRITTEN INSTRUMENT,
cannot in general be contradicted, varied, or explained by extrinsic evidence, 808[1].
(See PAROL EVIDENCE RULE.)

WRITTEN INSTRUMENT — *continued.*
exceptions, 818[18].
fraud, &c., 808[21].
WRONGFUL CONDUCT,
presumption against, 183[28].

Y.

YOUTH,
witness incompetent because of, 910[4].
moral perception essential, 910[6].
may be instructed, 910[6].